

RESPONSE TO LITTLE HOOVER COMMISSION INTEREST NO. 1

History & Overview: A brief history and overview of the California Department of Fish and Wildlife (CDFW) and its permitting responsibilities.

CDFW administers many regulatory programs manifested in over 500 permitting structures that can be broken down into 5 major categories; hunting, fishing, marine commercial and recreational harvest, scientific collecting, and activities occurring on land and water that incidentally adversely affect fish and wildlife. We authorize activities in this last category through several key regulatory programs including Lake and Streambed Alteration (FGC 1600), California Endangered Species Act (FGC 2080), Natural Community Conservation Planning (FGC 2800), Safe Harbor (FGC 2089.2) and Conservation Banking (FGC 1797).

Fish and wildlife protection regulatory programs intersect with virtually every business sector, recreational activity, and planning effort in California. The geographic diversity of the state, coupled with an unusually high rate of occurrence of unique or endemic resources, leads to the application of fish and wildlife regulatory programs throughout the state and in virtually every political jurisdiction from San Diego to Crescent City.

The fish and wildlife regulatory programs that have the highest protection standards in law are often contentious, and can result in permanent protection of land as a compensatory mitigation. Permits issued pursuant to the California Endangered Species Act (FGC 2080) typically require permanent land protection as mitigation for project impacts. This may include purchase of mitigation bank credits, or acquisition of land in fee title or through conservation easements. CDFW's responsibilities under CESA include ensuring that compensatory mitigation for impacts to species listed under the CESA are "fully mitigated" and that the proposed action does not "jeopardize the continued existence" of the impacted species. CDFW issues about 100 Incidental Take Permits (ITPs) each year. Incidental take is also authorized for numerous other projects through the Natural Community Conservation Planning Act.

Under the Lake and Streambed Alteration Program (FGC 1600), CDFW is responsible for conserving fish and wildlife resources by avoiding and minimizing impacts associated with projects that will substantially divert or obstruct the bed, bank, channel, or natural flow of any river, stream or lake; substantially change or use any material from the bed, channel or bank of any river, stream or lake; or deposit or dispose of debris, waste or other material where it may pass into any river, stream or lake. For LSA projects that may substantially adversely affect fish and wildlife resources, an Agreement is entered into between CDFW and the notifying entity. This Agreement, which fulfills a regulatory permitting role, identifies the measures necessary to protect fish and wildlife resources. These measures only rarely require permanent protection of land and generally focus on impact avoidance, minimization, and remediation. CDFW receives an average of about 2,200 Notifications and issues about 1,550 Agreements and Amendments each year.

Attachment I provides a brief chronology of the major fish and wildlife protection statutes and their origins.

Interests & Legal Responsibilities: What are the department's interests in and legal responsibilities for wildlife protection and mitigation of harmful impacts? Please provide any fundamental information which will help the Commission understand the department's role and daily operations within the state.

The mission of the Department of Fish and Wildlife (CDFW) is to manage California's diverse fish, wildlife, and plant resources, and the habitats upon which they depend, for their ecological values and for their use and enjoyment by the public. Additionally, the California Fish and Game Code includes many legislative findings and declarations directing CDFW's responsibilities for holding fish and wildlife in trust for the people of the State of California. Specifically, CDFW is a trustee agency with jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species¹.

CDFW's regulatory programs described above are led by our Habitat Conservation Planning Branch (HCPB) in Sacramento, and extend into each of our seven regional offices. As a headquarters' unit, HCPB provides statewide policy direction and oversight, training, and regular program coordination for regional regulatory staff who work locally with project applicants to implement these programs. Regional staff review permit applications and LSA notifications, consult with project applicants, prepare permits and agreements, conduct compliance monitoring, and ensure compliance with CEQA.

[Additional *Interests and Legal Responsibilities* are covered under *Interest No. 2 below*]

RESPONSE TO LITTLE HOOVER COMMISSION INTEREST NO. 2

Permitting Processes: An overview of the department's permitting processes, especially for those types of climate-related projects described on the first page of this letter.

As described above, CDFW authorizes activities through regulatory programs including Lake and Streambed Alteration (FGC 1600), California Endangered Species Act (FGC 2080), and Natural Community Conservation Planning Act (FGC 2800).

Based on testimony provided at the Commission's October 27, 2016 public hearing on special districts, CDFW understands that the climate-related projects the Commission described include those specific to flood protection. Climate-related projects often include flood protection such as creek channel widening, floodwalls and levees, flood detention basins, overflow channels, and bypass channels.

CDFW can authorize incidental take of CESA-listed species during the course of an otherwise lawful activity (i.e., projects to protect public infrastructure) by issuing either an Incidental Take Permit or a Consistency Determination.

Incidental take permit (ITP). The process begins when the project proponent submits an ITP application to CDFW following regulatory requirements² with the appropriate application fee³. CDFW is mandated to comply with the Permit Streamlining Act (Gov. Code, § 65920 et seq.) to review ITP applications for completeness within 30 days of receipt. For non-complex projects, CDFW is required to approve an ITP application and issue a permit, or deny an application, within 90 days from the date the application was

¹ Fish & G. Code, § 1802

² California Code of Regulations, title 14, section 783.2

³ Fish and Game Code section 2081.2 added by Statutes 2016, Ch. 340, Section 6. Effective September 13, 2016

deemed complete. For complex projects, CDFW may extend the 90-day timeline to 150 days⁴. On rare occasions when CDFW is lead CEQA agency for the purposes of issuing an ITP, the regulations allow CDFW 180 days to issue the permit. Any of these deadlines may be extended if the lead agency for the project has not completed environmental review under CEQA by the time the ITP would otherwise have to be issued.

Prior to issuance, CESA permits often require frequent consultations between CDFW and the permittee. CDFW regularly meets with project proponents to ensure a complete ITP application. CDFW staff may make recommendations over the phone, or in person to discuss information needed in order to deem an application complete. Every ITP application will necessitate some level of CDFW staff consultation at the project site. CDFW will regularly request a site visit to discuss and verify components of the ITP application. These components include, but are certainly not limited to: 1) verification of species absence or presence; 2) verification of the project description and its entire footprint; 3) determination of the adequacy of the proposed minimization and mitigation measures; and 4) determination that the minimization measures are capable of successful implementation while meeting the proponent's project objectives. During site visits, CDFW will view the entire project area and may offer recommendations to avoid impacts to CESA-listed species.

Larger complex projects often undergo substantial changes during the permitting process and therefore necessitate the extended regulatory timeline. For example, a project proponent may request a CESA permit for a bridge project that will ultimately go out for bid. CDFW will work with the project proponent, including consultations and site visits, in order to meet construction schedules. However, following permit issuance, the successful bidding contractor may propose changes to the original project description in order to meet a specified budget. These changes often result in amending the finalized permit, and adding additional CDFW and project proponent resources.

