



Drafting Programmatic EIRs

Lessons Learned and Practical Tips

May 19, 2017

Session Overview

» Background, best practices, context, and case studies on:

- Mitigation and self-mitigation
- Response to comments in a plan context
- Setting up for future tiering

» Panel

- Margaret Sohagi
President, The Sohagi Law Group
- Fred Buder
City Planner, City of Vacaville
- Alyssa Muto
Deputy Director, Environment & Policy Analysis, City of San Diego
- Tanya Sundberg (moderator)
Senior Associate, PlaceWorks

Programmatic EIRs

- » Program EIRs may be used for activities that are:
- » **Linked geographically**
 - Parts of a chain of planned events
 - In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing plan
 - As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects that can be mitigated in similar ways
- » **Substance over form!** (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036)

Advantages of Programmatic EIRs

- » Allow for more exhaustive consideration of effects and alternatives than practical for project EIR
- » Ensures consideration of cumulative impacts
- » Avoids duplicative reconsideration of policy considerations
- » Allows the lead agency to consider broad policy alternatives and mitigation measures
- » Reduces paperwork

Mitigation and Self-Mitigation

Background, Best Practices, and Context

Mitigation Measures

- » **May be incorporated into plans that will set the legal and/or policy framework for later projects and approvals** (Pub. Resources Code, § 21081.6(b); CEQA Guidelines, § 15126.4(a)(2))
- » **Must be implemented as a condition of later development and “not merely adopted then neglected or disregarded”** (*Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261)

Self-Mitigating Plans

» What is it?

- A plan (e.g., General Plan, Specific Plan) that has policies and programs designed to mitigate environmental impacts

» Why prepare? Why not?

- Creates fewer significant and unavoidable impacts to override
- Review and approval of future development projects is more efficient
- May be difficult for an agency to reduce all impacts to less than significant

Self-Mitigating Plans

» How?

- The EIR must present substantial evidence and reasons why impacts would be less than significant
- Must follow CEQA requirements for mitigation measures

» After approval?

- An agency must determine if subsequent activity fits within scope of the Program EIR and if any additional environmental documentation is required
- An agency must incorporate feasible mitigation measures and alternatives developed in the Program EIR into subsequent actions

LOTUS v. Department of Transportation

» Facts:

- CalTrans incorporated “[a]voidance, minimization and/or mitigation measures” into an EIR to avoid, minimize and mitigate expected impacts of a highway construction project that passes through Richardson Grove State Park.



LOTUS v. Department of Transportation



» Holding:

- CalTrans needed to separately identify and analyze significant impacts and the measures necessary to mitigate those impacts.

» Take away:

- Be careful when incorporating mitigation measures into a plan because the EIR must clearly and separately identify potential impacts and mitigation measures.

