

Improving State Permitting for Local Climate Change Adaptation Projects

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A LITTLE HOOVER COMMISSION LETTER REPORT
TO THE GOVERNOR AND LEGISLATURE OF CALIFORNIA

To Promote Economy and Efficiency

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By statute, the Commission is a bipartisan board composed of five public members appointed by the governor, four public members appointed by the Legislature, two senators and two assemblymembers.

In creating the Commission in 1962, the Legislature declared its purpose:

...to secure assistance for the Governor and itself in promoting economy, efficiency and improved services in the transaction of the public business in the various departments, agencies and instrumentalities of the executive branch of the state government, and in making the operation of all state departments, agencies and instrumentalities, and all expenditures of public funds, more directly responsive to the wishes of the people as expressed by their elected representatives...

The Commission fulfills this charge by listening to the public, consulting with the experts and conferring with the wise. In the course of its investigations, the Commission typically empanels advisory committees, conducts public hearings and visits government operations in action.

Its conclusions are submitted to the Governor and the Legislature for their consideration. Recommendations often take the form of legislation, which the Commission supports through the legislative process.

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LETTER FROM THE CHAIR

June 2, 2017



The Honorable Kevin de León
President pro Tempore of the Senate
and members of the Senate

The Honorable Jean Fuller
Senate Minority Leader

The Honorable Anthony Rendon
Speaker of the Assembly
and members of the Assembly

The Honorable Chad Mayes
Assembly Minority Leader

Dear Governor and Members of the Legislature:

Local governments designing and constructing projects to protect Californians from the threats of climate change have landed on a collision course with the state's complicated state permitting process intended to protect the environment.

At an October 2016 hearing on the role of special districts in adapting to climate change, the Commission learned that the lengthy and complex state permitting process is hampering the ability of local governments to move forward on infrastructure projects designed to improve California's resiliency against the effects of climate change. As a result of what it heard, the Commission scheduled a February 2017 hearing to specifically examine this issue with state and local government officials. The goal was to find common ground and solutions for keeping important environmental protections while cutting red tape and reducing unnecessary bureaucratic delays in permitting.

Both sides in this clash are united on one front: the necessity of the state permitting process in protecting clean air and water and wild landscapes and endangered species. Additionally, officials told the Commission that state permitting largely helps improve infrastructure projects.

But local officials also described a frustrating and time-consuming permitting phase in between project design and construction that in a best case scenario added months or years to project implementation or in one worst case scenario, more than a decade. In an often unsuccessful attempt to speed up the process, some local governments have resorted to paying salaries of what they consider understaffed state regulatory agencies.

The state departments issuing permits – primarily the Department of Fish and Wildlife and the regional water quality control boards – expressed equal frustration with local governments often submitting permit applications that they consider low quality or incomplete.

The result is what both state and local government officials described as a back and forth exchange of letters and disagreements over permit conditions that often goes around and around and around. Surprisingly simple solutions emerged during the Commission's hearing:

Formalizing a “big table” approach to establish multi-agency communication at the earliest stages of complex infrastructure projects designed to defend California from the effects of climate change.

Requiring state permitting agencies to develop “cookbooks,” detailed guides for expectations and requirements for permit applications.

When progress fails, particularly for large and complex infrastructure projects, establishing a formal dispute resolution process and structure to mediate permitting conflicts.

Although seemingly simple, creating detailed guides and convening multiple permit approvers upfront in the permitting process is not without costs, particularly in departments that may not have enough permitting staff to begin with. The Commission did not assess staffing adequacy at the hearing, but does believe that by eliminating the wasted time and resources spent on the permit process merry-go-round, both state and local governments could save taxpayer dollars.

In the Commission’s hearing process, local officials also objected to permit conditions that require them to set aside millions of dollars upfront to maintain mitigation habitat in perpetuity. Local officials urged state officials to consider options beyond an upfront endowment for local governments that have a strong financial history. State officials and one land trust manager cautioned that any government agency can go bankrupt and the state or the land trust would be left on the hook to manage perpetual habitat mitigation for an insolvent local government.

Local officials are not seeking dramatic changes. They suggested that flexibility is already written into existing permitting requirements – the state just needs to use it. Again the solution seems simple: require state government permitting agencies to develop guidelines that encourage greater flexibility regarding endowments to finance mitigation lands that offset the effects of local climate change adaption projects. State departments should make greater use of the alternatives already allowed.

In 2014, the Commission issued a report, *Governing California Through Climate Change*, urging the state to provide leadership for local governments to plan for climate change adaptation. The report found that while California leads the nation and the world in setting goals to reduce carbon emissions, it has not done anywhere near as much to protect California lives and livelihoods against the effects of climate change. Following the report, laws were enacted establishing a state-level point of contact and a clearinghouse of information on climate change adaptation. Local governments have forged ahead, designing projects and developing resources to pay for climate change adaptation. Many are now attempting to implement these projects and the state needs to work with and not against them toward shared goals.

This letter provides common sense solutions for moving forward. The Commission stands ready to assist in this effort and will monitor progress as the need for a streamlined process to build infrastructure to protect California is only going to grow more urgent in the coming years and decades.



Pedro Nava
Chair, Little Hoover Commission

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Recommendation 1: The Legislature should convene a working group of permitting agencies and regular permit applicants to formalize a “big table” approach for important climate-impact infrastructure projects in which parties sit down early to discuss potential delaying problems and work to avoid them. The process agreed to by the working group should be formalized in statute as a requirement for specified projects	20
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PERMITTING FOR INFRASTRUCTURE AND CLIMATE CHANGE ADAPTATION

Every public infrastructure project begins with the application for a permit. It is a simple act, but one that invariably launches a difficult journey through the state permitting bureaucracy, say representatives of local agencies that seek state permits. Many describe a process of repeated state requests for more information, one-size-fits-all permit conditions, lack of answers to questions and a gnawing perception that, as local governments seeking state approvals, their local experience and environmental commitment are not to be trusted.

Yet the frustration is a two-way street. State permitting agency representatives, too, describe a stormy process in which their limited staffs receive incomplete and poorly written applications, often overlooking or ignoring state concerns expressed earlier, and most typically requiring time-consuming back-and-forth rounds of letters seeking additional information.

Multiply these complications exponentially for large projects – those needing permits from three or four state agencies and perhaps two or three federal agencies to proceed – and one sees why California state agency permits can take so long to finalize and are often so perplexing for both sides. The bad news is this may get worse as the impacts of climate change become more apparent and the needs for adaptive infrastructure projects grow.

“You’ve heard about the complexities. The complexities of permitting are only going to get more difficult as we address the impact of climate change.”



Bruce Wolfe, Executive Officer, San Francisco Bay Regional Water Quality Control Board.

In 2017, the Little Hoover Commission looked into this little-understood function of state government. During a February 23, 2017, hearing it reviewed infrastructure project disruptions and holdups that local and regional public agencies say they are having with state permitting processes. While the private sector – especially firms involved in construction – frequently complains about strict and lengthy state permitting processes, it is far less common to hear local government agencies – publicly – register the same complaints about project delays and added costs.