Consistency Determination (CD). If a project proponent has received take authorization from a federal fish and wildlife agency for a species that is listed under both federal and state law, the proponent can seek take authorization from CDFW without obtaining an ITP by seeking a determination that the terms of the federal take permit are consistent with the requirements of state law as well. This process involves a project proponent submitting a request to CDFW's Director to make a determination that the federal document meets the requirements of CESA. This process has a 30-day statutory timeline, which CDFW has met for each of the 285 issued to date.

Lake or Streambed Alteration Agreement (LSA). An entity must notify CDFW before beginning a project that could substantially alter a river, stream, or lake. If after reviewing the notification, CDFW determines that the project could have a substantial adverse effect on fish and wildlife resources; it issues a draft Agreement that includes measures necessary to protect those resources. If the entity accepts the measures, CDFW issues the Agreement after ensuring compliance with the California Environmental Quality Act (CEQA). If there is any disagreement regarding the measures, CDFW and the entity enter into negotiations. If the disagreement cannot be resolved, the entity may request a three-person arbitration panel to settle the dispute, in which case the panel will issue the final Agreement. Fees charged are established in an amount necessary to pay the total costs incurred by CDFW in administering and enforcing the Lake or Streambed Alteration Agreement.

⁴ California Code of Regulations, title 14, section 783.5 (c)(1)(C).

Natural Community Conservation Plan (NCCP). CDFW's permitting process for NCCPs is multifaceted and can take several years to complete. Attachment II has flowcharts showing NCCP-HCP processes and timelines.

Projects Permitted: What are the kinds of projects that require department permits?

Entities planning to carry out projects that may require a CESA Incidental Take Permit may or may not decide to apply for a permit, depending on their understanding of their project's potential impacts, or the risk of not seeking a permit. CDFW cannot compel a project proponent to seek a CESA permit from us; however, they may be in violation of the Fish and Game Code if their project impacts CESA-listed species

There is however a legal obligation to notify CDFW pursuant to Section 1600 before beginning any activity that may substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of any river, stream, or lake. If CDFW determines that the activity may substantially adversely affect fish and wildlife resources, an LSA Agreement will be prepared. Here are the types of projects we have permitted:

Since 1999, CDFW issued the majority of ITPs for:

- Housing/residential projects (19%)
- Energy (10%)
- Road/transportation (9%)
- Oil/gas (9%)
- Water associated projects (7%)
- Mining (6%)
- Commercial development (5%)

LSA Agreements have been categorized by eight different Agreement types:

- Standard Agreement (84%)
- Timber Harvesting (5%)
- Water Diversion/Extraction/Impoundment (4%)
- Routine Maintenance (3%)
- Fisheries Restoration Grant Program (1%)
- Gravel/Sand/Rock Extraction (1%)
- Master Agreement (<1%)
- Master Timber Harvesting (1%)

An LSA Agreement could include any single or multiple project types including, but not limited to:

- Bank stabilization
- Boat dock/pier
- Boat ramp
- Bridge
- Channel clearing/vegetation management
- Culvert
- Dam
- Debris basin
- Diversion/diversion structure

- Fill of wetland, river, stream, or lake
- Geotechnical survey
- Habitat enhancement
- Levee
- Road/trail
- Sand and gravel operation
- Sediment removal
- Storm drain structure
- Utility crossing
- Water crossing

Local & State Agencies Permitted: What local and state government agencies most frequently engage in the department's permitting processes?

The majority of CDFW permits have been issued to the following respective types of entities:

- State Agencies
- Local governments and districts
- County governments
- Private corporations and partnerships
- Private individuals

CDFW has issued a total of 595 ITPs since the program began. Since 2013, East Bay Regional Park District has applied for three ITPs. One of those resulted in issuance of a permit, and the others were deemed as incomplete applications and were not pursued further by the district. Santa Clara Valley Water District has applied for two ITPs since 2011. One resulted in issuance of a permit; the other is in progress.

Permitting Timelines: Please describe reasons why permitting timelines may be extended. Have permitting timelines increased in recent years, as some agencies contend?

Local and state government agencies work with CDFW and other regulatory agencies to obtain permits and other authorizations. Attachment III summarizes permits and associated timelines for several federal, state, and local agencies. CDFW's statutory and regulatory permitting timelines have not increased in recent years. In many instances the permitting process has been prolonged by the following:

- Incomplete notification/application. The timeline begins with a complete application.
- Applicant changes to the proposed project. This requires new designs, analyses, etc.
- Permit condition dispute.
- Agreements between CDFW and the project proponent to extend the CESA permitting process to accommodate analysis of complex projects.
- LSA statute allows for extension of timelines by mutual agreement. Applicant project planning delays and LSA staffing limitations have been the basis for an occasional extension.
- CEQA compliance. CDFW must comply with CEQA before issuance of a permit. In many instances the CEQA lead agency has not yet completed the CEQA process. In few instances, CEQA documents are deemed inadequate by CDFW.

Reimbursable Agreements: Please also describe agency practices of paying for department staff time to process their permits? Which agencies commonly use this alternative?

CDFW has reimbursable contracts⁵ with a few state agencies and public utilities to fund dedicated CDFW regulatory staff to work on their projects. Agencies necessitating dedicated staff are those with long-term projects (i.e., Department of Water Resources, High Speed Rail Authority), and agencies receiving multiple permits per year (i.e., Caltrans). Pacific Gas and Electric Company funds positions to facilitate project review in the interest of public service and safety. All CDFW staff paid for by permittees are supervised by and report to CDFW, not the project proponent.

Emergency vs Statutory Timelines: Please address a complaint by some agencies such as East Bay Regional Park District that they can get emergency repair permits rather quickly, but face long permitting timelines for routine levee maintenance to prevent emergencies.

To CDFW's knowledge, these complaints concern delays that result from compliance with permitting requirements for the United States Fish and Wildlife Service and the United States Army Corps of Engineers, not CDFW. However, we offer some insight on how this may apply to our permits.

Statutory procedures⁶ exist for issuing an LSA Agreement for emergency⁷ work to protect life or property, or repairs to public service facilities to maintain service that may divert or obstruct, use material or deposit material into any river, stream, or lake. An entity simply notifies CDFW within 14 days of beginning the emergency work. For routine maintenance projects with a term of no more than five years, CDFW can issue an LSA Agreement within 90 days of receiving a complete LSA Notification. There are no statutory or regulatory timelines for long term Agreements (> 5 years).

