



Memorandum

TO: TRANSPORTATION &
ENVIRONMENT COMMITTEE

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: February 21, 2012

Approved

Date

2/24/12

COUNCIL DISTRICT: City-Wide

**SUBJECT: CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) MITIGATION
MONITORING AND REPORTING PROGRAM STATUS REPORT**

RECOMMENDATION

Staff recommends that the Committee accept the status report regarding the CEQA Mitigation Monitoring and Reporting Program.

OUTCOME

Comments from the Transportation and Environment Committee will provide guidance to staff for ongoing improvements to the City's Mitigation Monitoring and Reporting Program (MMRP) to be more successful in fulfilling environmental mitigation commitments and enhance CEQA compliance in accordance with State requirements.

BACKGROUND

This is the fourth progress report on the status of the implementation of and improvements to the City's Mitigation Monitoring and Reporting Program. The previous status report was accepted by the Committee on December 5, 2011.

The California Environmental Quality Act (CEQA) requires the City to require feasible mitigations to reduce or eliminate significant environmental impacts from proposed projects as identified in either a Mitigated Negative Declaration (MND) or an Environmental Impact Report (EIR). At the time of project approval, the City is required to make findings as to how specifically the project will avoid or substantially reduce its significant environmental effects. In order to ensure that the required mitigation measures and imposed project revisions are implemented in accordance with those measures identified in the MND or EIR, CEQA mandates the City to adopt a Mitigation Monitoring

and Reporting Program (MMRP) for the individual project until the mitigation measures are completed. CEQA requires mitigation measures to be fully enforceable through permit conditions, agreements or other measures. The expectation is that there will be consequences to the project for noncompliance with performance objectives.

In addition, the City's current Operating Budget acknowledges that the Senior Planner conducting environmental review for public and private projects will be focusing on the creation of a Mitigation Monitoring Program for San Jose. This memorandum identifies the work completed since the last report and upcoming activities, which are increasing in 2012.

ANALYSIS

The previous status report included a work program of actions that would improve and enhance the City's implementation and tracking of Mitigation Monitoring and Reporting Programs (MMRPs). Planning staff has begun work on four specific items since the last report:

- Developing standard mitigation measures to be included in Mitigation Monitoring Programs
- Exploring the structure of the City's monitoring efforts (roles and responsibilities between a project coordinator hired by the developer and between the professional staff of the City of San Jose)
- Formalizing existing enforcement options and identifying further options for approved projects out of compliance with their MMRP
- Developing fiscal strategy for sustaining an effective Mitigation Monitoring and Reporting Program

Other activities include: the maintenance and addition of MMRP information available to the public through the City's website, reviewing monitoring reports, and following up with developers and public agencies on outstanding mitigation measures.

Standard Mitigation Measures

Staff compiled a list of common measures found in Mitigation Monitoring and Reporting Programs (MMRPs) based on the MMRPs from large-scale Environmental Impact Reports (EIRs) including the Downtown Strategy Plan, the Vision North San Jose, the Evergreen Development Policy, and the Edenvale Redevelopment Project. This analysis revealed sixteen main categories of mitigation measures that routinely occur in MMRPs. Staff has organized the measures by both timeframe for monitoring compliance and by responsibility for monitoring compliance. To give the Committee an idea of the variety of mitigation measures and responsibilities that can arise, selected measures from the larger list are summarized in Attachment A of this report. Staff continues to add measures to the inventory we come across them from previously approved projects.

Structure of Monitoring Efforts

Based on the analysis of the mitigation measures, staff is proposing to split project monitoring between City staff and project consultants. The consultants would act as the project's Mitigation Coordinator to coordinate field monitoring and reporting back to the Planning Division. The Mitigation Coordinator would be accountable for documenting the relevant compliance with the mitigation measure(s). Table A identifies a sample of the measures that would best be served by a Mitigation Coordinator, including air quality, biology, archeology, and soils. This would solve the irregular reporting on mitigation measure implementation that currently occurs on an ad hoc basis.

The remainder of the monitoring will be performed by City staff. Most of the monitoring work is already being carried out as a part the City's regulatory processes, including grading inspections, building inspections, stormwater inspections, and the like but is not well connected to the CEQA process. As a part of the MMRP program development, Planning staff is coordinating with other divisions and departments to ensure that monitoring records are forwarded onto the Planning Division to better track and close out monitoring requirements in an affirmative way.