The Commission particularly examined public projects increasingly necessary to protect California residents, wildlife and environments – both natural and human-altered – from the anticipated impacts of climate change. The hearing brought together three local public flood control agencies, the Santa Clara Valley Water District, Los Angeles County Department of Public Works, Santa Barbara County Department of Public Works and two state agencies, the Department of Fish and Wildlife, which processes endangered species and stream alteration permits, and the San Francisco Bay Regional Water Quality Control Board, which manages water quality permits.

“Public Works’ ability to maintain and enhance the functionality and capacity of its facilities is critical to its ability to adapt to climate change. There is the concern about the potential for storms arriving with less frequency but also, when they do arrive, delivering more intense rainfall. This can result in a greater potential for flooding and narrower windows for stormwater capture. Rising sea levels from climate change could necessitate relocation of seawater intrusion barriers or portions thereof, which in that case would involve installation of new injection wells.”

Chris Stone, Assistant Deputy Director,
Los Angeles County Department of Public Works.

During the February 2017 hearing, the Commissioners also considered local agency pleas to be exempted from lump sum endowment payments for mitigation lands that can run into millions of dollars – because of their reliable financial track records and enduring, stable institutional histories. Commissioners heard an equally spirited defense of endowments offered by representatives of two state agencies and a statewide land trust. All maintained that local government agencies, despite what they say, cannot fully assure necessary funding, year in and year out, to maintain permanent commitments to mitigation responsibilities.

For all the disputes about permitting timelines, processes and requirements, however, the Commission heard that one area of agreement unites all sides. That is the critical importance of the permitting processes in California’s world-class protection of the environment and the state’s growing response to the impacts of climate change. The Santa Clara Valley Water District, in written testimony, stated:

“We first as a preliminary matter want to establish and recognize how our interactions with state permitting agencies have largely helped to improve our projects, as well as drive the state of the art regarding climate resiliency. To be certain, our testimony below is not premised by an intention to shirk our stewardship of the environment, nor avoid compliance with promulgated standards. Rather, it discusses issues arising from when four vital and necessary projects, two of which included sea-level rise considerations as part of their design-criteria, were impeded and delayed by disputable exercises of authority during and after adjudication of our permit applications.”

The Los Angeles County Department of Public Works similarly stated its respect and support for state agencies’ “environmental protection missions, including those involving water quality and biological resources.”¹

State agencies also attested to successes resulting from high-quality joint permitting work.

“You’ve heard a lot of impacts from the (recent 2017) storms,” testified Bruce Wolfe, executive officer of the San Francisco Bay Regional Water Quality Board, during the February 23, 2017, hearing. “You haven’t heard that the City of Napa has flooded. That’s the first time ever that the Napa River has flooded in some areas that the city has not. And that’s due to a living river flood control project that we worked on with the flood control district. And they’re very pleased with the approach. It’s resulted in wetland expansion, fisheries expansion, and the mayor told me they now have \$1.2 billion of new development in downtown Napa due to that project.”

Clearly, the results of state permitting processes speak well for the State of California’s commitment to environmental quality. Just as clearly, these processes could benefit from improvements. In that spirit the Little Hoover Commission makes recommendations in this letter to speed up permitting, build in earlier consultation between parties, improve dispute resolution and make the process less burdensome to both those agencies seeking and issuing permits.

Origins of the Commission’s Permitting Study

The Commission’s 2017 review of permitting disputes began with unexpected comments during its October 27, 2016, hearing regarding special districts’ infrastructure investments for climate change adaptation. Hearing witness Melanie Richardson, Interim Chief Operating Officer – Watersheds – for the Santa Clara Valley Water District, described how state permitting agencies delay and raise costs for district projects with requirements she described as excessive and amounting to regulatory overreach. (See Appendix B for a transcript of Ms. Richardson’s comments).

“We used to have planning, designing and construction phase of our projects,” Ms. Richardson said. “We’ve added a permitting phase because it takes up to three years to do the permitting between design and construction. It’s a major phase of the work that has to be factored in. And it didn’t used to be that way. It’s changed over the last few years,” she told the Commission.

Ms. Richardson also testified about district objections to the practice of state agencies requiring costly financial endowments – as a condition of permits – to mitigate the impacts of their projects. October 2016 hearing witness Alan Hofmann, General Manager-Secretary of the Fresno Metropolitan Flood Control District, added his agreement to Ms. Richardson’s assertions about delays, costs and frustrations of state permitting processes, as did East Bay Regional Parks District Deputy General Manager Ana Alvarez during the Commission’s public comment period. Concerns voiced by Ms. Richardson and officials of other special districts referred specifically to the state Department of Fish and Wildlife, which processes endangered species and stream alteration permits, and the state’s nine regional water quality control boards, which manage water quality permits.

Following the October hearing the Commission decided to pursue a closer look, and scheduled a February 2017 hearing with local and state agencies to review three major areas of concern:

- Allegedly lengthy and frustrating state permitting timelines and processes for maintenance and construction of public infrastructure, especially those involving climate change impacts.
- The practice of local and state agencies having to pay understaffed state permitting agencies for designated staffers to process their permits more quickly.
- Requirements that public agencies offsetting infrastructure project impacts fund endowments to finance perpetual maintenance of lands established for environmental mitigation.

Local Agencies: State Permitting Practices Slow Us Down and Drive Up Costs

The Commission’s February 23, 2017, hearing examined contentions by local special districts involved in flood control projects that state permitting agencies take too long to process permits – and subject them to inconsistent, sometimes-baffling requirements. District witnesses and representatives of other districts in public

comment provided numerous specific examples in written and oral testimony.² Witnesses also contended that federal agencies, particularly the U.S. Fish and Wildlife Service, are slower even than state agencies in issuing permits. The Commission lacks statutory authority to review federal practices, however, and did not pursue contentions regarding federal agencies.



“Large, complex projects can have three to four state agencies and maybe another two to three federal agencies for which a permit would be required or some regulatory action would be required for approval. So it is a very complex environment in California for permitting, especially for large projects.”

Kevin Hunting, Chief Deputy Director,
California Department of Fish and Wildlife.

Local and regional flood control agencies need state permits to build flood control infrastructure in California, and also to maintain it afterward. Maintenance typically involves clearing concrete or dirt flood control channels of vegetation that slows water flows, but has value as wildlife habitat. Districts also build access roads to channels and remove vegetation from reservoirs. Witnesses told the Commission that even driving a tractor inside a flood control channel requires a permit with standard conditions in which districts must compensate by enhancing wildlife at another site. Such permits can take months, they said, with paperwork going back and forth between the locality and the state to answer questions and negotiate conditions for receiving the permit.