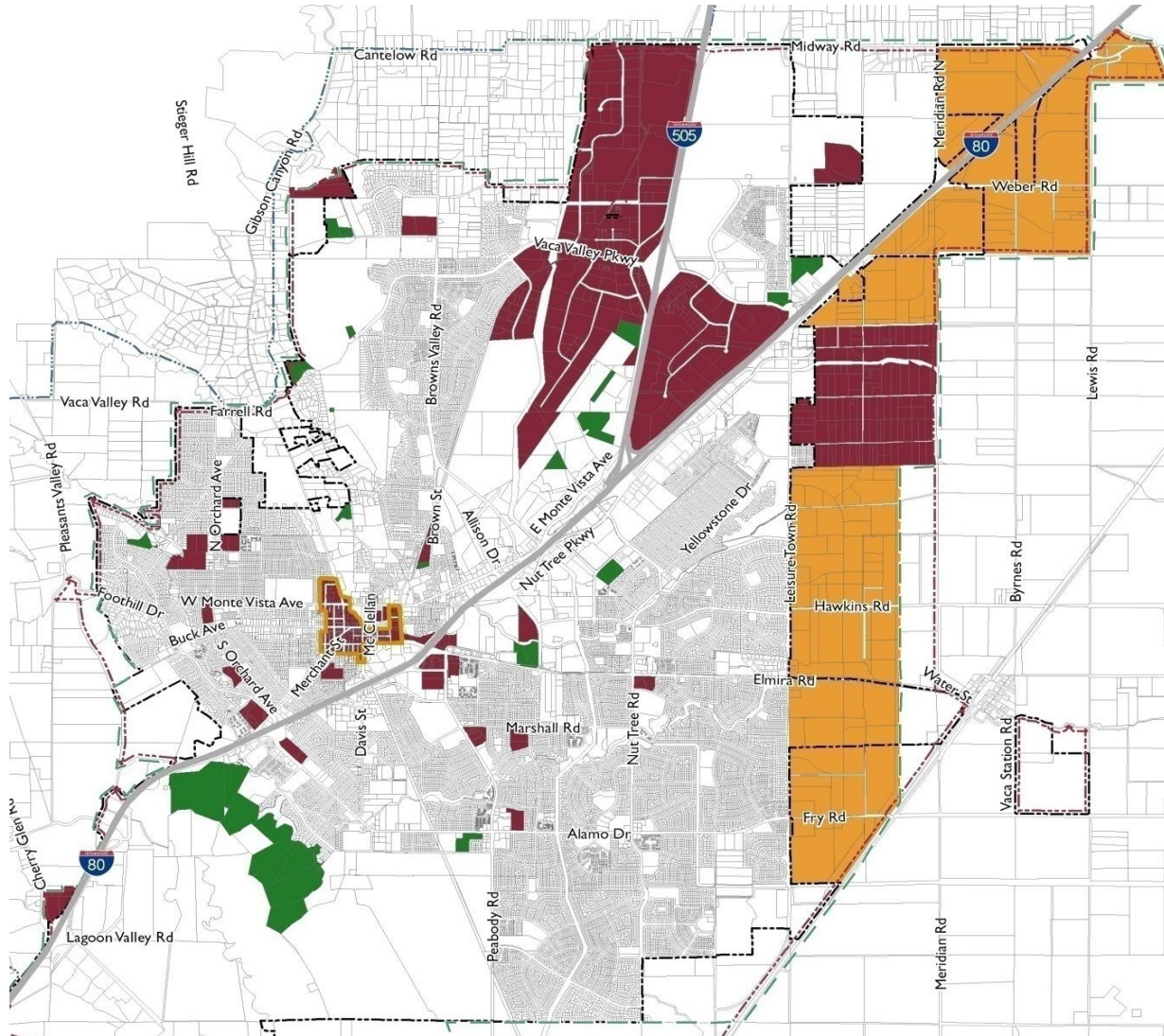
Life After LOTUS

- » EIR should clearly separate the analyses of project impacts and mitigation measures
- » However, a mischaracterization of a mitigation measure is significant “only if it precludes or obfuscates required disclosure of the project’s environmental impacts and analysis of potential mitigation measure” (*Mission Bay Alliance v. Office of Community Investment and Infrastructure* (2016) 6 Cal.App.5th 160, 185)

