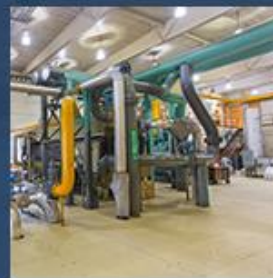


Endowments and Conservation Easements What do they mean to Counties?

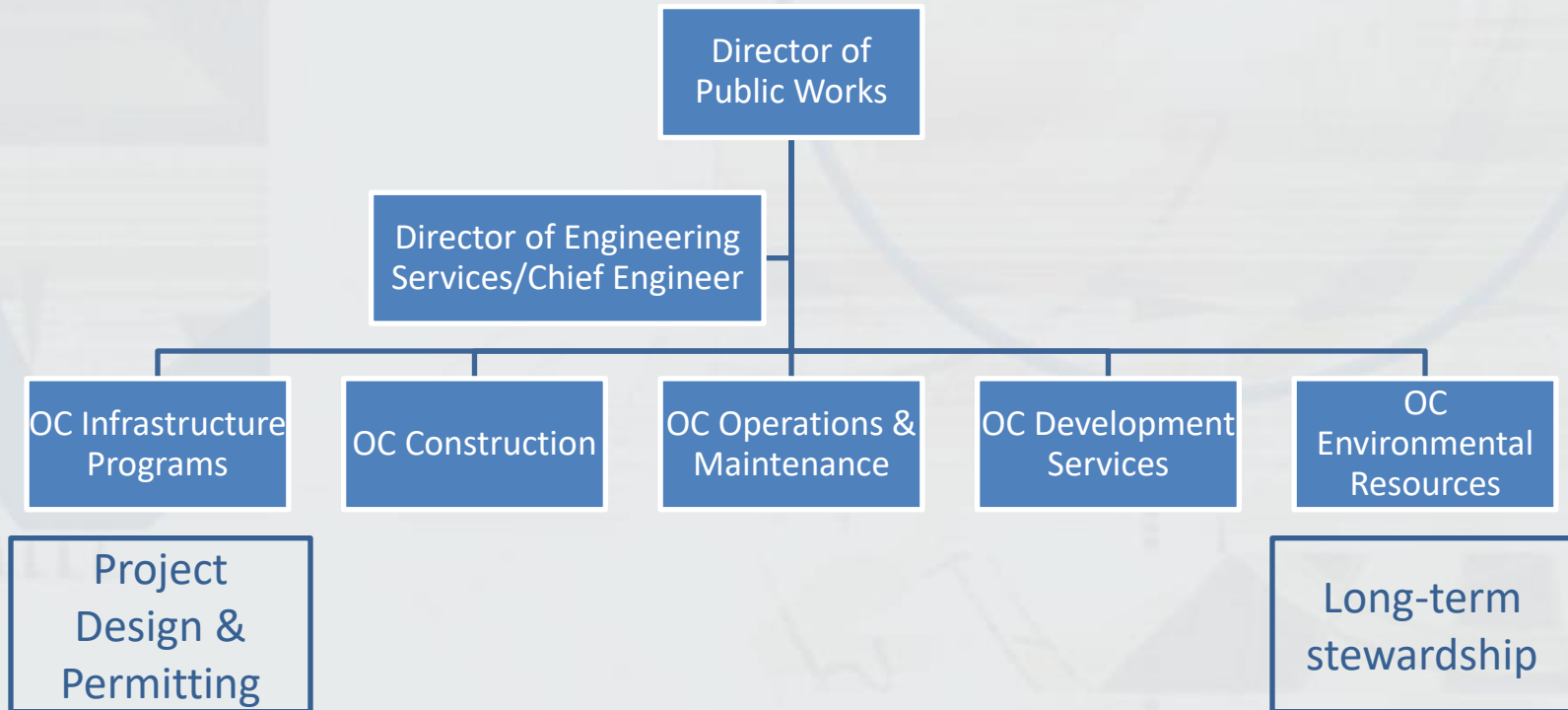


August 23, 2024

CEAC Flood Control & Water Resources Policy Committee

Introduction

Jennifer Shook
Regulatory Compliance Manager
Mitigation Program



Presentation Overview

ENDOWMENTS – When they are required and the impact to Counties

- California Code of Regulations & Fish and Game Code
 - Endangered Species Act / Incidental Take Permit
 - Financial Assurance
- Alternatives to endowments
- Fiscal and other impact to counties



