



CEQA In the Weeds

March 5, 2020

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Overview of Today's Presentation

- » How CEQA Decisions are Made
- » Setting & Baseline
- » Project Description
- » Thresholds of Significance
- » Project Impacts
- » Mitigation Measures
- » Findings
- » Statements of Overriding Consideration
- » Testimony at Hearing(s)



CEQA
in the weeds

Mark. Yes, you asked and we're going to try and put several years of CEQA understanding into an hour or so of presentation.

Project Description

Whole of the project

- Onsite changes
- Off-site changes
- Operational Characteristics
- Mitigation Measures



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Shannon. Its important that the entire project be described...even the connection to services like water and power, installation of curb and gutter, etc. Mitigation measures required by the project must also be evaluated in the EIR. For example if there is a measure to add a traffic signal or widen a turn lane, the impacts of that construction must be evaluated in the environmental document.

How CEQA Decisions are Made

- » Type of project
- » Results of technical studies
- » Knowledge of the community
- » Previous decisions by decision makers
- » Results of litigation
- » Public controversy



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Mark: The lead agency staff is likely to make the initial decision on the application. Most of the time the level of CEQA analysis is obvious or can be determined based on the results of a technical study (or the anticipated results of the technical study). The initial decision is made based on a number of factors, most of which are intended to reduce risk. Knowledge of the community and precedent also play an important role as every agency is different. Some cities allow some uses as ministerial, while others require a discretionary permit. Examples include drive through windows, or liquor stores. Litigation, in the community, or elsewhere in the state, can change how staff makes its recommendation. For example a recent San Diego case on cannabis distributors essentially requires at least an IS/ND even when the impacts are likely to be speculative.

What Type of CEQA Analysis?

Substantial Evidence

- » Exemptions
 - Statutory
 - Categorical
- » Environmental Impact Reports
 - Subsequent
 - Supplement
 - Master
 - Program
 - Project
- » Addendum to EIR

Fair Argument

- Negative Declarations
 - Negative Declaration (No Mitigation Measures)
 - Mitigated Negative Declaration
- Addendum to Negative Declaration

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Mark. While this decision is typically made well before the Commission sees the document, its important to know why some applicants ask for an EIR, while others are ok with an MND. Most of the decisions on the level of CEQA analysis are made based on facts...will the project have a significant impact or not? But some are made by the applicant (or their attorney) based on the type of protection each level affords. The substantial evidence threshold of challenge is the highest standard and gives the lead agency the most protection. The fair argument is easy to challenge, and seldom used for controversial projects...aka something that may be litigated.

Baseline / Setting

- » Often the existing conditions
- » “Frozen” at the start of the process
- » Can also be a future condition
- » Includes regional context



Shannon. The CEQA evaluates change...and in order to measure the amount of change there needs to be a fixed point that represents ‘current conditions’. Usually this point is the conditions on the ground at the time the process is begun, but occasionally a ‘future’ base line is acceptable. This is one end of the analysis and it provides the context for the subsequent analysis. Without a baseline its impossible to measure change, which is the point of the CEQA analysis.

Baseline Example

- » Large regional mall redevelopment
 - Essentially closed for the last decade
 - Area streets sized to accommodate fully occupied mall
 - New uses include residential, office
 - Overall trips are less than mall's heyday
- » What is the baseline?
 - Compare traffic to fully occupied mall
 - Measure against existing traffic
- » Why does it matter?
 - Changed circumstances
 - Not reward past bad behavior
 - Limits analysis and mitigation



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Shannon: This is only one baseline discussion, there are many court cases on this issue. In essence, the past doesn't really matter all that much. The idea is to compare the proposed project against the condition that exists at the time the analysis is initiated. Usually this is the NOP for an EIR, or acceptance of an application for processing. The setting of the baseline is difficult for some things. In the example, the 10 year slow decline of the mall would make me hesitant to use the fully occupied as baseline as background growth may have changed the numbers substantially. However, an analysis short of a full TIA might be possible if all the expert was doing was demonstrating that the existing improvements are adequate to meet the needs of the project.

Study Methodology

- » Scope of the analysis
 - Geographic area
 - Not limited to agency boundaries
 - Focused on environmental topic
- » Times & days matter
 - Is school in session
 - Is it spring or winter
 - Wet or dry year
- » Models
 - Generally blunt instruments
 - Four decimal places is absurd
 - Results based on assumptions



"Of course we can make fast decisions ...
once we have considered the 4872 factors."

