

To: Department of Fish and Game Staff

Subject: POLICY FOR MITIGATION ON PUBLICLY OWNED,,
DEPARTMENT OWNED, AND CONSERVED LANDS

The Department of Fish and Game (Department) is often faced with development project proposals that seek to mitigate for impacts to fish and wildlife resources through restoration or enhancement of lands that are publicly owned or already protected for conservation or other purposes. There has been significant discussion within the Department about the appropriateness of such mitigation on Department and other conservation lands since the mid-1990s. Mitigation has been proposed for Department lands, Bureau of Land Management lands, and existing mitigation lands.

The appropriateness of such proposals has been addressed by the Department's Lands Committee, Banking Policy Team, and Habitat Conservation Supervisors. These discussions have resulted in issue papers that address the benefits and drawbacks of mitigating on already-protected conservation lands. Recent discussions have been in response to: 1) the regulated community seeking to restore or enhance habitat as mitigation on publicly owned and conserved lands, and 2) Department managers seeking to situate such mitigation on Department lands to enhance or restore degraded habitats, and provide a mechanism for funding long-term management and maintenance of these lands. This would be consistent with established management objectives for the particular site.

The policy statement below addresses those situations where the Department has regulatory or approval authority over the mitigation, and/or where the mitigation site is proposed on publicly owned, Department-owned and conserved lands. This policy only addresses the use of Department-owned and conserved lands for mitigation in the form of restoration and enhancement. It is not appropriate to allow the use of Department-owned and conserved lands when mitigation requires the preservation or protection of additional acres of land.

POLICY STATEMENT

To assure that mitigation is implemented in a way that best serves California's fish and wildlife resources, the Department's policy for mitigation on publicly owned, Department owned and conserved lands is as follows:

Mitigation for impacts to fish and wildlife resources may occur on publicly owned, Department owned, and conserved lands if it has been determined by the Department that: 1) the mitigation is consistent with requirements of

the law under which the mitigation is being sought; 2) its relative value as mitigation is equal to or greater than it would be if the same mitigation were situated on non-public or non-conserved lands; 3) it results in a clear and quantifiable improvement or positive change above that currently present or reasonably expected to exist under current conditions on the site; 4) the future uses of the land, including encumbrances or easements, will not preclude or diminish the mitigation; 5) the mitigation will not preclude, diminish or interfere with the funding or purpose of acquisition, encumbrances, or management plan for the property; and 6) it will not result in a net loss of existing conservation values.

The Department has developed a flow chart to help evaluate whether proposed mitigation is consistent with the policy. The flow chart provides a step-wise process for Department staff to follow to make the determination.

IMPLEMENTATION GUIDANCE

The policy for mitigation on publicly owned, Department owned, and conserved lands applies when such mitigation results from an environmental document prepared pursuant to the California Environmental Quality Act (CEQA), a Lake or Streambed Alteration (LSA) Agreement issued pursuant to Fish and Game Code section 1600 *et seq.*, or a California Endangered Species Act (CESA) Incidental Take Permit (ITP) or Consistency Determination (CD) issued pursuant to Fish and Game Code sections 2081(b) and 2080.1 respectively.

CEQA Mitigation

The Department may have little or no discretionary approval authority over CEQA mitigation measures that do not take place on Department lands or do not require permitting by the Department. The Department may support such mitigation in those situations where mitigation is proposed on publicly owned or conserved lands, the Department's input is requested, and the proposed mitigation is consistent with this policy.

LSA Mitigation

For LSA mitigation the Department shall include reasonable measures necessary to protect the resources affected by the project or activity. Such protection is based on project and site specific conditions and may include habitat restoration, rehabilitation and/or protection on a temporary or permanent basis. Project proponents may request that mitigation requirements to restore or rehabilitate habitat occur on publicly owned or conserved lands, or the Department may determine that the fish and wildlife resources will be best served by placing the mitigation on publicly owned or conserved lands. In these cases, the mitigation may proceed if it is consistent with the policy.

CESA Mitigation

CESA requires, among other things, that the impacts of authorized take be minimized and fully mitigated, the measures required to meet this obligation shall

be roughly proportional in extent to the impact, and that all required measures shall be capable of successful implementation (Fish and Game Code Section 2081(b)).

