

# Legal and Regulatory Considerations for Land Conservation Science

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# Agenda

- Introduction
- Legal and Permitting Requirements
- Hiring a Professional
- Building in Defensibility of Data
- Recommendations

# Permitting

- Why is permitting required?
  - Resource protection
  - Public safety
  - Also promotes better science
- Who requires a permit? You are likely to run into permitting requirements from:
  - State agencies
  - Local agencies

# Permitting

## ➤ Types of Permits

- Permits for excavations including hand-augered soil borings
- Permits for well/piezometer installation
- Encroachment permits
- Waste discharge permits
- Stream alteration
- Underground Service Alert notification for any excavations including soil borings and wells – this can be a “life or death” task.

# Professionals

- Use of licensed contractors
- Use of licensed professionals
  - Professional Geologists / Certified Hydrogeologists
  - Professional Engineers
  - There are no licensed “hydrologists” in California
  - Licensed surveyors

# Specific Issue – Wells / Piezometers

- California has well standards
  - Example: securing wells
- Local agencies can have more stringent standards
  - 33 counties have well ordinances establishing standards
  - Example: San Mateo County

# Implications of Not Complying

- Personal, professional, and organizational liability
- Organizational reputation if cited for not complying with environmental regulations
- Costs of having to re-do work
- Defensibility of Data / Standard of Care

# Data Defensibility

- Burden is typically on party that claims an impact
  - Technical evidence of impact will need defense
  - “Professional judgment” based conclusion are weaker than those supported by data
    - If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply “taking the expert's word for it.”

*Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319 (9th Cir. 1995)*

# Excluding Evidence

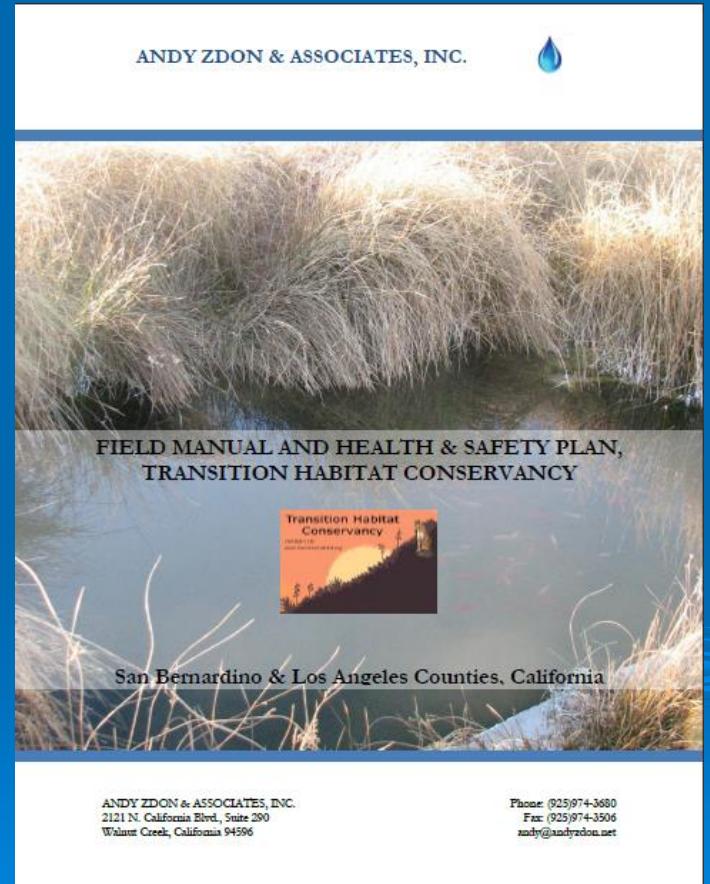
➤ Federal Rule 702 / CA Evidence Code 801(b)

- Can exclude:
  - Matter not reliable
  - Is speculative
  - Reasons unsupported by material relied upon
- “Analytical gap” test
  - Where the expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”.

*General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)*

# Have a Plan

- Objective
  - Why are you collecting data?
  - Is your data sufficient?
- Sampling and Analysis Plan (SAP)
- Quality Assurance Program (QAP)
- Rule 702 requires opinions to be based on sufficient facts or data



# Ensure Data/Analysis Quality

- Training of Staff
  - Consistently Follow Procedures
  - Regular Intervals of Data Collection
  - Database Information
  - Analyze Data
  - Use Statistics
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- Rule 702 requires opinions to be the product of reliable principles and methods

# Professional Oversight

- Rule 702 requires opinion that have reliably applied scientific/technical principles and methods
- Assess potential property impacts
- Guide appropriate data collection
- Develop SAP/QAP that is the “standard of practice”
- Certify data collection and analyses
- Represent technical issues in legal proceedings

# Recommendations

## ➤ *Don't Put Your Land at Risk*

- Limit your risk through the use of permitted procedures
  - Protect the land being investigated
  - Ensure the safety of visitors
  - Collect the information needed to show potential impacts

## ➤ *Don't Waste Time/Money*

- Collect and analyze data correctly
  - Have a plan
  - Ensure quality
  - Professional oversight