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Mark: The foundation of the environmental analysis is the technical study. This is a custom report by an expert in the topic on the potential impacts of the proposed project. Because everything is as assumption, it is important to understand the scope of the analysis, when it was conducted, and if industry models are used. Usually the study only focuses on answering the question of whether an impact is above or below a threshold, and if the impact is above a threshold then the study may recommend actions that can reduce the impact to the threshold. Models are interesting because they are not all that accurate at predicting the future impacts, and should be taken with a liberal seasoning of salt. In as much as the baseline assumptions are accurate, then the resulting predictions will follow the mathematical formulas and produce a number. Courts and attorneys love numbers, and we built other reports on the numbers of the traffic report. The difficult is that the numbers are not absolute and there is a lot of wiggle room. At best the studies are intended to show whether the project will have big impacts or little impacts, not whether the predicted vehicle delay at an intersection will change by a few thousandths of a second. The reports are substantial evidence to be sure, but don't forget in your deliberations that these are educated predictions rather than absolutes.

Technical Studies

| A | B | C |
|----------------------------------|-----------------------------|--------------------------|
| Aesthetics | Biological Resources | Air Quality |
| Agriculture & Forestry Resources | Cultural Resources | Energy |
| Geology/Soils | Population/Housing | Greenhouse Gas Emissions |
| Hazards & Hazardous Materials | Public Services | Noise |
| Hydrology/Water Quality | Recreation | Cumulative Analysis |
| Land Use/Planning | Transportation | Alternatives |
| Mineral Resources | Tribal Cultural Resources | |
| | Utilities / Service Systems | |
| | | |
| | | |

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Mark: These follow the environmental topics in Appendix G. Many of these will have a technical study, or portion of the application intended to address the thresholds of the agency. The first column (A) shows those topics that can usually be completed with the application materials. The second column (B) are topic areas that require additional study, based on the information in column A. Column C represents those studies or analysis that is dependent upon the conclusions of the technical studies completed in column B. This seems wonderfully linear, but in reality, changes to the project, preliminary results that change the project, or even changes to CEQA, can derail this and make keeping everything in line difficult.

Technical Studies

- » Usually very narrow scope
- » Check the baseline information
- » Before you ask for more study, what is it you hope to find out?
- » Expensive and time consuming
- » Results dependent upon the assumptions



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Shannon: One of the tasks of the environmental analysis is to put the technical studies into context. Each specialist spends a lot of time studying their one small piece of the project impacts, its up to the author to explain to the public if something is significant, and what to do about it.

Thresholds of Significance

- » Roots in Appendix G of CEQA Guidelines
- » Also included in:
 - General Plan
 - Municipal Code
 - Adopted Development Standards
- » Varies by Agency
- » Can vary by location

| P-VALUE | INTERPRETATION |
|---------|--|
| 0.001 | HIGHLY SIGNIFICANT |
| 0.01 | |
| 0.02 | |
| 0.03 | |
| 0.04 | SIGNIFICANT |
| 0.049 | |
| 0.050 | OH CRAP REDO CALCULATIONS. |
| 0.051 | ON THE EDGE OF SIGNIFICANCE |
| 0.06 | |
| 0.07 | HIGHLY SUGGESTIVE, SIGNIFICANT AT THE P<0.10 LEVEL |
| 0.08 | |
| 0.09 | |
| 0.099 | HEY, LOOK AT THIS INTERESTING SUBGROUP ANALYSIS |
| ≥0.1 | |

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Shannon. Once we have a baseline we then need to consider if the increment of change is significant. The point at which an environmental impact becomes significant is known as the ‘threshold’ and varies by agency around the state. While many agencies rely on “appendix g” of the CEQA guidelines (even though the guidelines suggest not doing this), others adopt their own procedures that reflect their unique condition. Perhaps the most critical thing an agency can do to streamline CEQA is to adopt their own thresholds. CEQA specially allows (encourages even!) each agency to do this.

Threshold Examples

» Appendix G: Aesthetics

- a) Have a substantial adverse effect on a scenic vista?

» Custom Threshold (Gilroy)

- a) Have a substantial adverse effect on a scenic vista or degrade the existing visual character in the Hecker Pass Specific Plan Area (GP Policy 1.07) or the hillside areas (GP Policy 1.16, GP Policy 12.04)?