Presentation Overview

CONSERVATION EASEMENTS – The challenge with finding third-party grantees

- Fish and Game Code & California Civil Code
 - Conservation Easements as defined in code
 - The challenge with finding grantees

CASE STUDIES HIGHLIGHTING THE CHALLENGES

NEXT STEPS

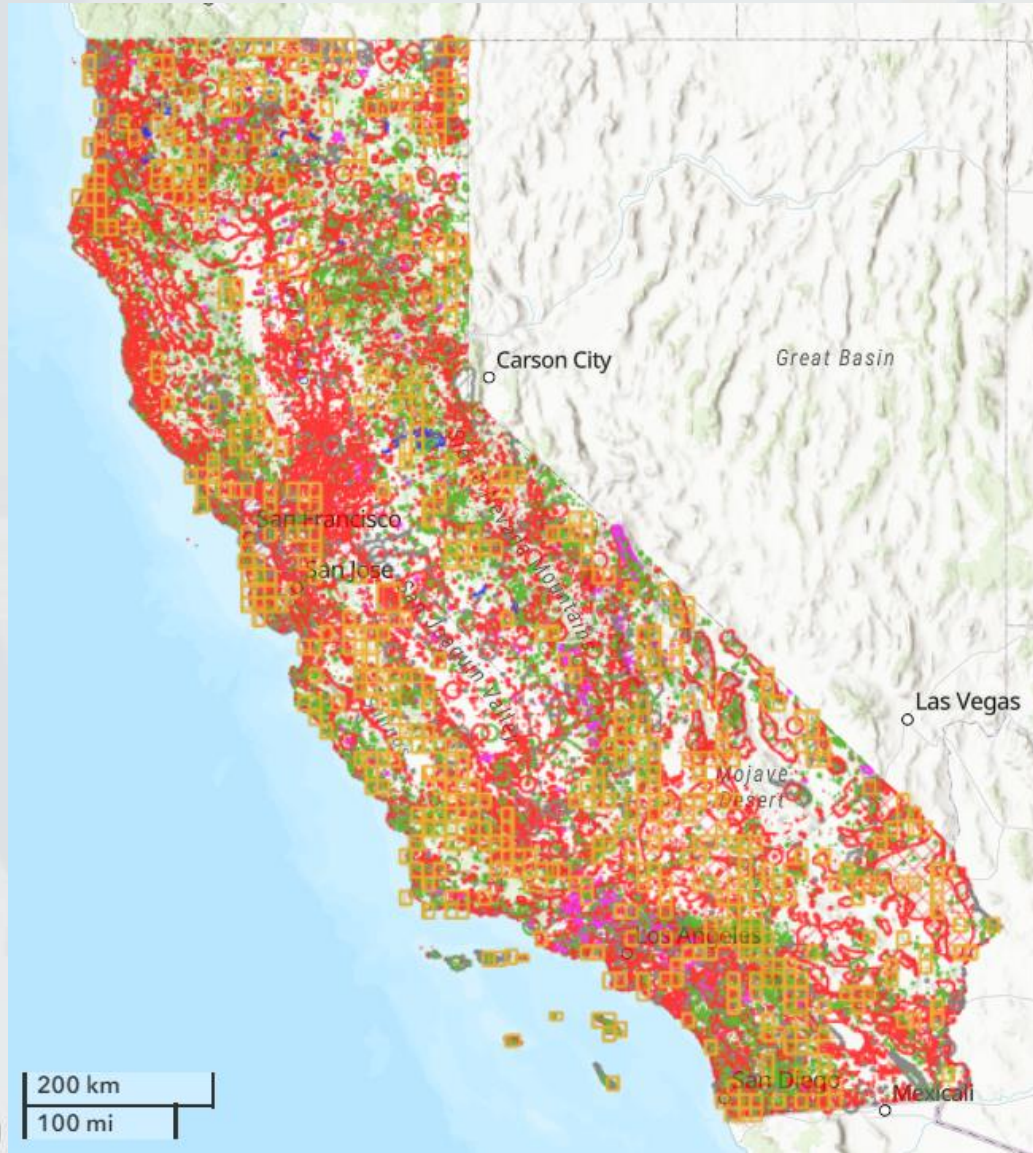


BACKGROUND

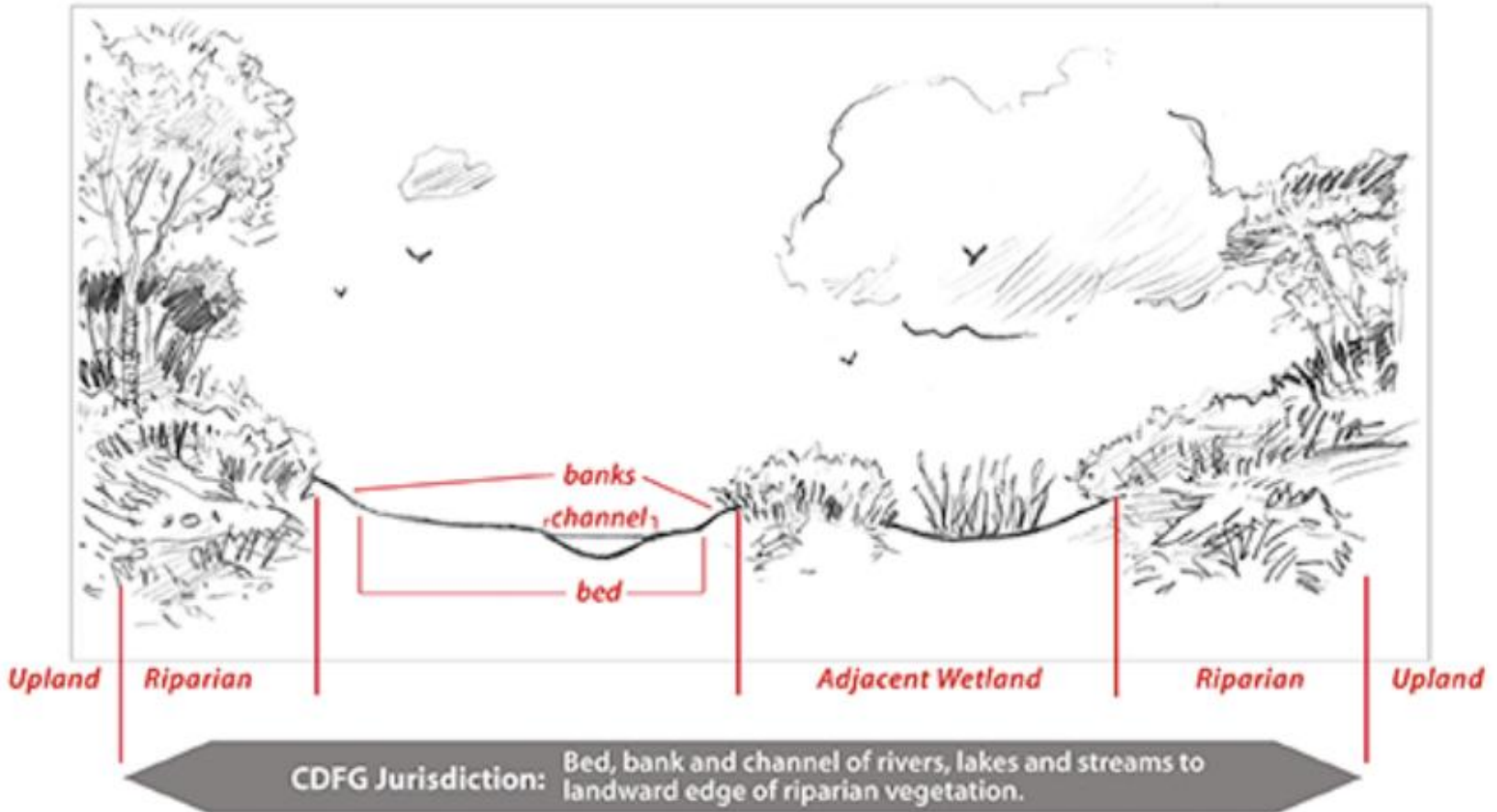


CDFW Jurisdiction - CESA

California Endangered Species Act



CDFW Jurisdiction – Streams/Channels



Source: Wetland Project Permitting Guide; http://pwaportal.ventura.org/ONESTOP/ESD/Wetland_Project_Permitting_Guide_in_Ventura_County.pdf



Little Hoover Commission



The Little Hoover Commission, formally known as the Milton Marks “Little Hoover” Commission on California State Government Organization and Economy, is an independent state oversight agency created in 1962. The Commission’s mission is to investigate state government operations and policy, and – through reports and legislative proposals – make recommendations to the Governor and Legislature to promote economy, efficiency and improved service in state operations.