Statutory or regulatory provisions for CDFW to issue emergency permits to take CESA-listed species do not exist. Prolonged CESA permit timelines related to routine levee maintenance projects often result from incomplete applications or permittees wanting to negotiate the permit's conditions of approval. Therefore, in the context of this specific complaint, it appears that the East Bay Regional Park District is erroneously comparing two different types of projects with two distinct permitting authorities.

RESPONSE TO LITTLE HOOVER COMMISSION INTEREST NO. 3

Evolution of Endowment Requirements: An overview of the evolution of endowment requirements as a mitigation tool for wildlife impacts. Roughly, when did this mitigating practice begin? How has it evolved over the years? Has it become commonplace in California?

CDFW has required endowments since 1991 to ensure long-term management of mitigation lands. It is well established, and commonplace for CESA permits, mitigation and conservation bank agreements, and NCCPs to require endowments to ensure long-term management. It has been rare for LSA Agreements to require permanent land protection and associated endowment. Refer to Attachment IV for legislative history on endowments.

What has changed is the set of entities that are allowed to hold the endowments and how the funds are invested. This has evolved from CDFW being the only entity holding endowments in the State Treasury, to a broader set of entities holding endowments. This history is described below.

⁵ Pursuant to Government Code section 11256

⁶ Fish and Game Code section 1610

⁷ As defined in Fish and Game Code section 1601 subdivision (c) and section 21060.3 of the Public Resources Code

In 1991, CDFW began requiring endowments for habitat lands to ensure funding for long-term management of lands deeded to CDFW as a result of a CESA permit or a mitigation agreement. Endowments were originally conceived with the assumption that the interest earned would be used by CDFW to hire staff to manage the habitat lands as an integral part of CDFW's overall lands management program. The practice of requiring funds has enabled full cost-recovery to CDFW for the land management obligations.

Since the inception of this requirement, CDFW has been the primary trustee of endowments, holding them within the Surplus Monetary Investment Fund of the Special Deposit Fund within the State Treasury. Certain non-profit organizations and public entities have been allowed to hold endowments, although CDFW made a policy decision in 2000 that mandated that most long-term mitigation management accounts be held by CDFW.

In 2010, in response to a legislative proposal sponsored by Orange County (SB-1446), CDFW implemented a mitigation land endowment Pilot Program, which allowed National Fish and Wildlife Foundation (NFWF) to also hold the endowments for long-term management of the California Endangered Species Act mitigation lands. The Foundation has served for more than 15 years as a neutral third-party fiduciary that specifically manages funds for the benefit of government stakeholders and has Congressional oversight and accountability. The Foundation is specifically chartered as a quasi-governmental fiscal agent for environmental and conservation purposes and will hold the endowments in trust for the State of California. Under the Pilot Program, funds could be deposited with CDFW or the Foundation, which expanded endowment holding options and provided a greater opportunity for pooled funding, resulting in greater interest earnings and therefore more funding available for on-the-ground management, monitoring, and maintenance of mitigation lands. We believe the pilot program was successful. Under the short duration of the program, 12 project proponents entered into agreements with CDFW and NFWF and deposited a total of 15 million dollars now held in trust by the Foundation.

In 2011 and 2012, SB 436 and SB 1094 were enacted, resulting in an expansion of the list of endowment holders beyond CDFW and NFWF. Pursuant to Government Code section 65968 subdivision (b) endowments can now be held by: 1) the agency or agencies that required the mitigation; 2) the governmental entity, special district, or nonprofit organization that either holds the property, or holds an interest in the property, for conservation purposes; and 3) the governmental entity or special district that retains the property after conveying an interest in the property for conservation purposes if that governmental entity or special district is protecting, restoring, or enhancing the property that was retained.

Endowment Assessments: How does the department calculate the financial amount necessary to sustain permanent mitigation with an endowment?

The permittee calculates the endowment assessment in consultation with CDFW. After a project proponent obtains CDFW written approval of the mitigation land(s) site, long-term management plan, and endowment manager, the permittee prepares an endowment assessment to calculate the amount of funding necessary to ensure the long-term management of the mitigation lands. The endowment assessment is subject to CDFW approval.

Information submitted for CDFW approval from the endowment assessment includes but is not limited to: 1) the capitalization rate from the selected endowment manager for use in calculating the endowment assessment including any additional administrative, periodic, or annual fees; and 2) buffers for endowment establishment and use that will substantially ensure long-term viability and security of

the endowment. The buffers include: 1) a 10 percent contingency added to each endowment calculation to hedge against underestimation of the fund, unanticipated expenditures, inflation, or catastrophic events; 2) an assumption that spending will not occur for the first three years after full funding; and 3) all large capital expenses to occur periodically but not annually such as fence replacement or well replacement, payments are withheld from the annual disbursement until the year of anticipated need or upon request to an endowment manager and CDFW.

Calculating an endowment for land stewardship includes but is not limited to: 1) estimating personnel time for monitoring the site and preparing annual reports; 2) estimating legal costs related to enforcing the terms of the conservation easement; 3) site infrastructure maintenance and replacement (e.g., fencing, roads, culverts); 4) ecological management of the site (e.g., maintenance and improvement of suitable habitat components, listed species monitoring); and 5) occupancy related costs of the site (e.g., property taxes, insurance, utilities).

Endowment funds are intended to provide long-term, yearly funding for the parcels of real property with which they are associated. It is CDFW's expectation that such funds will be managed and invested by the endowment manager in a manner that enhances the likelihood that the initial principal amount of endowment funding for a particular parcel will provide sufficient investment growth and income to pay for required management and maintenance of that property over an indefinite period of time.

The overall objective with respect to the investment of endowment funds is to generate a level of financial support sufficient to pay the annual costs of long-term management for indefinite periods of time on parcels of real property secured or identified as "mitigation parcels" in connection with permits, authorizations, and other proceedings of CDFW. It is CDFW's expectation that these costs will be funded exclusively from the corresponding endowment funds deposited for each parcel and, thus, that no other funding sources will contribute to defraying these costs.

Endowment assumptions are made with the purpose of preserving the endowment's principal to the extent practicable while generating a level of income that will be available to fund land management activities on the mitigation parcels. Endowment funds are invested in a diversified, balanced portfolio that may include fixed income instruments, equity instruments, real assets, alternative investments, and cash. The endowment funds may be invested in any combination of individual securities, separately managed accounts with investment managers, commingled funds, or mutual funds.

