

**Los Cerritos Wetlands Authority**

**Date:** November 3, 2016

**To:** Governing Board Members

**From:** Mark Stanley, Executive Officer

**Subject:** Item 12: Consideration of resolution to direct staff resources on the development of the Los Cerritos Wetlands Authority Mitigation Policy.

**RECOMMENDED ACTION:** That the Los Cerritos Wetlands Authority (LCWA) direct staff resources on the development of the Los Cerritos Wetlands Authority Mitigation Policy.

**BACKGROUND:** Mitigation is the preservation, enhancement, restoration or creation (PERC) of a wetland, stream, or habitat conservation area which offsets, or compensates for, expected adverse impacts to similar nearby ecosystems.

The LCWA purchased its properties and funded its Stewardship Program through various state grants funds which precludes the LCWA from providing mitigation opportunities but over the past several years the LCWA has successfully partnered with its funders (State Coastal Conservancy and San Gabriel and Lower Los Angeles Rivers and Mountains Conservancy) and has effectively implemented mitigation opportunities which have provided substantial revenue for the Los Cerritos Wetlands Stewardship Program.

The LCWA was approached by various companies including, Southern California Edison, Orange County Flood Control District and other local and state agencies for the purpose of procuring mitigation credits of which the LCWA has successfully implemented, 1. Coastal Commission Memorandum of Agreement, 2. Southern California Edison In-Lieu Fee and 3. Orange County Flood Control District Wetland Restoration Services and Supplies. Since these mitigation programs continue to be efficiently implemented, additional companies and local agencies continue to contact the LCWA for the purpose of acquiring mitigation credits; thus Staff recommends the development of a mitigation policy that provides guidance and procedures for receiving, analyzing, approving and implementing mitigation programs.

The mitigation policy would require the following elements:

- Consistency with the LCWA's mission to provide for a comprehensive program of acquisition, protection, conservation, restoration, maintenance, operation and environmental enhancement of the Los Cerritos Wetlands area consistent with the goals of habitat protection and restoration, flood protection, and improved water supply, water quality, groundwater recharge and water conservation.
- The Mitigation Policy must advance and not impede the LCWA's goals and objectives for the long-term restoration.
  - Consistency with the Final Conceptual Restoration Plan (CRP) which developed three alternatives based on the best available science and input from Steering Committee, Technical Advisory Committee, public and stakeholders to fulfill the following objectives.
    - First, restoration should emphasize tidal salt marsh and related habitats (including sub-tidal, wetland-upland transition, and uplands).
    - Second, planning should occur on a complex-wide basis despite complicated land ownership in the area.

- Third, all restoration strategies should seek to be resilient in the face of sea level rise over the next 100 years.
- Fourth, restoration designs should not cater specifically to potential or known sources of mitigation funding since this might lead to designs that emphasize habitat for a limited suite of species (e.g., sub-tidal habitat for fish).
- Fifth, all restoration strategies should emphasize the restoration of natural ecosystem processes in order to create self-sustaining habitats.
- Sixth, improving public access and educational opportunities should be part of the restoration process and plan.
- Benefits of the proposed mitigation policy are quantifiable and provide a cost and benefit analysis.
- Identify all current conservation easements, deed restrictions, and any use limitations on the properties.
- Identify all revenues received by the LCWA which restrict mitigation funds and determine if the mitigation policy may be developed with these restrictions in place.
- Analyze the nature of the adverse environmental impact elsewhere that the mitigation is intended to offset and determine if the mitigation is perceived or actual controversy surrounding the project generating the mitigation requirement. Provide public input and commenting period for the mitigation policy.

Various mechanisms for third-party compensatory mitigation exist. In the short term, the LCWA has the opportunity to partner with third party entities needing to conduct mitigation on a case by case basis through in-lieu fee agreements, as well as by providing third party entities access to conduct permittee-responsible mitigation on LCWA property. The mitigation policy would provide a comprehensive guidance and procedure for receiving, analyzing, approving and implementing the following mitigation programs.

#### ***In-Lieu Fee Mitigation Agreements***

Mitigation that occurs when a permittee provides funds to an in-lieu-fee sponsor (non-profit organization, or public entities such as LCWA) is known as In-Lieu Fee Mitigation. Regulatory permits for habitat impacts such as U.S. Fish and Wildlife Service Section 7, California Department of Fish and Game Lake and Streambed Alteration Agreements, as well as for Environmental Impact Reports (EIR) can be satisfied by a ILF Mitigation Agreement on a project-by-project basis.

Using this agreement, the permittee would provide an upfront consultation, planning and administrative fee to the LCWA to identify potential mitigation site(s), as well as to prepare cost estimates and environmental documents per regulatory permit requirements. The LCWA would then prepare a draft ILF Mitigation Agreement, which would include mitigation fee cost estimates and would conform with regulatory permit requirements for restoration, establishment, and/or preservation of habitat. Once the ILF Mitigation Agreement is approved by all parties, the permittee will pay fees identified in the agreement to the LCWA. At that time the LCWA assumes full implementation and performance criteria responsibilities.