<https://lhc.ca.gov/>



ENDOWMENTS



Evolution of Endowments

CDFW has required endowments since 1991 to ensure long-term management of mitigation lands. It is well established, and **commonplace for California Endangered Species Act (CESA) permits**, mitigation and conservation bank agreements, and Natural Community Conservation Programs (NCCPs) to require endowments to ensure long-term management. It has been rare for Lake and Streambed (LSA) Agreements to require permanent land protection and associated endowment.

Source: Kevin Hunting, Chief Deputy Director, CDFW; written testimony to Little Hoover Commission; January 31, 2017



California Code Requirements for Funding

“fully mitigated”

“ensure adequate funding”

“description of funding source
and the level of funding
available”



Fully Mitigated Standard

“When a project is done the assumption is it’s a permanent impact for a species. Mitigation has to be permanent, too.”

Source: Steven Ingram, Senior Staff Counsel and Tribal Liaison, CDFW; Little Hoover Commission Report on Improving State Permitting for Local Climate Adaptation Projects (Report #238); June 2017



When and Why Endowments are Required

YES – if not
purchasing
bank credits

Is An Endowment Required?

Yes – if CDFW requires the project proponent to purchase, transfer, or protect lands to mitigate impacts to CESA-listed species.

No – if CDFW requires the project proponent to purchase credits at a conservation or mitigation bank.

YES – to
manage land
in perpetuity

Does CDFW Always Require An Endowment For The Long-Term Stewardship Of Mitigation Lands?

Yes. If CDFW requires a project proponent to purchase, transfer, or protect land to offset adverse impacts to fish and wildlife, state law requires the creation of a fund for the sole purpose of managing that land in perpetuity. That fund must meet the definition of an endowment (Gov. Code, § 65965, subd. (a)) and shall meet the following criteria:

1. The endowment shall be held, managed, invested, and disbursed solely for, and permanently restricted to, the long-term stewardship of the specific property for which the funds were set aside.
2. The endowment shall be calculated to include a principal amount that, when managed and invested, is reasonably anticipated to cover the annual stewardship costs of the property in perpetuity.
3. The endowment shall be held, managed, invested, disbursed, and governed as described in subdivision (a) of Section 65965 consistent with the Uniform Prudent Management of Institutional Funds Act (Part 7 (commencing with Section 18501) of Division 9 of the Probate Code).

In the context of mitigation lands, endowments are restricted and specifically defined in Government Code section 65956 as funds that are conveyed solely for the long-term stewardship of a mitigation property, and permanently restricted to paying the costs of long-term management and stewardship of the mitigation property for which the funds were set aside.



Agency Discretion on Financial Assurance

CDFW requires permittees to provide a performance security to ensure that mitigation obligations are satisfied. While some entities assert that the security may pose a financial burden on them, CDFW is required by the Fish and Game Code to obtain financial assurances to ensure the obligations are timely and successfully implemented.

Government Code section 65966 subdivision (b) states that endowments are not the only method for ensuring funding for long-term stewardship of mitigation land; however, the statute does not clearly define an alternative that is capable of perpetual financial support to maintain mitigation lands. In the absence of an established set of alternative mechanisms, the Government Code reserves discretion to determine the appropriate mechanism to the regulatory agency requiring the mitigation.

Source: Kevin Hunting, Chief Deputy Director, CDFW; written testimony to Little Hoover Commission; January 31, 2017



Alternatives to Endowments - Banks

Animals	Designation	Totals
	State listed – Endangered	55
	State listed – Threatened	43
	State Candidate for listing	10
	<i>Total</i>	108

Listing Status Summary; July 2024

Plants	Designation	Totals
	State listed – Endangered	137
	State listed – Threatened	23
	State listed - Rare	64
	State Candidate for listing	2
<i>Total</i>	226	