Extended state permitting timelines for years have been a frequent source of concerns relayed by counties to their Sacramento trade association, the California State Association of Counties, association officials said.³ Commission hearing witness Chris Stone, assistant deputy director of the Los Angeles County Department of Public Works, said it once took two and a half years to get a state permit to line an earthen flood control channel with

concrete. “I feel this is a very strong indication of being understaffed,” he said. Construction permits for flood control infrastructure can take even longer, as witnesses from the Santa Clara Valley Water District attested at the hearing.

“We are not averse to lengthy, complex, and detailed applications for permits. We understand their utility and appreciate their function. But we protest when there are insufficient directions, guidelines, and procedures for our submissions resulting in unpredictable and inconsistent follow-up requests for additional information to complete our application, thereby protracting the permitting phase of our projects and delaying them from proceeding to construction.”



Christopher Hakes, Assistant Operating Officer for Water Utility Capital Division and Vincent Gin, Deputy Operating Officer for Watershed Stewardship and Planning Division, Santa Clara Valley Water District.

Deadlocks over permit conditions with state front-line permitting staff frequently lead districts to elevate disagreements to their managers to break the logjam, officials in Santa Barbara and Los Angeles County public works departments told Commission staff in early 2017. Both said that constantly kicking disagreements up to state managers should not be the norm for local districts to get their permits. February witness Maureen Spencer, operations and environmental manager at the Santa Barbara County Department of Public works, said state agencies too often set standard conditions that “make no sense” for an individual project. “They always want us to do less and mitigate more, and often the conditions do not have any scientific justification.”



“I experience often that there is a kind of disregard for our local expertise. And our approach and commitment to environmental protection.”

Maureen Spencer, Operations and Environmental Manager, Santa Barbara Department of Public Works. Chris Stone, Assistant Deputy Director, Los Angeles Department of Public Works.

Flood district officials in Santa Clara and Santa Barbara counties complained that agencies – particularly the state regional water quality boards – often do not comment formally about proposed projects during the environmental review phase, then demand afterward that projects be modified or even redesigned – adding still more months to permitting timelines. Such modifications then hinder and delay processes of other permitting agencies adding further delays, local officials told the Commission.

“There’s a long daisy chain of approvals with overlapping authority. And so changes to one element of that daisy chain could affect that whole process,” said Vincent Gin, deputy operating officer for the Santa Clara Valley Water District’s Watershed Stewardship and Planning Division. “The result is inefficiency and delay. Meanwhile our residents wait for projects that will adapt our communities to climate change and protect them from the devastation of floods.”

Factors blamed most often at the hearing were understaffing and turnover at state permitting agencies. “I think it’s a matter of staff availability. I think it’s too few people trying to process too many permits,” Ms. Spencer testified. “Many times we send permit applications in and then we have to follow up because don’t hear from people because they’re so bogged down with work.”

Mr. Stone added, “There are many times we will submit what we think is a complete package and we’ll get comments back from the regional (water quality control) board asking for additional information, which is fine, for clarification and what not. But there are many times where they’re asking for the same information which was

submitted with the original application. And I think a lot of that is due to lack of resources to be able to review the material, the huge amount of material that flows through their office. That's not serving anyone well, I believe."

Mr. Stone proposed making more financial resources available to permitting agencies "so they can do a thorough review of the application and give you a full list of additional information or clarification that is needed for that application so on the next submittal, hopefully, it could be approved or maybe there are some minor things to clean up. But it shouldn't go round and round and round," he told the Commission.

Some special districts, indeed, pay permitting agencies for additional designated staffers to speed up completion of their permits – and even that may not greatly cut timelines. The Santa Clara Valley Water District pays for three full-time staff members at permitting agencies – one each at the U.S. Fish and Wildlife Service, California Department of Fish and Wildlife and San Francisco Regional Water Quality Control Board. Similarly, the Los Angeles County Department of Public Works pays for a California Department of Fish and Wildlife staffer to process its flood control permits, Mr. Stone told the Commission. He said the department explored paying for a staffer at the Los Angeles Regional Water Quality Board, but was denied due to perceptions within the board that it would be a conflict of interest. Mr. Stone also told Commission staff before the February hearing that the value of its investment is debatable. It has not produced faster timelines for its Department of Fish and Wildlife permits, he said.

Among other entities that pay for designated staffers to process their multiple permits at the Department of Fish and Wildlife are Caltrans, the Department of Water Resources, High Speed Rail Authority and the Pacific Gas & Electric Co., stated department Chief Deputy Director Kevin Hunting in written testimony to the Commission. Though this option is not affordable to smaller applicants it doesn't mean their permit applications go to the end of the line, representatives of the San Francisco Bay Regional Water Quality Control Board told Commission staff.⁴ Nonetheless, concerns raised during the hearing cause the Commission to wonder about the implications for many small special districts lacking financial capacity to pay for their own permitting staff at the state level.

State Agency Views of their Permitting Processes and Timelines

Witnesses from the Department of Fish and Wildlife and San Francisco Regional Water Quality Control Board testified with their own views of extended timelines for permit applications. While not holding their agencies blameless, they told the Commission that a key reason for extended timelines is applications that are incomplete or lacking in quality.

"We get 250 applications a year for permits. It's easy to grade an A paper. If you get a C or D paper you spend a lot of time to get it to the level to accept."

Bruce Wolfe, Executive Officer, San Francisco Bay Regional Water Quality Control Board.

"The reason for a lot of delays is we need more information from the applicant and that takes time," said Steven Ingram, senior staff counsel and tribal liaison at the California Department of Fish and Wildlife. Mr. Ingram said applications are often incomplete because less experienced applicants and their consultants may lack understanding of what they need to do. More sophisticated applicants might disagree with the scope of what they're expected to do, or not want to provide all the information the department seeks from them. Also, he said, it is common for bigger projects to see project supervisors change several times due to staffing changes and turnover. "Even large permittees like Caltrans have staff turnover and new permit applicants filling out paperwork who need training," said Mr. Ingram.

Mr. Hunting also testified in February that "larger complex projects often undergo substantial changes during the permitting process and therefore necessitate the extended regulatory timeline."

"For the most part our environmental permitting timelines have not changed in the past 20 years," he told the Commission.

Witnesses from both state agencies also told the Commission they are working to streamline state permitting with new approaches, especially in light of uncertainty associated with climate adaptation and the need for action and flexibility. The Department of Fish and Wildlife is exploring greater use of regional permits in which individual agencies apply for permits as part of regional consortiums with a common habitat plan to “get away from plan-by-plan permitting,” department representatives said.

Mr. Wolfe of the San Francisco Bay Regional Water Quality Control Board said permitting processes can be simplified, as they have with a water board approach to dredging permits in the Bay Area. “We set up a one-stop shop where the water boards, San Francisco Bay Conservation and Development Commission (a state agency) and the (U.S.) Army Corps of Engineers can address one application and use guidance we’ve had for the last 73 years ... We’re trying to see if we can replicate that for other projects,” Mr. Wolfe said.