In addition to the above, there is other monitoring work is not currently being carried out by staff; specifically, certain field verifications of mitigation requirements are not currently proactively checked by staff. This field verification would be supported through the fees collected at project milestones (see funding discussion later in this report). Staff's initial proposal is that field verification would be similar to the proof-of-payment system on Caltrain or on the Light Rail—in other words, compliance is verified through random checks as opposed to continuous oversight.

Enforcement Options for Projects Out of Compliance with their Mitigation Monitoring Program

Enforcing mitigation measures for non-complying projects is one of the thorniest problems related to Mitigation Monitoring.

For projects with permit approvals, the Municipal Code offers the Notice of Non-Compliance/Order to Show Cause as a possible remedy. Procedures for the Notice of Non-Compliance / Order to Show Cause are contained in Chapter 20.100 of the City's Zoning Code. The Director of Planning has the ability to notify property owners of non-compliance with a permit for a project. If the non-compliance is not abated within the timeframe specified in the Notice of Non-Compliance, the Planning Director has the ability to issue an Order to Show Cause, which calendars the issue before the Planning Commission. The Planning Commission has the ability to revoke, suspend, or modify the permit or approval if the property owner does not sufficiently rebut allegations that, or show sufficient cause for why, mitigation measures were not implemented as required by a permit. As this occurs after development permits have been closed out, this becomes a General Funded activity and competes with other priorities for those scarce resources.

The biggest issue with this process is that uses can be operating for significant periods of time before a complaint is received or violations are discovered, prompting a Notice of Non-Compliance to be issued. Going forward, tying completion of mitigation measures to project milestones (in other words, requiring compliance prior to proceeding with the next step in the project) should help improve mitigation review and compliance.

Mitigation Monitoring Funding

Based on the analysis contained in Attachment A, the relationships become more clear between the specific projects, mitigation measures, and the appropriate step in the permit process for mitigation completion. Attachment A demonstrates that monitoring is linked to the impacts and mitigation. Currently, the mitigation monitoring fee is based on the type of environmental clearance (Mitigated Negative Declaration or Environmental Impact Report). This approach covers the cost of preparing the MMRP and reviewing some monitoring reports, but does not cover the costs of monitoring mitigation measure implementation over the duration of construction activities.

As a part of the FY 2012-2013 budget process (specifically, fees and charges), staff is exploring changing the structure of the fee for mitigation monitoring so it is tied to a project's progress towards completion, with an initial fee at the Planning application stage used to cover the staff costs associated with the development of the project MMRP, and appropriate fees collected at the Grading Permit, Building Permit, and Certificate of Occupancy stages to be used for monitoring mitigation implementation at those particular points in time. This is a more precise approach to fee calculation than the current method of basing the fee on the type of environmental clearance issued for a project because the fees would more closely relate to the project's progress and to staff time spent monitoring the project at that point in the process. This also is a better system from an accounting standpoint, because it requires PBCE to carry less money forward on its balance sheet from year to year, which occurs under the current, up front, one-size-fits-all, single payment system.

Creating a process built around project milestones also ensures that as a project moves through the entitlement and construction process, mitigation measures are implemented and monitored. For instance, requiring pre-construction surveys for birds and bats prior to issuance of a Demolition Permit ensures that the mitigation measure is completed in the appropriate timeframe in the life of the development proposal. Requiring fees at each milestone also ensures that the City is adequately reimbursed for the time spent performing the required monitoring work.

Because mitigation monitoring is a fee-based program, the fees that are charged are cost-recovery. Staff is proposing with the new structure that fees be charged on a per-milestone basis. If the adopted MMRP only contains measures that are required prior to a Grading Permit, then the developer is charged only for mitigation monitoring for that one milestone. In addition to more closely mapping to a project's progress, this fee structure would help to account for differences in project size and complexity. Staff is proposing that the fees for each milestone be commensurate with the time required to review the palette of standard mitigation measures coincident with that milestone. The amount of the fees is still being determined and further outreach to the development community will occur once staff has a specific fee proposal.

EVALUATION AND FOLLOW-UP

In the next three months, Planning staff will:

- Hold outreach meetings with developers to discuss the Mitigation Coordinator concept, a proposed permit requirement for a Mitigation Coordinator, and the fee proposal;

- Meet with other City staff to refine the protocol for development of individual project monitoring programs; and
- Continue to add to the database of all monitoring and reporting programs obligations of past projects and continue to update the current status of implementation for public review.

The next status report on the Mitigation Monitoring and Reporting Program will be added to the fall 2012 T&E Committee work plan.

