

Date of Hearing: June 15, 2016

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Susan Talamantes Eggman, Chair

SB 1020 (Wieckowski) – As Amended April 19, 2016

**SENATE VOTE:** 38-0

**SUBJECT:** Land use: mitigation lands.

**SUMMARY:** Specifies an additional action that park and open space districts may take in order to meet mitigation obligations. Specifically, **this bill:**

- 1) Adds to existing law, which provides that, if a state or local agency, in the development of its own project, is required to protect property to mitigate an adverse impact upon natural resources, the agency may take any action that the agency deems necessary in order to meet its mitigation obligations, including, but not limited to, a number of items. This bill adds to this list of permissible activities, as follows: if the local agency is a park, park and open space, or open space district formed pursuant to Public Resources Code 5500, et al. (5500 districts), it may possess budget reserves in excess of the funds required to do all of the following:
  - a) Meet mitigation obligations;
  - b) Retain permanent stewardship and maintenance staff to manage the resource;
  - c) Maintain mitigation obligations consistent with permit requirements; and,
  - d) Ensure that if the mitigations are not maintained, the state will not incur any financial liabilities from the lack of mitigation.
- 2) Finds and declares all of the following:
  - a) The Department of Fish and Wildlife (DFW) construes Sections 65966 and 65967 of the Government Code to require all entities, including public entities and private businesses and nonprofit corporations, to set aside restricted endowments to guarantee the stewardship of lands where conservation easements have been required;
  - b) In the case of the East Bay Regional Park District (EBRPD), which is a nonenterprise, independent special district with its own taxing authority and elected board of directors, whose sole purpose is to acquire and manage land for open space, public recreation, and natural resource protection, endowment requirements need additional consideration. For the reasons set forth below, a special statute is necessary with respect to the EBRPD;
  - c) Requiring entities established pursuant to Section 5500 of the Public Resources Code, such as the EBRPD, which employs permanent police, rangers, and stewardship staff, to fund endowments effectively doubles the cost burden on local taxpayers for managing specified habitat enhancements or conservation lands;

- d) Requiring this agency to mitigate for its own public projects and permanently put local tax dollars in restricted endowment accounts increases the costs and taxpayer obligations by millions of dollars;
- e) The EBRPD is specifically required to manage public parklands consistent with its master plan, as well as state and federal regulatory requirements;
- f) Furthermore, the EBRPD's ability to manage land for the benefit of protected species and habitat has been recognized by DFW, which has authorized the EBRPD to hold and manage mitigation lands for third parties and the state;
- g) Permanently obligating local taxpayer funding toward endowment accounts will significantly reduce the funds available to invest in stewardship staff and the appropriate management of habitat sensitive public lands;
- h) Consistent with existing law, the Legislature affirms the authority of DFW to require local agencies to establish endowments for the ongoing care and maintenance of lands and projects resulting from mitigation practices; and,
- i) It is the intent of the Legislature that DFW, as part of mitigation and resulting endowment practices, administer Section 65967 of the Government Code so as not to unnecessarily obligate public resources for activities otherwise performed as part of an agency's ongoing responsibilities and operations.

**EXISTING LAW:**

- 1) Requires, pursuant to the California Endangered Species Act (CESA) and DFW regulations implementing CESA, DFW to find that the taking of an endangered species has been fully mitigated before DFW issues an incidental take permit. A permit applicant must ensure adequate funding to implement the mitigation measures required under the permit and to monitor compliance with, and the effectiveness of, those measures.
- 2) Provides that, if a state or local agency requires a project proponent to transfer property to mitigate any adverse impact upon natural resources caused by permitting the development of a project or facility, the agency may authorize a governmental entity, special district, a nonprofit organization, a for-profit entity, a person, or another entity to hold title to and manage that property.
- 3) Defines "endowment" to mean the funds that are conveyed solely for the long-term stewardship of a mitigation property.
- 4) Requires a mitigation agreement to govern the long-term stewardship of the property and the endowment.
- 5) Requires any conservation easement created as a component of satisfying a local or state mitigation requirement to be perpetual in duration, as specified.

