

Losing What We Thought We Gained

An Investigation Into Mitigation Monitoring



Failed mitigation: Never maintained.



Hundreds of oaks planted following mitigation investigation.

Prepared for the Santa Clara Valley Audubon Society
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Losing What We Thought We Gained

Executive Summary

This report is the end product of a project looking at the issue of mitigation monitoring, primarily under the California Environmental Quality Act (CEQA). In other words, I investigated past development project approvals, tried to ascertain what mitigation measures or conditions were placed on those projects in order to protect the environment, and then tried to find out whether those conditions had in fact been met by the developers, whether public or private. Where problems with compliance were found, I tried to find ways to correct the problems, or at least to elucidate how things had gone wrong.

This document chronicles the history of SCVAS with mitigation monitoring efforts, my methodology in continuing those efforts, how mitigation monitoring works in the real world, and my conclusions from the work I've devoted to this overlooked area of resource protection. Additionally, I've added practical examples of how to approach a project, sample CEQA comments anticipating mitigation monitoring problems, how to submit a Public Records Act request, and how to request mitigation monitoring documents.

The project concludes having found a considerable number of problems with individual development sites in Santa Clara County and the larger geographical region of the South Bay Area. Some problems have been corrected; others remain problematic; and with still others there was simply not the information found to conclude whether projects were in or out of compliance with their approved permits.

A major portion of the appendices for this report discusses the California law applicable to mitigation monitoring and possible legal mechanisms to deal with mitigation compliance problems when found. Another significant section relays many of the common issues I encountered in attempting to track compliance with mitigation monitoring requirements, primarily working with planners and other city and county staff persons in the region. I make recommendations as to ways cities and counties can improve their mitigation monitoring efforts, ways in which members of the public might track development projects in their areas and improve mitigation monitoring in their localities, and potential clarifications to state law that I believe would help improve performance in this area of land use statewide.

It is my belief—based on my investigations and accompanying research—that California and Californians are losing considerable natural resource values that we might rightly have assumed were protected by local development approval processes. I have shown that some of these lost natural resources can be recovered through investigation and advocacy. The work of this project has resulted in the recovery of resource values related to riparian and wetland habitats, water quality, rare and endangered species habitats, tree planting, and preservation of open space (See Appendix I, a table of development projects investigated during this effort, for a more detailed account of this project's accomplishments). I have also

shown, unfortunately, that the process of finding and correcting such problems is lengthy, frustrating, and often only partially effective.

It is my hope that other individuals and community organizations will read the experiences related herein and consider whether applying some effort to the issue of mitigation monitoring in their communities would be worthwhile. I believe it would be. While this project only investigated a small number of projects in a limited geographical area, I believe the problems associated with mitigation monitoring are widespread, leaving a large hole in the CEQA process statewide. This is an area of land use ripe for additional work, and a larger, coordinated effort to spark change on both the local and State levels, and perhaps in the courts, is warranted.

Introduction

California's long-standing commitment to an open public process for land development has afforded individuals, neighborhoods, and community organizations the opportunity to help shape their communities and protect natural resources. Californians, in turn, take good advantage of these opportunities. While most development projects go through the governmental approval process with little public input or controversy, those projects with greater community or resource impacts often receive strong scrutiny.

This project report deals with the aftermath of the public process. After the community meetings, after the circulation of documents, comments, and responses to comments, after the public hearings...what happens to the commitments to environmental protection forged under the California Environmental Quality Act (CEQA) and other environmental laws?

One end result of an approved development project is numerous commitments to protect from or in some way compensate for the potential damage done to the environment and natural resources from that development. These commitments represent a sort of promise from our government: "Surely, development will damage our environment and disturb our communities, but here is how we intend to lessen that damage."

As individuals or in affiliated groups, Californians work hard to see that development in or near their communities takes care to protect natural resources and the physical environment. Endless hours go into the community organizing, document research, writing, and public hearings that surround larger proposed development projects. Often enough, that community participation produces results: changes for the better in the interplay between development and natural resource protection.

With that process of community involvement completed, how do we know that the environmental gains made during the development review process are in fact implemented as a given development project goes forward? As it turns out, we often do not know, to our detriment. In short, based on the experience of this project and other efforts, it appears that Californians may be losing a substantial amount of the perceived gains made through the development approval process. **However, it is possible to recapture some of those gains, as this report explains, and greater efforts in this area would almost certainly bear substantial fruit.**

This report and the project it is based on depict a small slice of a larger pie. The Santa Clara Valley Audubon Society has made several attempts to address the issue I call here "mitigation monitoring." This is not a universal term, and other terms such as "post-approval monitoring" or "permit compliance" are often used to discuss the same topic. Essentially, we are talking about whether developers—public or private entities—and the governments that are intended to oversee the development process are fulfilling the promises they make to the people of California to protect our natural resources. From my limited experience, they often do not fulfill those promises. The questions then become, "How can we as activists or

advocacy organizations address these broken promises and recover the resources lost?” and “How can we ensure that our painstaking gains in environmental protection at the local level are not then undermined by future inattention or ill intentions?”

Over the course of more than two years SCVAS looked at numerous development projects in an area loosely defined as the South Bay portion of San Francisco Bay. The clear majority of the projects were in Santa Clara County, as the territorial home of SCVAS, but a few projects in other counties were included. The results should be read as a cautionary tale: **we are losing considerable resource values by not following-up on results of the development process, and we really have little idea of the magnitude of the problem.**

At the same time, this project also shows a path towards recovering some of those resources. We have, in fact, done exactly that with several projects. In addition, I make recommendations as to how the mitigation monitoring process can be improved in most any community.

SCVAS History with Mitigation Monitoring and Permit Compliance

My interest in the issue of mitigation monitoring on behalf of the Santa Clara Valley Audubon Society began with a drive across a bridge in Silicon Valley. Noticing what seemed to be an unfulfilled commitment of one particular development project led to the inevitable question of how widespread the problem might be.

[Insert: For a more detailed look at the Basking Ridge project, which first sparked my curiosity in this subject matter, see the case study in Appendix D]

Shortly after that discovery of an unfulfilled commitment, SCVAS engaged in a review of Stormwater Pollution Prevention Permits (SWPPPs) for construction sites, which are issued by our Regional Water Quality Control Board but are part of the development approval process. Local cities and counties rely on SWPPPs during the CEQA review process as a standard method to mitigate for potentially significant, negative impacts to water quality from development projects. This investigation of stormwater permits also stemmed from a single incident identified in the field. In the end, however, we concluded that a significant number of the development projects subject to these permits were in violation of their permit conditions, and that local cities, the County and the Regional Water Quality Control Board did little to enforce the permits after they were issued.

Perhaps due to my growing interest in this area of land use, other mitigation monitoring issues in SCVAS' region came to my attention. Each was dealt with as an individual incident.

From these nascent efforts, SCVAS took a step forward by focusing greater resources on a larger scale investigation of local development projects, thanks to a grant from the Santa Clara Valley Water District. With the help of intern Kim Yuan-Farrell, SCVAS was able to look at more than twenty projects throughout Santa Clara County. It quickly became clear that problems of documentation would be considerable in tracking compliance or lack thereof with mitigation requirements. In addition, we found that even when problems were brought forth to local cities or the County, action on those problems was often slow or simply did not occur at all. In the end, while that grant-funded project made some significant steps forward in our knowledge, we did not change much on the ground.

That background led to this current effort. I wanted to delve further into the issue of mitigation monitoring, following through on past-identified problems and uncovering new ones. I also wanted to see if I could identify common problems and possible solutions that might allow others to make progress in preserving or even recovering lost natural resource values in their communities.

Methodology (or Approach)

Not intending to be a scholarly or scientific effort, this project did not develop a standard methodology. As mentioned in the summary of this report, this project was intended to investigate and advocate.

Projects were chosen for investigation primarily because they were in the southern portion of the Bay Area (with limited exceptions), required either an Environmental Impact Report or a Mitigated Negative Declaration as part of their CEQA process, and involved biological resources. Since SCVAS is primarily interested in wildlife and habitat issues, I focused on mitigation measures involving creeks, wetlands, open spaces, rare and endangered species, and certain other natural resource issues such as water quality. I have not generally looked at mitigation measures involving air quality, toxics, traffic, archeological resources, or a host of other environmental concerns.

I chose to look at many projects I had dealt with in the past in my positions as Environmental Advocate and Executive Director of the Santa Clara Valley Audubon Society. Other projects were identified in SCVAS' previous efforts to explore the issue of mitigation monitoring. Still more came from recommendations of planners, consultants, government agency employees, and other environmental advocates.

Some projects outside of Santa Clara County were chosen from the California Office of Planning and Research's CEQA database (www.ceqanet.ca.gov). This turned out not to be a particularly good method of choosing projects to investigate. Too often projects I began to look at from the state database turned out not to have been approved, not to have been constructed, or simply did not involve substantial resource values.

Once a project was chosen for investigation, the degree of effort devoted to that project varied greatly, from several hours to more than two years. The reasons for this disparity are myriad, including availability of documentation, scale of natural resources involved, my own familiarity with the project, and the degree of cooperation I received from staff. Where documentation itself was adequate to determine that required mitigation measures had been fulfilled, I could move on quickly. Where multiple problems of documentation, interpretation of mitigation requirements, timing, compliance and other issues arose, the projects seemed to take an inordinately long time to work through.

Document review represented a large portion of the time spent in this effort. In addition, I spent considerable time in discussion with employees of various local, state, and federal agencies as well as consultants. As occasions arose, I dealt with planning commissions and city councils in the region. Site visits were also common, although issues of trespassing render such visits of limited utility.

In addition to working on individual projects, I tried to look at local government systems of mitigation monitoring and made recommendations for improvement when appropriate. This

occurred primarily in the City of San Jose and Santa Clara County jurisdictions, but I touched on these more systemic issues with other jurisdictions as well.

[For an example of how problems with individual projects can be used to improve overall systems of monitoring, see the case study regarding the Corde Valle Golf Course in Appendix D]

I also met with one state legislator to discuss this project and possible legislative changes to CEQA that might aid local jurisdictions in mitigation monitoring. Potential legal challenges were discussed with a number of attorneys and others, yet no legal actions arose from this project. Finally, I discussed potential recommendations for changes to the law or local jurisdiction processes with numerous people I encountered over the course of my investigations.

It's Not Just CEQA

While this report focuses on CEQA almost exclusively (as CEQA is the primary State law in enunciating and addressing environmental harm from development), I do not wish to give the impression that permit compliance and mitigation monitoring are solely concerns related to CEQA. **The typical large development project will require a number of permits, and most all of these permits will contain conditions, some of which might be called mitigation measures. Therefore, compliance for any project actually involves compliance with all relevant permits, and a number of agencies could be responsible for permit compliance, in addition to the governmental entity actually approving the project's CEQA documentation.**

As related above, one of the precursors to this project on mitigation monitoring was an effort by SCVAS focused on permits issued by our Regional Water Quality Control Board to protect water quality. Other common permits involving biological resources would include Streambed Alteration Agreements, issued by the California Department of Fish and Game, permits to fill jurisdictional wetlands, issued by the U.S. Army Corps of Engineers, or permits for protection of federally listed threatened or endangered species, issued by the U.S. Fish and Wildlife Service. All of these agencies have staff who work on permit enforcement, although all would no doubt assert, with reason, that they simply do not have the staff to monitor all of their permits effectively, in addition to other hindrances such as vague wording of requirements, the extent of their enforcement authority, and real or perceived lack of cooperation from other governmental entities.

In this project, SCVAS chose to focus almost solely on local governments and their responsibilities under CEQA to ensure that mitigations are completed effectively. Numerous other projects and studies have focused on permit enforcement effectiveness of other government agencies. No governmental entity can or should be held to an absolute standard of effective permit monitoring and enforcement. Nonetheless, we can and should hold local governments to a higher standard for CEQA compliance with mitigation monitoring requirements. These broken CEQA promises bring true harm to land, air, water, wildlife, and virtually every Californian.

Mitigation Monitoring in Practice

Beyond the Simple Legal Analysis

Like many complicated things, mitigation monitoring and enforcement can be made to sound relatively simple. As discussed in the legal section of this report, California State law provides that all developments of a certain size and gravity produce a mitigation monitoring plan and then subsequent progress reports to “ensure” that those mitigations get done. The plan must be approved prior to or at the same time as project approval, meaning that as soon as such a project is approved, a city or county planning department (or public works department, etc) should have a copy of the plan, and thus a clear path forward. Progress reports should be checked; sites may need to be visited to oversee compliance efforts; and if something goes wrong, the planners or another enforcement arm of the Lead Agency should become aware of the problem and take steps to deal with it.

The actions laid out in the above paragraph involve myriad details, and resulting inconsistencies, and things can grow quickly out of hand. The following section of this report describes some of the typical problems encountered by a Lead Agency performing mitigation monitoring, or by an individual attempting to track mitigation compliance, and attempts to discuss some solutions to those problems (these might be better termed steps forward, since true solutions are not likely). Many of these forward steps are most appropriately taken by planning departments, and the departments themselves could take several, without permission from local decision-makers. Other forward progress, however, would require action by the decision-making bodies of cities and counties.

The basis for this list and accompanying discussion is based on my own experience in pursuing these projects over more than two years. Thus, to an extent, this is a chronicle of some of the hurdles I encountered in trying to research mitigation monitoring on a variety of projects. While individual projects I looked at varied considerably in type, complexity, documentation, and staff responsiveness, trends quickly began to emerge. Perhaps of equal use to the reader, I will relate some of the mechanisms I tried in overcoming these obstacles.

While individual project investigations can and have led to some valuable results, in the end, **addressing a Lead Agency’s overall program would seem to have the most impact over time.** However, making positive changes to a city or county’s mitigation monitoring system would generally only impact future projects, leaving problems from past projects largely unaffected. I have yet to identify a systemic approach to addressing potential problems from past projects that would not be: a) costly in terms of staff time or funding for outside assistance to the Lead Agency, and b) cumbersome for those involved. Thus I would expect a generally negative response in requesting a Lead Agency to undertake a broad investigation of past mitigation compliance, though they should be willing to investigate individual projects from the past when potential problems are pointed out.

With that as preamble, I move onto common problems that emerged during the course of my investigations and possible ways to address those problems.

In General, Paperwork Matters

We often hear of endless government bureaucracy focused on paperwork rather than the services that actually matter to the public. It's an easy way to criticize government inefficiency—wasting time on paperwork.

In my experience with mitigation monitoring, paperwork matters. The heart of tracking down mitigation compliance, or lack thereof, lies in document research (although site visits and other tasks can play an important role). Documents missing, mislabeled, incomplete, difficult to find, or vague in their wording can make tracking mitigation monitoring a nightmare. In my opinion, the first thing a planning department can do to make mitigation monitoring work better is to work on their document trail. With a trail to follow, this research can be fairly easy, for a planner or the public. However, many of these trails are muddy at best.

Naming and Labeling

To start with, there is a problem with naming. It appears that some, perhaps many, Lead Agencies do not use the label “Mitigation Monitoring and Reporting Plan” or do not do so consistently. The further back in time one goes, the less consistency with naming is found. For example, in the City of San Jose (supposedly a relatively sophisticated city for planning) the term Mitigation Monitoring and Reporting Plan was not used consistently until 2004, after SCVAS began working on the issue of mitigation monitoring with the City.

To some extent, this problem can be traced back to the relevant laws and regulations, which do not specifically call for a unified name for the central document to be used in mitigation monitoring. Of course one could argue, “What's in a name...?” However, the practical problem that emerges is that a given planner, consultant, or member of the public often cannot trace this seminal document easily. I have encountered city clerks who did not seem to have heard the term Mitigation Monitoring and Reporting Plan, making even the first steps of document research difficult.

If a project approval does not have a document specifically listed as the MMRP, this does not mean that mitigation measures were not required of the project in accordance with CEQA. Such mitigation measures can often be found under labels such as “Conditions of Approval” or “Project Requirements” or as part of a more generic label of project environmental documents linked to the CEQA documentation. Since the law states that a mitigation monitoring plan must be approved at or before the time of project approval, typically a reference to whatever name or form this plan takes can be found in a city clerk's office by asking for the project approval documents and findings made by the decision-making body on the day of project approval. Many jurisdictions have a standardized method of labeling their mitigation monitoring plans, even if they do not use the term MMRP. Often, however, the labels for these documents change from project to project even within one jurisdiction, depending perhaps on the planner or the environmental consultants involved.