SB-1094 (2012) amended the statutes that govern endowments for mitigation lands essentially eliminating the concept of "non-wasting" endowments. Specifically, Government Code section 65966, subdivision (b), paragraph (3) states that [t]he 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) (UPMIFA). One of UPMIFA's key features is that it eliminates the historic dollar value (i.e., initial amount) as the driver of annual spending from the endowment, and expressly allows spending based on appropriate spend rates in times of economic downturn or economic strength, rather than on determinations of "income." As stated in UPMIFA, "UPMIFA improves the endowment spending rule by eliminating the concept of historic dollar value and providing better guidance regarding the operation of the prudence standard. The Act directs the [endowment holder] to focus on the purposes and needs of the [entity] rather than on the purposes and perpetual nature of the fund."

Management of Endowments: Who has managed the endowments over the years and how has that evolved? Have concerns about the required size of endowments cycled up and down as the amount of interest earnings rise and fall?

Under the accounts created by AB 2517 in 2004 within the Special Deposit Fund (i.e., The Fish and Game Mitigation and Protection Endowment Principle Account and The Fish and Game Mitigation and Protection Expendable Funds Account), monies that were received by CDFW for mitigation, including endowment funds, were required to be deposited and held in the aforementioned accounts that were invested in the state's Surplus Pooled Money Investment Account. Interest monies on these mitigation endowment accounts were intended to be used for long-term management, enhancement and monitoring activities on mitigation lands in perpetuity.

In 2008, the CDFW accounts in the Special Deposit Fund contained in excess of \$52 million for approximately 320 separate mitigation lands. However, investment strategies for the Pooled Money Investment Account resulted in a relatively low average rate of return (interest ranged from 1.4% to 4.5% from 2003 – 2008). The lower the interest earned on the endowment mitigation accounts, the less money there is available for these activities and the higher the initial endowment costs are to mitigation land providers. This was particularly problematic prior to the elimination of non-wasting endowments and the added flexibility afforded by UPMIFA.

In recognition of this problem, the Assembly Committee on Water, Parks, and Wildlife sponsored a committee bill in 2006, which would have authorized CDFW to enter into agreements with qualified public entities and nonprofit organizations to hold and manage endowment account funds, enabling the funds to be invested in portfolios with the potential for higher rates of return. AB 2916 would also have established standards for investment managers. That bill passed the Assembly but was held in the Senate Appropriations Committee. Similar legislation, SB 1011 (Hollingsworth) was introduced in 2007 but was also held in the Senate Appropriations Committee.

In 2008 SB 1538 was passed and that bill retained the funds in the State Treasury system, but allowed the funds to be invested outside of the Pooled Money Investment Account, enabling a higher potential rate of return. The State of California and NFWF have managed endowments over the years. CDFW managed mitigation endowment funds for actions subject to permitting under CESA for almost two decades. After a brief trial period, CDFW concluded that it lacked the capacity to perform the due diligence and monitoring necessary to ensure security of endowment funds held by third parties on behalf of the State. Specifically, CDFW could not keep up with the volume of applications received and lacked expertise in some financial matters. In addition, there was wide variation in investment strategies, highlighting risk in ability of some third parties to meet the “in perpetuity” standard for which these funds were collected.

Since the enactment of SB 436 in 2011, and subsequently SB 1094 in 2012, CDFW no longer conducts due diligence reviews of third parties' ability to hold and manage mitigation endowments. SB 1094 and current law⁸ allow entities wishing to hold endowments to self-certify that they are qualified to effectively manage the mitigation funds while complying with reporting and disclosure requirements set forth in the Government Code.

Alternatives to Endowments: Please describe legal alternatives to endowments and the department's use of them, if any.

⁸ Gov. Code, § 65968, subd. (e)

As a condition of approval for an ITP, CDFW has determined that permanent protection and perpetual management of compensatory habitat is necessary and required pursuant to CESA to fully mitigate project-related impacts of the taking on the CESA-listed species that will result by carrying out the permitted activities. To meet this requirement, a permittee can either:

- 1) Purchase acres of listed species credits from a CDFW-approved mitigation or conservation bank, or
- 2) Provide for both the permanent protection and management of mitigation lands and the calculation and deposit of the management funds.

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.

As indicated in the Commission's invitation to this hearing, some state agencies, special districts, local governments, and municipal utilities (collectively referred to herein as Agency or Agencies) have objected to the requirement of providing an endowment. Their reasons include:

- Project construction fund sources prohibit the use of funds for endowments (i.e., tax-free bonds, or stipulations on funding limitations in proposition language)
- Project funds are not available at the time of permitting
- Endowment amounts are too high
- It is inappropriate to set aside large amounts of public funds
- Significant assets or governmental status should allow CDFW to "trust" them to fund ongoing stewardship

Endowment Alternatives

CDFW evaluated the various strategies and initiatives currently available to Agencies to provide for the long-term stewardship of mitigation lands. The options and strategies available to the Agencies are listed below in order of feasibility and availability.

Endowment Provided at Time of Permitting

If an Agency will permanently protect compensatory habitat as a condition of approval under a CDFW-issued permit or agreement, the Agency is required to ensure that the mitigation lands are perpetually managed by a long-term land manager. After obtaining CDFW approval of the mitigation lands, the Agency must provide long-term management funding by establishing a long-term management fund (endowment). The endowment provides annual funds to the land manager for the perpetual management, maintenance, monitoring, and other activities on the mitigation lands.

Conservation/Mitigation Banks

The use of conservation and mitigation banks is a proven alternative to individual project mitigation approaches. Purchase of credits at an approved private bank includes payment of the proportionate share of the endowment. Alternatively, Agencies may also establish mitigation/conservation banks for their own use. Contracting with private mitigation bankers for the services necessary to establish a bank has provided flexibility to the Agencies in funding the necessary endowment. For example, the Department of Water Resources (DWR) has contracted to establish mitigation banks where their funds secure a set number of credits. The contract banker creates a bank larger than DWR's need, and must fund the endowment for the whole site out of the extra credits created and sold.

Participation in Regional Conservation Plans

An Agency can participate in regional habitat conservation plans HCP/NCCPs or HCP/ITPs that cover the Agency's service area or project. There are two ways to participate: as a permittee in partnership with the other plan permittees; or as a special participating entity (SPE). If they participate as a permittee, they are integrally invested in the outcome of the plan, and it can cover all of their covered activities within the plan area for the duration of the permit. If they are a SPE, the plan will include special measures they must comply with (such as fees, avoidance measures, and application process) to obtain their take authority and mitigation under the plan. Long-term management and monitoring of conserved lands must be provided in the regional conservation plan. Depending on the construct of the plan, participation in the plan covers funding for long-term stewardship, and a separate endowment from plan participants is typically not necessary.