Listing Status Summary; July 2024

Species covered by a Conservation Bank
Alameda whipsnake
Blunt-nosed leopard lizard
Burrowing owl
California gnatcatcher
California red-legged frog
Desert tortoise
Englemann oak
Giant garter snake
Longfin smelt
Mohave ground squirrel
Salmonids
San Diego barrel cactus
San Diego thorn mint
San Joaquin kit fox
Swainson's hawk
Tipton kangaroo rat
Tricolored blackbird
Western Joshua Tree
Western Spadefoot toad

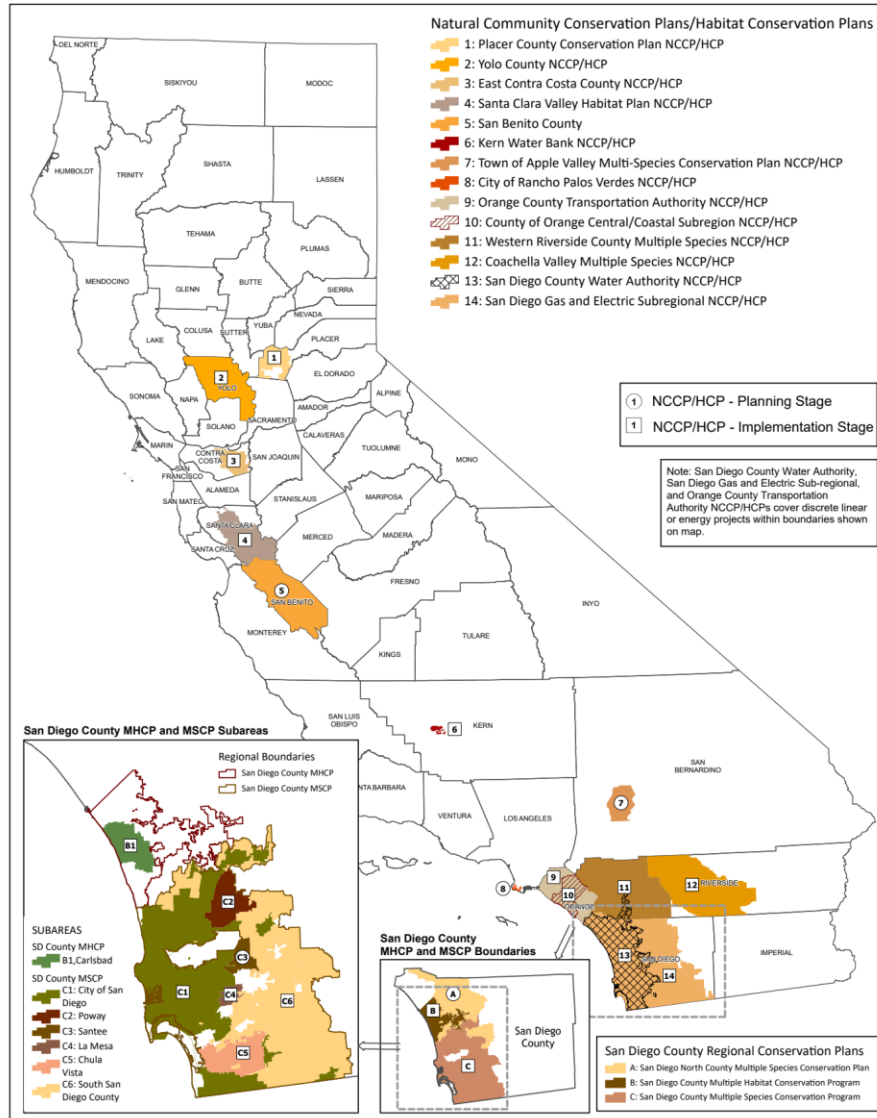
19 species currently have credits available in a conservation bank for purchase



Alternatives to Endowments - NCCPs

CALIFORNIA NATURAL COMMUNITY CONSERVATION PLANS

August 2023



Natural
Community
Conservation
Plans

17 approved
NCCPs

Alternatives to Endowments – Escrow Agreement & Pledge of Revenue

Agreement No. D10-011

ESCROW AGREEMENT

1
2 THIS ESCROW AGREEMENT (hereinafter referred to as "AGREEMENT") for
3 purposes of identification hereby
4 of August, 2010, is by an
5 subdivision of the State of Calif
6 "COUNTY"), the Treasurer-Tax Colle
7 referred to as "ESCROW AGENT"), an
8 Fish and Game (hereinafter referre
9 ESCROW AGENT establishing and the
10 held by the ESCROW AGENT for the p
11 contingency fund equivalent to thr
12 the wildlife corridor habitat miti
13 fully defined herein, associated w
14 Project, establishing the terms an
15 held in the escrow account by DFG
16 matters as are expressed herein.