- 6) Requires, if an endowment is conveyed or secured at the time the property is protected, all of the following to apply:
  - a) 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;
  - b) 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; and,
  - c) The endowment shall be held, managed, invested, disbursed, and governed, as specified, and consistent with the Uniform Prudent Management of Institutional Funds Act.
- 7) Requires, if a local agency holds the endowment, the local agency to do all of the following:
  - a) Hold, manage, and invest the endowment, as specified;
  - b) Disburse funds on a timely basis to meet the stewardship expenses of the entity holding the property; and,
  - c) Utilize accounting standards consistent with standards promulgated by the Governmental Accounting Standards Board or any successor entity.
- 8) Provides, if a state or local agency, in the development of its own project, is required to protect property to mitigate an adverse impact upon natural resources, the agency may take any action that the agency deems necessary in order to meet its mitigation obligations, including, but not limited to, the following:
  - a) Transfer the interest, or obligation to restore and enhance property, to a governmental entity, special district, or nonprofit organization that meets specified requirements;
  - b) Provide funds to a governmental entity, nonprofit organization, a special district, a for-profit entity, a person, or other entity to acquire land or easements, or to implement a restoration or enhancement project, that satisfies the agency's mitigation obligations; and,
  - c) Hold an endowment in an account administered by an elected official provided that the state or local agency is protecting, restoring, or enhancing its own property.

**FISCAL EFFECT:** None

**COMMENTS:**

- 1) **Bill Summary.** This bill attempts to create an alternative to endowments that EBRPB can use as a financial security to meet its requirements when development on its lands requires environmental mitigation. The bill adds to an existing code section that states that, if a state or local agency, in the development of its own project, is required to protect property to mitigate an adverse impact upon natural resources, the agency may take any action that the

agency deems necessary in order to meet its mitigation obligations, including, but not limited to, a number of items. This bill adds to this list of permissible activities, providing that, if the local agency is a park and open space district (5500 district), it may possess budget reserves in excess of the funds required to do all of the following:

- a) Meet mitigation obligations;
- b) Retain permanent stewardship and maintenance staff to manage the resource;
- c) Maintain mitigation obligations consistent with permit requirements; and,
- d) Ensure that if the mitigations are not maintained, the state will not incur any financial liabilities from the lack of mitigation.

The bill makes a number of findings and declarations regarding the impact of endowment requirements on EBRPD and declares the intent of the Legislature that DFW, as part of mitigation and resulting endowment practices, administer existing law governing mitigation requirements so as not to unnecessarily obligate public resources for activities otherwise performed as part of an agency's ongoing responsibilities and operations. This bill is sponsored by EBRPB.

- 2) **Author's Statement.** According to the author, "In recent years, open space and parks districts have been required to set aside endowment funds for the long-term management of mitigation lands. Endowment funds are secured in a 'lock-box' and essentially serve as a guarantee that land will be permanently protected. Requiring these districts to spend general fund monies to steward and operate public lands in addition to setting aside permanent endowment funds is inefficient and does not further the purpose of preserving open space and is duplicative of the districts' sole purpose for existing.

"In cases such as the East Bay Regional Park District, which has an over 80 year history of responsible fiscal and environmental governance and a dedication policy to steward parklands in perpetuity, it is unreasonable to require districts to set aside mitigation funds which could be better used for staffing to actually manage protected land."

- 3) **Background.** Under existing law, public agencies that conduct or approve projects that have significant environmental impacts are required to obtain permits from various government agencies. As a condition of receiving the permits, the public agency is required to mitigate for the environmental impacts. The mitigation may take the form of setting aside other resource conservation lands. When lands are set aside in mitigation, the law requires that the mitigation lands be protected in perpetuity.

An endowment provides a means of ensuring that funding will be available to provide for the long-term stewardship of the mitigation lands in perpetuity. Typically, the interest on the principle is used to fund the annual management costs.

If an entity fails to meet its mitigation obligations, the land and the cost of maintaining it revert to the state.