PUBLIC OUTREACH/INTEREST

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

Although this item does not meet any of the above criteria, information is posted on the Planning Division Environmental Review web page. Additionally, during the next three months staff will conduct stakeholder outreach to solicit ideas and feedback on the various staff ideas for improving project compliance with the CEQA MMRP requirements. General information regarding improvements to the City's MMRP practices has been discussed with the development community in the past.

COORDINATION

This memorandum was coordinated with the City Attorney's Office.

TRANSPORTATION & ENVIRONMENT COMMITTEE

February 21, 2012

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CEQA

Not a project under CEQA, File No. PP10-069, City Organizational & Administrative Activities (Status Report).

/s/

JOSEPH HORWEDEL, DIRECTOR

Planning, Building and Code Enforcement

For questions please contact John Davidson, Senior Planner, at 408-535-7895.

Attachment

Attachment A

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Selected Major Categories of Mitigation Monitoring and Reporting Measures – Summary of Timeframes and Responsibilities			
Impact	Mitigation Measure	Completion Required	Verification Method
			Monitoring Responsibility <i>(Proposed in bold italic type)</i>
Loss of existing trees due to development	Replacement trees or in-lieu fees to Our City Forest	Prior to issuance of a Planning Permit	Inclusion on Development Plans / Receipt of donation / Field verification Planners during the permit process and <i>Mitigation Coordinator to do field verification and submit findings to Planning Division</i>
Air Quality impacts from additional automobile trips	“Mobile Source” measures, including making transit more available, providing bike and pedestrian facilities, eco-passes to on-site employees, etc.	Prior to issuance of a Planning Permit	Inclusion on development plans / Proof of ongoing obligation with Valley Transportation Authority Planners during the permit process; developer-funded <i>Mitigation Coordinator, who submits documentation to the Planning Division</i>
Impacts to Bats / Raptors / Burrowing Owls from development	Surveys by a qualified biologist prior to construction; protection measures if animals are found	Prior to issuance of a Grading, Building, or Demolition Permit	Pre-construction survey report <i>Mitigation Coordinator, who submits reports to Planning Division</i>
Construction Noise	Construction hours, preparation of a construction plan indicating when noisy activities occur, designation of a disturbance coordinator	Prior to issuance of a Grading, Building, or Demolition Permit	Inclusion of BMPs on approved plans / site checks during construction Planners during plan conformance review / PW inspectors in the field
Impacts to archaeological resources from site development	On-site monitoring by an archaeologist for artifacts / remains during excavation	Prior to issuance of a Grading or Building Permit	Contract with qualified archaeologist / monitoring reports <i>Mitigation Coordinator, who submits contract and reports to Planning Division</i>
Air Quality – construction dust	Best Management Practices (BMPs) including site sweeping and watering	Prior to issuance of a Grading Permit	Inclusion of BMPs on approved plans / site checks during construction Planners during plan conformance review / PW inspectors in the field
Construction near on-site trees	Tree protection measures, such as tree fencing	Prior to issuance of a Grading Permit	Inclusion of measures on approved plans / site checks during construction Planners during plan conformance review / PW inspectors in the field
Impacts to stormwater quality from construction	BMPs during construction including site sweeping, watering disturbed soil, drain rock in burlap bags around storm drains	Prior to issuance of a Grading Permit	Inclusion of BMPs on approved plans / site checks during construction Planners during plan conformance review / PW inspectors in the field
Impacts to people from contaminated soil	Preparation of a soil management plan describing handling and disposal	Prior to issuance of a Grading Permit	Soil Management Plan; on-site reports during construction <i>Mitigation Coordinator, who submits reports to Planning Division</i>

Attachment A

Selected Major Categories of Mitigation Monitoring and Reporting Measures – Summary of Timeframes and Responsibilities				
Impact	Mitigation Measure	Completion Required	Verification Method	Monitoring Responsibility (Proposed in bold italic type)
Impacts from unstable soil to building design/construction	Preparation of a geotechnical report; recommendations included in Building Permit plans	Prior to issuance of a Public Works (PW) Clearance	Geotechnical report, and inclusion in Building Permit plans	City Geologist, and Building Division Plan Checker
Loss of sensitive biological habitat	Preparation of a revegetation plan; ongoing monitoring to determine success	Prior to issuance of a Planning Permit or a Certificate of Occupancy; yearly thereafter	Revegetation plan included in Permit plans; monitoring reports	Mitigation Coordinator, who submits reports to Planning Division