In perhaps the worst example of this problem I encountered, one San Jose project appeared to have no MMRP or any document labeled “Conditions of Approval” or some equivalent. After some time, with help from planning department staff, I was shown a blueprint-like plan, with a list of requirements written in small type in one corner, and I was told that the list was the only equivalent of an MMRP they could locate. While extreme, this example and ones like it must inevitably lead to real difficulties for anybody, no matter their planning or legal experience, to track compliance for the project concerned.

So one of the first, easy steps to take for a local jurisdiction is to standardize naming across projects. Ideally, all jurisdictions would standardize around the term MMRP. EIR consultants do seem to be heading in this direction, so this problem will likely improve over time. Citizens involved in the planning and approval process should request that the term MMRP be used to ease future tracking efforts.

Not All Required Mitigation Measures are in the MMRP

Even if clearly labeled as part of an approved MMRP, conditions or requirements of a project may appear incomplete upon first research. The MMRP or other form of mitigation monitoring plan will often refer to documents produced in the CEQA process, to staff reports, or to other project approval documents. These subsidiary sources may then contain mitigation measures required of the project, but not mentioned in detail in the MMRP.

To an extent, this practice is understandable, even beneficial. Mitigation measures can be complex, and an MMRP containing detail of each required mitigation measure would often be an unwieldy document, difficult to work with in tracking future compliance.

However, this practice creates problems as well. To track the requirements of a large project—and I speak here not of subsequent reports following up on compliance, but just trying to determine the original requirements—may mean finding a dozen documents, perhaps located in different places (e.g. a planning department, a public works department, a city clerk’s office, and one or more consulting companies). This can provide a profound hindrance to accurate tracking of the project over time by those responsible within the Lead Agency. It can also mean frustration for an outside party with questions about compliance. As a side issue, this practice to an extent undermines one of the fundamental concepts underlying CEQA—that of informed decision-making. **When multiple documents contain the required mitigation measures for a project, local decision-makers and the public will have a difficult task in understanding the environmental ramifications and remedial actions of a project during the approval process.**

Since it does not seem reasonable to expect that all documents containing required mitigation measures be included in an MMRP, the question becomes one of improving the identification and location of subsidiary documents. **I would recommend that planning departments reference, within the MMRP or equivalent document, all other documents containing required mitigation measures, as well as where these documents will be housed into the**

future. Of course, the best path would be for all such documents to be housed in one location—typically a planning department. Again, citizens involved in the approval process can and should request this kind of clarity.

Continuity Through Subsequent Permits

Like the old game of telephone—where one person speaks a message to another, and that person gives the message to a third, etc.—mitigation measures tend to get lost or warped as they move from the first phase of approval through subsequent phases. The CEQA process and initial project approval often lead to subsequent zoning permits, recordation of a tentative map, and grading and construction permits, amongst others. Even if good mitigation measures are approved initially, they can get lost in this subsequent chain of events. They may never reach site inspectors for the Lead Agency or the developer’s construction managers onsite.

As planning departments computerize, there exists a better opportunity to see that mitigation measures get transferred from the original level of permits to subsequent levels. **One of the accomplishments of SCVAS’ efforts in mitigation monitoring occurred when the City of San Jose altered their planning documentation software to include a field for mitigation monitoring.** The end result is simple: a box gets checked signifying “mitigation monitoring required,” and that box then carries on to subsequent permits. While by no means foolproof, this simple step may go a long way towards consistent monitoring efforts.

Missing Documents

Often legally required documents just go missing, or perhaps were never created in the first place. If the latter, then there may have been a legal violation of CEQA that went unnoticed. Due to statute of limitation issues, such lapses generally cannot be corrected. If the former, tracking compliance will be difficult.

I have not kept statistics on how many projects I encountered with missing documents. However, I would estimate that more than 50% of the projects I looked at suffered from this problem. Sometimes the documents might be considered minor—such as a pre-construction survey for bats—but other times they were clearly major—such as reports on the completion and/or success of riparian and wetlands mitigations measures concerning significant acreage, or a completely missing MMRP itself.

Clearly, if required documents are missing, a fundamental problem arises in tracking compliance. However, a subtler problem arises as well. This has to do with **a basic assumption that once a project is approved and conditions are set, those conditions will be met. This assumption is so nearly universal that it becomes an institutional hurdle to tracking mitigation compliance.** Without basic documentation, it becomes difficult to impossible to show that a project has not complied with its required mitigation measures. One is left trying to prove a negative in a world of assumed positives.

Obviously, the burden should be on the developer and/or Lead Agency to show compliance. This seems the basic thrust of the law, which requires that Lead Agencies create plans “designed to ensure” that mitigations are complete and states that the Lead Agency “remains responsible” for those commitments until they are completed. In reality, the burden seems to be on the planner or citizen asserting that a mitigation measure may not have been completed, or not completed satisfactorily.

The progress to be made here comes in shifting that burden of proof—in assuming that a required mitigation measure has not been completed until documentation clearly shows that it has been. At this point, I have no solid recommendation or example for how this shift can be accomplished.

Who has the documents?

Unfortunately, as mentioned above, documents are housed in a variety of places. Most of the time, documents can be found either in a planning department or a city clerk’s office. However, many exceptions exist. For public works projects, such as road building, the public works department may house the documents. Special districts such as flood control districts or natural resource conservation districts house their own documents, even though local cities and counties may be involved in their project approvals.

Perhaps the most difficult situation concerns documents held by consultants or developers rather than Lead Agencies. Consultants and the staff of development companies typically play a huge role in mitigation monitoring. Whether a Lead Agency relies on self-reporting (i.e. compliance reporting from the project applicant/developer) or takes on monitoring responsibilities itself, consultants and developers perform a good deal of the work. I should add a caveat here: SCVAS’ efforts have focused on impacts to biological resources, where consultants play a more important role than some other areas of mitigation compliance, such as traffic mitigation or building site inspection.

Consultants and developers, being private companies, are not subject to public document legal requirements. Thus, when a consulting firm houses mitigation monitoring documents and does not transmit those to the Lead Agency, those documents can be difficult to find. For example, in searching for a pre-construction Burrowing Owl survey for a project located in the City of Sunnyvale, I was told by the responsible planner, “Perhaps the consultant company in Chicago has that.” (Paraphrasing) In such a situation, it becomes difficult to even know whether the document was ever generated, yet alone how to get a copy of it. I have run across situations where consultants claim documents to be privileged client information, even though lodging those documents with the Lead Agency would appear to be required.

The bottom line here is that **all documents relevant to mitigation monitoring should be housed by the Lead Agency—ideally, one department within the Lead Agency.** Again, citizens participating in the project approval process can request that all documents dealing

with mitigation monitoring for a given project be publicly held, in one place, and subject to Public Records Act requests. Planning departments should specify in project approval conditions that all documents showing compliance or lack thereof with required mitigation measures be sent to a specific department for centralized housing.

Tough-to-Track Mitigation Measures

The very nature of certain mitigation measures leads to ambiguity and some difficulty in determining compliance. It is convenient when mitigation measures can be easily quantified, such as an in-lieu park fee imposed on a residential development for increased impacts on local parks. However, many standards are more subjective, requiring the judgment of a staff person or consultant to determine whether the measure has been adequately accomplished.

This subject has been written about often in scholarly works on environmental impact analysis and mitigation monitoring, and thus I will not attempt to duplicate many elements of that discussion here. Suffice it to say that vague wording, subjective judgments, and interpretation of conditions can play a major role in determining whether a project has complied with its mitigation requirements. Given the tendency, mentioned above, to assume that requirements have been met until proven otherwise, it is an uphill battle to argue the gray areas of mitigation requirements.

The previous sentence obviously argues for the reduction or elimination of ambiguity where possible. **However, ambiguity and subjective judgment can work to the advantage of natural resource protection as well, and it would be unwise to assume that more specificity would inevitably lead to better results.** Nature can often not be pinned down to specific quantifiable measurement, and thus this problem of determining mitigation compliance will and in fact should continue. Nonetheless, planners and citizens will find mitigation monitoring much easier if they attempt to delineate what documentation will be required in order to show compliance with required mitigation, even if that documentation contains subjective judgments.

Hostile Staff

Many government employees have been quite helpful in my mitigation monitoring investigations. Even those that are not pleased to help often do so courteously as part of the routine of their job. However, more often than I would have expected, I met outright hostility towards what I was trying to achieve. Phone calls were not returned; defensive attitudes were openly on display; in one case, I was repeatedly blamed for delaying progress on the project.

When such problems appear at the staff level, I recommend raising the issue to the decision-making bodies of the jurisdiction (e.g. City Council or Board of Supervisors). The staff will likely remain hostile, perhaps become even more hostile, but they will often be

more responsive as well. When the decision-makers themselves are also hostile—well, good luck. [See case study on the Institute Golf Course in Morgan Hill—Appendix D]

Public Records Requests—An Essential Tool

While it is no panacea for the absurd amount of document problems one can encounter investigating mitigation monitoring, one of the best tools the public has access to is the California Public Records Act (PRA). [Government Code, Sections 6250 through 6270] The PRA is intended to give citizens access to a wide range of public documents. Most California activists dealing with the government will have some knowledge of PRA requests, even if they have not used them themselves. However, since many still underutilize this law, I will go further into its basics.

To play through a scenario, say a citizen or community group wants to investigate the mitigation monitoring records for a quarry near their home, concerned about disappearing open space and air quality in their neighborhood. The local County Board of Supervisors issued the quarry's permit, after environmental review under CEQA. There are several ways to attempt to get these documents.

The first way might be to ask the quarry company for their records. In general, I do not recommend this. While the quarry may have the requested documents, they will typically not have any legal responsibility to turn them over to whoever asks, and they sometimes will simply not produce the documents requested. I have also encountered developers and consultants who only turned over documents favorable to their companies. In general, I suggest avoiding asking private companies for documents. Clearly the best route is through the government, even if the government then has to ask the private companies to supply the documents.

Another course of action would be to walk up to the front desk of a planning department or clerk's office with a request for the documents desired. The Public Records Act actually mentions this as one way the public should be able to acquire documents. For many simple documents—such as the agenda for the next city council hearing—this face-to-face, immediate approach works well. However, for the back files of larger development projects, this method generally proves frustrating. Most government departments do not have sophisticated methods of document search, so a request for a particular set of documents can take time.

Calling a planning department and asking for the documents you want can also be effective. However, there seem to be infinite ways to delay such requests, especially in larger jurisdictions with many development projects. First, finding the right planner can be difficult, due to turnover. Next, people are always busy and will get to your request when they can, or they are sick or on vacation. Also, often they simply do not return calls or emails promptly, especially if they think you may be stirring up trouble. As a result, you can end up calling or emailing repeatedly, which is actually the right thing to do, since squeaky wheels do generally get greased eventually. However, **writing a formal request has**

advantages over other methods; the request is easy to fill out and often saves you significant time.

Writing a Public Records Act (PRA) request is fairly easy. Many examples reside online. I will include two examples from my work as appendices to this report. [See Appendix E] The first example is simple and can be used as a template for a first try in most any circumstance. The second example is more aggressive, and can be used when other methods of requesting documents have failed or when you believe the governmental entity may try to hide something.

In general, with documents regarding development projects, whether you use a PRA request or not, the city or county you are asking often will often not produce precisely the documents you request, but instead will provide you access to the entire project file. Depending on the size of the file, hours of work may lie ahead to find the documents you are interested in. Because the PRA does not allow agencies to charge you for staff time, only for copies, very few are willing to put in much time finding exactly what you are requesting.

To save costs, it's generally best to go look at the documents in the planning department or other governmental office. Copying costs can be expensive, and typically you will only need a small fraction of the project files, unless you are initiating legal action.

In the course of this project, I far too often relied on the good will of planning department and other government staff persons to provide documents in a timely manner. It would have been far more efficient of me to write a lot of PRA requests. Please learn from my mistake.

Conclusion

It would be logical to assume that compliance with both the letter and the spirit of the laws regarding mitigation monitoring would improve over time, with or without the urging of the environmental community. However, as the scholarly work in this area seems to show, such an assumption would be mistaken. Many if not most local governments have not made significant improvement in this area for years, and budget cut-backs may lead to even worse performance in the future. It will likely take an ongoing and significant focus by the environmental community to see overall performance in mitigation monitoring improve. It is my hope that this report, and the SCVAS projects leading up to this report, will provide others with both insight as to how to proceed and reasons for doing so.

I came to this project having some experience with the issues involved, expectations of making substantial progress on the local level, and hopes that my work would have broader impact. Certainly, the local impact materialized, but the broader impact will have to be left to future efforts. I hope these written guidelines can serve that purpose. I leave this project with at least three strong impressions:

- This work is worthwhile, and others should try it, so that we may build up a body of knowledge that may make a serious dent in a problem that is costing California a great deal of natural resource values.
- This work is harder, and especially more frustrating, than I had expected. Because CEQA does not provide clear enough legal responsibility and clear direction for the Lead Agencies of the state, someone attempting to address this issue does not control his/her own destiny. The problem of document acquisition best exemplifies this. No matter what tools CEQA and the Public Records Act can give a concerned citizen or organization, a recalcitrant, lazy, or hostile planning department, consultants, developers, and politicians can retard progress, seemingly for as long as they wish. This seems to be the case even when problems appear clear-cut upon first impression.
- Even a small amount of work in this area can yield impressive, on-the-ground results. There are so many mitigation compliance problems out there, and at least some people willing to help correct them, that even a modest effort can recapture some important resources we would otherwise lose for good.

In addition to those three major impressions, I have four recommendations for readers of this document interested in making a serious effort to resolve mitigation monitoring problems locally or on a broader front.

1. First, some organization should reach out to a small group of people in the state who have shown an interest in the area of mitigation monitoring and convene a meeting/forum for discussion to mull over the issue of mitigation monitoring in general, work done to date in this area, and possible future work. Ideally, each

participant would come to the meeting having read the law and some of the most relevant scholarly work regarding mitigation monitoring, and I hope they would read this report as well.

2. More people should try what I have done, albeit on a smaller scale. There are two reasons for doing this: First, if you find a mitigation monitoring and/ or compliance problem in your area (and if you search for a reasonable amount of time, you will), you can with some diligence and fortitude make a small difference for the natural resources around you. For someone who has not done this before, I would recommend that you follow my “simplified” mitigation monitoring pathway. [See Appendix A] Doing so should provide an activist with a good shot at identifying and addressing a problem. Because of course not all projects have problems, I would recommend that you either: a) pursue a project that you already know or suspect might have a problem, or b) pursue three or four larger projects at a time, giving you a better overall picture of performance in your area and a better shot at finding a problem you might then address. Second, we should build up a better record showing that mitigation monitoring problems are, as I suspect, widespread in California and not just technical in nature—in other words, that real and significant resources are being lost.
3. Attorneys and legally-minded others should get together to discuss a possible legal strategy for moving forward on the issue of mitigation monitoring. Further research should be done into whether other attorneys have attempted work in this area, and what their results were. Potential strategies should be discussed and, if the group were to choose one or more to pursue, a project management regime should begin. It is perfectly understandable that such a group might decide that there is no currently viable legal approach to make considerable progress on this issue. If so, I recommend moving on to my final recommendation.
4. Activists should approach one or more legislators about possible, incremental improvements to CEQA that could improve mitigation monitoring statewide. In Appendix I, I offer my thoughts for what might be politically possible while being effective, but I make no claim that these ideas are exhaustive on the subject. Considering the scholarly work done to date, the work of SCVAS to date, and the work of a few others who have attempted to grapple with this issue, **I believe we have enough information to make a credible claim that this area of CEQA is deeply flawed and deserving of legislative attention.** However, this argument would be greatly bolstered if more examples of problems and attempted solutions were to come in from other areas of the state. Thus, my second recommendation—that others activists further explore this issue in their areas—may be a prerequisite to this legislative recommendation.

While the area of mitigation monitoring has not been a strong focus of the environmental community in advocating on proposed development, there are some quite useful academic studies on the subject as well as a few examples of case law in the area and a small track record of other individuals who have addressed this issue. I mention some of these past

efforts throughout this report. I hope that this investigation into local mitigation monitoring performance complements and adds to this growing body of knowledge. However, I also emphasize that additional work is needed to make substantial change in this field. While SCVAS will continue to make mitigation monitoring part of its core environmental focus, SCVAS encourages others to continue with these efforts in their communities, with the desire that eventually larger-scale improvements will be made and thus resources more fully protected.