Mitigation and Self-Mitigation

Case Study: Vacaville

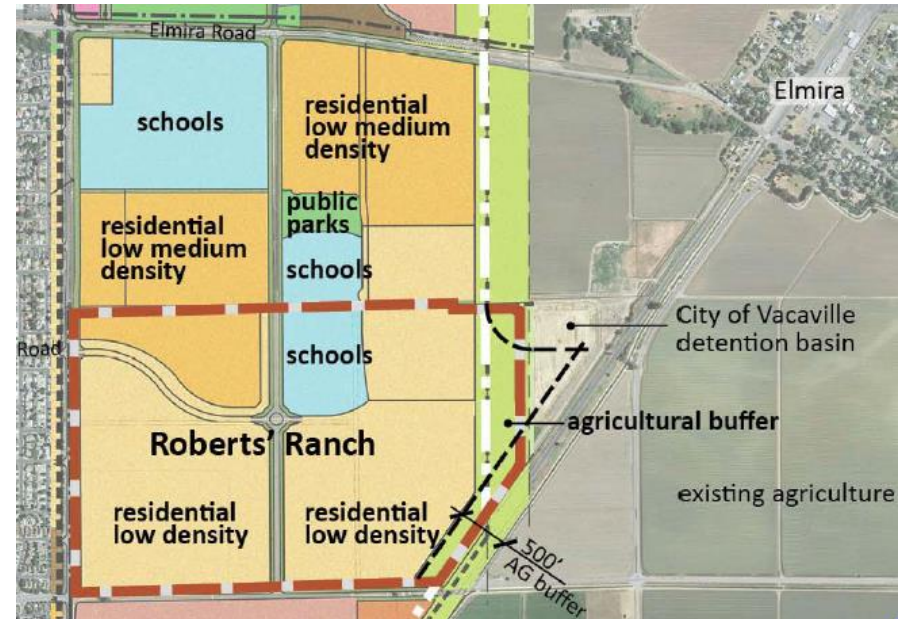
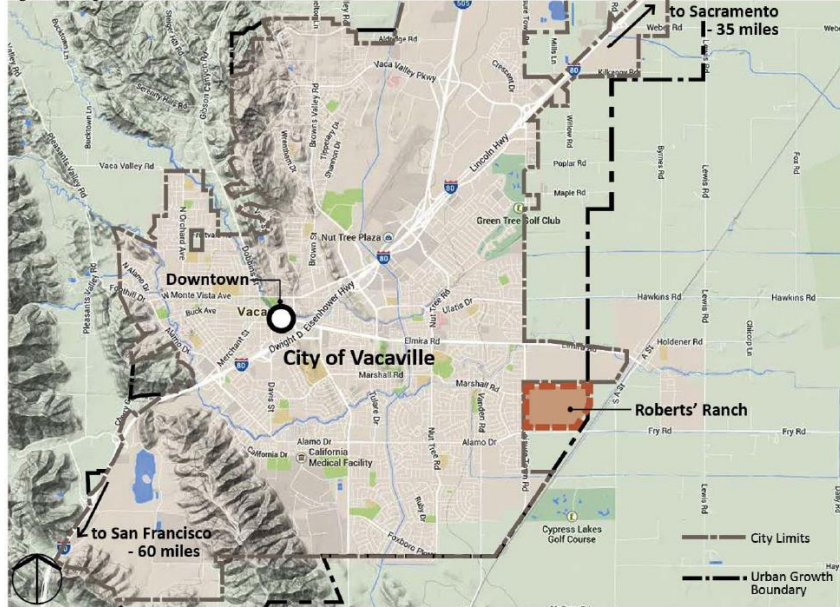
Potential Opportunities for Tiering



General Plan Update & Subsequent Specific Plans – Roberts' Ranch

ROBERTS' RANCH SPECIFIC PLAN

Figure 1-1 Regional Context

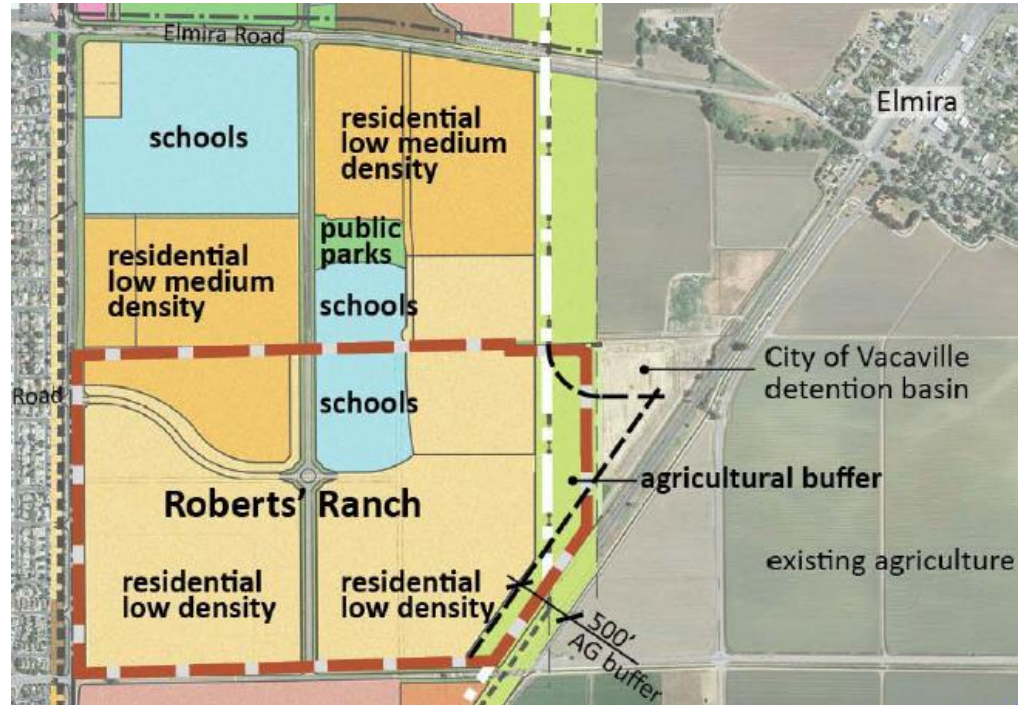


Relationship to General Plan

» Consistent with policies:

- 785 dwelling units
- Coordinated land use, phasing, infrastructure, public facilities
- Housing & project design
- Incorporate buffers or community facilities into project amenities
- Implement ECAS measures

» Consistent with land use:



Roberts' Ranch Specific Plan EIR

- » **Many impacts addressed by the General Plan EIR**
 - Project obligated to implement General Plan mitigations/policies
- » **EIR analyzed Active Park Alternative**
 - Impacts similar to Proposed Project
 - Active Park addresses unmet recreational need in General Plan
- » **Most impacts reduced to less than significant**
 - Unavoidable impacts to Air Quality & Traffic

Mitigation and Self-Mitigation

Case Study: San Diego

City of San Diego

» Community Plan Updates Program EIRs

- Pitfalls of batching analysis within a Program EIR
- Plan, ordinances, and DIF financing
- Provide a framework for tiering (§15183)

» Common issues

- Circulation – multi-modal
- Cultural resources
- Noise and air quality

» Alternatives



Community Plan Update

Response to Comments

Background, Best Practices, and Context

Response to Comments

- » **Agencies must review, evaluate and prepare responses to comments received during the comment period on the Draft EIR**
 - An agency may provide responses to late comments
- » **Written response must describe the disposition of any “significant environmental issue” raised in the comment**
- » **Responses to significant environmental issues must be detailed and provide a reasoned, good faith analysis**

Tips for Program EIRs

- » Master responses useful when there are complex topics raised numerous times
- » Make sure the scope of the project (i.e., Program EIR) is clear in the responses
- » Cross reference other responses that address similar issues raised

Response to Comments

Case Study: Vacaville

Construction-Level Impacts & Jurisdictional Comments (Roberts' Ranch)

» County & LAFCO comments

- EIR was opportunity to address boundary change issues/avoiding inefficient boundaries

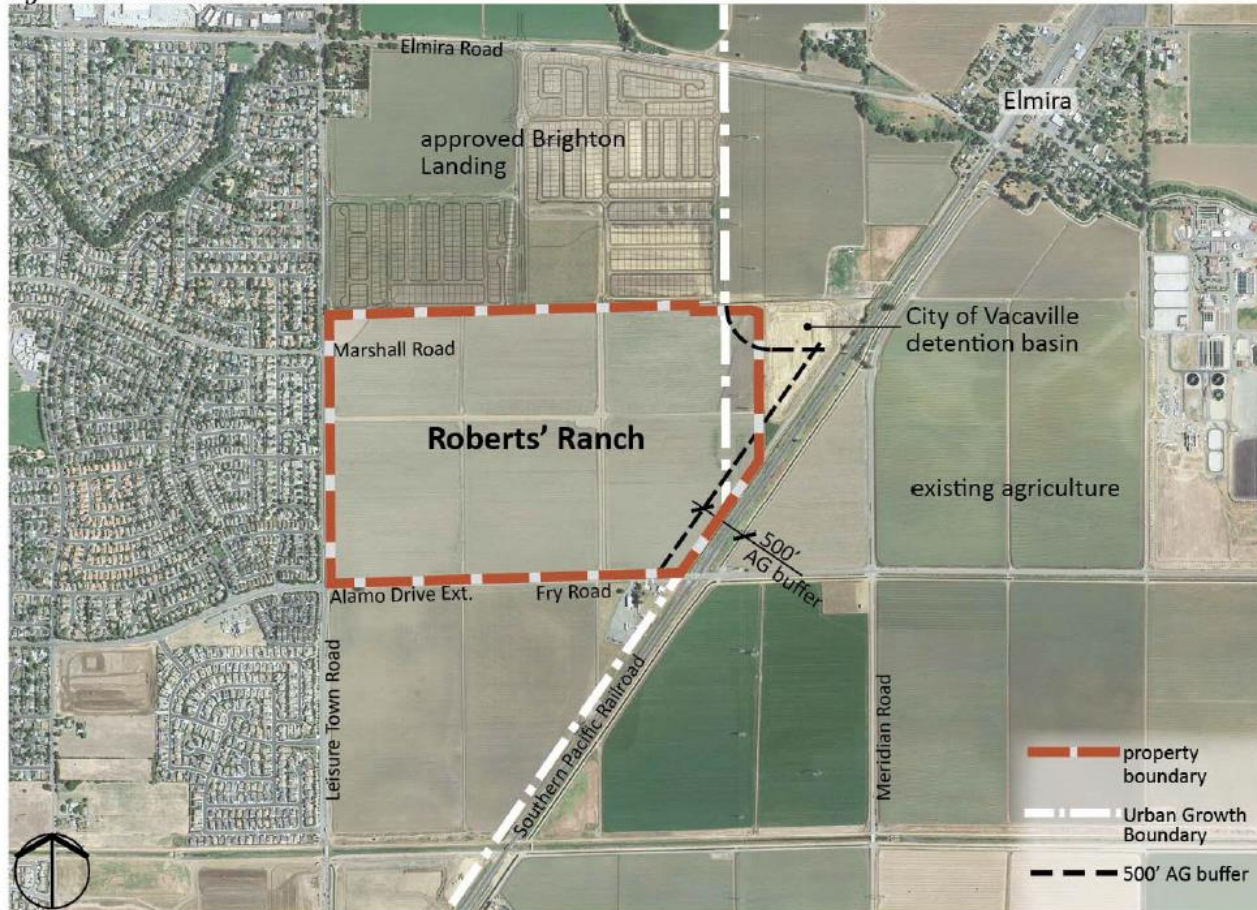
» Air quality: Unavoidable impacts caused greater concern

