


**Mitigating for Species, Water and Other Natural Resource Impacts:  
A Holistic Approach**

Special Districts Association of Monterey County  
January 20, 2014

Steve Anderson  
Partner  
Best Best & Krieger LLP

© 2014 Best Best & Krieger LLP



---

---

---

---

---

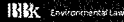
---

---

---

**Messages**

- ◊ Regulatory permits are a part of doing business
- ◊ Treat mitigation as project cost
- ◊ Avoid impacts if you can
- ◊ Know mitigation options early
- ◊ Can mitigation meet multiple goals?
- ◊ Negotiate with regulatory agencies



---

---

---

---

---



---

---

---

**Regulatory Permit Types**

- ◊ Army Corps of Engineers (CWA 404)
- ◊ Regional Water Quality Control Board (WDRs, NPDES; CWA 401)
- ◊ CA Department of Fish and Wildlife (CESA, F&G Code 1600)
- ◊ U.S. Fish & Wildlife Service, NMFS (ESA, MBTA)



---

---

---

---

---


---

---

---

### Mitigation Costs

- ◊ Regulatory mitigation can be expensive
  - Conservation easements, management endowments, detention basins, bioswales, et al.
  - 2008 Army Corps Mitigation Rule (33 CFR Part 332)
  - SB 1094 (2012) (Gov't Code 65965 et seq)
- ◊ It can cost considerably more if project proponents are ill prepared
  - Potentially more mitigation, fewer options



---

---

---

---

---


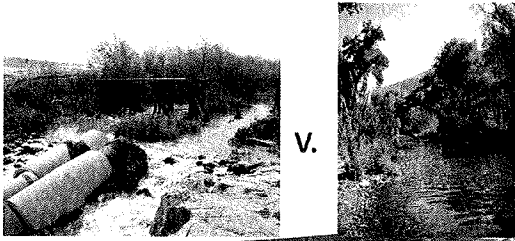
---

---

---

### Understanding Project Impacts: Technical Issues

#### Understanding Existing Site Conditions



---

---

---

---

---

---


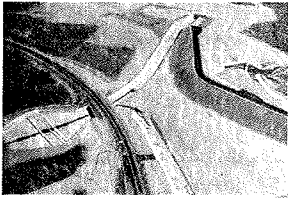
---

---

### Understanding Project Impacts: Technical Issues

#### Should you consider a Mitigation Partner?

- Benefits
  - ◊ Understand impacts
  - ◊ Understand options
- Brainstorm
  - ◊ Onsite mitigation
  - ◊ Offsite



---

---

---

---

---

---

---

---

### Understanding Project Impacts and Mitigation Terminology


Army Corps of Engineers Definitions  
(2008 Mitigation Rule, 33 CFR 332.2)

**Creation:** Establish waters where they do not exist today

**Restoration:**  
Re-establishment = Removal of a dam, levee or pier;  
Widening of a creek bed  
Rehabilitation = Restoration of a degraded wetland or riparian area

**Enhancement:** Removal of invasive and trash from existing water  
Some functions improved, others not

**Buffer:** Helps prevent weed invasion in restoration areas, reduces edge effects



---

---

---

---

---



---

---

---

### Understanding Project Impacts Technical Issues

- What type of mitigation should you consider?
- Consider the costs; differences among mitigations types are dramatic



---

---

---

---

---


---

---

---

### Standard Permit Conditions

- Permit Conditions Require Mitigation Installation and Conservation Site Protection Prior to Grading
- Site Protection (e.g. Conservation Easements—RCD's frequently hold easements and endowments)
- Endowment Agreements (SB 1094 – Gov't Code 65966)
- Performance Bonds



---

---

---

---

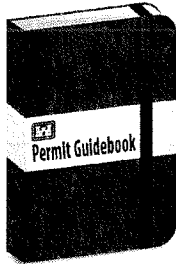
---

---

---

---

### Regulatory Perspective



- How do regulatory agencies view permit applicants and applications?
- What level of scrutiny is given?
- Are applications to utilize nationwide 404 permits or other general permits reviewed more closely?