» Custom Threshold (Lake Forest)

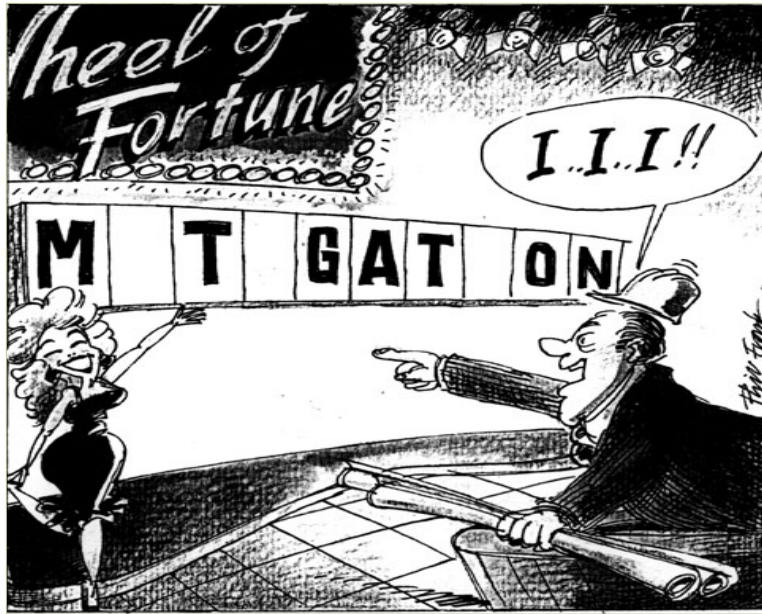
- A project will substantially damage scenic resources, including scenic vistas from public parks and views from designated scenic highways or arterial roadways.

» Custom Threshold (San Diego)

- A substantial obstruction of any vista or scenic view from a public viewing area as identified in the community plan?
- The creation of a negative aesthetic site or project?
- Project bulk, scale, materials, or style which would be incompatible with surrounding development?
- Substantial alteration to the existing or planned character of the area, such as could occur with the construction of a subdivision in a previously undeveloped area? Note: for substantial alteration to occur, new development would have to be of a size, scale, or design that would markedly contrast with the character of the surrounding area.
- The loss of any distinctive or landmark tree(s), or stand of mature trees as identified in the community plan? (Normally, the removal of non-native trees within a wetland as part of a restoration project would not be considered significant).

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Mark: Sorry for the tiny text. Here are three examples of thresholds. The first is from the CEQA Guidelines and comes from Appendix G, the others are adopted thresholds by cities. Note how unique they are to the community. The San Diego threshold is much longer than the others, but then again it's a much larger City. The point of this is to demonstrate that threshold can and should be customized to your agency.



Mitigation Measures



- » Mitigation Measures
 - Project design features
 - Measurable changes to a project
 - What does feasible mitigation mean?
 - What level do we mitigate to?

CEQA
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Shannon. Mitigation is a specific requirement that only applies to the project being considered. While the same mitigation measure may be applied to other projects, the application of mitigation for a specific project is specifically intended to address a significant environmental impact reported in the document. Without a determination of significance impact there is no authority to mitigate.

What are “Mitigation Measures” Supposed to Do?

Changes required of the project to:

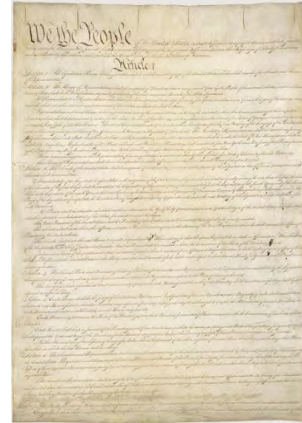
- » Avoid the impact altogether
- » Minimize the degree of magnitude of impact
- » Rectify the impact through restoration
- » Reduce or eliminate the impact through preservation
- » Compensate for the impact



Shannon:

Formulating Mitigation Measures

- » Constitutional principles serve as a constraint to required mitigation (Guidelines 15126.4(a)(4))
 - There must be a nexus between the mitigation required and a legitimate governmental interest
 - The mitigation requirement must be roughly proportional to the size of the impact
 - The measure must be within the ability of the jurisdiction to implement



Shannon:

Mitigation Measures

- » Requirement to mitigate does not confer to agencies any new legal authority:
 - "...a public agency may exercise only those express or implied powers provided by law other than this division." (PRC 21004)
- » Measures must be enforceable.
 - Pay particular attention to "fair-share fees"
 - Difficult to enforce future public behavior
- » Be linked to an impact – No nexus, no mitigation

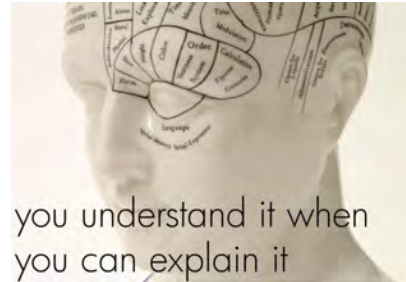


Mark: Fair share fees are only adequate mitigation where there is already an established fee and there is evidence that the fee will achieve its goals in a reasonable period of time.

Public behavior mitigations (like "keep people out of the creek", or "residents will not be allowed to own cats" or things like that) are typically difficult or impossible to enforce.

Formulation of Mitigation Measures

- » Clearly state the required action or level of performance that is necessary to mitigate.
- » Explain how the measure would mitigate, especially if it is not facially obvious.
- » Clearly state conclusion of effect after mitigation.
- » Substantial evidence must support determination that measure will mitigate.



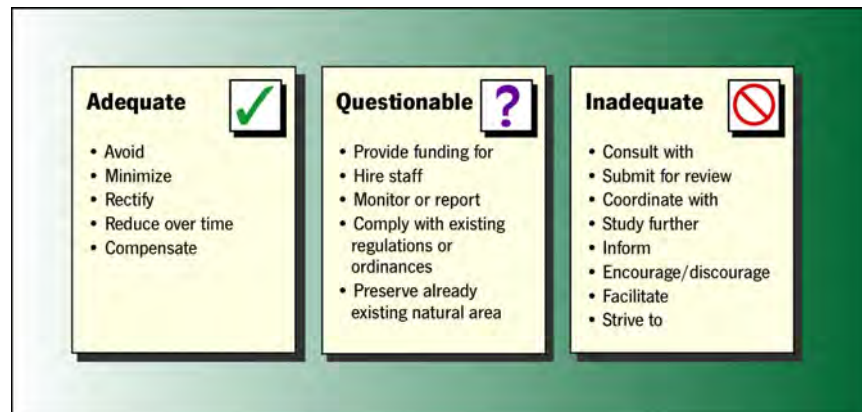
Mark: Before we write new “laws” we first need to look to see if an existing law will cover the issue. If there isn’t anything that fits, then we carefully craft the mitigation to narrowly address the significant impact identified in the analysis. The analysis should also demonstrate that the measure addresses the impact, and what the level of impact is after the mitigation is applied. And of course all of this must be substantiated by study or other evidence.

Five Questions for Reviewing Mitigation Measures

| | |
|--------------|--|
| WHY | State the objective of the mitigation measure and why it is recommended |
| WHAT | <ul style="list-style-type: none">• Explain the specifics of the mitigation measure and how it will be designed and implemented• Identify measurable performance standards by which the success of the mitigation can be determined• Provide for contingent mitigation (in certain circumstances) if monitoring reveals that the success standards are not satisfied |
| WHO | Identify the agency, organization, or individual responsible for implementing the measure |
| WHERE | Identify the specific location of the mitigation measure |
| WHEN | Identify the timing for implementation of the measure |

Shannon:

Adequacy of Mitigation



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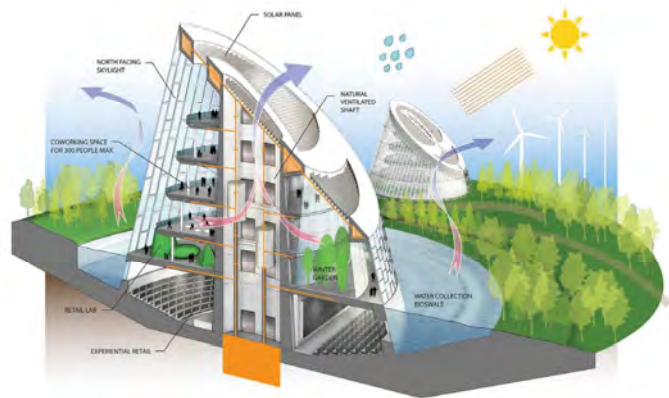
CEQA
in the weeds

Shannon: Also, recognize that modifying terms like “if available, if feasible, when necessary, etc.” undermine the commitment to the measure and mean that it cannot be relied up to reduce the effect to a less than significant level.