I end with a small story, from a law conference in Oregon more than a decade ago. An An environmental lawyer from India related his long and only partially fruitful attempts to enforce a provision in the Indian constitution requiring that all citizens respect nature and work towards its betterment. He concluded his talk by saying:

‘Surely we all feel at times that we are simply beating our heads against a wall. No doubt, we will emerge with bloody heads...but I think we may have some effect on the wall also.’

Appendix A

Simplified Mitigation Monitoring Pathway

The following is an attempt to simply lay out how a citizen might go about investigating and acting upon a mitigation monitoring issue. Commentary on some of the steps is provided in brackets, to better explain why the step is needed or refine how it might be done.

1. Choosing a Project to Investigate
 - a. If you already know of a project(s) that you want to investigate, go to step #2
 - b. If you do not know which project(s) you want to investigate
 - i. Best to ask a long-time activist/consultant/planner/politician in the area for project name(s) that may bear fruit
 - ii. Look at the state Office of Planning and Research (OPR) website (www.opr.ca.gov) for the CEQA Database (www.ceqanet.ca.gov)
 1. Choose an EIR(s) or a Mitigated Neg Dec(s) that is at least three years old but not before 1995 [documents too recent may lead you to a project that has not begun yet; documents too old will lead to an argument by the local jurisdiction that everything has changed since then and old problems prove nothing or simply cannot be tracked]
 2. Choose a project that appears to have the impacts you wish to look at [The CEQA database includes a basic subject matter list for most project documents]
 - iii. Call the applicable planning department and ask the current status of the project (e.g. was it approved? Has construction begun? Has construction finished?) [This will help prevent you from spending time on a project that has not generated adequate information to investigate]
2. Document Retrieval
 - a. Call the planning department for your project(s) and ask to come in and review documents, specifically:
 - i. The original Draft and Final EIR or Mitigated Negative Declaration
 - ii. The approved Mitigation Monitoring and Reporting Plan (or equivalent document(s))
 - iii. Any subsequent documents identified as Mitigation Monitoring Reports or any documents showing compliance or lack thereof with required mitigation measures [It is especially important to make clear that you are requesting these documents as well, since these are almost always the hardest documents to find]
 - b. Get the name of the planner most likely to know about the project(s) for future reference
 - c. If you want to create a paper trail of your investigation, draft a Public Records Act request (see page ??) for the documents you wish to find and send that request to the city or county clerk [Generally these requests do not go straight

to the planning department but instead use the clerk's office as an intermediary]

3. Document Review

- a. Review the original Draft EIR **o** Neg Dec for the issues you are interested in [Generally, start with the summary of impacts and mitigations at the front of the document and then proceed to the more detailed information after that]
 - i. Take notes on the impacts you are most interested in and their associated mitigation measures or mark the relevant pages for copying
 - ii. Pay particular attention to future documents named within required mitigation measures (e.g. the need for a "Riparian Habitat Management Plan" or the requirement for an Army Corps 404 permit to fill wetlands) [Noting these specific document requirements now will help to craft subsequent requests for specific documents]
 - iii. Beware of "tiered" documents, where a Supplemental EIR, for example, builds upon a previous EIR [You may need to read both to find all the applicable mitigation measures]
- b. Review the approved Mitigation Monitoring and Reporting Plan (or equivalent document)
 - i. Again, look for those impacts and mitigation measures you wish to focus on
 - ii. Pay particular attention to timing (e.g. a mitigation measure which is required "prior to recordation of a Tentative Map" or "prior to construction") [It is easier to identify when a mitigation measure has not been complied with if you have a specific time horizon for when it should have been started or completed]
 - iii. Pay attention to which party is responsible for which actions that will lead to compliance (e.g. the developer is responsible for planting the trees while the city is responsible for approving the tree planting plan) Local governments will often try to say that the developers and/or their consultants are responsible for compliance actions, yet typically the government has some specific actions, and associated documentation, that they are required to take on as well.
- c. Review subsequent monitoring reports, if available
 - i. If you are lucky, there will be a master document tracking mitigation compliance; however, generally numerous documents will have to be reviewed
 - ii. Look specifically for documents named in your review of (a) and (b) above
 - iii. These are the documents most likely to be missing, so keep track of what you expected to find but did not

4. More Document Retrieval and Review

- a. Ask the planner most knowledgeable about your project to find those documents which you believe are missing

- b. Write a Public Records Act request (see page ??) for documents you believe to be missing [If you have not already been keeping a paper trail of your investigation, now is a good time to start, as you may know specifically which documents should be on record to establish compliance with required mitigation measures]
 - c. If the planner or whoever is helping with document retrieval acknowledges that monitoring documents are missing or cannot be found, ask that a letter be sent to the developer and/or consultant requesting these documents (see Appendix C) for a simple example of such a letter) and that the letter containing a specific date by which they should be submitted
 - d. Give adequate time for document retrieval (under the Public Records Act, typically the government has ten days to respond in some manner)
5. When Documentation Problems Arise (and they will)
- a. Do not give excessive time for the problem to be corrected [If you get no response within ten days to a records request, call or write again, and again]
 - i. If you do not get an adequate response after repeated requests, write to the city/county planning commission and/or council/board of supervisors or attend a public meeting and make your request publicly [Local government employees may not be used to requesting mitigation monitoring documents from older projects, so asking the decision-makers to in turn ask their staff to find the documents may be needed to get a reasonable response]
 - 1. Remind them that this is not just about paperwork, but rather that real losses of natural resources may be at stake [Basically, you want to remind them that they made a promise to protect the environment and that that promise may not have been kept]
 - 2. This is where keeping a paper trail of your past attempts to retrieve information and the specific documents you wish to find will be very helpful
 - ii. For mitigation measures requiring the involvement of other agencies (e.g. DFG, US FWS, Regional Water Board), asking those agencies to request the documents sometimes yields better results
 - b. Keep track of common documentation problems [This may help if you later wish to suggest that your jurisdiction improve its overall program of mitigation monitoring]
6. Make a Site Visit
- a. Take maps etc. that you find while researching documents, as these may point to very specific things to look for
 - b. Take a camera and document what you can, both problems and evidence of compliance [Your arguments that a monitoring compliance problem exists will be more credible when you can also show that other required measures have been performed]
 - c. Beware of trespassing [Trespassing may be necessary to adequately review a site. I make no recommendations as to what to do in that situation. Stating the

obvious: if you can view an issue from off-site or ask permission to come onto the site, that is preferable.

7. When a Mitigation Problem is Uncovered
 - a. Provide what documentation you can to the planning department or other applicable department (e.g. public works department for public road projects) and ask for them to pursue the problem
 - i. Ask what they intend to do about the problem you raise, or what their options are, and hold them to that
 - ii. Try to get them to give you an estimate of timing for their work in investigation and/or enforcement
 - iii. If they do not do as they say or take an inordinate amount of time, raise the issue to the level of the planning commission or city council/board of supervisors
 - b. Consider whether another government entity (e.g. DFG, US FWS) has separate enforce authority that they can pursue, and ask them to do so
8. When Multiple Mitigation Problems Arise
 - a. Talk to staff about what changes could be made in their monitoring and documentation practices to deal with more common problems [Many very useful changes can be made without approval from above]
 - b. Raise more common problems before the planning commission and/or city council/board of supervisors [Some problems will not be correctible without action by these governing bodies]
9. Learn from your frustrations.

Appendix B

Public Records Act Examples

The following are two examples of Public Records Act requests I sent out during the course of my work. The first is relatively simple and something like it should suffice in most circumstances. The second is more involved and was used in a situation where the Lead Agency had been less than diligent over some time in handling my requests for information.

#1

Wednesday, March 6, 2007

Peter Hu
Project Manager
Santa Clara County Roads and Airports Department
1505 Schallenberger Road
San Jose, California 95131

Re: Public Records Act Request—Stevens Canyon Road Improvement Project

Dear Mr. Hu,

On behalf of the Santa Clara Valley Audubon Society (SCVAS) and our 4000 members in Santa Clara County, and pursuant to our rights under the California Public Records Act (Government Code Section 6250, et seq.), I am writing to request copies of materials in the possession of the Santa Clara County Roads and Airports Department. SCVAS' mission is to maintain, preserve and protect native animal and plant habitats and to foster a greater public awareness of our environment, with an emphasis on birds and their ecosystems, particularly in Santa Clara County and the San Francisco Bay Area.

Specifically, I am requesting documents related to the Stevens Creek Road Improvement Project (Project). I am trying to establish whether and when the mitigation measures agreed to in the environmental documents relating to this project were performed. This is part of a larger SCVAS project tracking mitigation measures from a variety of local projects with impacts to natural resources. To this extent, our work should aid the County in ensuring that its environmental processes work to protect these resources adequately. We would be happy to share the results of our work with your staff. Therefore, the release of these documents is in the public interest.

I am enclosing a two-page letter from your office to SCVAS dated June 28, 2004. In it, you set out a timeline of actions needed to complete the mitigation for the Project. I am primarily looking for the documents, which would show that this timeline has been met, or explain why not. In addition, I would like the original Mitigation Monitoring and Reporting Plan for the Project, if one exists. Finally, I request any periodic updates of the mitigation monitoring of this project that have been produced by either your department or consultants under contract to your department.

Pursuant to Government Code Section 6253, we ask that you duplicate these files and forward them to us at the address below. We understand that you have ten days to respond to this request. We also request that you waive the fees or costs associated with retrieval or duplication of these records. SCVAS is a 501(c)(3) tax-exempt non-profit organization

acting in the public interest. If the County is unable to waive these fees and costs, please provide an estimate of costs, if any, to me at the address listed on our letterhead prior to making and forwarding the copies.

Thank you for attending to this request. If you have questions, please call me at (650) 851-2688.

Sincerely,

Craig K. Breon

#2

December 5, 2008

Mr. Richard Doyle
Office of the City Attorney
200 East Santa Clara Street, 16th Floor
San Jose, California 95113-1905

Re: Public Records Act Request—Cinnabar Hills Golf Course

Via: Email and Fax to the Office of the City Attorney

Dear Mr. Doyle,

I write on behalf of the Santa Clara Valley Audubon Society, a nonprofit conservation organization with approximately 4000 members in Santa Clara County. Pursuant to our rights under the California Public Records Act (Government Code Section 6250 et seq.), I ask to inspect the following documents held by the City of San Jose:

All records generated or received from January 1, 1996 to the present concerning the Cinnabar Hills Golf Course, formerly known as the Tradition Golf Club (originally PDC 96-3-13, however, filing numbers have changed over time). This request is related to project approval documents and background for those, CEQA documents, and any documents related to compliance or noncompliance with conditions of approval and mitigation measures for the project. These records should include, but are not limited to, staff reports, reports by consultants, reports or correspondence from or to the representatives of the Cinnabar Hills Golf Course, The California Department of Fish and Game, and the U.S. Fish and Wildlife Service, and the Santa Clara Valley Audubon Society, Planning Commission and City Council minutes and actions, letters, emails, and hand-written notes. These records should include but are not limited to those generated by the office of the City Clerk, the City Manager, the City Attorney's Office, and the Planning Department.

I ask for a determination on this request within 10 days of your receipt of it, and an even prompter reply if you can make that determination without having to review the records in question. If you determine that any or all of the information qualifies for an exemption from disclosure, I ask you to note whether, as is normally the case under the Act, the exemption is discretionary, and if so whether it is necessary in this case to exercise your discretion to withhold the information. In any event, please provide a signed notification citing the legal authorities on which you rely if you determine that any or all of the information is exempt and will not be disclosed.

If I can provide any clarification that will help expedite your attention to my request, please feel free to contact me at (650) 851-2688 or ckbtravel@earthlink.net.

The Santa Clara Valley Audubon Society is a nonprofit organization registered with both the State of California and the United States governments. Disclosure of information requested is in the public interest in determining whether the City of San Jose and the Cinnabar Hills Golf Course are in compliance with California and Federal laws intended to protect natural resources in and around the City of San Jose. As such, I request that all fees associated with this Public Records Act request be waived in accordance with law. If such a waiver is not to be granted, please inform me as to costs associated with this request prior to producing the relevant information.

Thank you for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig K. Breon". The signature is written in a cursive style with a horizontal line extending from the end.

Craig K. Breon, Esq.

Cc: Joe Horwedel, Planning Director

Appendix C

Letter Requesting Mitigation Monitoring Documentation

The following is a letter sent by the City of San Jose to a developer requesting mitigation monitoring documentation. The letter was sent at my request, as it appeared that the City had no such documentation on file. I provide this as a simple example of what to ask of a local government when monitoring documents can not be found,



Department of Planning, Building and Code Enforcement
JOSEPH HORWEDDEL, DIRECTOR

August 5, 2009

Metcalf Partners, LLC
c/o Lynn Jochim
3130 Crow Canyon Road, Ste. 310
San Ramon, CA 94583

**SUBJECT: METCALF ROAD/BASKING RIDGE PROJECT MITIGATION
MONITORING (PD ZONING FILE NO. PDC01-098)**

Dear Lynn:

The environmental clearance for the above-referenced project included required mitigation to reduce the project's adverse environmental impacts. Please provide available documentation of successful implementation of all required riparian, vegetation and wildlife mitigation measures identified in the Mitigation Monitoring and Reporting Plan for the project.

This information request is part of a routine Department mitigation reporting procedure. Please return this documentation to Janis Moore of my staff within 30 days of the date of this request. Questions should also be directed to Janis at (408) 535-7815.

Sincerely,

Akoni Danielson
Akoni Danielson
Principal Planner

C: Braddock & Logan Group
Richard Mindigo, Environmental Consultant
Sycamore Associates, LLC, Biological Consultant

Appendix D

Recommendations for CEQA Comments

Often the issue of mitigation monitoring is not a subject of questioning and debate in the course of a CEQA analysis of a given proposed development project. This is perhaps shortsighted, since effective commenting during the CEQA process regarding monitoring and enforcement can only help to assure that the substantive CEQA mitigation measures in fact do what is promised when a project is approved. It may be possible, through the public comment process under CEQA, to improve mitigation monitoring from the outset for a development project. Clearly, this would be preferable to trying to fix a mess that occurs later. With that in mind, I provide suggested CEQA questions and comments that are designed to sharpen the focus of a Lead Agency on the issue of mitigation monitoring.

The following questions and comments are designed to explore a Lead Agency's capabilities to monitor and enforce mitigation measures as well as to suggest best practices that can be used to increase the likelihood that mitigation measures will be implemented effectively. In responding to the questions and accepting or rejecting the suggestions, a Lead Agency may then commit itself to better management of the development project through time. If the Lead Agency does so commit itself, this may provide an additional legal argument in the future if a mitigation monitoring problem arises. At the very least, it will put the agency on notice that the commenter intends to pay attention to this area of the agency's responsibility.

First of all, it may be necessary to provide background or a rationale for such comments. Explain that the substantive mitigation measures imposed on the project (e.g. air quality, open space, riparian and wetland resources) will be less meaningful if an adequate system of mitigation monitoring is not in place. If possible, cite one or more previous examples of where the Lead Agency has not adequately performed mitigation monitoring, or even where the documentation for mitigation monitoring has been missing or incomplete.

It should be noted that CEQA questions and responses develop over time. As questioners get more sophisticated, or a new avenue of CEQA commenting is opened (e.g. recent comments on global warming), Lead Agencies, developers, and consultants learn appropriate responses, which are then passed on to the CEQA analysis of future development projects. It is my hope that as individuals or organizations use these sample comments (or other examples that exist out there) and expand on them, this area of land use will become more fleshed out and thus more effective.

I have twice submitted such comments on proposed projects in my area. In the first instance, involving a Mitigated Negative Declaration in the City of Cupertino, no written response was made (CEQA does not require written responses to all comments in the case of a Mitigated Negative Declaration). In the second instance, involving an EIR in the City of San Jose, the project collapsed in the midst of the CEQA process (largely due to more than 1000 pages of CEQA comments submitted by scores of commenters), and thus no responses to comments were issued.

Clearly, the unique circumstances of a given development project will allow a commenter to take the following questions and comments or other ideas regarding mitigation monitoring and enforcement and tailor them to best address specific circumstances. [See Appendix B for example] My suggestions are by no means exhaustive, but they attempt to get at the Lead Agency's system of mitigation monitoring, potential problems with that system, funding, and enforcement. As cited in the legal section of this report, the law in this area is somewhat vague, and the CEQA commenting process allows citizens to tighten up those requirements.