Agency Agreements with Local Partners Providing Matching Funds

State transportation and water infrastructure agencies often partner with local or regional counterparts to complete projects. These partnerships typically involve a cost sharing arrangement, and the Agencies have flexibility in creating the terms of the agreements. Such flexibility includes the option for one of the partners to provide endowment funding when the other partner's fund source cannot be used for an endowment. It may also be a solution for providing endowment funds in advance of the availability of expected project reimbursement funds.

Infrastructure State Revolving Fund

A revolving fund would allow the Agencies to obtain a loan from the fund to satisfy their mitigation obligations, including establishing an endowment, and then pay the fund back with project monies when they are available. The California Infrastructure and Economic Development Bank ("I-Bank") was created to serve a variety of public purposes including providing an accessible low-cost financing option to eligible borrowers for a wide range of infrastructure projects (Government Code section 63000 et. seq.). To meet this need, the I-Bank developed its Infrastructure State Revolving Fund ("ISRF Program"). ISRF Program loan funding is available in amounts from \$50,000 to \$25 million, with terms of up to 30 years. For infrastructure projects, the borrower may be any subdivision of a local or state government, including departments, agencies commissions, cities, counties, non-profit corporations formed on behalf of an applicant, special districts, assessment districts, and joint powers authorities within the state or any combination of these subdivisions. The ISRF Program specifically funds 100 percent of project costs including land acquisition, easements, and environmental mitigation measures.

Phased Endowments

An endowment does not have to be funded all at one time as long as a performance security for the endowment is sufficient and in place before project construction begins and take occurs, habitat

mitigation land is protected, and interim management of the mitigation lands is provided from other fund sources until the endowment is fully funded.

Phased endowments could be available to any Agency with the understanding that the long-term costs may be greater than if the endowment was provided in advance. Payments for phased endowments would require an annual adjustment for inflation to ensure that the endowment would have full buying power once it is fully funded. Payments for a phased endowment must also make up for the lost growth and interest due to deposits made over time. The endowment assessment, must account for the additional costs of phasing. In addition, the endowment would not provide for annual costs of management of the mitigation property until three years after it is fully funded to allow it to grow enough so that the principal would not be invaded with the first payments. Thus, the Agency would have to provide annual management funding during the interim period.

Pledges of Annual Funding

Through legislative proposals and other mechanisms, some Agencies have recently proposed a line item in their budget that pledges annual funding of long-term management and monitoring of the mitigation lands. Recent proposals would have placed these funds within unrestricted funding accounts (i.e., general fund) that are not binding or enforceable under state law..

Funding for long-term management from an Agency's general fund lacks certainty that CDFW would be able to collect the necessary monies to fulfill the mitigation obligations for permanent impacts in the event of a default. Should an Agency pledge a budgeted line item and fail to provide the annual funding, CDFW would have no direct and immediate remedy to cure the default once the project is completed, and the Agency has no further incentive to comply. CDFW's only recourse to remedy the default is to pursue administrative or legal action, which requires substantial staff time and resources and has no guarantee of success.

CDFW has determined that adequate funding of long-term management of mitigation lands can only be ensured through establishment of an endowment or similar restricted spending account. Any measure less than an endowment for an ITP or LSA Agreement (when permanent habitat protection is required) does not ensure enforceable funding commitments, and would hinder CDFW from determining the assurance of adequate funding when issuing permits and agreements.

Endowments can be provided through a variety of mechanisms as described above. CDFW is willing to work with Agencies to implement these mechanisms, and to explore alternatives as they become available.

Future of Endowments: Are endowments likely to remain the most common form of mitigating impacts despite recent legislation to explore more alternatives?

Endowments are likely to remain the most common form of providing perpetual funding, and any proposed alternatives must address CDFW's three major concerns:

- Increased workload for CDFW: CDFW issues most ITPs for short-term projects where once a project is constructed, mitigation is provided, and final reports are filed, the permittee typically has no further contact with CDFW. Lack of perpetual funding would necessitate a permanent compliance monitoring connection between the permittee and CDFW to ensure that annual funding for long-term management of mitigation lands is provided at regular, appropriate intervals. CDFW does not have the capacity for a compliance-monitoring program to maintain regular and permanent interaction with permittees that would be exempted from endowment

requirements. Further, CDFW would be required to perform regular due diligence to assess the solvency of a permittee's excess budget reserves.

- Use of unrestricted financial accounts: Funds that are not placed in a restricted account (i.e., endowment or pension fund) allows an entity to freely borrow to make up deficiencies elsewhere. In lieu of a restricted account, a dedicated line item in a budget for mitigation land stewardship provides no provisions for contingency to ensure continued management of the affected habitat mitigation lands should the agency fail to fund its obligations.
- Liability for the State: Eliminating endowments or creating an exemption from establishing any restricted account in this context has the potential to create significant legal and financial liability for the State. In the event the landowner or land manager does not properly manage mitigation lands, fee title for the property reverts⁹ to CDFW. CDFW must then manage the mitigation lands with the funds available in the endowment, or through another funding mechanism. Without a reliable and enforceable mechanism for funding long-term management, CDFW will be at constant risk of having to bear the burden of managing mitigation lands with inadequate funds and could even face the risk of a public trust doctrine lawsuit challenging whether CDFW is adequately managing the property.

Financial Assurances: What is the department's position generally regarding contentions by public agencies that they are reliable, established entities that should be considered differently than development companies that are more likely to come and go?

CDFW's position, in general, is that public agencies and private development companies are not immune to the risks of becoming bankrupt or insolvent. It is important to note that in recent years counties and cities¹⁰ have been involved in bankruptcy proceedings, and that it is not uncommon for special districts to be dissolved, often for insolvency. There is a real and present danger that many different kinds of local governmental entities¹¹ could go bankrupt.

Established entities such as utility companies or special districts also vary in their size and customer base, and may have different levels of revenue reliability. There are approximately 2,109 independent special districts in California.¹² There are numerous concerns and other ramifications if CDFW exempted an entity such as the Santa Clara Valley Water District (2015 annual revenue \$130,483,347) but did not exempt other entities such as the San Juan Ridge County Water District (2015 annual revenue \$22,091)¹³.

Mismanagement of funds by a public agency would result in the State (i.e., CDFW) assuming responsibility for lands with little or no management funding, thereby creating a burden to taxpayers and full mitigation needs potentially going unmet. Conversely, because landholders and land managers have inherently greater liability risks, there have been cases in which endowments held by those same entities have been lost along with the land. CDFW's past practice was to separate the endowment holder from the landholder; however, SB 1094 eliminated this practice by allowing landholders to also hold the endowment.