- Overlapping phases of construction:
 - Standard approaches to mitigation not accepted by concerned citizens
 - More detail in localized mitigation needed
- Additional AQ modeling prepared/mitigation added to project approval

Site Context

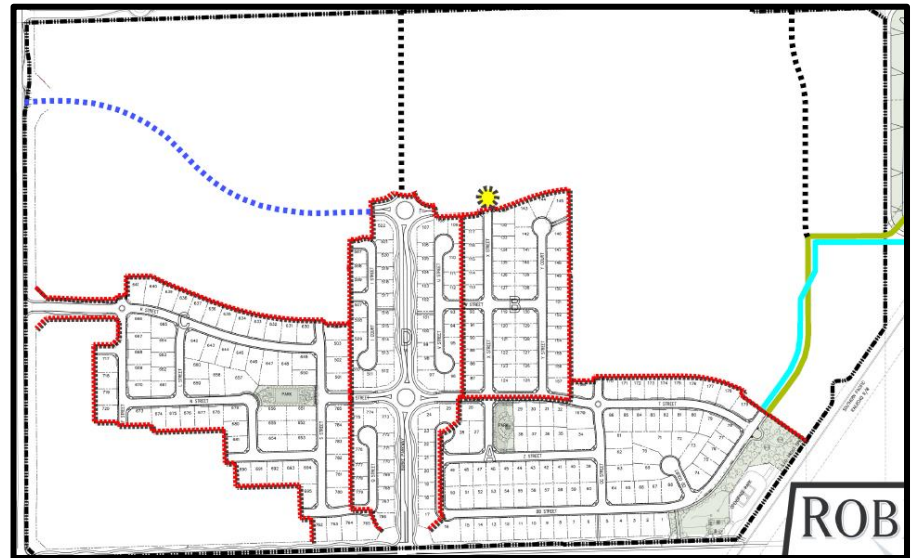
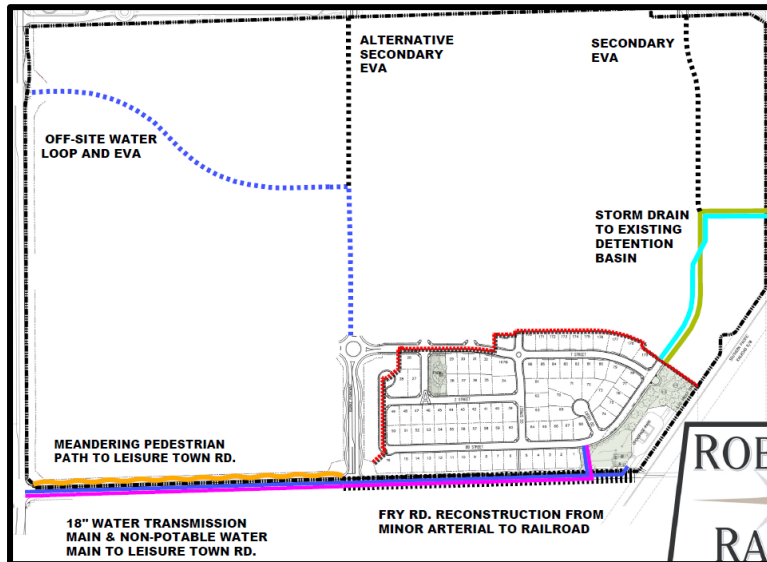
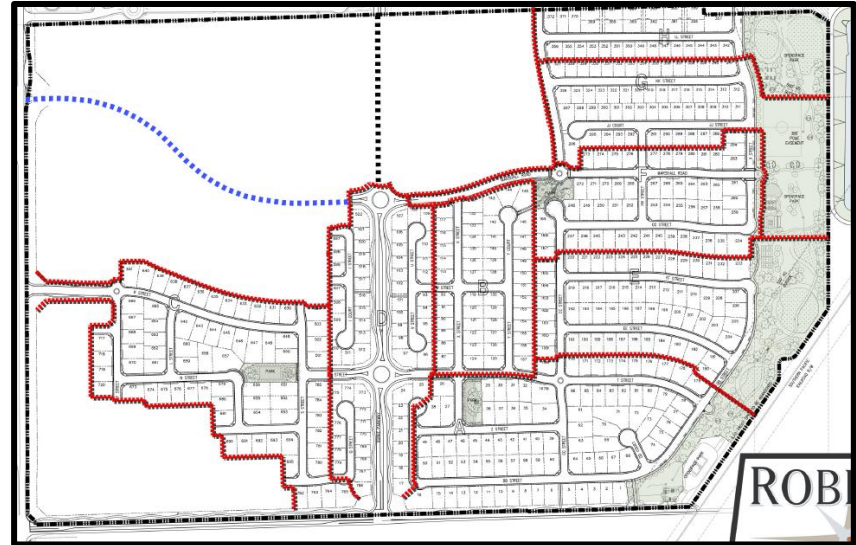
- » Site-specific impacts on adjacent areas and other agencies