The LCWA is presently capable of participating in this form of mitigation/environmental enhancement.

#### ***Permittee-Responsible Mitigation / Right of Entry Agreements***

A commonly preferred option for all forms of compensatory mitigation allows for impacts to habitat and/or wetlands resulting from a project to be mitigated directly by the permittee through restoration, establishment, or preservation at the site of the permitted impact, or at an

'off-site' location. Under this mechanism, the permittee performs the mitigation and is ultimately responsible for implementation and success of the mitigation.

Locations for 'off-site' mitigation can be provided by at the Los Cerritos Wetlands. In exchange for providing a Right of Entry Agreement for the permittee to conduct the mitigation activities, the LCWA would charge standard mitigation fees at a cost per acre. An upfront consultation, planning and administrative fee can also be required at the time an agreed upon mitigation/enchantment area is found, and before a habitat mitigation and monitoring plan is reviewed by the LCWA.

A habitat mitigation and monitoring plan must be reviewed and approval by the LCWA prior to approval by the appropriate regulatory, permitting or resource agencies. All aspects of the proposed plan would need to be consistent with applicable LCWA policies, guidelines, and/or plan adopted by the Board. Additionally, site location, plant palette, planting methods, and weed eradication methods identified in the plan must be developed in coordination with LCWA staff or its designated agents.

Through an extensive planning process, the LCWA also has the opportunity to develop more comprehensive mitigation programs for the wetlands. This includes the establishment of a Migration Banks, In-Lieu Fee Program, and/or a Conservation Bank.

***Mitigation Banks and In-Lieu Fee Mitigation Programs***

Mitigation banks place a perpetual conservation easement on the land, with a trust fund specifically dedicated to long term management of natural resources inherent to the bank. By securing mitigation credits from neighboring ecosystems many large landowners, including the government, are able to maintain a property in its current management state while retaining ecological functionality. Because mitigation bank credits are negotiated prior to development, hence prior to impact, purchasing credits from a mitigation bank decreases permitting time while also ensuring no net loss of habitat. The cost is often lower than other alternatives. Both regulatory and long term management risk is passed from developer to mitigation banker.

The Clean Water Act prohibits the discharge of dredged or fill material into wetlands, streams, and other waters of the United States unless a permit is issued by the U.S. Army Corps of Engineers (the Corps) or approved State agency under CWA Section 404. When there is a proposed discharge, all appropriate and practicable steps must first be taken to avoid and minimize impacts to aquatic resources. For unavoidable impacts, compensatory mitigation is required to replace the loss of wetland, stream, and/or other aquatic resource functions and areas. The Army Corps of Engineers (or approved state authority such as the State Water Board) is responsible for determining the appropriate form and amount of compensatory mitigation required. Methods of providing compensatory mitigation include aquatic resource restoration, establishment (creation), enhancement, and, in certain circumstances, preservation.

Under the CWA, compensatory mitigation is accomplished in three mechanisms, permittee-responsible mitigation, and two forms of third-party mitigation, Mitigation Banks and In-Lieu Fee Mitigation Programs.

- **In-Lieu Fee Mitigation (ILF):** A permit applicant may make a payment to an in-lieu fee program. In-lieu fee programs are generally administered by public agencies or non-profit organizations who have established an agreement with regulatory agencies (the Army Corps) to use in-lieu fee payments collected from permit applicants to conduct wetland,

stream or other aquatic resource restoration, creation, enhancement or preservation activities. Under this mechanisms, credits are issued and sold, and payments are pooled together (often after an impact has occurred) to fund mitigation activities.

Cons:

- More competition. There are approved ILF program within are territory. A local example of an approved ILF program is the San Gabriel River Watershed Aquatic Resource ILF Program sponsored by the San Gabriel Mountains Regional Conservancy. Another local example within Los Angeles County, which mostly excludes the San Gabriel River Watershed, is the Santa Monica Mountains Conservancy's efforts to seek reauthorization of its existing Los Angeles County Aquatic Resources ILF Mitigation Program to be consistent with the new 2008 Final Compensatory Mitigation Rule.
- Harder to match specific impacts with ILF Program credits.

Pros:

- The only upfront costs are those required to develop the program.
- Mitigation Banks: A permit applicant may purchase credits from a mitigation bank. A mitigation bank is a wetland, stream or other aquatic resource area that has been restored, created, enhanced, or, in certain circumstances, preserved. This resource area is then set aside to compensate for future conversions of aquatic resources for development activities. The value of a bank is determined by quantifying the aquatic resource functions restored or created in terms of "credits." Permittees, upon approval of regulatory agencies, can acquire these credits to meet their requirements for compensatory mitigation. Generally, the credits are issued to reimburse cost of mitigation efforts conducted prior to an impact and therefore require upfront capital. Banks can be established by governmental, non-profit, and for-profit entities.

Cons:

- Requires upfront capital to conduct mitigation. At periodic milestones the bank can issue credits that can be sold to reimburse this upfront cost.