“One of the things we’re working on with Measure AA (the 20-year \$510 million regional shoreline restoration initiative approved by Bay Area voters in June 2016) and climate change is to find out how to minimize [disruption]. We want to provide guidance to get the type of designs we can quickly approve,” Mr. Wolfe added. He said he is part of an advisory committee that will help design a unified Request for Proposals for Measure AA projects. “The challenge moving forward is to get these on the same page so when designs are forwarded for permitting we can move quickly instead of writing letters back and forth,” Mr. Wolfe told Commission staff before the February hearing.

In addition to those proposals, Commission and witness discussion at the February hearing pointed toward additional possible resolutions, including:

- Earlier meetings between all parties – a so-called “big table” – to talk through expectations and design issues before they become problems.
- Better guides for those filling out permit applications – a “cookbook” – to help agencies, especially those with less experience, to bring better applications to the permitting agency.

- Better methods of dispute resolution over permit conditions – perhaps with panels of outside experts – to help both sides break through major disagreements that add costs to the process and extend timelines.

A “Big Table” Approach to Resolve Permitting Problems Much Earlier

At the February hearing Commission Chair Pedro Nava noted the time-consuming complexities of getting permits from multiple agencies across different layers of government. He then asked about the infrequency of all-agency meetings early in the permitting process, where permit applicants and issuers can sit down together to sort out issues regarding large infrastructure projects.

“When I read through your material one of the things that jumped out at me, and I’m not sure everybody appreciates this, is that not only do you have regional authorities, you have state authorities and federal, who all have permitting requirements. So it isn’t that you just have three. You have within each of those entities different branches of departments that are going to have permitting requirements. And I’m assuming within those different branches, there are deadlines that impact when things are supposed to be done.

Has there been any conversation, from any source, that talks about having one big table, so to speak, where the regional, state and the feds all sit around and talk about how to move a project forward?”

The answer, in short, was largely no. Witnesses discussed attempts, experiments and conversations here and there. But they acknowledged no formal process or routine expectations for such meetings.

“It is our desire for early coordination,” said Mr. Gin of the Santa Clara Valley Water District. “The best way to push that is to bring all the parties to the table to highlight

their particular interests and our objectives.” Mr. Gin said that in previous jobs and different parts of California he has seen versions of the “big table” approach, “what I call pre-consultation meetings early in the process, at the CEQA stage (California Environmental Quality Act), to highlight and flesh out those issues.”

Mr. Stone of the Los Angeles County Department of Public Works addressed Chair Nava, saying, “I like the idea that you brought up of getting these groups together early in the planning stages so that the different regulatory agencies and the project proponent can discuss what those concerns are early on before we get past the CEQA document and get into the design and permitting processes. That would help expedite that quite a bit.”

In response, Chair Nava said, “I think this is what contributes to an extraordinary delay. If the applicant had been advised sooner rather than later about where the permitting agencies could anticipate problems my guess is that you would be eager to address those right away.”

Answered Mr. Stone, “Absolutely, that would be the perfect time for those discussions to occur.”

Mr. Wolfe of the San Francisco Bay Regional Water Quality Control Board told the Commission about a “one-stop shop” approach the board uses to smooth permitting conflicts between differing state and federal views during joint permitting processes. “To a significant degree we find that the federal resource agencies, the U.S. Fish and Wildlife Service that makes recommendations to the U.S. Army Corps of Engineers on permitting, may differ from what the state resource agency may say. Then the Corps needs to incorporate that into its permitting and it may not align with what either the (local) applicant or the state agencies say.”

“We do try to get around that,” Mr. Wolfe explained. “As a long-term management strategy we essentially pull in the U.S. Fish and Wildlife Service to say this is going to be a one-stop shop. You need to work with us here. And they bought into that. So I think that’s the type of thing moving forward that we need to continue to push. How we can use efficient permitting approaches so that it’s not a one-by-one-by-one all the way along.”

State Agencies Need a “Cookbook” Guide to Writing Permit Applications

Throughout its review the Commission heard from local applicants and state permitting agencies about the difficulties agencies experience in submitting acceptable – and complete – permit applications. Even the experienced representatives of local agencies participating in the February hearing acknowledged that state permitting agencies *always* deem their applications incomplete – and seek additional information. “Round and round” is how both sides describe the back-and-forth exchange of letters and disagreements over permit conditions. “Never have we had a permit application submitted that was deemed complete,” Mr. Stone told Commission staff before the February hearing. “They reject it and request additional information. That delays it.”

During the hearing Chair Nava suggested that perhaps state permitting agencies should each develop a “cookbook” that spells out precisely for cities, counties and special districts what’s necessary in a permit application.

Responded Mr. Stone, “I like the idea of coming up with a cookbook of things you should be submitting with a permit knowing the type of project you have and the impacts it’s going to have.” Representatives of both state agencies also were supportive, acknowledging that their agency websites provide guidance and technical information, but no comprehensive how-to guides to filling out permit applications.”

“We recognize that it is a challenge with parties that may not go through permitting all that frequently. We need that cookbook,” testified Mr. Wolfe of the San Francisco Bay Regional Water Quality Board. “We put many things on our website including the needs to get a permit. We’ve developed some guidance manuals. We think these types of materials are significant in that they provide the technical basis for project development so that we can say right up front: these are the good things with your project, these are the bad things, let’s work it out.”

Mr. Hunting said the Department of Fish and Wildlife provides similar guidance on its website. He said the department also has experimented with small get-togethers with county public works staffers to explain

the permitting process. “We initiated this five years ago through the California State Association of Counties,” he said. “We put public works staff from the counties together with our staff four times a year so we could learn what it’s like to do a public works project and they can learn what it’s like to get permits. That’s helped tremendously. We’ve done that in seven counties. It’s obviously one of those things we don’t have a funding stream for so it’s a bit ad hoc but that model has worked fairly well.”

Also Needed: A More Formal System to Resolve Disputes

Stories of perceived state bureaucratic inflexibility submitted in written testimony by local agencies – and additional situations described during the February hearing – led Commissioners to ask whether there are formal dispute resolution mechanisms to break stalemates and impasses. Because the answer was, again, largely “no,” the Commission probed during the hearing for new ideas to resolve disputes that drive up costs and extend timelines of large and complex climate-related public infrastructure projects.

Ideas proposed ranged from the type of “strike teams” used by California fire agencies during wildfire episodes to neutral third-party expert dispute resolution panels used in the construction industry. Presently, perhaps the most common method of local agencies to address contested permit conditions with front-line state permitting staffers – who are sometimes new on the job or new to the project – is to get on the phone with their managers. Local agency representatives told the Commission this is not an ideal way to continually negotiate permit disputes.⁵

Mr. Wolfe of the San Francisco Bay Regional Water Quality Control Board testified that arbitration of permit disputes not resolved by staff go to the board level – also less than ideal. “Our (regional) board, which is a lay board, and then the state board itself, is essentially providing that arbitration,” he said. “Certainly we make recommendations to the board. All their hearings are public hearings so they consider testimony from all parties. When we haven’t reached agreement they work through and come up with a decision. And then again, that can be appealed to the state board. That’s not the cleanest,” he told the Commission at the February hearing.