⁹ Gov. Code § 65967, subd. (e)

¹⁰ Chapter 9 bankruptcies filed for Orange County (1994), Desert Hot Springs (2001), Vallejo (2008), Stockton (2012), Mammoth Lakes (2012), San Bernardino (2012).

¹¹ Pacific Gas and Electric entered bankruptcy under chapter 11 on April 6, 2001. Case 01-30923-M

¹² http://www.csga.net/special-districts/?doing_wp_cron=1481844797.5138249397277832031250

¹³ <https://bythenumbers.sco.ca.gov/Special-Districts-Other/Special-Districts-Non-Enterprise-Activity-Revenues/9yfc-gbmx>

Currently governmental entities, special districts, or nonprofit organizations are holding and managing funds for the long-term stewardship of mitigation properties, but this practice is still vulnerable to the policy and legal concerns noted above. Nevertheless, local agencies and non-profit organizations currently hold endowments for long-term management of mitigation lands, and many more would like to become involved in the practice of holding mitigation funds. Until a similar option becomes available, endowments will remain commonplace.

ATTACHMENT I

Chronology of Major Fish and Wildlife Protection Statutes and Their Origin

1870 - Board of Fish Commissioners, forerunner of the Fish and Game Commission, was established “to provide for the restoration and preservation” of fish in California waters. This was the first wildlife conservation agency in the country, even predating the U.S. Commission of Fish and Fisheries.

1885 - First compilation of fish and game laws were promulgated within the Penal Code.

1909 - Board of Fish Commissioners name changed to the Fish and Game Commission, which reflects the growing importance of game conservation, and non-game birds are protected by prohibiting the take and possession of the nests or eggs of any wild bird in California.

1927 - Newly established Division of Fish and Game, set up within the Department of Natural Resources, assumed administrative functions of the original commission.

1933 - Legislature created the California Fish and Game Code, and deleted fish and game statutes from the Penal Code.

1951 - Reorganization Act of 1951 elevated the Division of Fish and Game to the Department of Fish and Game.

1957 - The legislature added a list of fully protected birds and mammals to the Fish and Game Code, which provided protection to a handful of species believed to be rare or faced extinction.

1961 - The legislature added sections to the California Fish and Game Code requiring any state, local public agency, or public utility whose activities may alter a river, stream or lake to obtain a permit from the department.

1970 - The 100th anniversary of wildlife conservation in California, and the Legislature enacted the California Endangered Species Act (CESA), which preceded the federal Endangered Species Act by three years.

1976 - The legislature amended the Fish and Game Code to designate processes for public and private entities to obtain a streambed alteration agreement, clarify processes for timber harvest plans as they relate to streambed impacts, and to establish an arbitration process in the event the applicant and the department were in disagreement with the proposals to protect fish and wildlife.

1984 - Permitting incidental take of CESA-listed species began when Assembly Bill 3309 (Costa) was approved by Governor George Deukmejian on September 17, 1984. However, CDFW’s authority was limited to authorizing take only for scientific, educational, or management purposes.

1997 - With the approval of Senate Bill 879 (Johnston), CDFW could issue a permit to take a CESA-listed species incidental to an otherwise lawful activity. Since 1997, CDFW may only authorize the take (i.e., hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill) of an endangered, threatened, or candidate species if certain conditions are met. Of those conditions, the permittee shall minimize and fully mitigate the impacts of the authorized incidental take, and the measures to meet this obligation are contained within the incidental take permit. The permittee shall also ensure adequate funding to implement and monitor the minimization and mitigation measures.

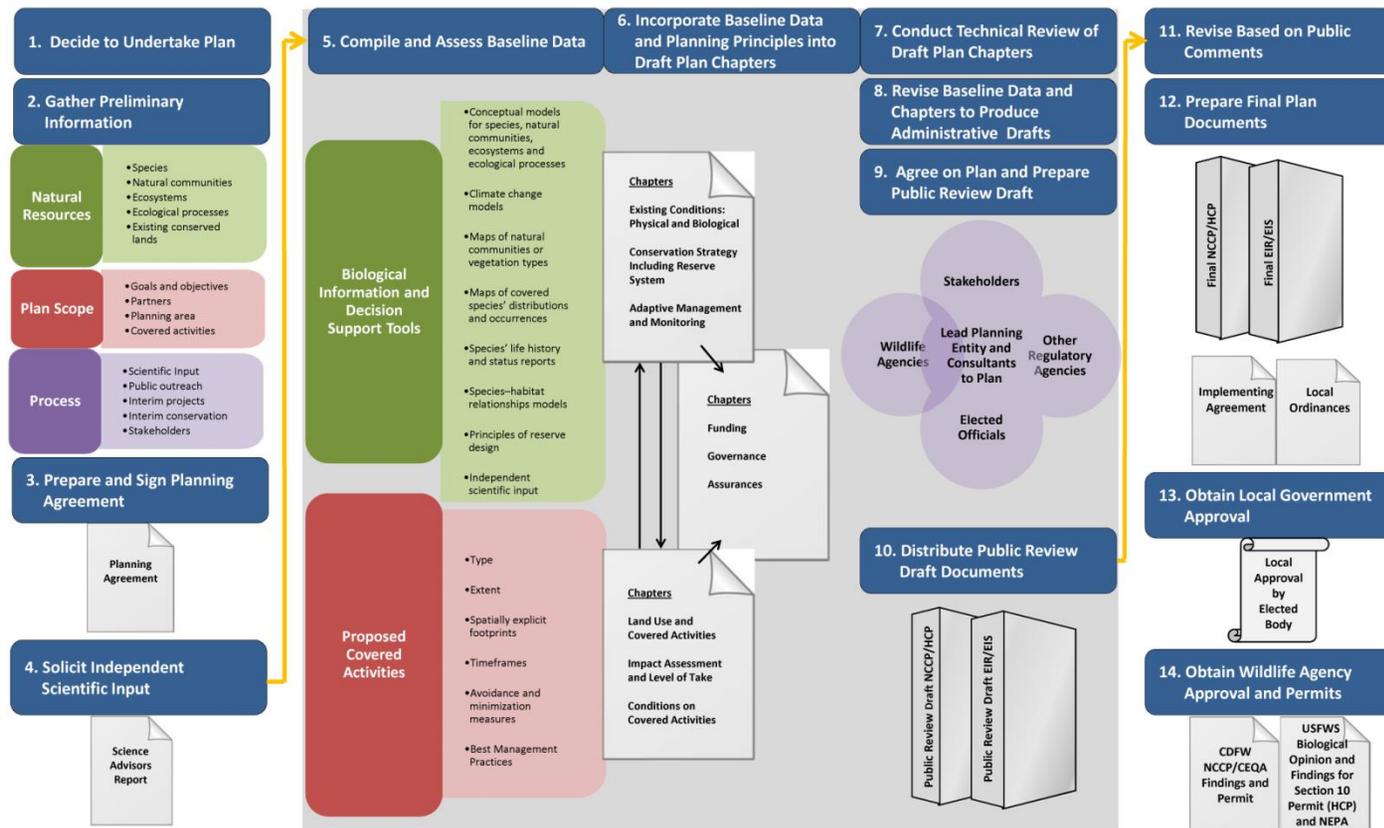
1984 - Amendment to CESA where the Legislature found and declared the following: The Legislature further finds and declares that it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat and that it is the intent of the Legislature, consistent with conserving the species, to acquire lands for habitat for these species.”