RESOLUTION OF THE BOARD OF SUPERVISORS OF ORANGE COUNTY, CALIFORNIA August 24, 2010

WHEREAS, County of Orange (COUNTY) intends to construct the Alton Parkway Extension and associated flood control improvements between Irvine Boulevard and Commercentre Drive in the cities of Irvine and Lake Forest (Project) and has negotiated appropriate mitigation for this action with the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service and the California Department of Fish and Game (DFG); and,

WHEREAS, the mitigation for the Project as agreed upon between COUNTY and DFG consists of the construction of the wildlife movement corridor and non-native invasive plant removal and enhancement of off-site mitigation lands pursuant to the Project's final approved Habitat Mitigation Monitoring Program; and,

WHEREAS, this Resolution establishes a Pledge of Revenue to guarantee the successful implementation of the non-native invasive plant removal and enhancement of off-site mitigation lands and long term management of the wildlife movement corridor; and,

WHEREAS, the U.S. Fish and Wildlife Service (USFWS), Carlsbad Office, issued a Biological Opinion (BO) to the U.S. Army Corps of Engineers for the effects of the Project on the least Bell's vireo (*Vireo bellii pusillus*, "vireo") and the Coastal California Gnatcatcher (*Poliophtila californica*, "gnatcatcher") that, based upon the Biological Assessment, determined that the level of anticipated take is not likely to result in jeopardy to the vireo and that there is no impact to gnatcatcher critical habitat; and,

WHEREAS, the BO contains specific conservation measures that are intended to mitigate for the effects of the Project on the vireo and vireo critical habitat including but not limited to the construction of the wildlife movement corridor and non-native invasive plant removal and enhancement of off-site mitigation lands; and,



Alternatives to Endowments – Cash/Credit/Bonds

Financial Assurances

Other forms of financial assurances that CDFW may accept:

- Cash deposit
- Letter of Credit issued by insurance company
- Surety Bond
- Demand Guarantee



Endowments - Fiscal Impacts to Counties

- \$ Acquire land
- \$ Dedicate easement
- \$ 3rd Party holder Land Trust
- \$ Habitat restoration
- \$ Monitoring
- \$ Compliance inspections
- \$ Management
- \$ CDFW processing fees
- \$ Holding fees
- \$ Annual expenses

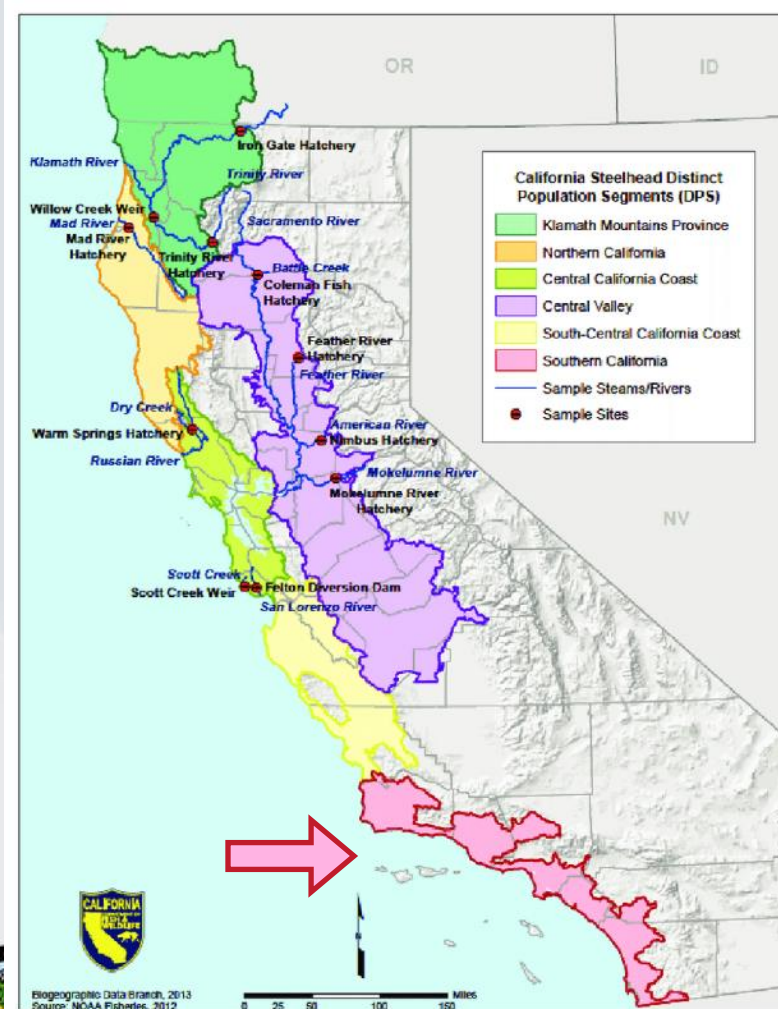
Applicant must determine total lifetime cost of mitigation **in perpetuity** = “Property Analysis Record” PAR