DEADLOCK: A \$720 STATE AGENCY CHARGE NO ONE CAN EXPLAIN

Maureen Spencer, operations and environmental manager of the Santa Barbara County Department of Public Works, testified at the February 2017 hearing how the department cannot get a state permitting agency explanation for a fee it considers an error. Ms. Spencer called the example indicative of routine permitting inconsistencies.

“One of the examples is the annual discharge fee that I mention in my (written) testimony. We cannot get an answer from the [Central Coast Regional Water Quality Control Board] as to the wording in that fee calculator. The wording that comes in the invoice specifically talks about how we’re being assessed this fee when an annual discharge occurs. And we haven’t had an annual discharge.”

Commissioner Flanigan: “So you’re getting charged for something you aren’t doing?”

Ms. Spencer: “We have a maintenance program that is an as-needed program, and we paid \$90,000 for the regional board permit. It’s a five-year permit. It’s an as-needed program. We haven’t had to do desilting in the Carpenteria Salt Marsh. But in addition to the fee for the permit, there’s also a fee now that’s called an annual discharge fee. It’s \$720. When we received the invoice we called the regional board. We said this specifically says when a discharge occurs – and we haven’t had a discharge. We have not done maintenance. They just said it needs to be paid. And nobody really understands why.”

Months after the February hearing Ms. Spencer said the county has not paid the fee and has received a regional board Demand for Payment notice – which offers a phone number to call with questions. Ms. Spencer said it is the same phone number where regional board officials previously could not explain the reason for the fee and simply said it needs to be paid.

Source: Maureen Spencer. Operations and Environmental Manager. Santa Barbara County Department of Public Works. February 23, 2017. Oral testimony to the Commission. Also: March 15, April 7, and May 9, 2017. Written communication. (On file).

DEADLOCK: RECHARGE GROUNDWATER OR WATER WILDLIFE IN CONCRETE CHANNEL?

During the February hearing, Chris Stone, assistant deputy director of the Los Angeles County Department of Public Works, described a permitting dispute with the state Department of Fish and Wildlife over water use – a classic case study of conflicting regulatory priorities:

“Being from Southern California there’s a huge effort to become more water independent. We know the availability of imported water continues to decrease all the time, and with that we’ve been tasked to become more sustainable locally. And that means that we reuse the recycled water and make the best use of the water we have down there in that area.

“What we’re seeing recently in some of our permit applications is that there seems to be a conflict between our goal of being able to conserve a lot of that storm water, store it and put it into spreading grounds and recharge groundwater basins, and (from the Department of Fish and Wildlife), ‘No, you need to let that water go downstream to resources.’ I support that if there are downstream resources that need water. That’s fine. We have a project right now, it’s a reservoir cleanout project where downstream of that reservoir there is nothing but concrete channel except for the first 800 feet which is soft bottom channel. And we’ve been asked in our permit application – again it’s a draft – but they’re asking us to not hold any water in that reservoir. Our intent is to be able to hold that water there and move it over to spreading grounds and recharge the groundwater basin. That seems to be a direct conflict with what I believe is in the best interest of the state.”

Commissioner Flanigan: “Who’s pushing back?”

Mr. Stone: “California Fish and Wildlife is pushing back on that. They believe there are resources downstream. There may be. I don’t think there’s many.”

Commissioner Flanigan: “In a concrete channel?”

Mr. Stone: “In a concrete channel. A fully-lined concrete channel. So that doesn’t make a lot of sense to me. There are no studies to show what is needed downstream. I think a lot of times there isn’t the scientific data that supports some of the decisions or the comments that are made by the agencies. I think that needs to be weighed out a little bit. Do you have something to support what’s needed downstream, needed to support wildlife? We’re more than happy to comply with that, and I think by code we have to comply with that. But just to say you can’t hold any water in a reservoir makes no sense to me other than for flood control protection.”

Weeks after the hearing, Kevin Hunting, the chief deputy director of the California Department of Fish and Wildlife (CDFW) told the Commission that the department and the Los Angeles County Department of Public Works had reached a common understanding on the Fish and Game Code relating to keeping fish downstream of a dam “in good condition.” He said the misunderstanding was in part due to the fact that the interpretation of this code section was new to the staffer at the department and also said the department and the county could have met more frequently to resolve the misunderstanding early in the permitting discussion.

Mr. Stone, in subsequent communication with Commission staff, stated he did meet with Mr. Hunting after the February hearing, but indicated he did not agree that his department and CDFW came to a common understanding of what “good condition” means. He said that CDFW staff was silent in a recent meeting when asked what flow amounts they wanted for fish downstream of a Los Angeles County facility. Uncertainty remains between the Los Angeles County department and the state on best use of excess water during very wet years – water conservation for groundwater recharge or sending more water through the concrete channels and out to the ocean. Mr. Stone suggested the state re-examine Fish and Game Code Section 5937, established more than 100 years ago, to assess whether a blanket application of the “good condition” clause still makes sense in all parts of the state.⁶

Few projects perhaps have been more in need of a more formal dispute resolution process than one that Christopher Hakes, assistant operating officer for the Santa Clara Valley Water District's Water Utility Capital Division, described in detail for the Commission at its February hearing. The water district's Upper Berryessa Creek project, which the U.S. Army Corps of Engineers will build and the water district will maintain, has been planned since 1999, he said. The project will provide flood control protection for a \$2.1 billion Bay Area Rapid Transit (BART) expansion project to Milpitas in Santa Clara County. Mr. Hakes said the flood control infrastructure project is scheduled to be done by December 2017 in time for opening the Milpitas BART station.

The flood control project, which needs both state and federal agency approvals, weathered a late-hour hiccup in 2016 when the San Francisco Bay Regional Water Quality Control Board proposed rescinding its earlier permit approval and requiring "an additional 20 acres of mitigation be performed to account for construction impacts," the water district stated in written testimony. While the tale is complicated and subject to various interpretations, the water district vigorously contended during the February hearing that there were ample earlier opportunities for the water board to make the proposal and avoid changes that threatened the federally-authorized project's funding and viability.

Mr. Wolfe, speaking for the water board, said its late-hour proposal to rescind the permit and change conditions was in response to the Army Corps of Engineers submitting an outmoded and less environmentally sensitive design than usual for flood control infrastructure. Mr. Wolfe attributed the design to disagreements between the Corps' Washington and California staff (in which Washington prevailed), but said the board agreed to allow it – in exchange for tougher mitigation requirements due to its less-than-ideal design.

Mr. Hakes told the Commission there is no formal mechanism to resolve such messes. "Even when we agree to disagree there's no way to bridge the gap," he said.

Asked by Commissioners what a third party neutral arbitrator might look like, Mr. Hakes, responded, "To actually come over the top it would have to be a neutral third party. In construction we have what's called the dispute review board, where you have three members

selected jointly by all the parties involved. So it might not be an existing agency. It might be the type of thing where you agree on a panel in advance."