A mitigation measure that proposes to “Hire Staff” is labeled “questionable” because it is indicative of an inappropriate determination of significance based on police or fire staffing (the old 1 per thousand type of staffing analysis). Where it may be more appropriate is when staffing levels are tied to increased safety risk (mainly in terms of wildland fire).

Project Design Features

- » Elements of the project designed to reduce environmental impact
- » Included in the project description
- » Shown on site plans
- » Should be reflected in the approvals

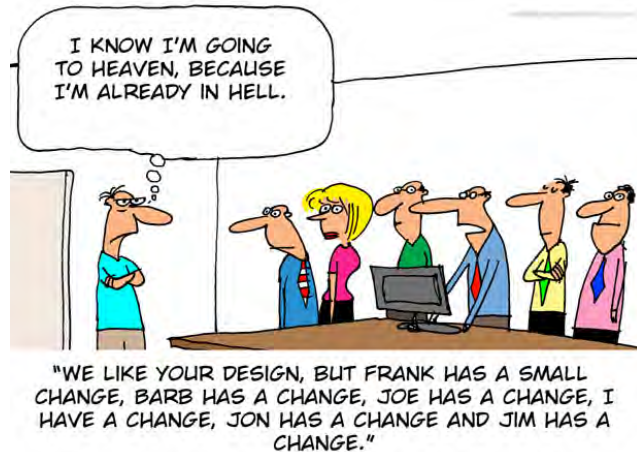


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in the weeds

Mark. If there is an element of the project design that mitigates an impact (i.e. reduced building height, triple-paned windows, rubberized asphalt) then it should be discussed in the analysis and included in the mitigation monitoring and reporting program (MMRP). Ideally it would also show up in or on the building plans and be included in a condition of approval. All too often design features are changed from approval to building...and its important that the process ensure that everyone understands that some parts of the project need to remain.

Example of Project Design Feature

- » Project includes a 6-foot masonry wall on property at adjacent street
- » All windows facing adjacent street are Sound Transmission Classification (STC) of 50
- » Hours of operation are from 7:00 AM through 7:00 PM, Monday through Saturday



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in the weeds

Mark. This is a short list of the design features that apply for this example. Others might include additional setbacks, landscape, adjacent buildings, parking structures, etc. Depending on circumstances other features might include HVAC equipment so that the windows can be kept closed. Note that hours of operation are great for some impacts, but a temporary impact is still an impact.

To What Level do we Mitigate?

- » To a level at or below the threshold
- » Zero impact is not the goal
- » ~~Can not~~ Should not have to mitigate for impacts of others
- » Important to demonstrate impact after mitigation



CEQA
in the weeds

Shannon. Often the public will ask for more mitigation than the project needs, or the agency can legally apply. Its important to note that the goal of the mitigation is to reduce the impact to the level of significance shown in the thresholds of significance. In most instances zero impact is not the goal. Until recently, the environmental analysis was only concerned about the impacts of the project on the environment. However, the courts have recently moved toward having a project mitigate more than its impact...at least in the area of greenhouse gas emissions. This is an evolving issue that will likely be a moving target for some time. Finally, its important that the document tell you what the impact is *after* the mitigation is implemented.

Not So Good Mitigation

- » Prior to ground disturbance a qualified archaeologist shall meet with the construction personnel and inform them on what cultural artifacts may look like, and the importance of notifying the City if any artifacts are uncovered during excavation. If artifacts are discovered, all work shall stop within 50-feet of the discovery, and the City shall be notified.

Better Mitigation

- » Prior to ground disturbance a qualified archaeologist shall be retained to monitor all excavation below 3-feet. The archaeologist shall meet with the construction personnel and inform them on what cultural artifacts may look like, and that the archaeologist may stop excavation if artifacts are uncovered. If artifacts are discovered, all work shall stop within 50-feet of the discovery site, and the City shall be notified.

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Shannon: On the face of it this seems reasonable. However, looking closer we see that the backhoe driver is being 'educated' on artifacts that may occur. This seems reasonable as they will be in direct contact with the material as its excavated. Where things start to unravel is when we ask the construction person to make a judgement call on the artifact, and then stop work and notify the City if they find anything. Essentially the contractor with deadlines and a budget to meet is now being asked to cost themselves money and time by reporting some beads or other artifacts unearthed during construction. Also, its hard to believe that a qualified archaeologist could teach a layperson what they are looking for in the space of a couple of hours.