- 4) **DFW and Incidental Take Permits (ITPs).** Existing law grants DFW the authority to issue ITPs for species listed under CESA that will be affected by a development project only if certain criteria are met. These criteria include, among others, that the impacts of the authorized take are minimized and fully mitigated; and, that adequate funding is provided to implement the required minimization and mitigation measures and to monitor compliance with and the effectiveness of the measures. Existing law grants DFW the authority to determine the terms and conditions of the permit, which must ensure that the criteria for issuing ITPs are met.

Measures to minimize the take of species covered by an ITP and to mitigate the impacts caused by the take will be set forth in one or more attachments to the ITP. This attachment will generally be a mitigation plan prepared and submitted by the permittee in coordination with DFW staff. The mitigation plan should identify measures to avoid and minimize the take of CESA-listed species and to fully mitigate the impact of that take.

These measures vary from project to project, and often include endowments for management of the lands in perpetuity. While applicants may propose alternative strategies for minimizing and fully mitigating impacts, DFW must be able to conclude that the project's impacts are fully mitigated and the measures, when taken in aggregate, meet the full mitigation standard.

If all mitigation and monitoring will not be completed prior to the start of activities that will affect CESA-listed species, a trust account or other form of security acceptable to DFW must be established to ensure that funding is available to carry out mitigation measures and monitoring requirements in the event the applicant fails to complete these activities. DFW generally requires that the performance security be in the form of an irrevocable letter of credit, surety bond, a bank trust (or escrow) account, or another form of security approved in writing in advance by DFW's Office of General Counsel.

- 5) **Recently-Listed Species and Impact to EBRPD.** Approximately five years ago, a species of salamander (the California tiger salamander) was added to CESA's listing of threatened species. Last year, DFW issued an ITP for that species (and the Alameda whipsnake) for a project that will restore ponds and construct recreational facilities in the district's Vargas Plateau Regional Park. To mitigate this take, the permit allows EBRPD to either purchase covered species credits from a DFW-approved mitigation or conservation bank, or to permanently protect and manage habitat management lands. The latter option requires EBRPD to establish an endowment fund.

There is an apparent disagreement between DFW and EBRPD regarding the necessary amount for this particular endowment, which the ITP estimates at approximately \$47,700, but EBRPD estimates at \$600,000. According to EBRPD, the amount is still being negotiated between the parties and an endowment has not been established to date.

In addition, there is dispute regarding EBRPD's anticipated endowment requirements during the next five years, which the district has calculated at \$9.75 million for 16 projects (including the Vargas Plateau project).

6) **Policy Considerations.** The Committee may wish to consider the following:

- a) **Ongoing Discussions.** According to the sponsor and opponents, discussions are ongoing between them and DFW to determine an alternative funding mechanism that is agreeable to all parties. A coalition letter from the California Council of Land Trusts, the Center for Natural Lands Management, Defenders of Wildlife, the Nature Conservancy, and the Wildlife Heritage Foundation dated June 10 states, "DFW made a commitment (last month) to convene a working group to consider and develop a longer-term solution while working with the sponsors to resolve their specific issue. It is our understanding DFW has recently taken steps to fulfill these commitments...(A) number of concepts exist that would directly address the issue raised by the proponents.

"The endowment issue is complex in terms of financial tools, assurances, legalities, enforcement, criteria, eligibility, authorities of different types of entities, short- and long-term resources, how to bind future governing bodies of an agency, and how enforcement of legal defense are funded in the absence of endowments. These complexities cannot be addressed within the few remaining months of this legislative session. In a further expression of faith on this issue, DFW committed to a short-term commitment to annual management funding (instead of an endowment) for the sponsor for up to a two-year period to provide the parties sufficient time to secure a longer-term fix." Given these ongoing discussions, the Committee may wish to consider whether this bill should proceed concurrently, or whether it is premature to enact legislation on this issue.