Vincent Gin, the water district's deputy operating officer for the Watershed Stewardship and Planning Division, added, "Traditionally, an arbitration process would have knowledge and awareness of those issues that could represent the different interests." Mr. Gin proposed including representatives of local and state government and the regulating community. "Who those would be would require a little more thought," he said, "but I think representation of the different interests of the parties would best set up an outcome that would be fair."

Ms. Spencer, testifying about alternatives, told the Commission, "You were asking earlier what would be a good mechanism for dispute resolution. One of the things that came to mind was this whole idea in the world of fire. They have a strike team. And the strike team is made up of individuals and they're not all necessarily from the same agency. In brainstorming, I can imagine some kind of strike-team situation where you have professionals who can come together. You can have a biologist, you can have an engineer, you can have a planner, you can have a regulatory representative from the local, the state and the federal level, perhaps on some kind of a board or an arbitration situation."

Mr. Hunting noted that the California Department of Fish and Wildlife has addressed dispute resolution involving permits for federal renewable energy projects "by forming a high-level team between federal and state agencies that met once a month. Projects were presented to us as we kind of worked through them. That was fairly successful. It certainly has to be funded, but it was helpful," he explained.

Are Endowments Really Necessary for Public Agencies?

During its review process the Commission also learned that a 1990s-era method of mitigating wildlife losses – to address environmental consequences of the private and public sector altering landscapes as part of California's continuing development and response to climate change – has some local public agencies crying

foul. More and more, in California, as well as nationally, permitting agencies require that private developers or public agencies preserve endangered species in new landscapes to compensate for damages to wildlife habitat caused by their projects. Further, they must set aside funds to maintain and manage those new landscapes in perpetuity. Typically, those funds are obtained through monetary endowments – in which a developer or public agency contributes a large one-time sum to a fund and the interest on that “principal” pays the maintenance and management costs in perpetuity.

“When a project is done the assumption is it’s a permanent impact for a species. Mitigation has to be permanent, too.”

Steven Ingram, Senior Staff Counsel and Tribal Liaison, California Department of Fish and Wildlife.

Steve Ingram, senior staff counsel and tribal liaison at the Department of Fish and Wildlife, said one-time individual contributions for endowments have ranged between \$33,000 and \$23 million. While the number of endowments statewide is unknown, he said the financial amounts in mitigation endowments statewide “is into the billions of dollars, but not high in the billions, would be my guess.”

Generally, agencies, land trusts and environmental groups maintain that endowments, as a permitting mechanism, are essential to fund long-term mitigation land management, especially in volatile financial environments in which public agency budgets can vary dramatically year to year. There is additional concern that waiving certain requirements for public agencies and not for private developers could create an uneven playing field in mitigating wildlife losses as part of private and public land development projects. The issue has received considerable legislative attention in recent years. (See box on Page 16).

Representatives of several local agencies asked the Commission during its February 2017 hearing to consider recommendations that exempt public agencies and special districts from requirements to fund endowments. Conversely, state agencies and a representative of a

statewide land trust defended their use as the most effective tool possible to guarantee a perpetual funding stream. Commissioners also learned during the hearing that both sides have used and continue to explore alternatives to a one-time lump sum endowments.

How Local Agencies View Endowments

Local agencies, particularly those involved in flood control infrastructure projects, have chafed for years over permit conditions that propose or require financial endowments as a habitat mitigation tool. Typically, their representatives maintain that they should not be lumped in with residential or commercial developers who might suffer financial losses in an economic downturn or failed development and go out of business and disappear. Most special districts and public agencies, they said, have lengthy, stable histories in California and guaranteed revenue streams that make them reliable partners for long-term financial commitments. They should be allowed to fund mitigation requirements through their annual budget appropriations. Requirements for one-time payments that can reach into the millions of dollars limit their ability to allocate taxpayer dollars effectively and remove large amounts of funds that otherwise pay for staff, operations and infrastructure maintenance, local officials told the Commission.

Testifying at the Commission’s February 2017 hearing, Vincent Gin, deputy operating officer for the Santa Clara Valley Water District’s Watershed Stewardship and Planning Division, said, “We firmly believe that an endowment is not appropriate for government. Local governments are enduring institutions with taxing powers and have the longevity the state seeks for mitigation sites.”

“Our concern,” Mr. Gin added, “is that endowments are essentially front loaded and would restrict large amounts of public funds and tax dollars that could otherwise be applied toward stream stewardship, safe and clean water and flood protection.”

Mr. Stone, of the Los Angeles County Department of Public Works, also testified, “In LA County, we have a very strong financial support. We have an AAA bond rating, and it just seems senseless to me to look at a mitigation area we’ve had it in place since 1998, where we do the annual maintenance, monitoring and reporting on this

thing, and yet to have to set aside \$10 million. It's a huge budget challenge. It's just money we're pulling away from other needs, in my opinion."

Mr. Stone said his agency has not yet had to pay for an endowment, despite pressure several years ago for a \$10 million endowment for stream maintenance. Discussions with state agencies, he said, continue to make it more likely the county will be required to pay one.

Likewise, Robert Doyle, general manager of the Oakland-based East Bay Regional Park District, told the Commission

during its public comment period, "The district has probably 30 projects that are as small as a small parking lot to a restroom which require mitigation. They're not big projects. Each one is required now to have an endowment. Those endowments can add up to between five and 10 million dollars for a park agency that has to put that money away permanently, which means we can't hire the rangers, we can't hire the police and we can't do additional projects that are good for the environment.

"The least common denominator, the bad actor is how the rules are created, not by the people who have a track

DEPARTMENT OF FISH AND WILDLIFE: A LEGISLATIVE HISTORY OF ENDOWMENTS

Since 2004 the Legislature has considered 13 bills related to endowments as the practice has continued to evolve nationally and in California. Some of the most recent, as compiled by the Department of Fish and Wildlife for the Commission's February 23, 2017, hearing include:

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 to 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 failed to pass 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 consequence 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.

SB 436 (Kehoe, 2011), amended existing law to allow nonprofit 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 nonprofit 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 nonprofit organizations that meets specified requirements; 2) provide funds to a special district, nonprofit 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 nonprofit organizations that holds the lands. It required a state or local agency to exercise specified due diligence in reviewing the qualifications of nonprofit 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).

Sources: Kevin Hunting, Chief Deputy Director, California Department of Fish and Wildlife, Sacramento, CA. February 23, 2017. Written Testimony to the Commission. Attachment IV. Accessed March 9, 2017.

record of excellence in natural resources management,” Mr. Doyle said. “There should be some mechanism for smaller projects that benefit the environment, and for agencies that primarily do natural resource management, to not be treated as if they’re a housing developer or a highway developer. Relief is essential if we’re going to make progress with so many challenges along the bay and the state of California,” he told the Commission.