Other CEQA Pieces – For EIR

» Cumulative Analysis

- Not necessarily 'build out'
- Two methods: project list or regional model
- May have different setting than project
- Not the worse case

» Alternatives

- Must avoid or lessen an environmental impact
- Project alternatives may not be CEQA alternatives
- Not discussed at same level as project
- Compared against project applicant's project objectives
- Only the no-project alternative is required



CEQA
in the weeds

Mark: These two issues used to be easy areas of challenge to an environmental document. The whole butterfly effect of how far do you study comes into play. Over the past several years there have been a lot of regional planning tools developed that help ease this. Documents like Regional Transportation Plans, Climate Action Plans, etc., can all be used to frame the baseline for the cumulative analysis, establish a reasonable threshold, and then allow for the analysis. The best of these regional plans also recommend mitigation. Note that the setting for some issues is limited to the project site, while others may extend well beyond the agency's jurisdiction. CEQA only *requires* the no-project alternative to be evaluated. In most instances the no-project alternative does not mean no-development as existing zoning will prevail. Where things get interesting is when a project alternative is evaluated, but doesn't necessarily reduce any impacts. A document can still evaluate the alternative, but it isn't necessarily a CEQA alternative. This is the only place where the project objectives are used.

Mitigation Monitoring & Reporting

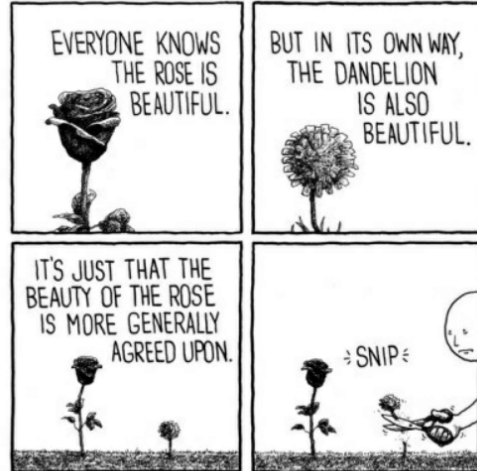
- » Required of every project that has mitigation
- » Indicates who is responsible for implementing the measure
- » Shows when the measure is supposed to be implemented
- » Includes date(s) of when the measure was completed
- » Is not technically part of the environmental process, but part of the project approval
- » Is a public document and should be part of the project file



Mark: This is a pretty simple concept really. If you require mitigation you need to make sure that it happens. You should also make sure that you have the skills to monitor the mitigation, and if not, make sure you have resources (\$\$) to pay someone else to do it. You'll often see the MMRP as part of the environmental analysis, but it is really part of the project approval.

Impacts that Can't be Mitigated to Less Than Significant

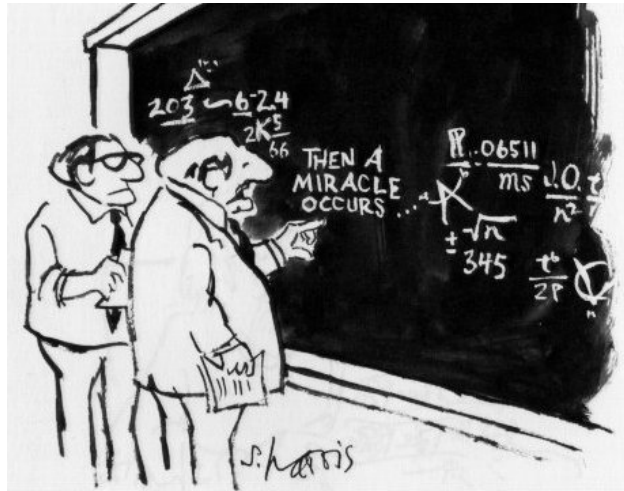
- » Sometimes even with mitigation an impact remains significant
- » The analysis must include all feasible mitigation
- » Substantial evidence is needed to discard a suggested mitigation
- » Cost should not be the only reason to discard the mitigation
- » The project can still be considered, however
- » If you have them you need an EIR
- » With an EIR you can still approve the project



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Findings

- Showing your work
- Explaining your reasoning
- Information other than the EIR/IS/MND
- Drafted by Staff, Approved by Council or Commission



"I think you should be more explicit here in step two."

from *What's so Funny about Science?* by Sidney Harris (1977)

CEQA
in the weeds

Shannon. This is the area of the document where the Commission can have the greatest impact. Findings for approval chronicle the discussion and information used to result in the decision. This is your opportunity to say your piece. Findings are not needed for denial, though it helps the staff to understand if you explain why you deny something. The findings can include testimony, information provided outside of the public review period, and anything used to help you make your decision. Make sure staff has the document(s) and/or information so that it can be part of the public record.