Sample Preamble

Public Resources Code Section 21081 requires a mitigation monitoring or reporting plan and "periodic reports" in order to "ensure" that mitigations required of a given development project are in fact implemented successfully. Clearly, the existence of an adequate system to monitor and enforce the required mitigation measures is necessary to ensure the public that those mitigation measures imposed on a development are completed. The following questions and comments relate to the City's (or County's, etc) system of mitigation monitoring both in general and as applied to this particular development project. As such, they are relevant to the adequacy of all mitigation measures imposed on the project, and therefore should be answered specifically in order to render those imposed mitigation measures legally adequate under CEQA.

Questions

- Will the City commit to enforcing each required mitigation measure contained in the Mitigation Monitoring and Reporting Plan, so that the public can be assured that identified environmental impacts will be reduced or eliminated in accordance with project approval documents?
- The City is required to "ensure" that all mitigation measures are carried out. What specific actions will the City undertake to make this assurance?
- Please describe the City's current method of mitigation monitoring.
- Does the City have a funding mechanism in place to ensure that lack of staff resources will not be an excuse for poor follow-through in mitigation monitoring?
- How does the City pay for staff time and resources spent in mitigation monitoring? Will this funding source continue at an adequate level throughout the period of monitoring required by this project?
- CEQA calls for "periodic" reports regarding mitigation compliance. How often will such reports be required, and what must those reports contain?
- What legal mechanisms does the City have in place to address problems with mitigation implementation or permit compliance? For example, can the City fine the developer, call the permit up for modification or revocation, or issue a stop-work order? Please list the possible enforcement mechanisms.
- If a mitigation measure is not performed, or is not performed adequately, what will the City do to ensure that the problem is corrected?

- If and when a problem with mitigation implementation is detected, how long will it take the City to address the problem?
- How can a member of the public bring a problem, or suspected problem, with mitigation compliance to the City, if one should be discovered? If an individual or organization does bring a problem forward, how will the City respond?
- If the City or the public identifies a problem with mitigation implementation, and the City does not then address that problem in a timely and effective manner, what recourse does the public have to ensure that the mitigations are fully implemented?
- If this project requires subsequent approvals from the City, what will the City do to ensure that the mitigation measures contained in the CEQA documentation and/or MMRP are incorporated into future project approvals?
- If the proposed project, or portions thereof, is sold to another company prior to completion of all mitigation measures, how will the City ensure that the mitigation responsibilities will fully transfer to the new owner(s)? How will the City ensure that the new owner(s) fully understand those mitigation requirements?

Comments

- The City should incorporate full cost recovery for mitigation monitoring services provided by the City to oversee the mitigation process. The City should incorporate as a condition of the development project that the developer would pay for all City staff time and resources spent in mitigation monitoring.
- Please identify the staff member(s) who will be responsible for ensuring that the mitigations imposed on this development are implemented. If responsibilities for monitoring or enforcement change to other staff members, or even other departments, in the future, how will those responsibilities be transferred, and will you inform the commenters on this document of such a change?
- The City should require at least yearly monitoring reports generated by the city or from the developer, tracking compliance with each and every mitigation contained in the MMRP. These reports should be public documents, along with any attachments, such as biologists' reports, that substantiate compliance or lack thereof. Any member of the public requesting so should be advised when the monitoring reports are submitted. The reports should continue until the city has determined that all mitigation measures are completed. The reports should also be sent to whoever asks for them, and we would like to receive them.
- The City's Planning Commission should agendaize, at least annually, a status report on mitigation compliance for this development project. We would like to be notified of such a hearing if this request is accepted.
- Please specify where, in the future, all documents related to mitigation compliance will be located, so that the public may inspect them. All documentation, not just summary reports, should be considered public records.

Appendix E

Example of CEQA Mitigation Monitoring Comments—Coyote Valley Specific Plan

The following is an excerpt from CEQA comments I wrote for the Santa Clara Valley Audubon Society. I have excerpted only those comments dealing with mitigation monitoring. These comments do not follow precisely the recommended comments from Appendix A, as they predate my attempt to write standardized comments. I insert these comments here as an example that provides greater context than the generic comments of Appendix A.

“Mitigation Monitoring

As background, SCVAS has been working on the issue of mitigation monitoring with the City of San Jose for some time, with varying levels of effort. The basic issue is whether the mitigations committed to when a project is approved will in fact be fulfilled. SCVAS has found that in San Jose such mitigation commitments are often broken, and thus natural resources are lost.

I will cite several references to past examples and practices. I do so to cast doubt on the City’s basic ability to monitor and enforce the mitigation commitments in a document such as this EIR. Past practice here is relevant to current and future performance. If the public can not trust that the environmental protections enumerated in the EIR will be translated to the ground (and air and water), then each mitigation measure becomes itself suspect. CEQA requires Mitigation Monitoring and Reporting Plans to “ensure” that mitigations are accomplished. Nonetheless, the following examples show that such assurance does not currently exist in San Jose.

- SCVAS discovered that some riparian mitigation associated with the Levine Residential Property and the Silicon Valley Boulevard Bridge over Coyote Creek had not been done. City staff at first made no response to SCVAS’ request for documentation on the mitigation measures, and it took a letter from the Department of Fish and Game to get the City to ask Shea Homes for documentation. Shea responded, saying that they would now begin mitigation monitoring (some five years had passed since project approval, and Shea had finished developing the project at that point). As it turns out they had also not done wetlands mitigation on their site. Evidently, the City had never checked on the biological mitigations for this project until SCVAS brought the issue up.
- In the Evergreen Specific Plan EIR, mitigation for the loss of riparian habitat due to various projects required the restoration of 12.6 acres of riparian habitat. This has never been done. SCVAS first pointed this out to City staff in 2003 and 2004, but the City took no action. Only after we pointed this out again to the staff and the

Council last year did staff attempt to look for documentation, and came up with very little. To date, there is only a faint chance that this restoration will occur.

- At Cinnabar Hills Golf Course, a required mitigation to protect California Tiger Salamander has not been done. When SCVAS pointed this out in 2004, City staff informed us that an alternate mitigation would be imposed. To date, that has not happened. Instead, City staff now maintains that because the species remains healthy on the mitigation site, the project has fulfilled its requirements. In other words, instead of requiring that the promised mitigation be accomplished, the City rests largely on luck to avoid its obligations.
- At the Dow Drive development on Communications Hill, mitigation for impacts to Santa Clara Valley Dudleya were installed but evidently never maintained. As a result, the resource has suffered. This has been pointed out to the City in the past, but no corrective actions were taken.
- On March 7, 2007, SCVAS issued a Public Records Act request to the City asking for Mitigation Monitoring and Reporting Plans (MMRPs) and/or Mitigation Monitoring Reports for six separate projects. To date, it seems the City can only provide the requested documentation for three of the six projects, and some of the documentation located still could not confirm that required mitigation measures had actually been completed.
- I have been told in emails from Planning Department staff that these documents are now online, and that the public should look there for them. A recent meeting with a records keeper for the Planning Department proved otherwise. Picking a project at random from a past SCVAS database (the Riverside Golf Course) I asked for the original MMRP and any subsequent monitoring reports. She searched for approximately 45 minutes on the database and could not find them. A second, shorter data request then also led nowhere.
- The City imposed a specific fee on Mitigated Negative Declarations and Environmental Impacts Reports in 2004. The fee was intended to ensure that mitigation monitoring was done properly. Nonetheless, a recent SCVAS Public Records Act request showed that no attempt has been made to see that the fee is adequate; there is not tracking of staff time related to this issue (and thus we can not know if the fee is being put to the use it was intended); and there appears to be no work plan or regular progress reports for the staff to show activity or improvement in mitigation monitoring.

All the above examples support the generalized comment that the City has in the past and continues to this day to be unable to adequately track compliance with mitigation measures required as part of project approvals on numerous past projects.

There is a tremendous problem with documentation in the City. SCVAS has requested documents for nearly 20 projects to date. We have received documentation on about half of those projects, and often only after months of asking. I will attach as evidence of this a portion of a database that was compiled in 2004 by an SCVAS intern. You can see that many requests for documents led to partial or total failure.

The documentation problem stems from many causes. Among them are:

- The main system that tracks developments in the Planning Department (the AMANDA system) does not track mitigation monitoring.
- Often, the mitigation monitoring documents that do exist show numerous occasions when what was in an original EIR or other CEQA document was not then translated to the subsequent documents used by planners and inspectors as development occurred.
- There has been no staff person or persons specifically assigned to work on mitigation monitoring (until perhaps last summer or fall; it is still difficult to tell).
- The staff almost never visits a site to see that the biological mitigation measures have been completed or were successful.
- Mitigation monitoring documents, if they exist, are often in the hands of consultants or developers, not with the City, and thus are inaccessible to the public for oversight.
- Mitigation Monitoring and Reporting Plans, where they exist, often do not contain a list of the required mitigations, but reference other documents instead. Thus, anyone trying to track compliance may have to look for multiple documents in different places (unless they can figure out the database better than the Planning Department's own record keeper).

With that as background, I will continue on to questions relating to mitigation monitoring and enforcement relating to the CVSP. However, since the problems are systemic within the City, any single project is affected by the errant system, and thus I will have to address the system as well.

1. Please identify the CEQA statutes and Guidelines that identify a Lead Agency's responsibilities for mitigation monitoring under CEQA and what they require.
2. Please describe the City's system of tracking, monitoring, and enforcement of mitigation measures, as they would relate to the CVSP.
3. Please identify one or more examples in recent years when the City has found a significant problem with a biology-based mitigation for a project and then corrected

that. When I asked the head of the Environmental Services division of the Planning Department this question in an email, he said he could not think of one.

4. Given the examples and problems mentioned above, what are the chances that the myriad mitigation measures contained in the EIR will be accomplished successfully?
5. What are the tools the city has to enforce against a developer once a problem with mitigation completion or success has been identified? What are the City codes or other powers that underlie such an enforcement action?
6. When a citizen or citizen's group identifies a problem with completion or success of a mitigation measure, what recourse do they have to correct such a problem within the City? If the City fails to act when notified of a problem, what recourse then does a citizen have?
7. Can adequate staff resources be dedicated to monitoring the CVSP mitigation measures? Please describe what those resources will be for the CVSP.
8. As an overarching mitigation measure, we request that—if this project goes forward—one or more staff members be specifically designated as coordinator(s) for the mitigation measures contained in the EIR and eventual Mitigation Monitoring coordination (I understand these staff members would change over time). If this were done, city staff and members of the public would know who to go to with questions or complaints, helping assure better monitoring.
9. Again, as a mitigation measure, I request that all mitigation measures be tracked and posted electronically to the web. An example of this with a large-scale project can be seen in San Francisco with the Mission Bay development. The URL is below. <http://www.rbfconsulting.com/catellus/measures.asp>
10. The EIR does mention formulation and adoption of a Mitigation Monitoring and Reporting Plan (MMRP). However, the EIR also mentions many other mitigation documents that may or may not be included within the MMRP. Is it not a legal requirement that the MMRP contain all required mitigation measures, to better ensure eventual compliance?
11. As an overarching mitigation measure, we request that there be a single Mitigation Monitoring Report that tracks mitigation measures associated with the CVSP. This document should be done at least annually, and compare the original requirements with what has actually been accomplished. The document and supporting materials should be public records easily accessible from the City.

SCVAS asserts that without answering these questions adequately and adopting such mitigation measures, the EIR is inadequate because it can not show that the mitigations required will actually be accomplished, and thus significant impacts

over a broad range of issues will not be reduced to a less-than-significant level. As evidence, we cite the examples and issues mentioned previously in this section of our comments, as well as the supporting materials.”

Appendix F

Case Studies

Shea Homes’ Basking Ridge Residential Project (a.k.a. how this all started)

In the year 2001, I was driving towards a site visit in east San Jose. In doing so, I passed over a bridge crossing Coyote Creek. The bridge had been constructed as the result of a large residential development project by Shea Homes, one of California’s largest homebuilders at the time. As I drove over the bridge, I noticed considerable amounts of the plant *Arundo donax* in the creek below. Having worked on the approval of the housing and bridge project several years earlier, I vaguely recalled that removal of *Arundo donax* and revegetation with native riparian species had been one of the mitigation measures for impacts from bridge construction on the creek.

Later, back in my office, I wrote a simple letter to the planning department in San Jose, expressing my concern regarding the bridge mitigation and asking for documents showing that Shea Homes had in fact completed their mitigation requirements. The City sent no reply. I then called a local biologist with the California Department of Fish and Game (DFG), communicating my concerns with the bridge project and the lack of response from San Jose. DFG then wrote a letter to the City’s planning department, requesting the same documents I had asked for previously. After some time, the planning department copied me on a letter from the department to Shea Homes, asking that the company submit all mitigation monitoring reports for the housing and bridge project. It appeared that the City neither had the documents themselves nor had previously asked Shea Homes for them.

The Shea Homes reply to the City was enlightening, hilarious, and a bit scary. While I no longer have the letter, the pertinent part said, to paraphrase, “Now that we have completed our project, we will begin mitigation monitoring.” This was a virtual admission that they had not been performing required mitigation monitoring, as well as flying in the face of their permit requirements, which required various mitigations at different stages of the development process, not only upon completion of the project. The thought that Shea Homes—which holds itself out as one of the more experienced home developers in the state—would put on paper such a laughable statement led me to believe that mitigation monitoring was not receiving the attention it deserved and that developers knew they were often not watched closely.

In a rather ironic twist, the Shea Homes letter acknowledged that wetlands mitigation within their housing complex had not been done. They were admitting to something that was in addition to what I had originally noticed, perhaps not understanding my complaint. So, as it turned out, both riparian and wetlands mitigation for the project had not been performed, or not performed adequately. San Jose had no knowledge or documentation of compliance or

noncompliance, as if they had never checked the site or reviewed documentation for adequacy. I began to wonder how widespread this problem might be.

Corde Valle Golf Course (a.k.a. one project can lead to bigger change)

Given that there are going to be problems with individual projects and systems of mitigation monitoring, it would be ideal if problem projects produced better systems. This is an example.

The Corde Valle Golf Course—located in unincorporated Santa Clara County near the community of San Martin—received EIR clearance and permits in the mid to late nineties, with golf course construction beginning in 1998. From the beginning, it appears, multiple mitigation requirements went unperformed, and the County did not keep track of the project, although it had been high profile and contentious when approved. After a year or two, ownership of the golf course changed, complicating eventual attempts to track records or assign responsibility for what went wrong.

Only in 2003 did problems at Corde Valle come to light. Oddly, the San Jose Mercury News wrote a story saying that the golf course was violating its permit conditions regarding required public play (a non-environmental issue, which I shall not elaborate on). After this, the California Department of Fish and Game (DFG) and the Santa Clara Valley Audubon Society began to pursue possible other violations at the course. A report by DFG could find documentation for completion of less than ten out of nearly 30 environmental mitigation measures. SCVAS called upon the County Planning Commission to hold a permit modification or revocation hearing for the golf course, and eventually a series of meetings were held in front of the Commission and eventually the County Board of Supervisors. Early on, the golf course owners had committed to full compliance and began sinking considerable funds into the consultant time and on-the-ground work to see that things got done.

More than five years later, every mitigation measure has been complied with or is in progress towards completion. Some, like archeological resource investigations, were only done years after golf course play began, besides the fact that development of the golf course may have destroyed some of the resources involved. Others, such as wetlands mitigation for California Tiger Salamander, are not meeting success criteria, and thus ongoing work is required. Nonetheless, all parties consider the project essentially in compliance, as do I.

One lesson here is the expense of not performing required mitigations in advance. According to one of the lead consultants, a single year's billing for consulting services, site visits, etc. can run \$1 million for the course. This is partially because of the modified conditions imposed by the Planning Commission in 2003 and the increased monitoring of the site since then. If Corde Valle had performed their required mitigations as originally permitted, many of these costs could have been avoided.

A more important outcome from this case study was its effect on the County, particularly the Planning Department. The County had been embarrassed in the press for their lack of

oversight and put through several difficult public hearings. In their zeal to improve, they imposed a number of new conditions on the golf course, including full-cost recovery for County time to oversee the permit.

Shortly thereafter, this concept of full cost recovery was incorporated into nearly all new conditional use permits and some other permits issued by the County. As a result, when County staff reviews mitigation compliance documents or performs a site visit, costs are recovered from the project developer. This in turn allows the County to keep a closer eye on a range of projects, often years into the future. It is now typical that a Planning Commission hearing will include updates on project permit compliance. One can only assume that this has induced project applicants to be far more vigilant in natural resource management and mitigation.