Figure 1-2 Local Context



Phasing Plan

- » Most issues were specific to construction activity



Response to Comments

Case Study: San Diego

City of San Diego

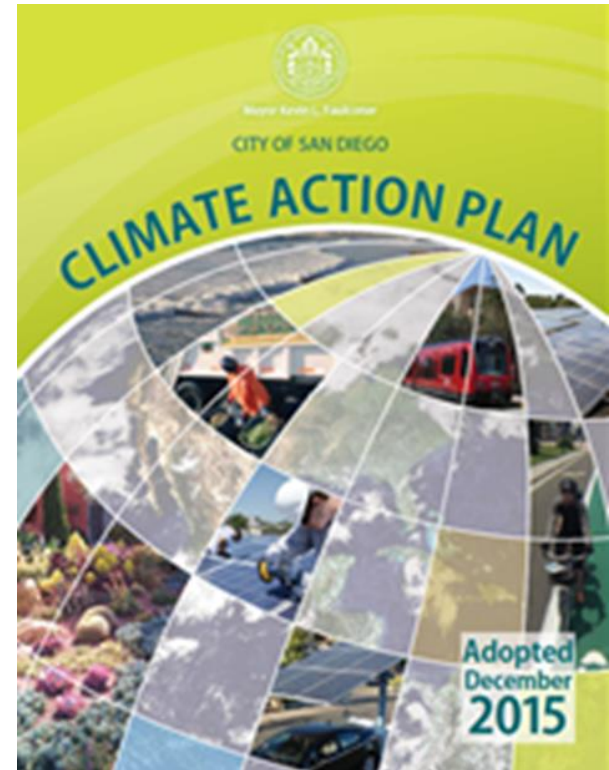
» Response to comments

(Part II: 2017 Version)

- Bracketing
- Master or topical responses
- Level of response

» Planning vs. PEIR Comments

- Standardized response
- Response within staff report



Future Tiering

Background, Best Practices, and Context

Tiering

- » Refers to the practice of covering general matters in previous broader EIRs and using a more specific, narrower and/or site-specific project EIR for a subsequent document
 - In *re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1169: Supreme Court upheld agency's use of a first-tier program EIR that did not identify with certainty specific sources of water because the second-tier projects would provide further analysis and be implemented in later stages of the program
- » Subsequent documents incorporate by reference the more general discussion and focus on the issues specific to that project