Example of a Finding

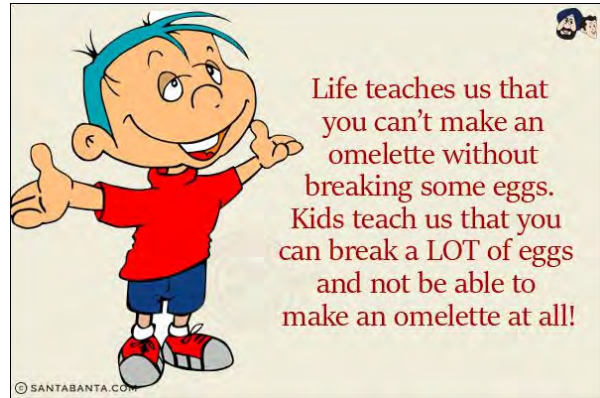
- » The project will result in a significant increase in noise on adjacent road.
- » Compliance with the noise mitigation measure will construct a wall of sufficient density to reduce the noise level by 5 dBA.
- » With completion of the mitigation measure, the resulting noise level is below the 65 dBA threshold and therefore less than significant.

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Shannon. This is more or less how it looks in an EIR set of findings. Variations of this should occur either in the IS/MND or staff report, etc. We refer to this as ‘closing the loop’ or ‘connecting the dots’. Impact, mitigation, results.

Statement of Overriding Considerations

- » Reasons why the project should be approved even though it has significant environmental impacts
- » Supported by substantial evidence
- » We need the \$\$\$ isn't likely to survive challenge
- » List as many reasons as make sense, only one is needed to support the determination



CEQA
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Mark: A statement of overriding consideration is usually part of the findings and explains why, with all of the environmental impacts, the project still warrants approval. Just because we like the project isn't enough of a reason. Ideally there would be several reasons, supported by substantial evidence. The reason you want more than one is to ensure that at least one will be found acceptable should the project be litigated.

Testimony at Hearings

- Late Hits
- How to balance testimony
- When to Continue the item
- When to decide



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Shannon/Mark. There is nothing in CEQA that penalizes late hits. Honestly, the process is 'open' until the last decision is made. Be patient, the end of a lengthy process is not the time to race forward and ignore late comments. The best approach is to take a deep breath, ask that staff review the document, and comment. Often the late hit is a repackaging of comments already received...sometimes there is something unique that requires additional study. Best practices is to review and determine whether additional work is needed...before making a decision. However, this only works once usually...after the initial delay its time to make a decision.

Thank You

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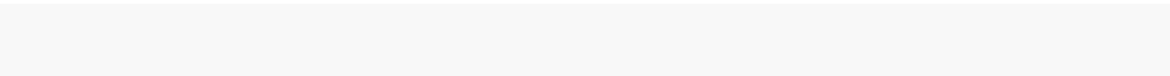

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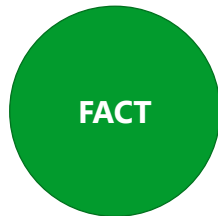
» Shannon,

» These were left-over slides from other presentations...I'd originally thought they might go in here but not so sure now as this is already at about 30 slides. I've left them here in case you think one or more of them are worthwhile.

» m

Overview for Environmental Document

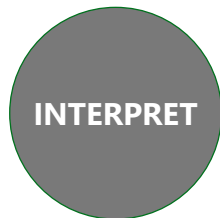
- » Project Description
- » Baseline/Setting
- » Thresholds of Significance
- » Technical Analysis
- » Mitigation Measures
- » Significant and Unavoidable Impacts
- » Findings
- » Statement of Overriding Considerations



- Project Description
- Biological Analysis
- Geology & Soils
- Hazards
- Mineral Resources

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These are things that are either on the application or on the site and can be independently verified by anyone. No special tools, education or experience is needed to count trees for example. Certainly the nuances may be a bit hard for the layperson to understand, but most people know if its green in August it's probably wet, and if there were a gold mine, we'd all know. The project description may not be complete, but its all easy to find in the file. Facts. Love 'em...and as we'll see there are surprisingly few of them in a CEQA document.