Applicant must submit Financial Assurance upfront ...*and also...* perform the land acquisition and restoration measures.

Even if the County owns the land that will be used for mitigation, their endowment still needs to include funding to purchase an “alternative site” in the event the County-owned property does not work out.

Other Impacts to Counties – New Listings

Southern Steelhead Trout
Added to State Endangered List in 2024



The six steelhead trout District Population Segments and locations of study sampling sites in California.

4 Species of Bumble Bees
Candidate status in 2024



Other Impacts to Counties - Discretion

Lack of standardized mitigation ratio calculations and discretion exercised by each region can lead to differing interpretations across the State, permitting delays, protracted legal reviews and ultimately distrust and overreach.



CONSERVATION EASEMENTS



Conservation Easements

California Code, Fish and Game Code - FGC § 1797.5

(e) "Conservation easement" means a perpetual conservation easement, as defined by **Section 815.1 of the Civil Code**, covering the real property that comprises the bank site.

California Civil Code § 815.1

For the purposes of this chapter, "conservation easement" means any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.



Conservation Easements

Hold or Manage Mitigation Land

Process Updated April 5, 2021

Government Code § 65967(c) requires a state or local agency to exercise due diligence when approving governmental entities, special districts, and non-profit organizations proposed to hold conservation easements (CE) or manage and steward mitigation lands.

When CDFW issues permits for a project, the project applicant may be required to transfer an interest in real property to CDFW or to another entity to mitigate the impact that the project will have on fish and wildlife resources. That interest in real property may involve a transfer of fee title, the granting of a conservation easement, or both.

Pursuant to its regulatory authority under Fish and Game Code, CDFW shall exercise due diligence when reviewing the qualifications of any entity seeking to hold conservation easements for mitigation lands or any entity or individual seeking to manage and steward mitigation lands.

Staff in CDFW regions will review the qualifications of the entity proposed on a project-by-project basis. Because this determination is made on a project-by-project basis, a single entity may be approved to hold one CE or manage certain mitigation lands but denied to hold another CE or manage other mitigation lands.

CDFW may provide a checklist, to entities proposed to hold conservation easements or manage and steward mitigation lands, requesting a list of documents to review the entity's qualifications. Document requests are based on the entity type, previous submittals, and property specific information.

**CDFW no
longer willing
to hold CEs**

CASE STUDIES



Case Study – County of Orange Escrow Agreement

San Diego Creek Emergency Project

- 2003 Emergency Flood Capacity Project
- CDFW issued Consistency Determination
- OC Flood Control District negotiated an alternative form of financial assurance – Pledge of Revenue and Escrow Agreement (\$1 mil).
- Initial mitigation unsuccessful. Proposed new mitigation but CDFW staff stated that they are not allowed to amend a Consistency Determination.
- CDFW currently not willing to claim escrow account to take on replacement agreement.



Case Study – County of Placer NCCP

Placer County Conservation Program

- Adopted/permitted federal Habitat Conservation Plan (HCP) and State-approved NCCP
- 404/401 Programmatic Permits
- In Lieu Fee Program for state/federal compensatory wetland mitigation
- All lands held under these “regulatory” programs/permits are required to have conservation easements with management plans backed by an endowment
- Permits were very challenging to get—competing regulations and objectives
- Endowment was challenging to set up and move out of the County treasury to a third party community foundation in order to achieve better returns



Case Study – County of Los Angeles CE

Conservation Easement on land not owned by the County

County is required to establish a conservation easement on a property that they do not own. They are concerned about being held accountable for something that they are dependent on a third party to pursue.