The Institute Golf Course (a.k.a. sometimes, you just can't win)

John Fry, CEO of Fry's Electronics, built and owns the Institute Golf Course, located in Morgan Hill. In 1998, sometime after taking over what was already a large property with diverse land uses, the City of Morgan Hill issued Mr. Fry a permit to regrade an old, nine-hole golf course on the site. Instead, he built a full eighteen-hole golf course—one of the largest (in terms of length) in the County. Afterwards, Mr. Fry claimed that a city staff person had given him oral permission to expand the course as he did.

Over the first two to three years of the building and play at the Institute, the City of Morgan Hill appears to have done very little (the records here are quite incomplete). Only after pressure from a number of outside sources—the Department of Fish and Game, the U.S. Fish and Wildlife Service, and media, and local environmental organizations including SCVAS, did the City become more earnest in their efforts, requiring an after-the-fact EIR and putting the Institute through a lengthy series of public hearings.

Thus arose a problem—how to determine the resource values that were on the already developed site before Mr. Fry built the Institute Golf Course? Many of those values would have been damaged or destroyed, while arguably others had been enhanced. The EIR eventually approved by the city assumed that a number of resources had been on the site, based on aerial photos, previous investigations, and other mechanisms. To what extent these resources were there beforehand will never be known. As a result, it could be argued that the Institute was forced to do more to comply with their EIR mitigation requirements and permit conditions than they would have if the project had been legally built in the first place. Mr. Fry has certainly argued this.

Thus, by the time the Institute received authorization for its EIR and an “interim” permit for play on the site, years of violations had already occurred. However, that was only the beginning. The combination of a developer with a penchant for violating the law and a city almost wholly unwilling to actively enforce that permit unless pressured from the outside continues to this day.

Almost immediately after the interim permit was issued, the Institute began to violate its conditions. Unfortunately, the resource agencies and the environmental community had largely moved on to other issues, leaving the City responsible for the bulk of permit enforcement. Even more unfortunate, Morgan Hill was reluctant, to say the least, to cross Mr. Fry.

It is difficult to avoid a sort of tabloid journalism when discussing the relationship between the Institute, John Fry, and the City of Morgan Hill. Mr. Fry and other Fry's Electronics employees had been and perhaps remain prominent givers of political and/or charitable donations within Morgan Hill and the surrounding area. At one point, the Mayor of Morgan Hill held a fundraiser out at the Institute, despite the fact that it had not yet received its permits and was therefore illegally built. In addition, Fry's Electronics (or some legal entity associated with it) hold land in Morgan Hill, and holds out the possibility that one day that land could be the site of the Fry's corporate headquarters, which would mean tax dollars and prestige for the City.

Thus, when violations of the interim permit came to light, the City again used little of its legal authority to deal with the issue, typically claiming that everyone involved was making "good faith" attempts at compliance. Nonetheless, on several occasions, permit conditions were changed, often favoring Mr. Fry's desires. Wetlands protections were altered to accommodate better play; a mitigation fee for Burrowing Owl conservation was lowered dramatically, under dubious reasoning; numerous deadlines were extended, and, when not met, extended again. Meanwhile, City staff reports to Council dealt with the repeated violations of permit conditions and timelines by listing conditions as "in process," never or almost never describing them as violations. City staff, council members, Mr. Fry and his associates typically blamed many of these problems on failed consultants, recalcitrant government agencies, bad timing, new information, and changed circumstances.

The Santa Clara Valley Audubon Society and other local conservation organizations worked for years on the Institute Golf Course and its pathetic record of illegalities and permit violations—working with City staff or government resource agencies, filing complaints, addressing the issue in the media, and appearing at public hearings.

Sometimes, however, long and earnest efforts seemingly have little effect. In 2007, the City of Morgan Hill issued a "final" permit to the Institute, with new conditions, often relaxing either the standards or the timelines of the interim permit. Nonetheless, the Institute violated the very first timeline in the new permit, and again the City did little, despite strong rhetoric from the City Council. Mr. Fry has subsequently entered into a jurisdictional dispute with the Department of Fish and Game that continues to this day, most likely under the perception that DFG, unlike the City, might impose requirements that Mr. Fry finds truly objectionable.

Most recently, the City issued a permit modification to the Institute in early 2009, again relaxing former timelines. For this golf course that was built in the late 1990's, some mitigations will not have to be performed before the end of 2011, and the permit contains provisions for extensions beyond that.

It can certainly be argued and is likely true that the involvement of the environmental community, including SCVAS, improved the situation for natural resources at the Institute site. Nonetheless, a powerful developer and a reluctant city can be a towering wall to move.

Santa Clara Valley Water District—Monitoring Innovations (a.k.a. monitoring ideas for interrelated projects and issues)

(The information below is based on information provided to me by Louisa Squires at the Santa Clara Valley Water District, and I borrow liberally from her language)

The Santa Clara Valley Water District (Water District) is responsible for wholesale water supply and flood management in Santa Clara County. In addition, in recent years they have added natural resource stewardship to their core mission. With more than 700 employees and an annual budget of more than \$300 million, the Water District represents the third largest government agency in Santa Clara County. Because many of their projects deal with riparian and wetland resources, as well as upland habitat management, water quality, and a host of other environmental issues, the Water District's mitigation monitoring responsibilities are massive.

In 2003, the District began a process to integrate their mitigation monitoring requirements. Deciding that project-by-project mitigation monitoring was inefficient and expensive as well as underperforming for the environment, they launched development of their Ecological Monitoring and Assessment Program (EMAP). This project, still in development, consists of four components.

- **Ecological Monitoring and Assessment Framework:** This is the science-related part of the project. It deals with the management questions that should be answered by monitoring activities and is creating an approach to systemic monitoring.
- **Ecological Quality Assurance Systems Requirements:** This part is developing standardized protocols and processes for ecological data collection, in order to assure quality control across a broad spectrum of monitoring efforts.
- **Ecological Monitoring Information Management System:** This will be a database covering the entire Water District jurisdiction. The initial focus is on a Mitigation and Monitoring Activities Database, collecting information on all the Water District's mitigation monitoring responsibilities into a centralized inventory. The Water District is considering whether, in future years, a more regional database of information, containing responsibilities of other local jurisdictions, is an option.
- **Ecological Monitoring Program Systems Plan:** This part of the program deals with the administrative end of monitoring—tracking costs, program performance, and making recommendations for program improvements.

While the names may be daunting and ring of environmental bureaucracy, the attempt is an admirable one. Essentially, the Water District realized that it might achieve better results for the environment, for permit compliance, and for their financial bottom line by moving away from project-based mitigation monitoring to a more holistic approach. While the law does not allow the Water District to avoid reporting and compliance requirements for each individual CEQA project, this effort may allow them to better manage their individual project responsibilities within a larger context. Also, information generated by individual project monitoring might then be used more generally for natural resource management. Results will come over the next few years.

Such an idea might be worth considering for other large government agencies handling dozens of complex mitigation projects at a time. For more information on this Water District effort, contact Louisa Squires, Senior Project Manager, at 408-265-2607, extension 2745.

Mission Bay Mitigation Tracking (a.k.a. the future for monitoring large projects?)

The Mission Bay Project in San Francisco—huge in scope—has incorporated a website specifically for mitigation monitoring that could serve as a model for other large-scale projects of many types. The project encompasses more than 300 acres and is mixed-use in character, meaning that there are residential, commercial, and industrial components, which can lead to environmental impacts of very different types in close proximity to each other. In addition, the area is surrounded by existing neighborhoods and businesses.

CEQA commenting from these adjacent areas regarding the Mission Bay Project was voluminous, and the mitigation monitoring website was one response to those comments—intended to ensure the public that commitments made during the CEQA process could be tracked quite closely and with relative ease. The mitigation monitoring website can be found at www.rbfconsulting.com/catellus/home.asp and has an easily identified area to click for a “quick reference” guide for first-time users.

Visitors to the site can view each separate area of the larger project for a description of what was approved for that location and the current status of that given area of the larger project. Since many large projects build out in phases, and individual mitigation measures are often dependent in their timing on the phases of the project, this aspect of the website helps someone trying to determine compliance with mitigation measures.

Block-by-block, the website then coordinates the required mitigation measures with the various phases of the project and identifies timing as well as who is responsible for reporting requirements. Because the website was developed for the major developer of the project, Catellus, it unfortunately does not cover some areas of the overall project, but it does try to direct the viewer to where information might be found for those areas not covered by the website.

The site can still be difficult to manage, yet for a project of this scope, it represents an honest attempt to capture what can be a daunting task even for professionals into a package that is, to an extent, usable by laypersons.

Unfortunately, many local jurisdictions still use paper documentation for both the project approval process and efforts at mitigation monitoring. However, increasingly CEQA and project approval documents, such as MMRPs, can be found online. It is much more rare to find mitigation monitoring documents online—most likely, this is because few members of the public ask for them.

However, CEQA advancements often spread from one local jurisdiction to others throughout the State. For example, when CEQA commenters started raising the issue of carbon emissions from development projects, local jurisdictions and the consultants they hired quickly learned from one another how to respond to such comments. Eventually, with many local jurisdictions taking varying positions on how to respond to comments on climate change, the State stepped in and issued their first ever set of guidelines on the subject.

It would be most useful for a similar process to occur for mitigation monitoring. If more CEQA commenters raised the subject, Lead Agencies would inevitably learn better how to respond. Ideally, some form of online mitigation monitoring methodology would emerge. Examples such as Mission Bay will serve as pioneers, and over time standardization would occur, so that organizations interested in mitigation monitoring would not find online results increasingly easy to compare across projects and jurisdictions.

Appendix G

Basic Legal Analysis

In May of 2005, the State Bar of California sponsored an environmental law conference in San Diego. Among the panels was one entitled “Mandamus and CEQA Proceedings,” including the typical panel presentations followed by a Q&A session.

At the end of the Q&A, the very last question of the day was from a woman in the back of the audience, who asked, “What do you do if someone doesn’t complete their CEQA mitigation?” [Paraphrasing] One of the most well known CEQA lawyers in the State responded, “That’s a good question.” This response points strongly to the need for further legal exploration of this field.

Since then, I have corresponded with another leading CEQA attorney—an attorney who represents primarily the pro-development side of CEQA cases—on this subject (he asked not to be named here). He asserted that state law is clear that Lead Agencies (see definitions) must prepare a mitigation monitoring and implementation document, and that those agencies must have the legal authority needed to enforce their required mitigation measures.

That much is true, but it leaves a large question hanging in the air. If a city, county, or other Lead Agency does not wish to enforce the required mitigations for a project, what recourse is there for an individual or organization to fill the void and attempt to force compliance? This fundamental question remains unanswered, but I will attempt to shine some light on it and other legal aspects of mitigation monitoring.

The purpose of the following section of this report is to provide a brief overview of the relevant laws, regulations, and cases regarding mitigation monitoring and enforcement. At the end of this section, I pose some questions and offer comments as to a possible future course of action in clarifying the law in this area. **In addition, in the appendices to this report, I supply some sample CEQA comments that might help a community group in improving mitigation monitoring for a proposed project going through the CEQA process in their community. Also in the appendices, I suggest modest legislative changes to CEQA, clarifying mitigation monitoring responsibilities that I believe would go a great way towards improving performance at the local level.**

Definitions

For the non-lawyers reading this, I begin with a few definitions, attempting to keep them simple and thus perhaps simplistic from an attorney’s point of view:

- CEQA, the California Environmental Quality Act, is the law that requires development projects to produce documentation elucidating their environmental impacts and what might be done to reduce, eliminate, or compensate for those impacts.

- EIR, or Environmental Impact Report, is the most complete document required for some projects under CEQA.
- A Mitigated Negative Declaration is a lesser document as compared to an EIR, required of some projects under CEQA. Both EIRs and Mitigated Negative Declarations trigger the requirement for a mitigation monitoring plan.
- An MMRP, or Mitigation Monitoring and Reporting Plan, is a document, required of some projects under CEQA, that lays out the required mitigations for a project and thus should be the primary guide for monitoring and enforcement of that project as it unfolds. This name is not mandated by law, but is increasingly common.
- A Lead Agency, typically a city, county, or other government agency, approves or denies the environmental documentation produced for a project undergoing CEQA review and approves or denies the project itself. The Lead Agency then becomes the primary enforcement authority for the MMRP, although other government agencies besides the Lead Agency may also play a role in monitoring and enforcement, typically when additional government permits are required of the project.
- A Responsible Agency is a government agency, not the Lead Agency, which may have jurisdiction over certain environmental impacts associated with a project undergoing CEQA review. The Responsible Agency may impose additional mitigation measures on a project and may thus become the primary agency responsible for enforcing those additional mitigation measures.
- The CEQA Guidelines are produced by the California Office of Planning and Research (OPR) and contain the regulations that, in addition to laws passed by the State Legislature, make up the rules governing CEQA review of projects. While the Guidelines are not laws passed by the legislature and signed by the governor, courts typically give the Guidelines nearly the same weight as laws when making decisions on CEQA cases.

Current Law

The primary law concerned here is the California Environmental Quality Act (CEQA). The language of CEQA can be found in the Public Resources Code for California, beginning with Section 21000 and continuing on from there. In California, every county is required to have a public law library, and each of those libraries should have a copy of the Public Resources Code. However, some rural counties do not have the resources to open a dedicated law library, and thus their “public law library” may be housed in a local public library or even in a judge’s chambers. You can find out where your public law library is by going to www.publiclawlibrary.org.

To begin with an analysis of the relevant sections of CEQA relating to mitigation monitoring and reporting, start with Public Resources Code Section 21081, which states in part:

“...no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless...

(a) The public agency makes one or more of the following findings with respect to each significant effect:

(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.

(2) Those changes or alterations are within the responsibility and jurisdiction of another agency and have been, or can and should be, adopted by that other agency.”

To reduce this to less legal language, a public agency (generally a city, county, or state agency) must attempt to mitigate each significant environmental impact identified in an Environmental Impact Report or Mitigated Negative Declaration. Because not all significant impacts can be mitigated, these agencies are, under certain circumstances, allowed to avoid mitigation by signing a Statement of Overriding Considerations, but I will not go into that here. In general, once the CEQA process is finished, each EIR or Mitigated Negative Declaration should have identified all significant environmental impacts associated with a project and then laid out specific mitigation measures to reduce or eliminate those impacts. As subsection (2) above allows, a governmental agency may delegate the detailing and implementation of some mitigation measures to other governmental agencies having jurisdiction over certain issues. An example of this would be an EIR that mitigates significant impacts on water quality by saying that the project applicant is required to obtain a water quality permit from the local Regional Water Quality Control Board. You may encounter similar delegations to the state Department of Fish and Game, the federal Fish and Wildlife Service or Army Corps of Engineers, a local Air Resources Board, or other governmental entities.

I thus move on to how the law tracks and enforces those promises.

Section 21081.6 of the Public Resources Code gives us the next piece of this puzzle, saying in relevant part:

(a) “When making the findings required [to approve an EIR and the associated project] or when adopting a mitigated negative declaration...the following requirements shall apply:

(1) The public agency shall adopt a reporting or monitoring program for the changes made to the project or conditions of approval, adopted in order to mitigate or avoid significant effects on the environment. The reporting or monitoring program shall be designed to ensure compliance during project implementation. For those changes which have been required or incorporated into the project at the request of a responsible agency or a public agency having jurisdiction by law over natural resources affected by the project, that agency shall, if so requested by the lead agency or a responsible agency, prepare and submit a proposed reporting or monitoring program.”

First, note that this section refers not just to projects requiring an EIR, but also to projects approved under a Mitigated Negative Declaration. Both these documents must lead to a reporting or monitoring program, increasingly called a Mitigation Monitoring and Reporting Plan (MMRP).

Second, note that not only is the governmental agency with primary approval authority over a project required to comply, but any public agency that imposes mitigation measures or conditions of approval on such a project regarding environmental impacts under its jurisdiction should also comply. For example, if the Department of Fish and Game is to require mitigation measures under a Streambed Alteration Agreement to reduce or compensate for impacts to a riparian area, it should also adopt a monitoring and reporting regime to ensure that those mitigation measures are completed. In fact, at times, this does not occur. It can be difficult to find reporting and monitoring plans issued for a project by governmental agencies such as DFG, a Regional Water Quality Control Boards, or others. While such documents may exist within these other agencies, they are often not then sent to the Lead Agency. The CEQA Guidelines clarify this further by stating:

“A public agency may delegate reporting or monitoring responsibilities to another public agency or to a private entity which accepts the delegation; however, until mitigation measures have been completed the lead agency remains responsible for ensuring that implementation of the mitigation measures occurs in accordance with the program.” CEQA Guidelines, Section 15097 (a)

At times, I have encountered Lead Agencies which try to shrug off their responsibilities by saying that a given mitigation measure is the responsibility of another public agency. **The above section of the Guidelines should then be used to remind the Lead Agency of their ongoing responsibility to ensure completion of the adopted measures.**

Section 21081.6 goes on to state that the adopted mitigation measures must be enforceable:

“(b) A public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures. Conditions of project approval may be set forth in referenced documents which address required mitigation measures or, in the case of the adoption of a plan, policy, regulation, or other public project, by incorporating the mitigation measures into the plan, policy, regulation, or project design.”