The Department has interpreted the loss and degradation of habitat to be prohibited under CESA if the destruction results in the death of listed fish, wildlife or plants, and such mortality is a foreseeable and natural consequence of the habitat modifications.

Lands with habitats that may be rehabilitated, restored, or preserved and maintained to fully mitigate for the impacts of take must be protected through fee title, transfer or conservation easement to an appropriate conservation entity to ensure long term preservation and successful implementation of the mitigation.

The fish and wildlife resources or environments replaced or substituted for those impacted must be maintained in perpetuity. There may be cases where some impacts of the take are temporary such that the credit (offsetting value) would not need to be in perpetuity. If the fully mitigated standard can be met on conserved or publicly owned lands and the mitigation and land are protected in perpetuity, the mitigation may proceed if it is consistent with the policy.

Implementing Mitigation on Department Owned or Conserved Lands

For mitigation to occur on Department-owned or conserved lands the following guidelines should be met:

1. Mitigation is consistent with the current and future uses of the land including any encumbrances, easements or public use values.
 - a. To find information on encumbrances, easements or public use values the following documents should be checked:
 - i. Management Plan for the property
 - ii. Any Conceptual Area Protection Plans (CAPP) or Land Acquisition Evaluations (LAE) written for the property
 - iii. Easements can be found on the California Natural Resources Agency website and at the County Records office. The Lands Program should also be checked.
 - iv. Title search – this should be performed by the entity proposing the mitigation
 - v. Site visits should be performed
2. Mitigation is consistent with the purpose for which the land was acquired and the funding source used for acquisition.
3. Mitigation will not preclude, diminish or interfere with encumbrances, or the management plan for the property.
4. Mitigation maintains and or enhances the current ecological and public use values of the land.

- a. Entity proposing the mitigation needs to provide documentation of how placing the mitigation on the land is going to maintain or enhance the ecological and public use values of the land.
5. The full cost of the mitigation is accounted for (this includes all capital improvements, restoration, enhancement, monitoring, long term management and maintenance and reimbursement for any Department staff time including enforcement, on all lands).
6. A Memorandum of Understanding (MOU) is in place prior to the project sponsors undertaking the project. The MOU will be developed in cooperation with the land manager, reviewed for statewide consistency by the Department's Lands Program in the Wildlife Branch and signed by the District Assistant Chief and the Department Regional Manager, the land management agency or non-profit (if other than the Department), and the project sponsor. The MOU will define the mitigation purpose, permit requirements, agreement term, scope of work, schedule, management and/or maintenance requirements, monitoring, and responsibilities of the parties to the agreement.

CEQA compliance and all applicable state, federal and local permits shall be the responsibility of the project sponsor and shall be completed prior to the implementation of the mitigation project. Conditions of such permits will be followed by the project sponsor at all times.

Further information related to this policy may be found on the Department's Intranet at

<https://intranet.dfg.ca.gov/portal/ExploreDFG/Programs/Program30ManagementofDepartmentLands/tabid/388/Default.aspx>.

DEFINITIONS

When used in context of this policy, these terms have the following meaning:

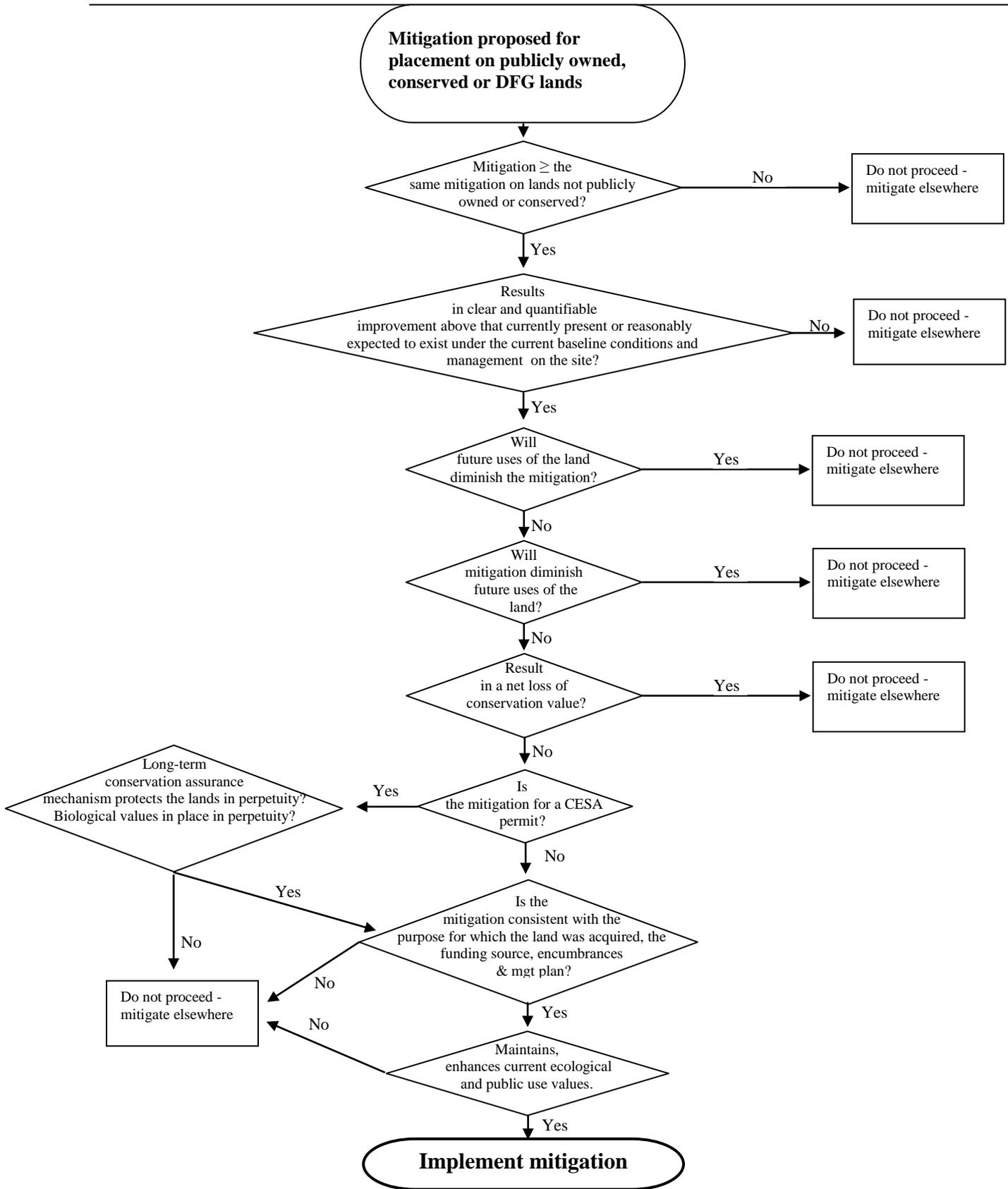
Conserved Lands: An interest in lands acquired by a tax-exempt nonprofit organization qualified under Section 501(c)(3) of the Internal Revenue Code and qualified to do business in California which has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition; and lands over which a Conservation Easement as defined under Section 815.1 of the California Civil Code has been granted.

Department-Owned Lands: Lands owned in fee title by the California Department of Fish and Game or the Wildlife Conservation Board.

Publicly Owned Lands: Lands owned in fee title by a public agency, other than Department-Owned Lands. Land access, use and/or certain resource purposes on the lands are preserved for the public by a government agency with legal title or other interest which is required to maintain them for such specific use(s) or to meet diverse needs of the public.

Restore or Enhance: Create, re-establish, rehabilitate, or improve habitat that is not present, has been lost or is degraded, improve the ability of existing habitat to support fish and wildlife, change management to improve ability of a habitat to support target species or functions.

ATTACHMENT: Mitigation on Publicly Owned and Conserved Lands – Flow Chart



For Conserved and DFG lands:

- 1) Recover full cost of mitigation including environmental review and permitting, capital improvements, enhancement, restoration, enforcement, monitoring, long-term management, etc;
- 2) Develop implementing documents as required; and
- 3) Mitigator completes or funds CEQA and any necessary permitting for project implementation