

To: Calaveras Board of Supervisors
From: Tom Infusino, CPC
Re: Deferred Mitigation Measures Lack Required Components.
Date: 11/7/19

I. Background

Neither the Planning Commission during its May and June, 2019 General Plan Update (GPU) hearing; nor the Board of Supervisors during its July 30-31, 2019, GPU hearing, addressed the CPC's concerns regarding the improper deferral of mitigation measures. Below we remind the Board of Supervisors that the failure to include the required components in deferred mitigation measures is a serious violation of the California Environmental Quality Act (CEQA). **Please add the required components to your deferred mitigation measures.** Also, below we note that the GPU leaves incomplete a number of planning tasks and policy decisions that should have been part of the GPU process.

II. Deferred mitigation measures must include specified components.

A) Mitigation measure proposals need to be evaluated in a Program EIR.

A program EIR is completed for a large scale planning approval like a general plan. (CEQA Guidelines, sec. 15168) Site specific analysis is often not available at the time a program EIR is completed. However, this does not prevent adequate identification of significant effects of the largescale planning approval at hand. (14 Cal. Code Reg. § 15152(c.) This does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration. (14 Cal. Code Reg. § 15152(b).)

When approving projects that are general in nature (e.g. general plan amendment), agencies must develop and approve whatever general mitigation measures are feasible. (*Citizens for Quality Growth v. City of Mount Shasta* (3 Dist. 1988) 198 Cal.App.3d 433, 442.) The mitigation measures must be incorporated into the plan. (*Sierra Club v. City of San Diego* (2014) 231

Cal.App.4th 1152, 1173.) When a program EIR identifies significant impacts on drainage, water supply, traffic, wastewater management, and/or fire protection, certification without adoption of the feasible mitigation measures is an abuse of discretion under CEQA. (*City of Marina v. Board of Trustees* (2006) 39 Cal.4th 341.)

B) Each adopted mitigation measure must be a mandatory commitment of the agency.

CEQA requires that mitigation measures be enforceable commitments to reduce or avoid significant environmental impacts. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 445; CEQA Guidelines, sec. 15126.4, subd. (a)(2).) “The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded.” (*Federal Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260-1261.)

When an agency adopts a plan that includes planned future development, it must actually mitigate the impacts that can be anticipated at that time, regardless of future tiers of review. (*Koster v. County of San Joaquin, supra*, 47 Cal. App. 4th at 39-40.) It is not adequate mitigation to simply promise to meet some goal in the future, without any criteria for how this will occur. (*Gray v. County of Madera* (2008) 167 Cal. App. 4th 1099, 1118 [“[W]e conclude that here the County has not committed itself to a specific performance standard. Instead, the County has committed itself to a specific mitigation goal.”].) An agency must commit to implement a mitigation measure using mandatory language. Otherwise, it does not qualify as a mitigation measure. (CEQA Guidelines, sec. 15126.4, subd. (a)(2); *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal. App.4th 173, 199.)

C) Under specified limited circumstances an exception allows mitigation measures to be deferred.

As a general rule, an agency cannot rely on mitigating a significant impact by developing a mitigation plan *after* project approval. "The CEQA process demands that mitigation measures timely be set forth, that environmental information be complete and relevant, and that environmental decisions be made in an accountable arena." (*Oro Fino Gold Mining Corporation v. County of El Dorado* (3d Dist. 1990) 225 Cal.App.3d 872, 884-885.)

The exception to the general rule is that deferral may be permissible under limited circumstances. First, the agency must provide a reason why the deferral is required. (*San Joaquin Raptor Center v. County of Merced* (207) 149 Cal.App.4th 645, 670-671.) Next, the agency must display a commitment to mitigating the impacts, list a menu of feasible mitigation measures, and identify performance criteria that the measures must satisfy. (*Sacramento Old City Association v. City Council of Sacramento* (3d Dist. 1991) 229 Cal.App.3d 1011, 1028-1029.) An agency may not defer adopting specific mitigation measures by adopting merely a "mitigation goal" without specific performance criteria and a menu of feasible mitigation measures. Similarly, merely committing to study an impact or the feasibility of its mitigation in the future is not sufficient. (See *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1118-1119.) Mitigation measures are improperly deferred when there is no commitment to a specific performance criteria, and there is no guarantee that mitigation will be in place at the time of project implementation. (*POET v. California Air Resources Board* (2013) 218 Cal.App.4th 681.)