Thus, not all mitigation measures need be contained in the adopted monitoring or reporting document approved by the Lead Agency. They may, for example, reference another document, such as a biologist’s report recommending mitigation measures to protect an endangered species. That document need not be included in whole in the adopted monitoring or reporting document, but it should be referenced. Also, a mitigation measure may not be specific to a given development project, but rather take the form of a change to a plan or

policy adopted by the Lead Agency. Thus, in the case of an EIR reviewing changes to a city's General Plan, for example, impacts to riparian areas may be mitigated by adopting a city zoning policy specifying a certain setback of new development from local streams, which would apply to all future projects rather than only one specific development project. Future CEQA documents for specific development projects might then just reference compliance with that setback policy as adequate mitigation.

Some further, logical questions arise from the above law. What form does the required monitoring or reporting program take, and what is the difference between monitoring and reporting? Clarifications to these questions are found in the CEQA Guidelines at Section 15097 (c), which was adopted in 1998. Taking the later question first, the Guidelines state:

“The public agency may choose whether its program will monitor mitigation, report on mitigation, or both. ‘Reporting’ generally consists of a written compliance review that is presented to the decision making body or authorized staff person. A report may be required at various stages during project implementation or upon completion of the mitigation measure. ‘Monitoring’ is generally an ongoing or periodic process of project oversight. There is often no clear distinction between monitoring and reporting and the program best suited to ensuring compliance in any given instance will usually involve elements of both.”

The Guidelines then go on to relatively useless delineation of when reporting or monitoring is appropriate before stating:

“Reporting and monitoring are suited to all but the most simple projects. Monitoring ensures that project compliance is checked on a regular basis during and, if necessary after, implementation. Reporting ensures that the approving agency is informed of compliance with mitigation requirements.”
(Guidelines, Section 15097 (c)(3))

In my experience, monitoring is by no means checked on a “regular basis” for a majority of projects and agencies are often not “informed” of compliance or lack thereof. Therefore, this language may be useful in reminding a Lead Agency of its responsibilities. This language might also be useful in a court challenge where a plaintiff is trying to show a lack of monitoring or reporting.

A subsequent section of the Guidelines contains a list of “standardized policies and requirements” that may be adopted to “guide individually adopted monitoring or reporting programs.” (Section 15097 (e)) The list is helpful in thinking about what details should go into a typical MMRP, so I reproduce it here:

- (1) The relative responsibilities of various departments within the agency for various aspects of monitoring or reporting, including lead responsibility for administering typical programs and support responsibilities.
- (2) The responsibilities of the project proponent.
- (3) Agency guidelines for preparing monitoring or reporting programs.

- (4) General standards for determining project compliance with the mitigation measures or revisions and related conditions of approval.
- (5) Enforcement procedures for noncompliance, including provisions for administrative appeal.
- (6) Process for informing staff and decision makers of the relative success of mitigation measures and using those results to improve future mitigation measures.

Combining the above-mentioned language that a monitoring program must be “designed to ensure” that mitigation measures are implemented along with Section 21081 stating that mitigation measures must be enforceable, the law emphasizes that the Lead Agency cannot simply adopt the measures and then say that it is the project applicant’s responsibility to complete those measures.

A key question then arises: if a Lead Agency does not enforce its own required mitigation measures, what can a community organization or even an individual do to force that governmental agency to comply with the law? This question has not been well hashed out in the courts, and I will leave it to later in this section to discuss this further. For now, suffice it to say that mitigation measures take a wide variety of forms (permit conditions, signed agreements, the language of a new policy, etc.), and it can be difficult to figure out exactly how a given mitigation measure can be enforced, but no matter what form a mitigation measure takes, the Lead Agency is responsible for ensuring that the measure is enforceable.

CEQA Cases Regarding Mitigation Monitoring

At this point, I will address a number of California cases that are relevant to an interpretation of mitigation monitoring and enforcement requirements under CEQA. I will begin each case with a layman’s question, which the case attempts to elucidate.

What does it mean that a Lead Agency’s monitoring program must be “designed to ensure” that mitigation measures are implemented?

Federation of Hillside and Canyon Associations v. City of Los Angeles, 83 Cal. App. 4th 1252 (2000)

In the *Federation* case, community groups challenged an EIR supporting the adoption of a general plan framework which projected future growth in the City of Los Angeles, impacts related to that growth, and adopted mitigation measures. The key issue here was traffic. While the City adopted a transportation improvement mitigation plan, by their own admission, the City acknowledged that many of the adopted traffic mitigation measures would be difficult to fund or implement.

The court found that the City lacked substantial evidence to show that the traffic mitigation measures were required under the adopted general plan framework and that the City had failed to show that the mitigation measures would in fact be implemented. The court relied

on Public Resources Code Sections 21081.6 (a) and (b) to support rejecting the City's action. The court went on to state:

“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.” (Federation, page 1261)

This case is most helpful for challenging a project upon its initial approval. The Lead Agency must adopt the mitigation measures in a form that represents a solid commitment to implement those measures. Mitigation measures adopted in the form of “if technically feasible” or “if funding is available” are highly suspicious. This case does not answer the question of whether a community group can force a governmental agency to enforce its own adopted mitigation measures.

Another relevant case here is *Sacramento Old City Assn. V. City Council*, 229 Cal. App. 3rd 1011 (1991). There, the court upheld an EIR, which, while not adopting specific mitigation measures for traffic impacts, nonetheless committed to study traffic impacts and prepare a transportation management plan. The court found that adoption of that traffic management plan implied a commitment to adopt specific mitigation measures in the future and thus represented a binding commitment to those mitigations.

What if a governmental agency decides not to fulfill a mitigation requirement after it has already been adopted?

Napa Citizens for Honest Government v. Napa County Board of Supervisors, 91 Cal. App. 4th 342 (2001)

In the *Napa Citizens* case, citizens groups challenged a supplemental EIR and updated specific plan for development near a county airport. The County Board of Supervisors had eliminated mitigation measures imposed years earlier on the original specific plan for the area, finding that those mitigation measures were infeasible. The EIR challenge claimed that a Lead Agency could not eliminate previously adopted mitigation measures. The court disagreed, finding that CEQA allowed for flexibility and changed circumstances so long as certain findings were made and those findings were backed by substantial evidence. Essentially, the court said that a Lead Agency could change or eliminate mitigation measures so long as they have a legitimate reason for the change (i.e. the originally adopted measure is infeasible), and that reason is supported by substantial evidence. (*Napa Citizens*, page 359)

In making its decision, however, the court in *Napa Citizens* did not intend that Lead Agencies should easily abandon mitigation measures. The court stated, “...the deference provided to governing bodies with respect to land use planning decisions must be tempered by the presumption that the governing body adopted the mitigation measure in the first place only after due investigation and consideration.” (Ibid.) “In other words, the measure cannot be deleted without a showing that it is infeasible.” (Ibid.)

Thus, when a Lead Agency refuses to enforce a previously adopted mitigation measure, one way they can do so legally is to go back, analyze the environmental impacts of deleting the mitigation measure, and adopt a finding that the measure is infeasible, perhaps for technical or financial reasons. However, a court should look at that deletion with a jaundiced eye, assuming that the mitigation measure when first adopted was feasible, and not allowing the Lead Agency to delete the measure simply because the agency (or the developer involved) no longer wishes to fulfill its promise.

A case that develops this concept a little further is *Lincoln Place Tenants Association v. City of Los Angeles*, 130 Cal. App. 4th 1491 (2005). In *Lincoln Tenants*, residents challenged the demolition of certain apartment buildings, stating that the City of Los Angeles had not followed previously adopted mitigation measures regarding demolition and had not found that those mitigation measures were infeasible. The court agreed, stating that the City had not gone through the proper course of action to delete or modify a mitigation measure (in accordance with *Napa Citizens*) and was thus bound by the previously adopted measure.

A refinement added by the *Lincoln Tenants* court states that the change or deletion of a mitigation measure must be included in a Supplemental EIR and thus be subject to typical CEQA procedures, such as circulation for public comment. This logic is disputed by at least one CEQA treatise (see *Guide to CEQA* by Remy, Thomas, Moose, and Manley) and, in my opinion, a Lead Agency might, unfortunately, be able to abandon mitigation measures in a lesser process that largely avoids a complete CEQA evaluation. Nonetheless, a Lead Agency or developer cannot simply respond that a mitigation measure was abandoned or will not be enforced because of changed circumstances or financial or technical infeasibility without first engaging in some form of public process.

When must an adopted mitigation measure be completed, and when can an individual or citizens group try to enforce a mitigation measure that remains incomplete?

Christward Ministry v. County of San Diego, 13 Cal. App. 4th 31 (1993)

In *Christward Ministry*, a church challenged an EIR for a local landfill expansion, citing as one reason that the adopted mitigation monitoring plan did not include specific dates by which the mitigation measures were to be implemented. The court upheld the monitoring plan, stating that the adopted mitigation measures were linked to specific phases of the development (e.g. “prior to initiation of grading”). (*Christward Ministry*, page 49) A second principle enunciated by this court states that the mitigation monitoring plan does not have to be contained in the EIR, draft or final, itself. Rather, the monitoring plan must be adopted prior to final approval of the project. It is typical that Mitigation Monitoring and Reporting Plans are separate documents from the EIR or Mitigated Negative Declaration associated with the project.

Generally, a Lead Agency should prepare a Mitigation Monitoring and Reporting Plan that includes either specific dates for mitigation implementation or a plan which links mitigation deadlines to phases in the development process. However and unfortunately, I have often encountered adopted mitigation measures that include neither a specific date nor a link to a

development phase. If such a mitigation measure then goes undone, when can an individual or citizens group attempt to enforce the promise? There does not appear to be any court case addressing this issue. For now, I would say that a reasonable amount of time should be allowed. In addition, if a citizen encounters a mitigation promise that he/she believes has been broken, early notification of the Lead Agency is advisable. This notification will establish that the Lead Agency is aware of the problem, and hopefully cut short later possible arguments that the mitigation measure has simply not been done yet or that the agency was unaware that it had not been done.

Other Informative (but not published) Legal Cases

In general, attorneys often restrict their legal analysis of an issue to a discussion of published cases, since these are the cases that would have some authority as precedent in a current day court. However, I wish to mention a couple of non-published mitigation monitoring cases here, as they might be of help to an individual or community organization pursuing the issue of mitigation monitoring.

The first case is *Save Our Peninsula Committee v. County of Monterey* (2000), a case that settled and thus never rose to the level of an appellate court. In the *Save Our Peninsula* case, the plaintiffs asserted that Monterey County had routinely failed to create mitigation monitoring and reporting plans as required by CEQA. The plaintiffs cited nearly twenty projects in a previous five-year period that had been approved without mitigation monitoring plans. While the ability to challenge many of these projects individually under CEQA would have been barred by the statute of limitations, the plaintiffs asked the court for a writ of mandate directing the County and various officials within it to comply with the law in the future and to review past projects for mitigation compliance.

In settlement, the County agreed to adopt mitigation monitoring provisions into its CEQA compliance guidelines and to review a variety of past projects for mitigation compliance. Subsequently, it was found that a number of those projects were not in compliance with required mitigation measures, and the County began to address those problems. From a discussion I had with the plaintiffs' attorney, compliance by the County with the provisions of the settlement has been spotty. Nonetheless, the plaintiffs in this case were able to use examples of past mitigation problems to both make the county's overall mitigation program more effective and to address past problems. This case could be informative for other areas that have chronic mitigation monitoring problems. The complaint for this case can be found under CASE NO. M 47847 (2000) in Monterey County.

A second case to mention is *Santa Clara Valley Audubon Society v. City of Morgan Hill* (2003). In this case, SCVAS sued Morgan Hill to enforce a mitigation measure requiring the city to adopt a Burrowing Owl management plan pursuant to an EIR for the city's redevelopment area. The EIR had been approved in 1999, and noted impacts to the few Burrowing Owls remaining in the city. The city required of itself, as a mitigation measure, to approve a draft Burrowing Owl plan then a final plan within given time periods. The city did

not then do this, despite SCVAS' efforts to point out the city's responsibilities and help them draft a plan.

SCVAS, utilizing the services of the Stanford Environmental Law Clinic, then sued, citing the Code of Civil Procedure, Section 1085, which states in part:

“A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.”

In short, this code section allows a court to require a city or county to perform a mandated duty under the law. In the SCVAS case, the city settled quickly, agreeing to adopt the Burrowing Owl plan, and thus the case never went to court.

This case provides an option for situations in which a Lead Agency requires itself to perform a mitigation measure. This does not necessarily apply to the more typical situation, where a private developer receives approval from a Lead Agency, which then has enforcement authority over the mitigation measures of that approval. However, since most MMRPs contain required duties not only for the project developer but for the Lead Agency as well (e.g. the developer must prepare a riparian habitat restoration plan, and the city must approve that plan before project construction can begin), this same code section might provide an avenue for forcing a Lead Agency to enforce mitigation requirements against a noncompliant developer.

The Question Remains

Looking at the laws, regulations, and some of the cases regarding mitigation monitoring, the basics of how monitoring and enforcement should occur are there, as related above. However, as my work and the work of others has shown, there will be times when mitigation monitoring and enforcement simply is not done or not done properly, resulting in the loss of natural resource values that we, the public, have a right to expect will be protected.

The Planning Section of this report (see below) discusses some of the common problems leading to lapses in mitigation monitoring, and further goes on to suggest ways to correct those problems and methods a citizen might use to track and, if necessary, correct a mitigation monitoring problem. Hopefully, when such a problem is brought forth to a Lead Agency, that agency would take on its legal responsibility to address the issue.

Nonetheless, there will be times when a clear problem with mitigation compliance arises, that problem is brought forth to the Lead Agency, and that agency decides not to take action. What, then, can an individual or community organization do to address this situation? One

line of thought may be, “Take them to court.” However, this path seems largely untested and frankly may not be available. Nonetheless, I believe it should be tried.

In general, a government has considerable discretion over whether or not to enforce its own laws. To give a simple example: you can not force the California Highway Patrol to ticket all vehicles exceeding the speed limit. The analogy could be made to the mitigation monitoring context: you can not force a city, county, or other Lead Agency to enforce its own mitigation requirements.

However, the law does say that a Lead Agency must create a plan “designed to ensure” compliance with mitigation measures; and the law does say that a Lead Agency “remains responsible” for those mitigation measures until they are completed. It is this language, as well as the overall structure of the law in this area, that I believe affords an opportunity for some challenge to a Lead Agency’s decision not to enforce a required mitigation measure.

While possible legal challenges were discussed relating to some of the individual development projects I dealt with in the course of this SCVAS project, none came to fruition. It is my hope that, before long, a strong case(s) will be built to further explore the possibility of legal action forcing a Lead Agency to enforce its own requirements. Towards that end, I make a few recommendations.

First, the facts of the case to be brought (i.e. the violation of mitigation requirements) should be very clear. Resting such a case on a mitigation measure with vague language or an arguable timeline would be folly. If a judge is going to plunge into this seemingly new territory, he/she will need to be bolstered by nearly irrefutable facts.

Second, the resources at stake should be considerable. One argument against allowing private legal action to enforce mitigation measures will surely be that a judge allowing this would be opening the door to a flood of nuisance litigation on minor mitigation measures. This will be a tough argument to overcome. By ensuring that the mitigation measure(s) being litigated involve substantial resource values, a judge will be given stronger incentive to make a bold decision.

Third, the Lead Agency should be given adequate time to correct the problem on its own. What would constitute “adequate time” is unclear. There is no statute of limitations laid out in CEQA or the CEQA Guidelines. Suffice it to say that the Lead Agency involved should be given sufficient time to give the plaintiffs a strong argument that enforcement is not intended by the agency.