CEQA Sections on Tiering

» **Infill projects: CEQA Guidelines, § 15183.3**

- Appendix M: Performance Standards for Infill Projects Eligible for Streamlined Review

» **Transit priority or residential/mixed use residential projects (SB 375): Public Resources Code, § 21099**

- Must be consistent with general land use designations and applicable policies in the Sustainable Communities Strategy or Alternative Planning Strategy

» **Tiering/streamlining GHG analysis: CEQA Guidelines, § 15183.5**

CEQA Sections on Tiering

- » Projects consistent with Community Plan, General Plan or Zoning: Public Resources Code § 21083.3 and CEQA Guidelines, § 15183
- » Focused EIRs and small projects: Public Resources Code, § 21158.5 and CEQA Guidelines, § 15179.5
- » Staged EIR for large capital projects: CEQA Guidelines, § 15167
- » Examples of tiering: Appendix J

Benefits of Tiering

- » CEQA encourages tiering “whenever feasible”
- » **Avoids unnecessary repetition**
 - For example, if a site-specific environmental review is completed in the Program EIR, CEQA does not require additional review unless the agency discovers a new impact (*Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 234 Cal.App.4th 214, 238)
- » **More efficient**
- » **Avoids speculation**
 - Program EIR may defer a more detailed site-specific analysis of future projects when specifics cannot be meaningfully evaluated (*City of Hayward v. Board of Trustees of the California State University* (2015) 242 Cal.App.4th 833, 850)

Program EIR (First Tier)

- » The agency must analyze an impact in the first tier EIR if it is a reasonably foreseeable consequence of the action and the agency has “sufficient reliable data to permit preparation of a meaningful and accurate report on the impact”
- » Agency may reserve to a later date more detailed and specific evaluations of impacts that may be difficult to analyze on a more limited geographical scale

Process for Tiering Subsequent Activities

» Tiering may be used if:

- An EIR has been certified
- A subsequent project is being considered
- The subsequent project is consistent with and within the scope of the Program EIR

Process for Tiering Subsequent Activities

» No additional CEQA document is required if:

- The project falls under the scope of the Program EIR;
- The project is consistent with applicable local land use plans and zoning;
- All significant impacts were adequately addressed in the prior EIR;
- The project would not make a considerable contribution to a new significant cumulative impact; and
- None of the triggers for subsequent/supplemental EIRs in CEQA section 21166 apply.

Process for Tiering Subsequent Activities

- » The Initial Study Checklist must be used to document this determination
- » Feasible mitigation measures must be incorporated
- » Environmental document must indicate reliance on previous Program EIR
- » May tier using a different document, e.g., ND, MND, EIR or **exemption** (*Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1316)

Future Tiering

Case Study: Vacaville

Implementing Tiering for the Specific Plan EIR

- » Expanded Initial Study to evaluate General Plan EIR coverage of potential impacts
- » Roberts' Ranch project: Modified Initial Study
 - Specific citation to General Plan policies to provide basis for analysis
 - Detailed in comparison to City's standard Initial Study

Implementing Tiering for the Specific Plan EIR

» General Plan EIR adequately addressed majority of impact issues

- Aesthetics
- GHG
- Agriculture
- Recreation

» Findings and conditions of approval

- Findings reference policies in the General Plan
- Conditions of approval
 - Requirement to comply with policies of the General Plan

Future Tiering

Case Study: San Diego

City of San Diego

» Framework for Mitigation

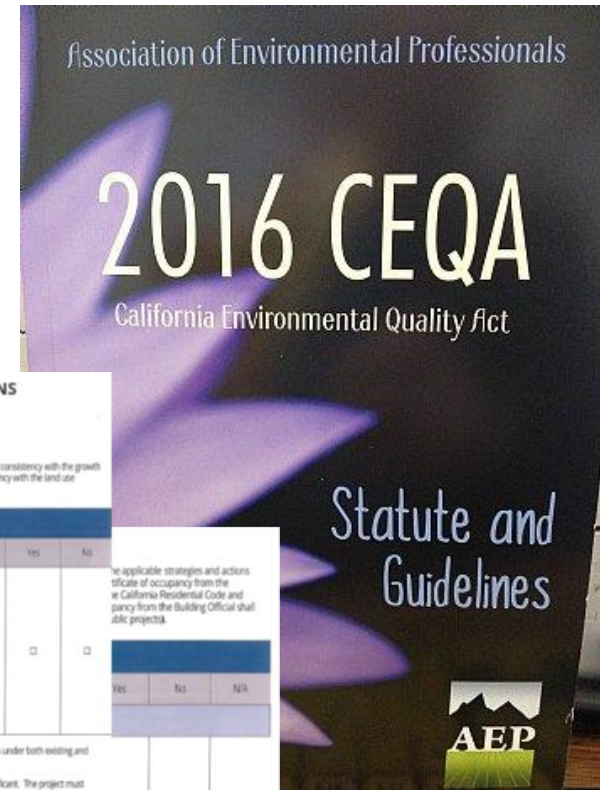
- Feasible project-level mitigation
- Special activities/projects