IBB Environmental Law

---

---

---

---

---

---

---

---

### Understanding Regulatory Agency Requirements & How Regulators Operate

- 2008 ACOE Mitigation Rule (33 CFR 332.1 et seq.)
  - How has this changed Corps processes?
  - Rule has now prioritized mitigation options (332.3(b))
    - (1) Buy Mitigation Bank Credits
    - (2) Buy In Lieu Fee (ILF) Program Credits
    - (3) Permittee-responsible mitigation—watershed approach
    - (4) Permittee-responsible mitigation—on-site, in-kind
    - (5) Permittee-responsible—off-site
- Final Regional Compensatory Mitigation and Monitoring Guidelines for ACOE S. Pacific Division
  - <http://www.spd.usace.army.mil/Missions/Regulatory/PublicNoticesandReferences/tabid/10390/Article/552934/final-regional-compensatory-mitigation-and-monitoring-guidelines.aspx>

IBB Environmental Law

---

---

---

---

---

---

---

---

### Understanding Regulatory Agency Requirements & How Regulators Operate

- Temporary v. Permanent Impacts
- 12501-SPD Standard Operating Procedure for Determination of Mitigation Ratios
  - <http://www.spd.usace.army.mil/Missions/Regulatory/PublicNoticesandReferences.aspx>
- Guidance on Delineations in Drought Conditions
  - <http://www.spd.usace.army.mil/Missions/Regulatory/PublicNoticesandReferences/tabid/10390/Article/21521/guidance-on-delineations-in-drought-conditions.aspx>

IBB Environmental Law

---

---

---

---

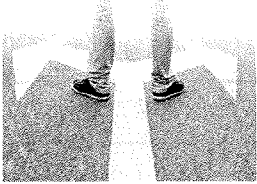
---

---

---

---

WHAT OPTIONS SHOULD YOU CONSIDER???



IBB Environmental Law

---

---

---

---

---

---

---

---

Propose Mitigation

- ◊ Preliminary Questions:
  - How much mitigation is needed?
  - What and how much mitigation will be acceptable?
  - Who should implement the mitigation?
    - ◊ Buy credits?
    - ◊ Consultant installs and monitors mitigation until success criteria satisfied?
    - ◊ Partner with RCD or other agency? DIYS?
  - Where to implement the mitigation?
    - ◊ Offsite? Onsite? Bank?

IBB Environmental Law

---

---

---

---

---

---

---

---

Propose Mitigation

- ◊ Mitigation Banks (Buy credits)
- ◊ In Lieu Fee Programs (Buy credits)
- ◊ Establish a Bank or ILF Program
- ◊ Partner with an RCD or Non-Profit
- ◊ Joint Program with a public agency
- ◊ Place mitigation onsite or on other property your agency owns
- ◊ Do you need mitigation for multiple projects?

IBB Environmental Law

---

---

---

---

---

---

---


---

### Implementation Options

Consider the costs and risks

Buy Credits (Mitigation Bank or ILF Program)  
\* Cost: **\$\$\$\$** (Permit Duty transfers; one and done)  
\* Risk: **0**

Partner with a Consultant/RCD/Non-Profit on Permittee Responsible Mitigation Onsite  
\* Cost: **\$\$ - \$\$\$\$** (Transferred Duties Negotiable)  
\* Risk: **00**



---

---

---

---

---

---

---


---

### Implementation Options

Creative partnership with RCD or natural resource non-profit or agency re offsite mitigation (Share bank; trade land for credits?)  
\* Cost: **\$ - \$\$\$\$**  
\* Risk: **0 - 000**

Permittee Responsible Mitigation Onsite – Permittee retains primary management duties  
\* Cost: **\$ - \$\$\$\$\$**  
\* Risk: **0000**

Permittee Responsible Mitigation Onsite – Permittee has few or no ongoing management duties  
\* Cost: **\$\$ - \$\$\$\$\$**  
\* Risk: **00**



---

---

---

---

---

---

---


---

### Implementation Options

Establish Bank/ILF for existing/future projects  
\* Short Term Cost: **\$\$\$\$** (Long Term Cost: **\$\$-\$\$\$**)  
\* Risk: **000**

\* Already done by public agencies such as CalTrans, Port of LA, SMUD, SDCWA

Project proponents handles by itself  
\* Cost: **\$ - \$\$\$\$\$** (Regulations may not allow)  
\* Risk: **00000**



---

---

---

---

---

---

---

---

### Final Message

- Project mitigation requires the same attention as the project—start early
- Prepare, prepare, prepare
- Understand evolving legal standards
- Choose a mitigation strategy early
- Know your options
- Know your project & be prepared to work with regulatory agencies

**BBK** Environmental Law

---

---

---

---

---

---

---

---

### Thank You

**Steve Anderson**

Partner  
Best Best & Krieger LLP  
(951) 826-8279  
*steve.anderson@bbklaw.com*  
*www.bbklaw.com*

**BBK** Environmental Law

---

---

---

---

---

---

---

---