It is not certain at this time which GPU implementation measures will be adopted by the Board of Supervisors as mitigation measures. Below we identify why specified implementation measures would not comply with CEQA standards for deferred mitigation measures.

III. Some deferred provisions of the General Plan Update may be acceptable mitigation.

In many cases, the GPU only defers impact mitigation to the time when a specific development project receives environmental review of its own. For example, Implementation Measures C-1D

Circulation Access Plans, C-3D Transit Stops, C-4B Airport LUCP, COS-5F Air Pollution Evaluation, COS-5I Air Quality Buffers, COS-5J Asbestos Emissions, COS-8H Preservation of Historic Resources, N-1E Acoustic Analysis will all be immediately employed by the County to review new applications for discretionary projects. Thus, these measures are sure to be applied to mitigate impacts of discretionary development from implementation of the GPU.

IV. Some deferred provisions of the General Plan Update do not meet the requirement that there is a reason to defer mitigation.

LU-3A, the need to assess the GPU's consistency with the Airport LUCP and LU-3C the need to evaluate facilities and services needed for development under the GPU, and COS-4E regarding wildlife corridor protection, are analyses that should have been done as part of the GPU EIR, not as some mitigation measure at some unspecified future date. There is no justification for deferring these analyses.

Many other deferred implementation measures are actually analyses and decisions that should have been made during the GPU process, not deferred until a later date. For example, LU-5C calls for assessing the adequacy of the code to facilitate local participation in emerging markets. That is the sort of planning activity that should have been done during the GPU, and led to a direction by the BOS to amend the code or not. LU-5D calls for evaluation of the Special Events permitting requirement to determine if streamlining is needed. That evaluation should have been done during the GPU process, and resulted in direction to streamline the process or not. C-1C calls for considering including transportation alternatives in impact fees. That consideration should have been done during the GPU process, and resulted in a direction from the BOS to include the alternatives in the fees or not. C-2E calls for considering new funding sources. That consideration should have happened during the GPU process, and resulted in direction from the BOS to pursue or not pursue the new funding sources. RP-4D calls for considering having a mining advisory committee. That consideration should have taken place during the GPU and resulted in a direction from the BOS to have or not have such a committee. COS-1A calls for a review of the code to identify dedicated open space lands. That was supposed to happen during the GPU process. COS 5I calls for investigating the potential uses of woody biomass. This

preliminary planning task should have been done during the GPU. COS-8A calls for identifying Native American resource sensitive areas. This preliminary planning task should have been done during the GPU process. PF 1B calls for the review of methods to maintain level of service. This review should have been done during the GPU process, and resulted in direction from the BOS to adopt methods or not. PF-2N calls for reviewing and amending if necessary the code related to connection to public sewers. That review should have been done during the GPU process, and resulted in a direction by the BOS to amend the code or not. PF-3C calls for the County to consider new solid waste diversion options. That consideration should have taken place during the GPU process, and resulted in some direction from the BOS to choose or not chose new solid waste diversion techniques. PF-7D calls for consideration of a secure funding source for libraries. That planning task should have been done during the GPU, and resulted in a BOS direction to secure the funding source or not. A general plan that defers basic planning tasks and defers establishing policy directions is simply incomplete.

RP-1F, mitigation for conversion of Resource Production land, was already completed. The issue was already thoroughly studied for ten years and addressed by local stakeholders, local experts, County planning staff and consultants, and mitigation recommended by the State Department of Conservation. Nothing more needs to be done that was not done during the 13-year GPU process. There is no justification for deferring the adoption of a mitigation measure.

COS-4N, mitigation to protect riparian corridors was already completed. It was developed by County staff and expert consultants for inclusion directly into the GPU for immediate implementation. It was supported by commenters at the Planning Commission hearing in May and June of 2019. There is no justification for deferring the development of this mitigation.

PF-2J is about protecting groundwater recharge areas. However, the time to identify and protect these areas is during the GPU EIR, so that these areas are not designated for intensive development. Deferring that analysis undercuts options for protecting these areas.

COS-3C calls for the development of stream and wetland setback guidelines. Such guidelines were developed by County staff and expert consultants for inclusion directly into the GPU for

immediate implementation. They were supported by commenters at the Planning Commission hearing in May and June of 2019. There is no justification for deferring the development of this mitigation.