Case Study – Merced County Permitting Delays

RE-CATEGORIZED

State allegedly ghosted Merced's attempts to get permission to clear creeks for months before the floods

JUNE 11, 2024 • by Jesse Vad, SJV Water



Water surrounds a neighborhood in western Merced after Bear Creek overflowed its banks in January 2023 storm. CITY OF MERCED

SPONSORED



SANTA CLARITA VALLEY
WATER AGENCY

<https://sjvwater.org/state-ghosted-merced-attempts-to-get-permission-to-clear-creeks-for-months-according-to-a-lawsuit-then-the-floods-came/>



Case Study – County of Orange Inconsistent Mitigation Ratio

Addition of rip rap to earthen engineered channels

Initial mitigation ratio was 0.66:1 and 1:1 for impacts to Waters of the State (total impact of 2.97 acres). Mitigation installation estimated at \$1.16 mil over five years (Permittee responsible mitigation).

Additional 0.25-acre of rip rap added to project:

- Purchased enhancement credits from Mitigation Bank
- Required to mitigate at a 2:1 ratio (\$125k)



NEXT STEPS



Next Steps

Endowments

Revisit recommendation #4 from the June 2017 Little Hoover Commission Letter Report (#238):

The Legislature should require state government permitting agencies to develop guidelines that **encourage greater flexibility regarding endowments** to finance mitigation lands that offset impacts of infrastructure projects strengthening California's defenses against climate change impacts. State agencies also should make greater use of alternatives already identified and allowed in statute.



Next Steps

Endowments

Revisit Senator Correa's Bill – SB 1446 (2010)

The County of Orange, with support from the California State Association of Counties, collaborated with Senator Correa to draft SB 1446.

SB 1446 proposed that a local government be deemed to have met the financial assurance requirement if it:

- Certified that it was financially stable and able to pay its debts.
- Appropriated sufficient moneys through its annual budget process to fund the maintenance and management of its mitigation obligations, and the cost of monitoring compliance with, and the effectiveness of, those measures.



Next Steps

Conservation Easements

Use new technology to provide visual oversight of mitigation lands in lieu of a third-party grantee (CDFW would remain a third-party beneficiary on a Restrictive Covenant).



Next Steps

Conservation Easements



Next Steps

Reduce uncertainty from broad discretion

- Develop tools such as a mitigation ratio check list similar to the Army Corps of Engineers.
- Recognition of municipal government appropriations process. Endowments work well for the development community, but not for public agencies.
- Allow for flexibility in the form of site protection [easements] on local government owned land.
- CDFW could become signatory to in lieu fee programs, which operate similar to mitigation/conservation banks but provide better implementation flexibility for municipal governments.



Next Steps

Explore cooperative agreements

There are provisions in the Fish and Game Code that allow CDFW to enter into cooperative agreements with various entities, including federal agencies, other states, political subdivisions of California, and private individuals or organizations. These agreements are aimed at the management and protection of species listed as endangered or threatened under CESA.

As an alternative form of mitigation, CDFW could develop a mitigation fund for species such as the candidate bumble bees to prepare management and recovery plans.



Wrap Up

Build on current momentum of County interest to address challenges on the horizon

1. April 2023 outreach to CSAC on these topics / August collaboration meeting
2. June 2024 collaboration meeting

Participation from the following counties:

- Los Angeles
- Orange
- Placer
- Riverside
- San Diego
- Santa Barbara
- Ventura



Conclusion

- Municipal agencies do not disappear.
- Counties do not have a history of non-compliance with mitigation.
- Counties do not wish to avoid CESA compliance nor avoid mitigation obligations.

The 'ask' of CEAC...

Form a Statewide working group and initiate discussions with the California Natural Resources Agency to address counties concerns.



Thank you!

Thank you for your time today.

I would also like to thank the following individuals for their contribution to this presentation:

Sarah Ahmed – County of Los Angeles

Nardy Khan – County of Orange

Gregg McKenzie – County of Placer

Joan Valle – County of Riverside

Gail Getz – County of San Diego

Andrew Raaf – County of Santa Barbara



Wrap Up

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