“We feel that a commitment in a budgetary line item from a local government proponent is not secure. Those can be undone by future boards. They can be undone by current boards. There’s no guarantee that funding would be available and then that creates a liability for the state.”

Kevin Hunting, Chief Deputy Director,
California Department of Fish and Wildlife.

The State’s Response: Any Government Agency Can Go Bankrupt

In February 2017 written testimony, Kevin Hunting, chief deputy director of the California Department of Fish and Wildlife, the agency most frequently requiring endowments for perpetual mitigation projects to offset losses under the California Endangered Species Act, defended the use of endowments. He told the Commission that local public agencies cannot assure annual payments in perpetuity for mitigation purposes. He said the department’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 cities 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 entities could go bankrupt.”

Other department representatives told the Commission staff that many of California’s more than 2,000 independent special districts are small and often not highly sophisticated in financial matters. “It’s not clear they will always be here. It’s hard to separate who will always be here and who won’t,” said Mr. Ingram.

Mr. Hunting also explained the downside to the state in the event of nonpayment, adding, “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.”

Darla Guenzler, executive director of the Lincoln-based Wildlife Heritage Foundation, told the Commission that approximately 75 active nonprofit agencies like hers maintain approximately two million acres of mitigation lands statewide, and also would be hard-pressed to continue their work if local agencies that won exemptions from endowments defaulted on their annual budget obligations.

“What has evolved as a practice,” she said, “is that when land has to be set aside the agencies often direct the party, whether it’s a public entity or a private party like a housing developer, to have a non-profit to hold that land. We accept the legal responsibility in perpetuity for everything from land management, monitoring, repairing fences, paying insurance, those kinds of things. The idea and concept of an endowment evolved so the nonprofit or whoever was holding it, would have assured money to take care of that property in perpetuity to offset the loss of habitat and other resources. And so for the nonprofit organization like mine, and others that hold a lot of mitigation land, we need to make sure we can meet our responsibilities for these in perpetuity.”

Department of Fish and Wildlife representatives told Commission staff in 2016 that public agency complaints about endowments tend to be cyclical, rising and falling alongside changes in interest rates. Complaints have escalated after years of low interest rates, limited ability for endowments to generate significant earnings and subsequent requirements for higher-principal endowments. “I didn’t hear this so much 10 years ago when rates were higher,” said Mr. Ingram.

Ms. Guenzler, making a similar point and expressing an openness to alternatives to endowments, told the Commission, “Public agencies are very limited in their investment options and so, just by way of example, if you needed \$25,000 a year to take care of a piece of property, a nonprofit like myself, we have a very prudent interest rate of three and a half percent, so only \$700,000 needs to be set aside. If you’re a public agency, even earning 1.5 percent, which is generous for some, that is over \$1.6 million. Looking at the funding that’s needed for this, I think there’s a variety of tools, timing, letters of credit, a variety of things as long as we can keep in mind: how do we make sure there are resources in difficult budget times to make sure the parties are taken care of?”

A Middle Ground: There are Alternatives to Endowments

Alternatives to endowments do exist in California statute. Local agencies, beginning with testimony at the Commission’s October 27, 2016, special districts hearing, pressed the Commission to recommend greater use of them. “The issue is there are other options available,” said Melanie Richardson, interim chief operating officer – watersheds for the Santa Clara Valley Water District. “Most of the agencies have flexibility written into their requirements, but for some reason they’re not choosing to use those. So we are requesting that you all look into why state permitting agencies are not following the ability to allow flexibility in long-term financial assurance mechanisms, including exemptions from endowments for flood protection agencies and other entities with a long history of responsible environmental and fiscal governance.”

Responding at the Commission’s February 23, 2017, hearing, Mr. Hunting acknowledged, “There are alternatives to endowments that we’ve been exploring. We’ve explored these with special districts. We’ve explored them with local governments the last several years. One example is special district assessments. One in particular, geological hazard abatement districts, are a specialized type of assessment district that we feel hold promise for more incremental and kind of annual guarantees of funding for management activities that wouldn’t put the burden of a large endowment on a local government or a proponent. That holds promise.”

Mr. Hunting added, “There’s some flexibility, especially under SB 1094 from 2012 and how endowments are funded. So it’s not that in every case an endowment is required to be fully funded right up front. Oftentimes they can be funded over a longer period of time which reduces the initial fiscal impact of the endowment requirement. There may be other ways to fund long-term perpetual management, as well. We’ve explored several.”

In written testimony, the department, in its own words, cited five specific options and strategies available to local agencies in lieu of endowments:

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 its 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 (Natural Community Conservation Planning) or HCP/ITPs (Incidental Take Permit) 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, nonprofit 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.”

Conclusion

The vast majority of people working in government, with its responsibility for clean air and water and for protection of wild landscapes and endangered species, believe in the necessity of the permit process. It is the procedural stage of physically altering the face of California where public service professionals gauge environmental impacts and tradeoffs – and work to minimize or compensate for them. The entire cast of government witnesses who testified at the Commission’s February 23, 2017, state permitting hearing, honored the formal permit process as beneficial to the people and wildlife of California.

But clearly something also is wrong. That a small sampling of government agencies reported so many bureaucratic glitches, inconveniences and delays with their infrastructure projects suggests a wider problem, particularly amid the mounting impacts of climate change. As Ms. Spencer of Santa Barbara County told the

Commission, “I think if you put us in a dance hall we’d all get along really well. But I think that the system is so bogged down that it doesn’t happen that easily.”

In other words, the problem is more about the system than the people – though apparently, too few people at that, as so many witnesses talked about “too few people trying to process too many permits.” Inadequate funding and staff, however, is an issue best left to others given the Commission’s traditional focus on economy and efficiency and its resistance to suggesting more money as a solution.

Fortunately, several other solutions presented themselves at the hearing. All have potential for faster, more effective responses to climate change impacts already beginning to manifest themselves statewide. Accordingly, the Commission offers the following recommendations:

Recommendations

Recommendation 1: The Legislature should convene a working group of permitting agencies and regular permit applicants to formalize a “big table” approach for important climate-impact infrastructure projects in which parties sit down early to discuss potential delaying problems and work to avoid them. The process agreed to by the working group should be formalized in statute as a requirement for specified projects.

Clearly, greater multi-agency communication at the earliest stages of proposed infrastructure projects to defend California from climate impacts would ease more of the common glitches inherent in the state’s permitting process. While the Commission does not offer specific recommendations for what size project mandates a “big table” approach, what exactly should trigger the requirement for such an approach and how specifically to bring the federal government into the process it recommends that a working group first create a framework for the approach and that the Legislature institutionalize it in statute.

Recommendation 2: The Legislature should require state government permitting agencies to move beyond current practices of putting guidance for permitting applicants on their websites. They also should provide detailed so-called “cookbooks,” as they were described in the Commission’s February 23, 2017 hearing, that spell out precisely the expectations and requirements for applicants when filling out application forms for their permits.