- b) **Endowments and Alternatives.** The purpose of endowments is to ensure guaranteed funding for the perpetual stewardship of mitigation lands. Endowments are generally accepted as the most conservative, secure funding source when compared to other funding sources for mitigation lands. The Committee may wish to consider whether alternatives to endowments provide adequate financial protections to ensure that mitigation requirements will be fulfilled in perpetuity and not become responsibilities of the state.
- c) **Slippery Slope.** The proponents of this bill argue that parks and open space districts, because of their mission and goals, should not be required to set aside endowments. The Committee may wish to consider whether an exemption from endowment requirements for park and open space districts is merited, and whether it will invite other agencies to seek similar or identical exemptions.
- d) **Drafting Questions.** This bill adds language to an existing section in the Government Code that states (emphasis added):

"If a state or local agency, in the development of its own project, is required to protect property to mitigate an adverse impact upon natural resources, the agency *may take any action that the agency deems necessary in order to meet its mitigation obligations, including, but not limited to, the following:*

- i) Transfer the interest, or obligation to restore and enhance property, to a governmental entity, special district, or nonprofit organization that meets specified requirements;

- ii) Provide funds to a governmental entity, nonprofit organization, a special district, a for-profit entity, a person, or other entity to acquire land or easements, or to implement a restoration or enhancement project, that satisfies the agency's mitigation obligations; and,
- iii) Hold an endowment in an account administered by an elected official provided that the state or local agency is protecting, restoring, or enhancing its own property.

It is not clear that existing law, or this bill, abrogates any permittee from its "mitigation obligations" as required by a permitting agency. If existing law does allow an agency to meet its mitigation requirements by taking "**any** action that the agency deems necessary...**including, but not limited to**" the three existing options, this bill is unnecessary. On the other hand, if existing law allows these listed items to be pursued only if they meet the agency's mitigation obligations, this bill would not nullify an agency's obligations to meet the requirements of a permit. The Committee may wish to consider whether this bill, as drafted, achieves the intent of the proponents.

- 7) **Previous Legislation.** AB 1799 (Gordon) of 2014, would have exempted a governmental entity or special district from the requirement to provide an endowment for long-term stewardship of mitigation lands if the entity provided evidence that it possessed an investment-grade credit rating and provided a resolution or contractual agreement to enforce the mitigation requirements. AB 1799 was held in the Assembly Appropriations Committee.

SB 1094 (Kehoe), Chapter 705, Statutes of 2012, as a technical clean-up to SB 436, modified provisions related to mitigation agreements and the entities that may hold endowments dedicated to mitigation lands, and expanded the eligible entities authorized to hold title, manage property, and hold endowments related to mitigation lands.

SB 436 (Kehoe), Chapter 590, Statutes of 2011, authorized a state or local agency to allow a qualified and approved nonprofit organization or special district to hold property and long-term stewardship funds to mitigate adverse impacts to natural resources caused by a permitted development project.

AB 484 (Alejo) of 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.

AB 444 (Caballero) of 2009, would have clarified that funds set aside for long-term management of mitigation lands conveyed to a nonprofit organization may also be conveyed to the nonprofit, and would have authorized the nonprofit to hold, manage, invest, and disburse the funds for management and stewardship of the land or easement for which the funds were set aside. AB 444 was vetoed by Governor Schwarzenegger because of the lack of adequate fiscal assurances.

AB 2746 (Blakeslee), Chapter 577, Statutes of 2006, and AB 1246 (Blakeslee), Chapter 330, Statutes of 2007, clarified the authority of state and local agencies to allow nonprofit land trusts to accept and hold mitigation lands.

SB 1011 (Hollingsworth) of 2007, would have allowed DFG to authorize a local public entity or a nonprofit to hold and manage mitigation endowment funds, subject to specified conditions. SB 1011 was held in the Senate Appropriations Committee.

AB 2916 (Water, Parks and Wildlife Committee) of 2006, would have authorized the Department of Fish and Game (DFG – now named DFW) to enter into agreements with eligible nonprofit organizations to hold and manage endowment accounts, subject to specified standards. AB 2916 was held in the Senate Appropriations Committee.