COS-6B calls for developing hillside and hilltop construction standards. There is no explanation why this mitigation should be deferred rather than identified in the GPU EIR.

COS-8D regarding Cultural Resource protection should have been developed during the GPU EIR process. There is no reason to defer creating this mitigation language.

V. Some deferred implementation measures of the GPU do not meet the requirement that there is a menu of feasible measures available from which craft the deferred mitigation.

COS-4B calls for identifying biological resource impact mitigation options. The development of this menu of measures is supposed to be done as part of the GPU EIR, not deferred until later.

N-1B calls for the development of noise reduction strategies to be applied to applications for new development under the GPU. The development of this menu of measures is supposed to be done as part of the GPU EIR, not deferred until later.

VI. Some deferred implementation measures do not meet the requirement that there be specific performance standards.

LU-2C calls for standards for exceptions to CEQA for infill projects. The time for identifying performance standards is during the GPU EIR, not some later time.

LU-4H calls for developing standards for buffers. The time for identifying such performance during the GPU EIR, not some later time.

S-1B calls for level of service requirements for emergency responders. The time for identifying performance standards is in the GPU EIR, not at some later time.

PF-1H calls for the development of level of service thresholds for new development. These performance standards for new development are supposed to be part of the GPU EIR, not deferred until later.

PF-4A calls for setting level of service standards for law enforcement. These performance standards are supposed to be part of the GPU EIR, not deferred until later.

PR-7A calls for establishing internet service standards. This should have been done in the GPU EIR, not deferred until later.

VII. Deferred implementation measures do not meet the requirement that there is a commitment to adopt the measure.

Completing and applying deferred general plan implementation measures will only begin when they are selected as priorities by the Board of Supervisors on an annual basis. There are 43 zoning ordinance updates, and 81 other items that are deferred specific actions to implement the GPU, that have no due dates or implementation timelines. Because all of these measures are conditioned on future selection by the BOS for before their development can even begin, there is no enforceable commitment to adopt any of them.

The other 81 deferred implementation measures are as follows: LU-2D Infill Database, LU-4E Historic Resource Database, LU-5F Amend G.P. re business constraints, LU-5G Inventory of land zoned for development, C-1C Transportation Alternatives in impact fees, C-2B Transportation Impact Study Guidelines, C-2C Valley Springs Circulation Realignment, C-2D Update RIM and Benefit Basin Fees, C-2E Consider new funding sources, C-3A Ridesharing Programs, C-4C Use of Airport Land, RP-2D Ag. Best Management Practices, RP-3A Code Consistency with TPA, RP-3B Forest Conservation Programs, RP-4C Updating GP Maps, RP-4D Mining Advisory Board, RP-4G Adding Mineral Resource Zone Areas, COS-1A Identify dedicated open space lands, COS-2A Watershed Management, COS-2B Prescribed Burning, COS-2C Air Quality Regulations (Prescribed Burning), COS-4B Biological Resource Mitigation

Options, COS-4C Habitat Conservation Plan for Amphibians, COS-4D Oak Woodlands, COS-4E Wildlife Corridors, COS-5A Air Quality Planning Efforts, COS-5D Green Waste Collection, COS-5G Emission Reduction Programs, COS-5L Woody Biomass use, COS-6B Hillside & Hilltop Construction Guidelines, COS-7C Identify Access to Public Waterways, COS-7E Local and Regional Trail System, COS-7F Corridor Plans, COS-7H Recreation Master Plan, COS-8A MOA with Central California Information Center, COS-8C Professional Qualifications/Consultant list, COS-8D Unanticipated Cultural Resources, COS-8E Cultural Resource Education, N-1C Transportation Related Noise, N-1D Best Management Practices (Ministerial Projects), S-1A Local Hazard Mitigation Plan, S-1B Level of Service (emergency responders); S-1C Evacuation Routes, S-1D Water Supply Inventory, S-1E Current Information (Hazards), S-1F Public Safety Information, S-1G Communications Systems (Permit Streamlining); PF-1B Maintenance of LOS, PF-1C Public Facilities Impact Fees, PF-1D Facility Joint Use, PF-1E Capital Facilities Plan, PF-1F Consistent Growth Projections, PF-1G Growth Projections, PF-2A Define Service Boundaries, PF-2F through 2L, PF-2M Groundwater Monitoring, PF-3D and 3E Facility Siting, PF-3F Alternative Energy Incentives, PF-4A LOS Law Enforcement/Emergency Services, PF-4C Funding Law Enforcement and Emergency Services, PF-4D Emergency Communications, PF-5A Multi-agency Cooperative Group, PF-5B Emergency Operations Plan, PF-6A Safe Design, PF-6B Community Policing, PF-7A Quality Internet Service Standards, PF-7B Workforce Development Support, PF-7C Schools, PF-7D Libraries, PF-7F Medical Facilities, CP-1A New Community Plans.