Finally, there would be an issue of where to bring the case. Judges are people and thus varied, and some judges may be more inclined than others to push the law in this area. Perhaps a good strategy would be to bring multiple cases in different localities.

A point should be made here that even losing such a case has some value. If it becomes clear, based on one or more unsuccessful attempts to force enforcement, that the courts are not going to force Lead Agencies to act, then the language of CEQA regarding “ensur[ing]”

compliance and “remaining responsible” for mitigations is shown to be hollow. That then builds on an argument to go back to the state legislature to push for reform of CEQA in this area.

A Potentially Innovative Approach

The following idea for an innovative approach to enforcing required mitigation measures comes from another attorney that I contacted during the course of this project. I include it here because it may offer an alternative approach for bringing a mitigation monitoring case, beyond the straightforward approach I discuss above.

The idea for this approach comes from a CEQA case entitled *Concerned Citizens of Costa Mesa v. 32nd District Agricultural Assn.* (1986) 42 Cal. 3d 929. In the *Costa Mesa* case, the City of Costa Mesa built, along with a private developer, an amphitheater near residential areas. While the CEQA process was followed in approving *an* amphitheater, the amphitheater actually built differed substantially from what had been approved by the city—it was larger both in size and capacity, and it was aligned differently, in a manner that residents said increased noise impacts from the site. The neighbors had not received notice of these changes, only learning about them after the amphitheater was constructed.

The plaintiffs, largely neighbors, filed a case calling for a subsequent EIR to address the project changes. However, they filed their case after the typical 180-day statute of limitations had run, counting from the date construction had begun. Thus, a fundamental question emerged as to whether the plaintiffs had filed their case on time.

The California Supreme Court sided with the plaintiffs, calling for additional environmental review despite the fact that the amphitheater had already been constructed. The court focused largely on the lack of public notice for the changes. Quoting from another case, the court noted that:

”CEQA compels an interactive process of assessment of environmental impacts and responsive project modification which must be genuine. It must be open to the public, premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process.’ (County of Inyo v. City of Los Angeles (1984) 160 Cal.App.3d 1178, 1185.”

The court went on to say:

“It cannot be doubted that some of the changes allegedly made in the project by the contract between the district and West could be characterized as substantial enough to require the district to file a subsequent EIR to assess their environmental effects, as required by section 21166, subdivision (a). [of CEQA]”

Finally, of the timing of the case brought by plaintiffs, the court said:

“We agree that the action should not be barred simply because of plaintiffs' failure to file their action alleging a violation of CEQA within 180 days of the time construction of the theater began. The failure of the district to file a subsequent EIR in violation of section 21166, subdivision (a) deprived plaintiffs and the public of the opportunity to participate in the evaluation of the environmental effects of the project as finally approved.

We can give effect to the statute, while simultaneously vindicating the Legislature's goal of promoting public comment on projects that may have environmental significance, by holding that the phrase "commencement of the project" in subdivision (a) of section 21167 refers to the project described in the EIR and approved by the agency. However, if the agency makes substantial changes in a project after the filing of the EIR and fails to file a later EIR in violation of section 21166, subdivision (a), an action challenging the agency's noncompliance with CEQA may be filed within 180 days of the time the plaintiff knew or reasonably should have known that the project under way differs substantially from the one described in the EIR.” (42 Cal. 3d 938)

What might this case say about mitigation monitoring? It could be argued that when a project does not comply with its required mitigation measures, and when the Lead Agency involved does not correct the problem using its monitoring and enforcement authority, that the project has essentially been changed, and thus additional environmental review is called for.

This is not an easy argument to make. Relying on the language of CEQA Section 21166(a), the *Costa Mesa* court noted the “substantial” nature of the changes made to the amphitheater project. Thus, one would have to argue that the failure to implement one or more mitigation measures constituted a “substantial” change to the project. A judge would have considerable discretion as to what constitutes a substantial change.

The *Costa Mesa* case would appear to say that a plaintiff must file such a case within 180 days of discovering the project change[s] (here, the mitigation measure[s] not done), or within 180 days of when they should have known of the problem. Some of the projects mitigation problems I have tracked have taken longer than 180 days to resolve; others are still unresolved. While a Lead Agency should clearly have a reasonable amount of time to correct a mitigation problem once that problem is brought to their attention, a community group considering this legal approach would have to be cognizant of the 180 day timeline.

In all, I believe this legal approach would be a difficult one for a court to adopt in dealing with problems of mitigation compliance. However, it does give a court a precedent for doing so, without abrogating the basic concept that a city or county has considerable discretion over its own enforcement actions.

Appendix H: Scholarly Work on Mitigation Monitoring

I have previously noted that this project was not intended to be a scientific look at mitigation monitoring. I have the background of an activist and attorney, and that perspective was reflected in developing the original scope and description of this project. Nonetheless, there have been more-or-less scientific analyses of aspects of mitigation monitoring since the original passage of Assembly Bill 3180 in 1989. I shall cover two such efforts here.

Angell and Anderson Article

One recent article of use was published in the Spring 2006 edition of *The Environmental Monitor*, a quarterly publication of the Association of Environmental Professionals. In that article, authors Patrick Angell and Hilary Anderson, both consultants, look back at past scholarly work in the field and compare their current results with that past work. For this reason, I will skip a lengthy discussion of the previous studies and focus on the methodology and conclusions of Angell and Anderson, who performed the work for Pacific Municipal Consultants' (PMC).

PMC's methodology was similar to previous studies in its basic approach. They mailed a survey consisting of twenty-nine multiple choice or short answer questions to 303 cities and counties throughout the State. The questions were similar in content and wording to those asked in previous surveys in the 1990's. To quote the authors of the article,

“The questions in the survey were geared toward evaluating the extent and success of mitigation monitoring that is taking place throughout California and to see how mitigation monitoring has changed over the fourteen-year period since the first survey was conducted.”

The surveys were sent to cities and counties of varying size and spread geographically to see if regions might differ (e.g. Central Valley versus Bay Area). Of surveys sent, approximately 36% were returned, which the authors claim to be statistically significant for purposes of testing their hypotheses.

PMC then posed a series of hypotheses—generally geared towards noticing trends over more than a decade—and compared the various survey results over the years to analyze those hypotheses. In addition, they held more in-depth conversations with a variety of planning professionals.

Based on my work on this project, the conclusions of the 2005 PMC study and resulting 2006 article come as little surprise. To sum up, the authors state:

“...it appeared that some jurisdictions are not writing mitigation measures that can be implemented or enforced successfully and more than a few jurisdictions are not monitoring mitigation measures or reporting as required by CEQA. The results of the previous surveys echo this finding.”

The authors go on to state that their hypotheses had expected improved efforts over time, and thus improved results, from the jurisdictions involved. They say that “given the tendency” of planning programs to improve over time, and given refinements to CEQA and the Guidelines that had occurred in intervening years, such expectations of improvements were warranted. However, few such trends emerged from the data. The authors concluded,

“As described in the 2005 survey results above, there appears to not have been substantial expansion of mitigation monitoring activities by cities and counties, though substantial changes to CEQA and the State CEQA Guidelines since 1989 have emphasized the need to ensure that adopted mitigation measures are properly implemented and monitored.”

Finally, the article’s authors identified likely reasons for the lack of significant improvement over time and made suggestions as to how, “with minimal cost,” jurisdictions might improve their monitoring programs. As the suggested corrective steps are lengthy to quote here, I will simply list the five perceived roadblocks that led to their recommendations,

- “1. Lack of staff resources to perform mitigation monitoring and reporting.
2. Funding of work associated with performing mitigation monitoring and reporting.
3. Mitigation monitoring and reporting is not incorporated into local agency operations (EIR and MMRP end up on the shelf syndrome).
4. Perceived complexity of conducting mitigation monitoring and reporting.
5. Lack of enforcement process.”

These are certainly all fundamental problems that others and I have encountered. As one might expect, the recommendations of those familiar with this topic also contain many similarities.

Sheeran Thesis

In a 2007 Masters Thesis for San Diego State University, author Melyssa Sheeran not only analyzed the same CEQA surveys mentioned previously (and other information), but conducted in-depth interviews with various participants in the CEQA process in an attempt to flesh out some mitigation monitoring issues from different perspectives. Since Ms. Sheeran’s work was conducted more recently than past mitigation surveys, one might expect that a more modern picture of CEQA compliance would emerge, making her work valuable. Her resulting paper is entitled *Mitigation Measures: Implemented or Ignored*. The thesis is available from the library of San Diego State, but unfortunately is not available online.

Ms. Sheeran’s analysis of the above mentioned statistical surveys—the same as analyzed by the PMC authors—comes to largely the same conclusion.

“The survey data seem to indicate that mitigation monitoring and enforcement has not been very successful. In 1992, 82% of jurisdictions reported that they had inadequate staff, expertise, and funding to do monitoring. By 2005, 84% of cities reported having a program for mitigation monitoring and reporting but only 49% of the cities surveyed had taken an enforcement action against a project for failing to comply with the MMRP (Angell, Amrhein, and Anderson 2005).” (Sheeran, page 42)

I find this last statistic to be particularly telling. One could argue, as Sheeran acknowledges, that a lack of enforcement actions by a majority of local jurisdictions implies compliance with required mitigations. However, the fact that I was able to identify so many problems in the projects I looked at as part of my investigations would seem to indicate that the problems are there, it’s the monitoring and enforcement that are too often missing. It should also be noted that Sheeran interviewed Southern California CEQA participants not only because of proximity but because survey results had found less effective mitigation monitoring performance in Southern California. (Sheeran, page 45-6) My investigations were from just a small slice of projects in the Bay Area, where monitoring performance is statistically better, and I still found the volume of problems that I did. Again, I must emphasize that the projects I looked at were not chosen at random, and my methodology was bound to find more problems than a random sample.

Ms. Sheeran interviewed four groups of CEQA participants from Southern California: representatives of public agencies, developers, consultants, and environmental advocacy groups. The total number of interviewees was twenty-four.

One of her conclusions is that, “...developers in large part were implementing the majority of their mitigation measures.” (Sheeran, page 14) I agree with this...if by majority she means more than 50%. In fact, the percentage is likely quite higher than 50%. However, this could be countered by saying that many mitigation measures simply come with the development process—traffic measures are done as roads are laid out, landscaping is part of most larger developments, but is generally listed as a mitigation measure, etc. Since my investigations focused not on such things, but rather on mitigation measures related to biological resources, which are often not integral to completion of the development itself, I would inevitably find a lower percentage of mitigation compliance than someone who looked at the full range of mitigation measures required of a project. Since, as previously noted, my investigations were not intended to lead to a scholarly paper, I did not keep statistics on mitigation measure compliance.

Ms. Sheeran does discuss which types of mitigation measures typically get implemented and which do not, based on the opinions of her interviewees. I shall list her conclusions below, followed by my opinion based on my own experiences. I agree almost down the line with her conclusions.

Sheeran’s Successful Mitigation Types:

“Development Fees/Engineering Measures”—This category includes “mitigation measures that require the payment of development impact fees or require construction of large engineering projects such as roadway improvements, new facilities, and/or noise walls.” (Sheeran, page 57)

Breon Opinion—True. These mitigation measures often benefit the developers (i.e. increased value of project) and, perhaps more importantly, benefit the Lead Agency. Impact fees typically go directly to the Lead Agency, and facilities such as new parks and roads directly benefit not only the development involved but also often nearby residents. Conversely, if mitigation measures such as traffic improvements are not made, the Lead Agency may have to come back later and make such improvements, absorbing the cost itself.

“Linked to Subsequent Stage of Review”—These are measures linked to a future permit or approval of a subsequent stage of development. (Sheeran, page 58)

Breon Opinion—Partially True. If a permit is required from another resource agency, such as DFG or a Regional Water Board, then theoretically there are two watchers rather than one, and this does lead to greater compliance. However, requiring a permit does not then mean that those subsequent permit conditions will be followed, as SCVAS’ previous work in stormwater permits and my own experience has shown. These outside agencies are also understaffed and too often under-motivated. Measures linked to a subsequent stage of development can fall through the cracks when a Lead Agency does not have an adequate method to convey the requirements from a first set of documents (e.g. CEQA) to a subsequent set (e.g. tentative map)(see above discussion of planning problems I encountered).

“Regional/Controversial Issues”—These measures may be particularly important to a given region (e.g. stormwater to a beach community) or are the subject of particular scrutiny in the project approval process. (Sheeran, page 58)

Breon Opinion—Partially True. I agree regarding regional issues, but my experience has shown that even controversial projects or topics can often be overlooked. I would attribute this to the fact that, after project approval, players move on to the next hot project or topic. If directly adjacent neighbors are involved, they more often stick with a project over time, which Sheeran notes as well.

Sheeran’s Unsuccessful Mitigation Types:

“Long-Term Mitigation”—These measures are typically biologically related and often require on-site or off-site habitat preservation or restoration. With such measures often come long time periods for monitoring. (Sheeran, page 59)

Breon Opinion—True. In my investigations, this is where the environment is losing out the most. First, these measures often involve a significant quantity of resource value (e.g. acres of wetlands or rare species habitat). Lead Agencies will often say that DFG and/or FWS are responsible for these, despite the fact that CEQA is clear that Lead Agencies remain

responsible for all mitigation measures until they are complete. Things that take time are by nature harder to monitor than one-off measures, and focus moves elsewhere. After project approval, lands may change hands from one company to another or from a company to a Home Owners Association, further complicating matters.

“Air Quality Mitigation Measures”—Self-explanatory. (Sheeran, page 62)

Breon Opinion—None. My investigations did not look at air quality measures.

To Sheeran’s above list, I would add a single comment, again based on looking at biological resources. I believe there is a large problem with preconstruction surveys for such resources (e.g. bat surveys in older buildings, active nest surveys during breeding season). If these surveys are in fact being done, they seem to be the documents least often given to the Lead Agencies. Two consultants have told me that the same is true of surveys for archeological resources (e.g. remains of Native American or early Spanish settlements).

Ms. Sheeran comes to many of the same conclusions as to impediments to good mitigation monitoring as have been noted in other papers and my own work. (Sheeran, pages 69-78) First, that many agencies simply do not have the resources or the expertise to monitor projects effectively. Second, that many mitigation measures are designed in ways that make monitoring and enforcement more difficult. Third, that developers are not involved enough in the generation of CEQA documents. This conclusion does not seem to appear in other literature I have read, and certainly many environmental advocates feel that developers are too closely involved in the generation of CEQA documents, thus exerting undue influence. I see both sides. Fourth, that contractors and workers are undereducated regarding mitigation measures. Fifth, that there is an inability to litigate arguably noncompliant mitigation requirements. Sixth and finally, that data management and technological barriers remain a hindrance, perhaps even an increasing hindrance as CEQA documents become more complex.

Sheeran’s most simple conclusion is in her introduction:

“I find that mitigation measure implementation is not uniformly successful. Implementation success relies in large part upon the salience (how important an issue is) and tractability (whether the mitigation may be measured) of the mitigation measure.” (Sheeran, page 6)

Appendix I

Proposed Changes to CEQA and/or the CEQA Guidelines

From the past and current work of the Santa Clara Valley Audubon Society and others, I am convinced that some relatively small changes to CEQA could benefit the state greatly in ensuring that our natural resources are protected. I have approached a State Senator regarding the desire for these changes, but the conversation has not come to fruition. Thus, I make the recommendations here for possible future pursuit.

CEQA changes are notoriously difficult. Because so many development projects in the state fall under the requirements for CEQA review, even small changes are often perceived as having large economic, administrative, or environmental effects. Developers and local jurisdictions typically claim that changes designed to strengthen CEQA will lead to a flood of new lawsuits by NIMBYs wanting no growth in their communities. This concern has largely been dispelled by past CEQA research [see, for example, the CEQA “myths” discussion in *CEQA Deskbook* by Bass, Herson, and Bogdan and the studies mentioned in that publication], but the claim remains vibrant. As a result, I have tried to limit these proposed changes to ones that would clarify existing requirements, rather than add new ones. I asked a number of environmental lawyers, planners, and consultants to make suggestions for CEQA changes. However, a number of those suggestions—such as creating a specific cause of action (i.e. the ability to sue) usable by the public when mitigation measures are not implemented—just seemed too substantial to realistically suggest at this point.

First, the law should state that the term Mitigation Monitoring and Reporting Plan, or MMRP, be the universal term for the document Lead Agencies must adopt to “ensure” implementation of required environmental mitigation measures. This is the term that many consultants, planners, and Lead Agencies are now using. However, as mentioned in the planning section of this report, many agencies do not universally use this term, leading to considerable problems in tracking down exactly which documents contain the required mitigation measures.

