



COUNTY OF ORANGE  
**BOARD OF SUPERVISORS**

ROBERT E. THOMAS HALL OF ADMINISTRATION  
333 W. SANTA ANA BLVD.  
10 CIVIC CENTER,  
SANTA ANA, CALIFORNIA 92701

November 4, 2008

The Honorable Thomas W. Mayfield  
District 2 County Supervisor  
Stanislaus County  
1010 10th St., Ste. 6500  
Modesto, CA 95354

RE: Habitat Mitigation Financial Assurance Requirements

Dear Chair Mayfield:

In the last few months, the County of Orange has become aware of a change in state policy related to financial assurance for habitat mitigation projects that will have a significant financial impact on cities and counties. The change significantly increases the obligations of public agencies to provide financial assurance for habitat mitigation projects which can result in detrimental effects on the economy of local governments and agencies.

The purpose of financial assurance is to ensure that the California Department of Fish and Game (CDFG) will have sufficient funding available to complete habitat and project mitigation should the project proponent default and fail to complete the required mitigation. To ensure that there is sufficient funding available CDFG has insisted that project proponents, including public agencies, place up to 100% of the mitigation cost in an escrow fund to cover establishment, monitoring and maintenance of the mitigation. This means that the funds can be held for up to 5-7 years past the construction of the mitigation site and are in addition to the public agency's cost for implementing the mitigation plan.

In addition, CDFG can also mandate that a project proponent provide an endowment to cover the in-perpetuity maintenance and monitoring of the mitigation site for a period of time no less than 100 years. Project proponents are being asked to fund an endowment large enough that the annual interest will cover the annual long-term maintenance and monitoring costs for the site. CDFG has suggested that applicants must write CDFG a check for the total amount of the in-perpetuity costs without a financial agreement between the applicant and CDFG. CDFG would then hold the endowment indefinitely with little control by the applicant as to how the money is spent.

Under these two requirements, the County of Orange has estimated that as much as \$54 million may be tied up in mitigation escrows and endowments as a result of currently anticipated road and flood control projects and as much as \$7 million may be held as a result of future waste management and recycling projects. It is important to note that this \$61 million is in addition to project construction costs and is a freezing of funds which would otherwise be available for other essential public works projects necessary to improve public safety and the environment.

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Overall, these financial assurance requirements are burdensome on public agencies who in tight financial times have limited funds to complete essential road, flood, and public infrastructure projects. Further, these requirements are unnecessary given that CDFG already has the authority to issue substantial fines and penalties to ensure that public agencies complete their mitigation projects.

The County of Orange has prepared, and enclosed with this letter, a briefing paper that provides greater detail on these two policies, as well as two Excel Spreadsheets, that can be used to determine the amount of funds your agency may be required to place into escrow in order to demonstrate financial assurance in both the short-term and in-perpetuity for habitat mitigation projects. We would greatly appreciate you taking the time to calculate what your financial obligations may be and e-mailing your findings to [John.Arnau@iwmd.ocgov.com](mailto:John.Arnau@iwmd.ocgov.com) so that we can begin to understand the state-wide impact of these policies.

At the present, the County of Orange is contemplating proposing legislation that would amend the California Fish and Game Code by adding language to exempt a city, county or a public agency with the authority to levy and collect taxes and fees, from the requirement to demonstrate adequate funding to implement compensatory habitat mitigation projects.

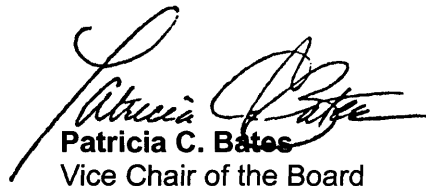
If you would like to discuss this issue further or if you would like more information, please feel free to contact either John Arnau, Habitat Manager for OC Waste & Recycling Department, at (714) 834-4107 or via e-mail at [John.Arnau@iwmd.ocgov.com](mailto:John.Arnau@iwmd.ocgov.com), or Vince Gin, Interim Manager of Project Management for the OC Public Works Department, at (714) 834-5732 or via e-mail at [Vincent.Gin@rdmd.ocgov.com](mailto:Vincent.Gin@rdmd.ocgov.com).