- Land Use
- Aesthetics
- Cumulative
- Public Services
- Population/Housing
- Growth Inducement
- Alternatives

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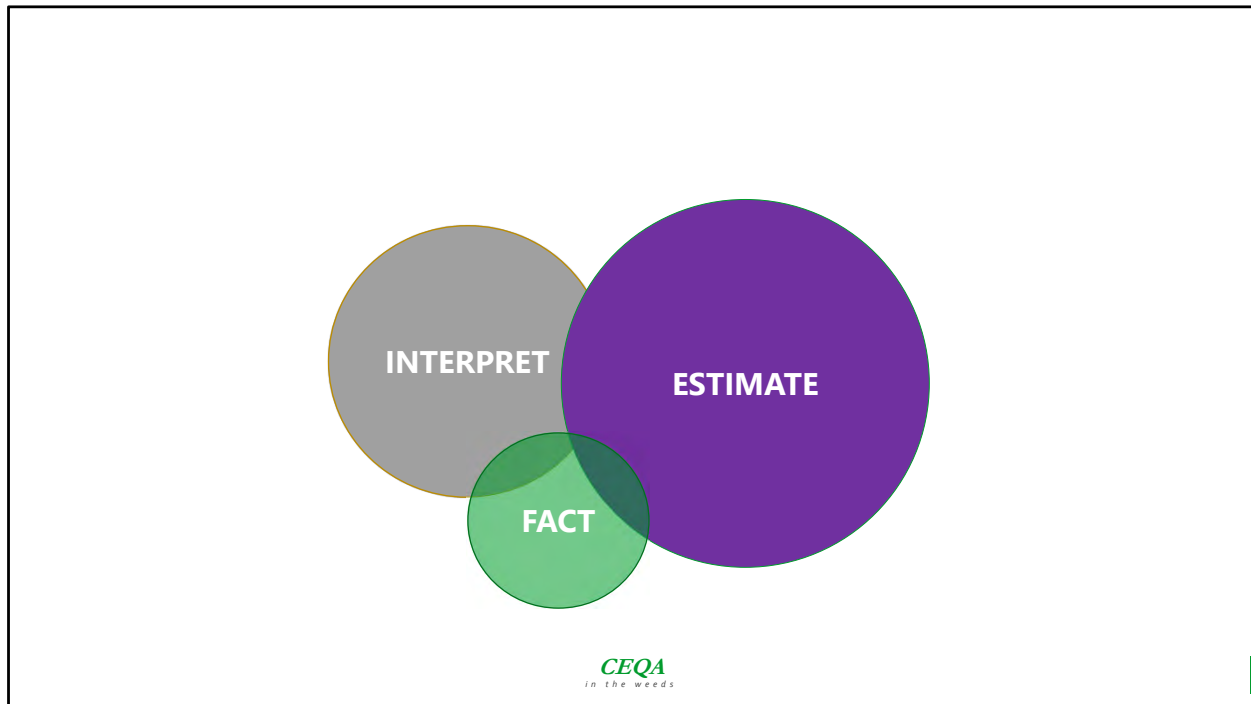
These are topics that are fuzzy and difficult to explain. How is one land use compatible with another? Who decides what is pretty and ugly? What will really happen in 20 years? Estimates are by their nature dependent upon the experience of the estimator. Sometimes we get lucky, but most of the time we're close. Certainly more data has helped inform the process over the years, but realistically its still an estimate. Sorry, no big book of planning here, only skilled staff with experience...and some estimation.



- Air Quality
- Greenhouse Gasses
- Hydrology
- Noise
- Traffic
- Utilities

CEQA
in the weeds

Now these topics are different from estimates because they rely on both the facts AND the results of the estimate. Certainly, there are aspects of each that are factual, such as the number of cars, the quality of the air, or how noisy things can get. But all of these rely on assumptions made during the estimation phase of the CEQA process. Surprisingly, some of these calculations are run out to several decimal points as if that somehow made them more accurate.



This is how these look in real life. As you can see there are comparatively few facts in an environmental document. The rest of the 'evidence' is calculated using a whole lot of assumptions based on estimates. Its not perfect, infallible or even all that reliable, but its both what we have to do, and its worth doing.