Furthermore, some of the implementation measures to reduce impacts have been tried before and failed to result in implementation by the County. LU-4B, calls for adopting a dark night sky ordinance. This has been tried before under the prior general plan and never resulted in adoption by the County. COS-4C calls for the adoption of a Habitat Conservation Plan for amphibians. This was tried by the County before under the prior general plan, and did not result in creation and implementation of an HCP. COS-4D calls for an Oak Woodland conservation program. One was outlined by the Planning Department and its expert consultants, but was rejected by the Planning Commission during its 2019 hearing. COS-7H calls for adoption of a Recreation Master Plan. There has been a draft Recreation Master Plan for years under the prior general plan, but the County has failed to adopt it. PF-4A calls for funding for law enforcement. The

Sherriff completed a nexus study for impact fees in 2008 under the prior general plan, but the BOS refused to adopt it. CP-1A calls for the completion of new community plans. New community plans were completed with the help of County Planning Staff for Valley Springs and Copperopolis, but the Board refused to include them in the GPU in 2019. It is disingenuous for the County to claim it is “deferring” these measures when it is actually just continuing to evade their adoption.

VIII. Some deferred provisions of the General Plan Update might not meet the standard for timely implementation.

It is not unusual for a General Plan to defer some impact mitigation until an updated zoning ordinance is approved. However, the GPU defers action until 43 different ordinance updates, and does not give them any timelines, due dates, or priorities. Without due dates, implementation timelines, or priorities pursuant to CEQA, the zoning ordinance changes need only be made within a reasonable time after GPU approval. Each of the 43 different ordinance updates will only begin when the Board of Supervisors makes them a priority during one of its annual implementation priority setting meetings.

These 43 ordinance updates are LU-2A General Plan Consistency, LU-2B Mixed Use, LU-2C CEQA Infill Exception Standards, LU-2E Low Impact and Clustered Development Standards, LU-4A Community Design Standards, LU-4B Dark Sky Ordinance, LU-4C Landscape Ordinance, LU-4D Historic Commercial/Historic Mixed Use Zoning; LU-4E Signage, LU-\$G Parking, LU-4H Standards for buffers, LU-5A Telecommunications Facilities Ordinance, LU 5N Emerging Markets, LU-5C Expanding Opportunities for Home Businesses, LU-5D Special Events, C-1A Complete Streets, C-1F Public Works Manual (Snow Storage & Removal), C-4A Private Air Strips, RP-1A Code Amendments for parcel sizes near agricultural land, RP-2A Solar Use Easement, RP-2B Right to Farm Ordinance, RP-2C Williamson Act Implementation, RP-2E Agritourism expansion, RP-4A Amend County Code (Mineral Resources), RP-4B Amend County Code (Surface Mining), RP-4F Water Impacts from Mining Operations, RP-5A County Code (Geothermal), COS-2E Green Waste, COS-3B Grading Drainage & Erosion Control, COS-3C Storm & Wetland Setback Guidelines, COS-4J Landscaping Ordinance, COS-5E Alternative

Energy, COS-6A Flexible Development Standards, COS-7A Recreation Facility Standards, COS-7B Bike and Pedestrian Facilities, COS-8F Archaeological Resources, COS-8G Historic Resources, N-1A Update Noise Ordinance, PF-2H Water Conservation (Reclaimed), PF-2N Review and Amend re Connection to Solid Waste Diversion.

It took years to adopt just the one ordinance regarding commercial cannabis cultivation. It is unlikely that the 43 different zoning updates will be completed in the 20-year horizon of the General Plan Update. It is even less likely that those zoning updates relied upon as mitigation measures will be implemented in time to avoid the impacts developments approved under the GPU.