Thank you in advance for your response.

Very truly yours,



**John M.W. Moorlach**  
Chairman of the Board



**Patricia C. Bates**  
Vice Chair of the Board

Enclosures

cc: Chairs, Board of Supervisors California Counties  
CEO/CAOs, California Counties  
Directors of Public Works, California Counties  
Members, Orange County Board of Supervisors  
Thomas G. Mauk, County Executive Officer

ATTACHMENTS AVAILABLE  
FROM YOUR CLERK

## THE HIDDEN COSTS OF MITIGATION

All public agencies in California know that they will be required to mitigate the impacts of their major public works projects and that this may involve improvement or replacement of habitat. Not all public agencies will realize that there are significant short term costs to this process and that the California Department of Fish and Game believes that the local agencies need to support the mitigation forever once they have initiated it. This position has been incorporated in agreements imposed as part of the permitting processes related to the public works project and its mitigation.

Imagine the following scenario: a County is working on a major public health and safety project which involves significant earth movement and includes work in a drainage and therefore requires a permit from the California Department of Fish and Game to allow it to move 7 endangered plants that are located in low quality habitat with little chance of long term survival to an area well populated with such plants in a habitat that maximizes chances for long term survival that is also away from the area of proposed disturbance. Now imagine the County's surprise when DFG says that, once the move is made, it must pay to have the plants maintained in the new site for a period of 7 years at a total cost of approximately \$130,000. Then imagine the further surprise when the County is also told by DFG that there will be no permit until the County endows a fund for the maintenance of the 7 plants in perpetuity at an estimated cost of \$200,000 which can never be refunded to the County, must be replenished if used and yet may never be used. This is all justified because once upon a time, an underfunded private developer promised to do mitigation and then went out of business without completing the work.

These additional costs, which increase exponentially with the size of the project, force California public agencies to decide whether they can afford to carry out public works project that help to provide for the health and safety of the community when these incremental costs are so large.

In order to develop property that contains wetlands/riparian resources, a project proponent, including public agencies, must obtain a federal permit from the U.S. Army Corps of Engineers (Corps) which must consult with United States Fish and Wildlife Service (FWS) regarding impacts on and potential take of endangered or threatened species and state permits from the California Department of Fish and Game (CDFG) and the Regional Water Quality Control Board (RWQCB). In order to develop property that contains a federal or State-listed plant or animal species, the project proponent must obtain a permit from FWS or CDFG. To obtain these permits, the project proponent must prepare a mitigation plan that will fully compensate for the lost habitat. The project proponent must also provide financial assurance for the implementation of the mitigation plan. The purpose of the financial assurance is to ensure that, should the project proponent default on its obligation to fully implement the mitigation, sufficient funds exist so that the Corps, CDFG or RWQCB can use the funds to carry out the remainder of the mitigation obligation.

In order to demonstrate financial assurance for habitat mitigation projects, a project applicant, including a public agency, must provide matching funds in the form of an escrow account or letter of credit that guarantees that the mitigation work will be completed. The mitigation work is deemed complete when the vegetation within the mitigation site is fully mature and established which generally takes approximately five years. Once the federal and state resource agencies confirm that the mitigation site is deemed complete and finished, the remaining of the financial assurance funds are returned to the project applicant. This process can take much longer than five years, due to environmental conditions that may cause poor mitigation site performance.

The second part of demonstrating financial assurance is the requirement for an in perpetuity endowment. This is a requirement that has evolved from CDFG interpretation of the State Endangered Species Act. It requires that a project proponent, including a public agency guarantee that the mitigation site will be maintained forever by providing financial assurance in the form of an endowment in the form of a payment to CDFG. The endowment can be millions of dollars for each project, and the funds will never be returned.

OC Public Works and OC Waste & Recycling have analyzed the financial cost of these financial assurances for habitat mitigation projects. OC Public Works has estimated that as much as \$54 million may be required for future Road and Flood projects. OC Waste & Recycling has estimated that as much as \$6.9 million may required for future OC Waste & Recycling projects.