2009 - Senate Bill 448 signed on October, 11 2009 enacted the California State Safe Harbor Agreement Program Act, which established a program to encourage landowners to manage their lands voluntarily, by means of state safe harbor agreements approved by CDFW, to benefit endangered, threatened, or candidate species without being subject to additional regulatory restrictions as a result of their conservation efforts.

2010 - AB 2402 changed the name of Department of Fish and Game to the Department of Fish and Wildlife (CDFW). The Blue Ribbon Citizen Commission recommended the name change to more accurately reflect the scope of jurisdiction in the 21st century.

Attachment II

NCCP/HCP Process Flowchart and Normative Timelines*

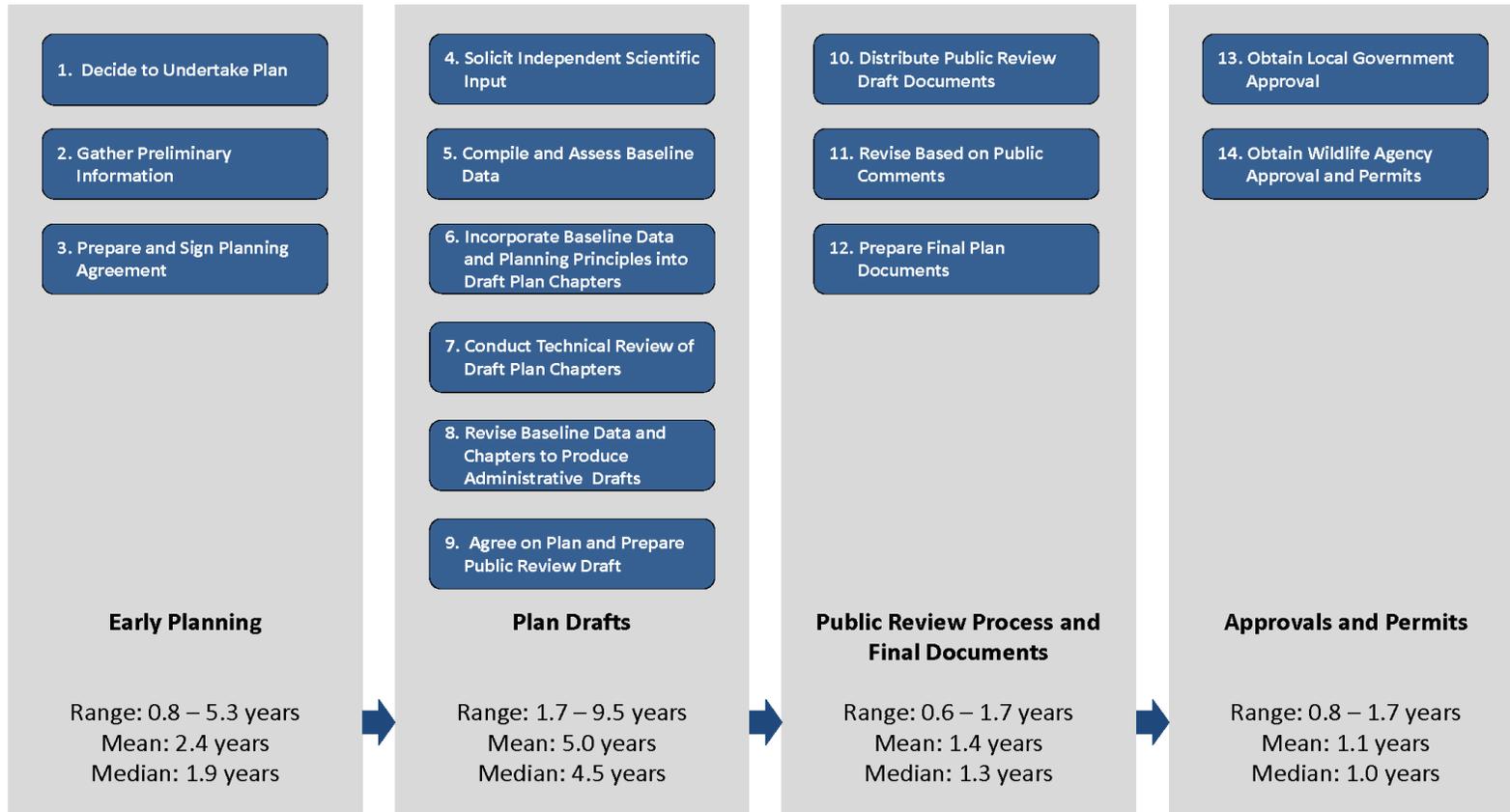


Prepared by: Landscape Conservation Planning Program, Habitat Conservation Planning Branch, California Department of Fish and Wildlife (2015)

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Attachment II (continued)

NCCP/HCP Process Flowchart and Normative Timelines*



* Notes: Analysis is based on seven NCCPs approved and permitted between 1996 and 2013. Number of years from signed Planning Agreement to plan completion did not correlate significantly with # of covered species, # of plan signatories, # of acres, or # of parcels in a planning area. In a recent survey of those involved in conservation plan preparation in California, respondents identified regular wildlife agency engagement and political will/leadership as the highest ranked factors in maintaining momentum during plan development. (California Habitat Conservation, California Department of Fish and Wildlife, and U.S. Fish and Wildlife Service. 2013. [Improving Efficiency During Preparation of Regional Habitat Conservation Plans: Results of Survey #1.](#))

ATTACHMENT IV

Legislative History of Endowments

SB 1020 (Wieckowski, 2016) was sponsored by the East Bay Regional Park District. It would have allowed park and open-space districts, as defined by Public Resources Code section 5500, that also possessed budget reserves in excess of the funds identified to manage mitigation lands in perpetuity would be exempt from providing any other long-term funding mechanism. Specifically, the bill aimed to provide an exemption from funding an endowment for perpetual stewardship of mitigation lands. The bill died in the Assembly Local Government Committee.

