



# Double-Take: Two Recent CEQA Cases Illustrate the Perils of Deferred Mitigation

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## Introduction

In October 2012, two California Courts of Appeal reached opposite conclusions regarding the deferral of mitigation under the California Environmental Quality Act (CEQA). The cases illustrate the difficulties project proponents and lead agencies encounter when formulating mitigation.

In *Mount Shasta Bioregional Ecology Center v. County of Siskiyou*, No. C064930 (Oct. 10, 2012) (order of publication) (*Mount Shasta*) the Third Appellate District held that the county did not improperly defer noise mitigation until neighbors complained because the measure included a performance standard that the owner must meet regardless of which noise-reduction measures the owner chooses to implement.

In contrast, in *Preserve Wild Santee v. City of Santee*, Nos. D055215, D061030 (Oct. 19, 2012) (*Preserve Wild Santee*), the Fourth Appellate District held that the city improperly deferred formulation of a vegetation management plan to mitigate impacts of a large housing development on the endangered Quino checkerspot butterfly.

## **No Improper Deferral Found: *Mount Shasta Bioregional Ecology Center v. County of Siskiyou***

In *Mount Shasta*, the EIR determined that the combined noise from early morning truck deliveries and operation of proposed new co-generation equipment to be installed at an existing wood veneer manufacturing facility may exceed an increase in 3 decibels (dB) over existing conditions. To mitigate the impact to less than significant, the EIR required that if the county receives noise complaints from residents living near the facility, the owner "shall cease delivery options before 7:00 a.m. or implement other measures to limit the increase in noise to 3 dB or less."

Project opponents argued that the county improperly deferred mitigation by relying on complaints from neighbors who may be reluctant to criticize a major employer in the area, and by failing to specify exactly what steps the owner must take if complaints are received. The court rejected the argument, concluding that the proposed mitigation "would go directly to the heart of the matter," and under the substantial evidence standard of review, the court may not weigh conflicting evidence regarding the effectiveness of the measure. The court also rejected the argument that the mitigation was impermissibly vague: "If a complaint is received, [the owner] must conduct measurements to determine if the [3 dB] threshold is exceeded at the indicated location. If so, changes must be made to bring the noise level below the threshold. . . . [T]he fact the mitigation measure leaves it to [the owner] to decide how best to reduce the noise should be of no concern." <sup>1</sup>

### **Improper Deferral of Mitigation: *Preserve Wild Santee v. City of Santee***

In *Preserve Wild Santee* the court upheld most of the proposed mitigation for a large housing development's impacts to the endangered Quino checkerspot butterfly, but held that the city improperly deferred the formulation of a vegetation management plan for an open-space preserve.

The project is located at Fanita Ranch on 2,600 acres of land within the 900-square-mile Multiple Species Conservation Program (MSCP) in the County of San Diego. It includes 1,380 single-family dwelling units and a pedestrian-oriented village center on 1,200 acres of land. To mitigate impacts to approximately 900 acres of potentially suitable butterfly habitat, the developer is required to conserve 1,300 acres of suitable habitat in perpetuity.

According to the EIR, the butterfly habitat must be managed to comply with a draft habitat management plan subject to the ultimate approval of the city and wildlife agencies. The draft habitat management plan specified that vegetation management is key to the success of the conservation of the butterfly. However, the city had decided not to allow use of the only two methods of vegetation management (i.e., controlled burns or goat grazing) specified in the draft plan. Instead, a vegetation management plan would be formulated and approved by the city and wildlife agencies, but the timing and details of actually implementing the habitat management would be subject to the discretion of the preserve manager depending on environmental conditions.

The court held that the city had improperly deferred mitigation because the EIR did not specify any performance standards or guidelines for the "key consideration for the Quino's conservation," namely active vegetation management in the preserves. Moreover, given the habitat manager's discretion under the plan, "these activities are not guaranteed to occur at any particular time or in any particular manner."

### **Bottom Line**

*Mount Shasta* and *Preserve Wild Santee* provide a helpful contrast for lead agencies and practitioners when formulating mitigation measures that defer the formulation of a specific plan of action until after project approval. So long as mitigation contains a clear, enforceable performance standard and specifies one or more actions that can meet the standard, it should withstand judicial review. Simply making the post-approval formulation of mitigation contingent upon agency approval is no substitute for those essential elements.

<sup>1</sup> Of additional note, the court rejected the argument that the EIR failed to analyze a reasonable range of alternatives by evaluating only the proposed project and the "no-project" alternative. The court noted that there is no rule in CEQA that specifies a particular number of alternatives that must be included in an EIR, and the appellants did not identify any potentially feasible alternative that would achieve the project's basic objectives. The court explained "an appellant may not simply claim the agency failed to present an adequate range of alternatives and then sit back and force the agency to prove it wrong."