Second, the term “periodic reports,” now contained in the law, should be made more specific. I would suggest requiring, at a minimum, annual reports for at least five years from initiation of project construction or until all mitigation measures are completed, whichever comes first. At this point, it’s the Wild West out there in regards to reporting requirements. A Lead Agency that has not a single report years after project implementation can simply claim that reports have not yet been made because the “period” has not yet run. Requiring annual reports for a reasonable amount of time would ensure the public that some documentation exists to show compliance or lack thereof.

Third, the contents of those periodic reports should be better specified. They should correspond to the MMRPs. Currently, reports may come in to a Lead Agency covering one or more aspects of required mitigation, but nowhere is there a requirement that all the environmental mitigation measures required of a project be reported on. Thus, a Lead

Agency could fulfill its requirement of “periodic reporting” with reports tracking only a fraction of the requirements. If an MMRP contains 24 required mitigation measures, then the annual report on that project should contain information on all 24 measures, even if just to say “Completed on [insert date].”

Fourth, the periodic reports and supporting documents should be required to be public documents housed with the Lead Agency or specifying which other government agency houses the documents. Currently, many mitigation reports are done by consultants and housed by those consultants. When asked for such documents, I have found consultants reluctant to turn them over, stating client privilege or simply ignoring my requests. Consultants are not subject to Public Records Act requests, so a community organization cannot get at them directly and must rely on the Lead Agency, or perhaps another government agency, to demand the production of the documents. The Lead Agency is the logical repository for these documents, and they should be available to the public for review. If another agency is responsible for monitoring and enforcement of a mitigation measure, then that agency should be noted in the Lead Agency’s periodic reports on compliance, and ideally compliance documents should be forwarded from that other government agency to the Lead Agency. **Appendix G**

Appendix J

Table of Projects Investigated

The following table summarizes most of the development projects I looked at during this more than two-year project. It does not include much detail; it is intended to show the type and scale of the projects, as well as some of my results. Many of the projects are left with questions or possible future work for SCVAS and others. Bear in mind that I looked only at biological resources and typically not all of those for these projects.

Project Name(s)	Lead Agency (Jurisdiction) and date(s)	Natural Resource Issues ¹	Results ²	Issues Remaining/Notes ³
1. Eagle Ridge (Golf course and residential project)	Gilroy	Trees, Wetlands, Tiger Salamander (CTS), Open	Wetlands and CTS appear complete, w/ records. Open space easement not accepted by	Open space is still theoretically at risk. City will likely not accept easement because of funding concerns. Could find conservation entity

¹ Lists do not include all issues reviewed.

² Where I note “no documentation,” I refer to documentation only for the issues I looked at. Other documentation may exist regarding mitigation compliance for these projects.

³ It is not assumed that SCVAS will continue to pursue all the recommended actions in this column.

		Space	city. Landscape plan—no documentation.	to accept easement.
2. The Institute Golf Course (Golf course and science institute on 192 acres)	Morgan Hill EIR—2004 Permits from 1998-2007	Wetlands, Riparian, Serpentine, Burrowing Owls, Water Quality and Quantity	Off-site riparian and serpentine lands acquired. Off-site riparian restoration success unknown. Owl fee paid (fee lowered improperly at request of developer). Wetlands and riparian mitigation on-site still not complete (2009 and 2010 deadlines). Mitigation deadlines routinely ignored/changed to accommodate developer. Many violations—no enforcement action. City documentation slanted for developer (e.g. all violations were termed “in progress”).	Monitor success of off-site riparian restoration. Monitor remaining deadlines for riparian and wetland mitigations. Work on this project is largely fruitless, as city is in the pocket of the developer.
3. Metcalf Road/Basking Ridge (213 residential units on 250+ acres)	San Jose EIR—2003	Wetlands, Red-legged Frog (RLF), serpentine.	City appears to have allowed building into RLF watershed, violating mitigation requirement. City has no	Track compliance when developer submits documentation. Particular attention to serpentine management, 219-acre open space preservation, and as well as RLF.

			documentation on mitigation compliance. City wrote letter to developer asking for documentation.	
4. Levin Property/Shea Homes/ Basking Ridge (Residential)	San Jose EIR 1996	Wetlands, Riparian, Open Space	Open space was preserved. Wetland and riparian mitigation requirements violated. City had no mitigation monitoring documentation. Wetlands and riparian mitigations now done and seemingly successful.	SCVAS began working on this in 2000. No additional work.
5. Las Llagas Golf Course/Tuers-Capitol Golf Course (180-acre public golf course)	San Jose EIR--1999	Riparian, Water Quality	City violated riparian policy when approving project. City has monitoring documents and mitigations seem to be working.	This site used to be prime habitat, especially for an urban area. City expected revenue from project, but is losing about \$500,000/year. No additional work.
6. Valley Christian School (School and road expansion)	San Jose Project Approval—2000	Serpentine Soils and Endangered Plants	Serpentine mitigation failed, likely due to lack of maintenance. City had no documentation. City eventually sent a letter of noncompliance, and developer has agreed to try mitigation again.	This project took an undue amount of time to deal with, due to city staff neglect. Discussing project with mayor's office and threats of legal action seemed to prod staff into work. New mitigation still needs monitoring. If it fails, off-site acquisition should occur.
7. Dow Drive	San Jose	Serpentine	Riparian setback	Off-site habitat

(Residential)		Soils and Endangered Plants, Riparian Setback	was achieved. Serpentine mitigation failed due to lack of maintenance. City had no documentation. Developer purchased off-site serpentine.	acquisition was achieved through a previous SCVAS lawsuit. I tracked on-site mitigation, which was abandoned, citing off-site acquisition, but city permit still required on-site compliance. No additional work.
8. Cisco Systems Site 6/Alviso (2.3 million square feet of office space on 152 acres)	Alviso/San Jose EIR 2000	Burrowing Owls, Rare Plant (Congdon's Tarplant), wetlands, Open Space	18.5 acres set aside for owls, plants, and wetlands. Wetland and owl mitigation seems successful. Plant mitigation disputed. Open Space buffer to residences and school not fully protected	Open space buffer could be proposed for future development unless preservation is finalized. City consultants disagreed with CNPS as to success of plant mitigation.
9. U.S. Dataports/Calpine Energy	Alviso/San Jose Dataports EIR 2000 Calpine permit 2001	Burrowing Owls, Bay Trail	Burrowing Owl mitigation was supposed to transfer but did not. Same with section of the Bay Trail. Some owl mitigation was completed.	U.S. Dataports project never was built. Calpine built on some of Dataports' land. Some mitigations were to transfer, but seemingly did not. No additional work.
10. Legacy Partners/Cargill—Collishaw Property (1 million square feet of office on 70 acres)	Alviso/San Jose EIR 1998	Burrowing Owls, Open Space, Nearby Wetlands	One-third of site reserved as open space (25 acres). Owl mitigation complete but never attracted owls. Wetlands buffered by open space.	This site violated water quality mitigation requirements during construction (multiple times). Neither city nor Regional Board enforced violations until SCVAS action (resulted in just a \$500 fine). No additional work.
11. Cinnabar Hills Golf Course/Lands of Figgie (Golf course on 347 acres)	San Jose EIR 1996	Wetlands, Riparian, CTS	Riparian restoration completed. Wetlands and	Developer should provide off-site CTS habitat, but refuses. Need to ensure that city

			CTS mitigations incomplete. On-site wetlands water supply issue corrected. City has sent notice of noncompliance to developer on CTS mitigation. Developer disputes claim.	enforces requirement.
12. Ranches at Silver Creek/Cerra Plata	San Jose Project approval-- 1993	Serpentine Soils, Wetlands, Riparian	Mitigation appears to have been completed satisfactorily.	No additional work.
13. Evergreen Specific Plan	San Jose Specific Plan Approval 1995	Riparian	12.6 Acres of riparian restoration never attempted. City had no documentation. City agreed to put \$800,000 into completing restoration. Plans are drafted but problematic.	The City is playing with the numbers here, because their funding will not cover fully restoring 12.6 acres of habitat. Send letter to city regarding this problem and possible additional mitigation. Mitigation is to an extent held up by hydrology problems.
14. King Road Widening (Public works project)	San Jose Negative Declaration— 2003	Riparian	City documentation shows project was completed.	No additional work.
15. Rubino Property—Summerhill Homes (Residential—part of larger property)	San Jose Rubino EIR— 2002	Riparian Setback and Restoration	Riparian setback was achieved, but restoration was never done. City had no documentation. City has sent letter to developer asking for documentation.	Ensure that riparian mitigation is complete and monitored. City review of old projects did not catch this problem.
16. Rubino Apartments (Residential)	San Jose Project approved in 2001	Riparian Setback and	Riparian setback achieved and restoration	No additional work.

		Restoration	planting succeeding. City has documents.	
17. Daisy Hill—Summerhill Homes (Residential)	San Jose	Serpentine Soils and Rare Plants	City has no monitoring documentation. City has sent a letter to developer requesting documentation.	Ensure that serpentine mitigation is complete and monitored.
18. San Jose Generally (systemic concerns)	San Jose	All Mitigation Measures	City has put into place mitigation monitoring fee, but funding is partially misused. City Planning Department IT system changed to include monitoring. City reviewed some old developments for compliance. City posting some monitoring documents online.	Approach city to ensure that monitoring fee goes to monitoring. Recommend to city annual monitoring reports, Planning Commission/Council hearing on monitoring, more monitoring reports online, and program for past project review.
19. Boulder Ridge Golf Course (Golf course on 200+ acres)	Santa Clara County EIR—1993 SEIR—1994 Project Approval—1995	Trees, Water Quality, Wetlands	Water quality and wetlands monitoring documents show compliance. Other evidence disputes this. Trees never planted. County ordered planting of more than 600 native trees.	No additional work. Worked closely with community groups on permit amendment in addition to mitigation monitoring.
20. Stevens Canyon Road Flood Alleviation Project (Public works road project)	Santa Clara County Negative Declaration—2001	Riparian	Riparian restoration plan never implemented	Could monitor restoration site for success. County staff untruthful in responding

			until SCVAS intervention. Implemented in 2007.	to SCVAS on this project.
21. Lexington Quarry (Operation and expansion quarry permit)	Santa Clara County EIR—2005	Noise, Dust, Water Quality, Wetlands	Lexington violated permit conditions often. County’s lax enforcement led to threatened State takeover of permit. County agreed to heightened monitoring and enforcement.	Lexington was only one of several mining permits showing severe lack of oversight by County. System has improved considerably. No additional work required.
22. Corde Valle Golf Course/Lion’s Gate (Golf course, hotel, and 40 homes on 1,680+ acres)	Santa Clara County EIR 1995	Wetlands, Riparian, CTS, RLF, Serpentine	County had little documentation on compliance. Most biologic mitigation measures were violated. All measures now complied with or heading towards compliance.	SCVAS work on this project started in 2001. No additional work required. Public trails could be added to the open space (1,354 acres), per permit conditions.
23. Santa Clara County Generally (systemic concerns)	Santa Clara County	All Mitigation Measures	County has adopted full-cost recovery for many projects. Regular staff updates are presented to Planning Commission.	Recent Planning Commission study session noted improvements. Problems likely exist with many past projects, but County has no funding or system to address this. Could help County address more past problems.
24. Lockheed Site 18 (Industrial)	Sunnyvale EIR—1999	Burrowing Owls, Wetlands, Bay Trail	City does not have pre-construction owl survey but claims no owls were found. My personal recollection disputes this.	Find preconstruction survey and follow-up. Additional owl mitigation may be required.

			Trail seems to be dedicated.	
25. Moffett Field (Specific Plan for expansion and management)	Sunnyvale EIR – 2003	Burrowing Owls	Difference of opinion whether U.S. government violated mitigation requirements in drafting new ground squirrel management plan.	Continue to work with Moffett in protecting owls from land management issues.
26. McCarthy Ranch (Industrial park and commercial on 226 acres)	Milpitas (EIR 1997)	Burrowing Owls	Plans required set aside of 6.5 acres for owls or “passive recreation.” Some open space exists, but not managed for owls or recreation.	Approach Milpitas and developer to see if open lands could be managed for owls.
27. Wildlands, Inc Mitigation Banks/Haera and Brushy Creek (Mitigation sites)	Alameda and Contra Costa County (Various dates)	Burrowing Owls	Mitigation credits sold to many projects in Santa Clara and surrounding counties. Sites are preserved and managed, but owl results are mixed at best.	Determine whether management regime should change and whether mitigation banks are at all useful for Bay Area owl mitigation.
28. DFG Burrowing Owl Mitigation Agreements (Various development projects)	Santa Clara County (Various dates)	Burrowing Owls	Communications with DFG show that owl mitigation agreements were signed and implemented.	Determine success or lack thereof of this type of owl mitigation.
29. Downtown Guadalupe River Flood Control Project/Guadalupe River Project (Flood control project, trail, and other amenities)	Santa Clara Valley Water District EIR/EIS – 2000	Riparian	Riparian mitigation did not meet success criteria, likely due to poor planning	Water District is proposing alternate mitigation. Check status of District efforts.

			assumptions.	
30. Sneckner Property (Four residential units)	San Mateo County Negative Declaration — 1999	Riparian Setback	County has no documentation confirming setback. Trespassing issues prevent conformation of setback.	County should inspect site for compliance with setback.
31. Miscelwitz Property (Residential)	San Mateo County	Riparian Setback	Setback mitigation measure violated on at least one property. County has no documentation. County sent letter to residents asking for access permission to inspect.	Follow-up on county inspection and urge removal of violations.
32. Cypress Walk Residential Development (Residential apartments on 10+ acres)	Pacifica EIR — 2005	Heritage Trees, Wetlands, Raptor Nests	Wetland issue was dismissed as too small. City has no documentation of Heritage Tree Plan or pre-construction nesting surveys.	No additional work.
33. Wind Farm	Alameda County	Bird Strikes	Developer out of compliance with permit requirements. County not enforcing requirements. County had no compliance documents.	County hopeful that developer will enter into lawsuit settlement regarding reducing and compensating for bird strikes. Project dropped due to possible interference with Gold Gate Audubon lawsuit settlement. No additional work. County staff unresponsive to SCVAS requests for information.
34. Pacific	Fremont	Wetlands,	Monitoring	U.S. FWS closely

Commons/Catellus (Mixed use on 768 acres)	SEIR--1996	Vernal Pools, Burrowing Owls, Wildlife Refuge	program seems to have worked well for most natural resources.	monitored this project. FWS has asked that SCVAS or other conservation entity continue monitoring, as original monitoring period is over.
35. Intervening Properties/Braddock & Logan (Residential—part of 767-acre development)	Contra Costa County, near Danville	Unknown	Monitoring documents requested but not yet seen.	Continue to pursue documentation or hand over to another Audubon chapter.
36. Estates at Tassajara Lane (Residential—24 units on 26+ acres)	Danville Project Approval 2001	Wetlands, Riparian	City planning department did not have monitoring documents (e.g. creek improvement plan), but claimed subdivision files would have then. Documents requested.	Continue with city to acquire documents.
37. El Charro (Mixed use on 250 acres)	Livermore EIR—2007	Vernal Pools, RLF, CTS, Riparian, Wetlands, Trees	City planning department had no mitigation monitoring documents. Construction has just begun, so many mitigation measures not yet triggered.	Continue to pursue documentation or hand over to another Audubon chapter.
38. Cantara at Positano/Braddock & Logan (Residential—part of 1132-acre Fallon Village Project)	Dublin Fallon Village EIR--2005	Riparian, Wetlands, CTS, Kit fox, Burrowing Owls	City has turned over relevant MMRPs but is still looking for monitoring documents.	Continue to pursue documentation or hand over to another Audubon chapter.
39. San Juan Oaks Golf Club (Additions to 237-acre golf course on 2000-acre site)	San Benito EIR--2003	Wetlands, Riparian, Water Quality	Golf course revisions not yet under construction.	No additional work.

			County has no monitoring documents on work to date.	
40. San Juan Vista Estates (Residential, hotel, and services on 195 acres)	San Benito EIR—2000	Wetlands, Riparian, Rare Plant and Animal Species	Project was approved but never constructed.	No additional work.
41. Lavaqino General Plan Amendment (Industrial on 34 acres)	San Benito (EIR—2002)	Riparian Setback	County had no monitoring documents. Riparian setback seems to have been achieved.	No additional work.

Appendix K

Photos of Selected Projects