AB 1799 (Gordon, 2014) was sponsored by the Santa Clara Valley Water District. It would have allowed governmental and special districts, as defined by Government Code Section 65965 subdivisions (e) and (k) with an “investment-grade” credit rating to secure their promise to fund long-term stewardship through either a resolution or a contract with the permitting agency. The bill was held under submission in the Assembly Appropriations Committee.

SB 1094 (Kehoe) Ch. 705, Statutes of 2012 ‘cleaned up’ and addressed unintended consequences resulting from SB 436 (Kehoe), Ch. 590, Statutes of 2011. It removed the requirement for performing due diligence on endowment holders, revised qualifications to hold specific funds, and added exceptions for federal and other enumerated projects. The Department recommended that the Governor sign SB 1094.

SB 436 (Kehoe, 2011), amended existing law to allow non-profit organizations and specified special districts which hold an interest in mitigation lands to also hold and manage funds set aside for the management, monitoring and maintenance of those lands. This bill allowed non-profit organizations, special districts, for-profit entities, any person, or other entities to hold and manage mitigation lands. This bill also allowed a state or local agency, in fulfilling its own mitigation obligations to: 1) transfer an interest in mitigation lands to a special district or non-profit organizations that meets specified requirements; 2) provide funds to a special district, non-profit organizations, a for-profit entity, a person, or other entity to acquire land or easements; and 3) convey funds for long term management of the mitigation lands to the special district or non-profit organizations that holds the lands. It required a State or local agency to exercise specified due diligence in reviewing the qualifications of non-profit organizations or special districts to effectively manage and steward natural land or resources as well as the accompanying long term management and monitoring funds (endowments).

AB 484 (Alejo, 2011) was substantially similar to AB 444 (Caballero) and passed this Committee on a 9-0 vote. AB 484 was subsequently amended to address a different subject.

SB 1446 (Correa, 2010) sponsored by Orange County proposed establishment of alternatives for financial assurances under the California Endangered Species Act for public agencies that would ensure that those agencies fully fund their obligations on an ongoing basis for habitat mitigation and the maintenance and monitoring of that mitigation. The purpose of this bill was to establish a process by which specified local governments could set aside funds on an annual basis (as opposed to funding an endowment) to pay for its obligations under CESA. The level of annual funding was termed “maintenance of effort.” Eligible public agencies included those without a termination date and which certify to CDFW all of the following: (1) That its accounting adheres to generally accepted accounting practices; (2) That it has not had a budget deficit of greater than 5 percent in either of the two immediately preceding fiscal years; (3) That it is not in default on any outstanding general obligation bonds; (4) That its bond rating is not lower than BBB (if rated by Standard and Poor’s) or Baa (if rated by Moody’s). SB 1446 died on file.

AB 444 (Caballero, 2009), expressly permitted a State or local public agency to authorize a non-profit organizations to hold endowments for land conveyed to mitigate adverse impacts to natural resources

resulting from the development of a project or facility. It required the authorizing State or local agency to review the qualifications of the non-profit organizations and permitted the agency to adopt guidelines to assist in that review. AB 444 specified that it would not apply retroactively to funds already held by CDFW. CDFW recommended AB 444 for veto and Governor Schwarzenegger who expressed support for third party endowment holders but was concerned about the lack of fiscal oversight vetoed it. The Governor directed CDFW to work with the Author and interested parties toward developing an alternative that provides sufficient protections for the financial and environmental resources subject to third-party agreements. The Pilot Program that wrapped up at year-end 2011 reflected CDFW's effort to provide alternative fund management for mitigation lands.

SB 1538 (Steinberg, 2008), authorized the mitigation endowment account funds, currently required to be held in the state's Pooled Money Investment Account, to be moved to another account within the State Treasury system to allow longer-term investments with the goal of increasing earnings over time, as determined by CDFW. Authorized CDFW to retain appropriate investment advisors acceptable to the Treasurer's Office to develop and maintain investment strategy for the accounts.

SB 1011 (Hollingsworth, 2007-2008 Session), would have allowed public entities and non-profit organizations to hold and manage funds that CDFW requires for the purpose of funding long-term management of mitigation lands, subject to specific requirements. These entities had expressed dissatisfaction over the previous performance of CDFW in accounting for funds, the accessibility of funds in terms of timely payment and consistent yearly funding for land management, and inability of CDFW to yield higher interest rates. The entities indicated they believe that, working in cooperation with CDFW, they can reduce and/or minimize the costs of long-term fund management, provide consistent funding due to the higher interest rates than CDFW, and set standards and guidelines to ensure that monies necessary are protected for land management in perpetuity. CDFW recommended Support with Amendments on this bill and shortly thereafter, it died on the Senate Appropriations Committee Suspense File.

AB 2916 (Assembly Water, Parks and Wildlife Committee 2006), contained provisions similar to AB 2517. CDFW recommended a position of Support with Amendments, but it was never approved. The Assembly passed AB 2916, but it died in the Senate Appropriations Committee because of several concerns raised by Committee members and/or staff.

AB 2699 (Emmerson, 2006), would have required an entity that accepts responsibility for the preservation and maintenance of mitigation land to create a management plan and conduct annual biological studies. It would also have required CDFW to conduct annual audits to ensure that all long-term management monies are used for habitat management and preservation on or relating to the specific mitigation land. CDFW recommended an Oppose position on the bill, which was subsequently amended into a mitigation lands intent bill. The bill died on the Assembly Floor Inactive File.

AB 2746 (Blakeslee, Chapter 557, Statutes of 2006), expressly permitted a State or local public agency to authorize a non-profit organization (as defined) to hold fee title to, or a conservation, or open-space easement over land conveyed to mitigate adverse impacts to natural resources resulting from the development of a project or facility. It required the authorizing State or local agency to review the qualifications of the non-profit organizations and permitted the agency to adopt guidelines to assist in that review. CDFW developed review guidelines for NPO applying to hold fee title to or a conservation easement for mitigation lands. CDFW recommended the Governor sign AB 2746.

AB 2517 (Berg, Chapter 427, Statutes of 2004), was sponsored by CDFW to create the Fish and Game Mitigation and Protection Endowment Principal Account and the Fish and Game Mitigation and Protection Expendable Funds Account. This bill allowed CDFW to deposit monies received pursuant to a variety of permits and agreements. It required CDFW to deposit long-term management funds and specified that accrued interest is available to CDFW upon appropriation to fund long-term management, enhancement, monitoring, and enforcement activities on mitigation lands. The bill was necessary to

respond to concerns from the Department of Finance that clarification of CDFW's method of accounting for long-term management funds was needed.