» Tools for engineers and planners

- Checklist/screening for reliance
- Addendum review forms

» Streamlining in CEQA

- 15183.5 CAP Checklist
- 15183 Checklist for Projects



SD CAP CONSISTENCY CHECKLIST QUESTIONS

Step 1: Land Use Consistency

The first step in determining CAP consistency for discretionary development projects is to assess the project's consistency with the growth projections used in the development of the CAP. This section allows the City to determine a project's consistency with the land use assumptions used in the CAP.

Checklist Item (Check the appropriate box and provide explanation and supporting documentation for your answer)	Yes	No
1. Is the proposed project consistent with the existing General Plan and Community Plan land use and zoning designations? ¹ Q8	<input type="checkbox"/>	<input type="checkbox"/>
2. If the proposed project is not consistent with the existing land use plan and zoning designations, does the project include a land use plan and/or zoning designation amendment that would result in an equivalent or less GHG-intensive project when compared to the existing designations? Q8	<input type="checkbox"/>	<input type="checkbox"/>
3. If the proposed project is not consistent with the existing land use plan and zoning designations, and includes a land use plan and/or zoning designation amendment that would result in an increase in GHG emissions when compared to the existing designations, would the project be located in a Transit Priority Area (TPA) and implement CAP Strategy 3 actions, as determined in Step 3 to the satisfaction of the Development Services Department?	<input type="checkbox"/>	<input type="checkbox"/>

If "Yes" proceed to Step 2 of the Checklist. For questions 2 and 3 above, provide estimated project emissions under both existing and proposed designations for comparison. For question 3 above, complete Step 3.

If "No" in accordance with the City's Significance Determination Thresholds, the project's GHG impact is significant. The project must nonetheless incorporate each of the measures identified in Step 2 to mitigate cumulative GHG emissions impacts unless the decision maker finds that a measure is infeasible in accordance with CEQA Guidelines Section 15091. Proceed and complete Step 2 of the Checklist.

	Yes	No	N/A
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

¹ This question may also be answered in the affirmative if the project is consistent with SANDAG Series 12 growth projections, which were used to determine the CAP projections, as determined by the Planning Department.

• Utilities: water, sewer, water sector or 6 gallons per cubic feet or drum capacity:

	Yes	No	N/A
Nonresidential buildings:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• Plumbing fixtures and fittings that do not exceed the maximum flow rate specified in Table AS 303.2-3.1 (voluntary measures of the California Green Building Standards Code (See Attachment A)) and	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• Appliances and fixtures for commercial applications that meet the provisions of Section AS 303.3 (voluntary measures of the California Green Building Standards Code (See Attachment A))	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Check "N/A" only if the project does not include any plumbing fixtures or fittings.

² Actions that are not subject to Step 2 would include, for example: 1) discretionary map actions that do not propose specific development; 2) permits allowing wireless communication facilities; 3) special events permits; 4) use permits that do not result in the expansion or enlargement of a building; and 5) non-building infrastructure projects such as roads and pipelines. Because such actions would not result in new occupancy buildings from which GHG emissions reductions could be achieved, the items contained in Step 2 would not be applicable.

Questions/ Discussion

THANK YOU!



Fred Buderer, City Planner
City of Vacaville
Fred.Buderer@cityofvacaville.com
(707) 449-5307
www.ci.vacaville.ca.us



Tanya Sundberg, Senior Associate
PlaceWorks
TSundberg@placeworks.com
(510) 866-8336
www.placeworks.com



Margaret Sohagi, Partner
The Sohagi Law Group, PLC
MSohagi@Sohagi.com
(310) 475-5700
www.sohagi.com



Alyssa Muto, Deputy Director,
Environment & Policy Analysis
City of San Diego
AMuto@sandiego.gov
(619) 235-5217
www.sandiego.gov/planning