Pros:

- Less competition. Currently, there a very few banks within Southern California and none within our territory.
- Easier to match an impact to bank credits. Especially if the impact is in the same watershed as the bank.
- Seen as a preferred mechanism over In-Lieu Fee programs.

The standards and criteria for these mechanisms are established in the 2008 Clean Water Act Section 404 Final Compensatory Mitigation Rule. The planning process for establishment will take a minimum of approximately 1 year, assuming no delays by regulatory agencies in review and approving documents.

Given the up-front capital funding required to establish a mitigation bank, the establishment of an ILFM program is currently the more feasible mechanisms for the WCA to become a competitive recipient of funding for third-party mitigation, unless lending institutions were willing to loan the required capital. Therefore, the first steps include:

- Determine funding for the development of an ILF Program Prospectus and Instrument. The LCWA would likely require the assistance of a consultant to develop a Prospectus and Instrument for any ILF program it develops. The ILF Program Prospectus describes the process and service area in detail, while implementation is governed by the ILF Program Instrument.
- Development and approval of the ILF Program Prospectus and Instrument. The process for ILF Program development is (roughly) as follows:

Draft the Prospectus > Initial review and comments from U.S. Army Corps of Engineers staff > Comments incorporated in to Prospectus > Review and Approval of the Prospectus by an Interagency Review Team > Once Prospectus is approved the Instrument is drafted > review and comments from U.S. Army Corps of Engineers staff on Instrument > Public Review > Final approval from U.S. Army Corps of Engineers

One immediate obstacle is for the LCWA to identify funding for staff time and consultant services needed to conduct the extensive planning process that is required to become an authorized ILF program or Mitigation Bank.

### ***Conservation Bank***

Conservation banking uses the same concept as mitigation banking, but is generally specific to protecting habitat of threatened, endangered, or otherwise at-risk species. "Credits" are established for the specific sensitive species that occur on the conservation bank site, and are sold in a similar manner as with mitigation banks. Agencies that typically participate in the regulation and approval of conservation banks are the U.S. Fish and Wildlife Service (NOAA National Marine Fisheries Service with respect to marine and anadromous species), and the California Department of Fish and Wildlife.

There are several steps to establishing a bank. First, the sponsor, potentially the LCWA, enters into a Conservation Banking Agreement with the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife. A long-term management plan is then developed for the site, and an endowment is established to provide sustained funding for monitoring and long-term management. Once all these conditions are satisfied, the project can seek approval to become an approved bank.

The current demand within the region for a conservation bank is unclear, and may not justify the large upfront financial investment for establishment. As with mitigation banks, the up-front capital that is required, principally for the endowment for long-term management, is an obstacle for the LCWA. Therefore, staff is still investigating if pursuing the development of a conservation bank would provide a greater environmental and economic benefit to the region over traditional acquisition and conservation of ecologically valuable areas.

**FISCAL:** Staff will require consultant services in order to assist in the development of the mitigation policy and currently the FY16/17 Budget does not have any unrestricted funds to support authorizing a consultant contract. The LCWA would require additional funds from its joint partners in order to provide the financial support for authorizing a consultant contract for services and development of the mitigation policy. The cost to develop the mitigation policy would range from \$50,000 to \$100,000. These cost estimates were determined by researching various non-profits, regulatory agencies and other local and state agencies whom have completed similar and comparable mitigation policies.

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RESOLUTION 2016 – 20

RESOLUTION OF THE LOS CERRITOS WETLANDS AUTHORITY TO  
DIRECT STAFF RESOURCES ON THE DEVELOPMENT OF THE LOS  
CERRITOS WETLANDS AUTHORITY MITIGATION POLICY

WHEREAS, the Los Cerritos Wetlands Authority has been established between the Coastal Conservancy, the San Gabriel and Lower Los Angeles Rivers and Mountains Conservancy, the City of Seal Beach and the City of Long Beach to facilitate the acquisition, protection, conservation, restoration, maintenance and operation an environmental enhancement of the Los Cerritos Wetlands; and

WHEREAS, the LCWA has further been established to focus on projects which will provide open space, habitat restoration, and watershed improvement projects within the Los Cerritos Wetlands; and

WHEREAS, this action will direct staff resources on the development of the Los Cerritos Wetlands Authority Mitigation Policy; and

WHEREAS, This action is exempt from the environmental impact report requirements of the California Environmental Quality Act (CEQA); and NOW

*Therefore, be it resolved that* the LCWA hereby:

1. FINDS that the actions contemplated by this resolution is exempt from requirements of the California Environmental Quality Act.
2. FINDS that this action is consistent with the purposes and objectives of the LCWA.
3. Directs staff resources on the development of the Los Cerritos Wetlands Authority Mitigation Policy. In addition, this action will require budget revisions to the FY16/17 Budget.
4. The Los Cerritos Wetlands Authority adopts the staff report dated November 3, 2016.

*~ End of Resolution ~*

Passed and Adopted by the Board of the  
LOS CERRITOS WETLANDS AUTHORITY ON November 3, 2016.

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Sam Schuchat, LCWA Chair

ATTEST:

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David Edsall  
Deputy Attorney General