- 8) **Arguments in Support.** The East Bay Regional Park District, sponsor of this measure, states, "Mitigation for habitat impacts and endowments are important tools for ensuring proper stewardship of California's natural resources. For 82 years, EBRPD has been trusted with the responsibility to manage habitat and parklands for the benefit of the public. EBRPD has been a strong partner with the state in ensuring proper mitigation, and actually holds endowments for projects in the East Bay.

"EBRPD's ability to manage land for the benefit of protected species and habitat has been recognized by the CDFW, which has authorized EBRPD to hold and manage mitigation lands for third parties and the state. CDFW asserts, however, that when EBRPD implements a project on its own land (i.e. a three acre staging area) it must mitigate, manage the mitigation AND lock up general fund operational dollars in an endowment.

"Requiring Public Resource code 5500 entities – such as the EPRPD, which employs permanent police, rangers and stewardship staff – to fund endowments would effectively double the cost to local tax payers for managing specified habitat enhancements or conservation lands. It would increase tax payer obligations by millions of dollars AND significantly reduce the funds available to actually carry out proper stewardship and appropriate management of the very sensitive habitats we are all seeking to protect. Permanently restricting funds in endowments also limits the District's overall ability to fund critical infrastructure projects and open space acquisitions. It is the fiduciary equivalent of robbing Peter to pay Paul.

"EPRPD is looking forward to working with committee, staff and members of the Legislature to explore solutions which encourage the CDFW, as part of mitigation and resulting endowment practices, to exercise discretion and creativity in administering this section of law. As stewards of the public's financial resources, the Legislature has an obligation to ensure tax dollars are wisely used by Public Resource Code districts to fulfill their ongoing responsibilities and operations."

- 9) **Arguments in Opposition.** The California Council of Land Trusts, Center for Natural Lands Management, Defenders of Wildlife, Sequoia Riverlands Trust, Sierra Foothill Conservancy, Solano Land Trust, the Nature Conservancy, and the Wildlife Heritage Foundation, in opposition, write, "...our strong objection to this bill is that it inevitably opens the door to a myriad of exceptions for every agency not wishing to meet mitigation endowment requirements – a policy that has been rejected on three previous occasions in both houses of the California Legislature.

"Decades of state policy have resulted in the basic principle of mitigating the loss of, or damage to natural resources when a project is developed. One typical result is the setting aside of land that is equivalent in size and natural resources quality as the land being lost or damaged. The issuance of a building or other permit is based on the mitigation being performed and continuing to exist in perpetuity. In order to provide the funds necessary for the long-term stewardship of that mitigation land, the project proponent can be required by the permitting agency requiring the mitigation to convey funds that are managed as an endowment...

"SB 1020 will inevitably exempt public agencies, including special districts such as water or parks districts, from permitting agencies imposing obligations to ensure the ongoing management of mitigation lands. Annual budgets by entities within these categories can, and do, vary dramatically from year-to-year. Additionally, statutorily providing this exemption creates an un-level playing field in which one class of project proponents is treated differently from other project proponents.

"Government Code Section 65966(b), which was enacted into law four years ago by SB 1094 (Chapter 705, Statutes of 2012), expressly provides that other methods of funding for the long-term stewardship of the property shall not be precluded as funding options (such as performance bonds, for example) for the long-term stewardship of the mitigation property. Yet, SB 1020 jumps completely past other funding mechanism options to completely exempt selected public parties from any form of dedicated financial assurance for mitigation lands."

10) **Double-Referral.** This bill is double-referred to the Water, Parks and Wildlife Committee.

#### **REGISTERED SUPPORT / OPPOSITION:**

##### **Support**

East Bay Regional Park District [SPONSOR]  
Santa Clara Valley Water District  
Save Mount Diablo

##### **Opposition**

California Council of Land Trusts  
Center for Natural Lands Management  
Defenders of Wildlife  
Sequoia Riverlands Trust  
Sierra Foothill Conservancy  
Solano Land Trust  
The Nature Conservancy  
Wildlife Heritage Foundation

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