Local government and special district witnesses with deep experience in permitting told the Commission that state permitting agencies *always* reject their applications as incomplete and begin rounds of requesting and requiring more information. In short, delays begin almost immediately. The Commission recognizes that a certain amount of this is inevitable. But better and far more detailed guides, especially for local governments less accustomed to the permitting routine, could prove invaluable in reducing the amount of frustration with incomplete applications expressed by both sides during the hearing.

Recommendation 3: The Legislature should put into statute requirements for a formal dispute resolution process and structure to mediate permitting conflicts for major projects necessary to guard the state against impacts of climate change.

The Commission’s February 23, 2017, hearing made it abundantly clear that few formal mechanisms exist to break through disputes on permitting conditions, especially on large, complex projects involving local, state and federal agencies. Because these permitting conflicts lengthen approval time and project implementation, there should be a conflict resolution process. Though state agencies have experimented with high-level teams to work out problems as they arise, the practice is not institutionalized within government permitting agencies. Witnesses suggested a dispute review board to mediate conflicts on major projects, a process similar to that used in the construction industry or the strike team approach used in fighting wildfires. The unifying concept of both is formally gathering a handful of experts representing the various interests who can mediate resolutions to disputes and push projects forward more quickly.

Recommendation 4: The Legislature should require state government permitting agencies to develop guidelines that encourage greater flexibility regarding endowments to finance mitigation lands that offset impacts of infrastructure projects strengthening California’s defenses against climate change impacts. State agencies also should make greater use of alternatives already identified and allowed in statute.

Long-established and highly-rated local government agencies and special districts, especially those performing mitigation on their own land, make a convincing point about needing to be treated differently than private developers and less reliable local government institutions. While it is admittedly difficult for state agencies to draw the line between reliable and potentially unreliable public entities, better and more flexible guidelines could help stop saddling all local agencies with required endowments due to reasonable concerns about the few. It is critical that climate-related infrastructure projects not be bogged down in lengthy disputes about tools to offset their impacts.

APPENDICES

Appendix A

Public Hearing Witnesses

The list below reflects the titles and positions of witnesses as the time of the hearing.

Public Hearing on State Permitting Processes
February 23, 2017
Sacramento, California

Vincent Gin, Deputy Operating Officer for Watershed Stewardship and Planning Division, Santa Clara Valley Water District

Christopher Hakes, Assistant Operating Officer for Water Utility Capital Division, Santa Clara Valley Water District

Kevin Hunting, Chief Deputy Director, California Department of Fish and Wildlife

Maureen Spencer, Environmental Services Manager, Santa Barbara County Department of Public Works

Chris Stone, Assistant Deputy Director, Los Angeles County Department of Public Works

Bruce H. Wolfe, Executive Officer, San Francisco Bay Regional Water Quality Control Board

Appendix B

Transcript:

State permitting comments by Melanie Richardson of the Santa Clara Valley Water District, at the Little Hoover Commission's October 27, 2016, hearing on special districts and climate change adaptation

"One of the obstacles we have moving forward is some of the regulatory permitting issues that we're seeing and I wanted to briefly touch on some of those.

The first one that I wanted to talk about was the use of financial assurance mechanisms for maintaining long term management of compensatory mitigation sites. I apologize if that's difficult to wrap your head around but essentially public agencies that conduct or approve projects that have significant environmental impacts are required to obtain permits from various governmental agencies, both state and federal, and as a condition of receiving those we're required to mitigate for our environmental impacts.

And the mitigation often takes the form of setting aside of other lands to make up for the ones that are being impacted by the project. When lands are set aside in mitigation the law requires that they have to be protected in perpetuity. More recently, however, federal and state permitting agencies are being insistent that endowments are the only acceptable avenue to ensure that the long-term sustainability of a compensatory mitigation site is achieved.

An endowment really means that it's a way of ensuring that funds will be available for long-term stewardship. Typically the interest on the principal is used to fund the annual management costs. By requiring endowments of public agencies, however, large sums of public funds are locked into an endowment, which otherwise could be used for other essential capital projects and their maintenance. And requiring public agencies to fund these effectively doubles the cost to local taxpayers for managing specified habitat enhancement or conservation lands. It increases taxpayer obligations by millions of dollars, significantly reducing the funds available to carry out the very important work.

And the issue is: there are other options available. Most of the agencies have flexibility written into their requirements, but for some reason they're not choosing to use those. So we are requesting that you all look into why state permitting agencies are not following the ability to allow flexibility in long-term financial assurance mechanisms, including exemptions from endowments for flood protection agencies and other entities with a long history of responsible environmental and fiscal governance."

Commissioner Flanigan: "Who are you negotiating with who's requiring this?"

Ms. Richardson: "Well, for an example, the United States Fish and Wildlife Services. All of the regulatory agencies have flexibility if they choose to use it. Some of them choose it. The U.S. Army Corps of Engineers has recently been a little bit more flexible in some of their cases and allow us to give letters of credit as an example, as opposed to a long-term endowment. I can follow up with you on more specifics.

Another key issue that we're having with permitting agencies is timeliness and consistency with other approved plans. So, state and federal regulatory agencies routinely take years to issue permits for both construction and routine maintenance activities with no clear procedures or guidelines to govern streamlining actions. Environmental decisions and permit processing timelines continue to be lengthened over time. In fact, I think I was telling Mr. Wasserman earlier that at our district we used to have planning, designing and construction phase of our project. We've added a permitting phase. Because it takes up to three years to do the permitting between design and construction. It's a major phase of

the work that has to be factored in. And it didn't used to be that way. It's changed over the last few years.

We have an example of a project, it's our Permanente Creek flood protection project, which was fraught with delays from the San Francisco Regional Water Quality Control Board. We submitted an application for the project which was consistent with all of the requirements in September of 2013. We saw no progress whatsoever for 16 months. Well, the agency decided to evaluate a completely new project design that the regional water quality control board insisted we evaluate. We did not reach any kind of agreement until March 2015 and received permits finally by December of 2015. So just that process took over two years. That's just an example. We have other examples.

The issue is that the agencies have demonstrated a practice of proposing redesign of the project through the permitting process. Even with the best of intentions redesign of a project after the completion of planning and lead agency project approvals circumvents the tenets of an open process. And it creates the unintended consequences of delays. We believe that changing the lead-agency-approved project does a great disservice to the community we serve. It also forces other state and federal agencies to wait to begin their permitting process and inefficiently redo their previous work. So it's kind of a domino effect that occurs.

Most importantly, redesign is likely to require additional and subsequent environmental documentation in compliance with the California Environmental Quality Act. And the basic purposes of CEQA, which I'm sure you all know, is to inform governmental decision-makers about the potential impacts of projects, identify the ways that environmental damage can be avoided or reduced and prevent it moving forward. By doing it this way it doesn't allow it all to occur in the public venue. And we believe that is not the best way of being open and transparent in all of our projects. So, we are urging you all for the establishment or adoption of procedures that streamline the permitting process and provide standards and guidance to facilitate a system of environmental review of projects. And we have spoken with other agencies and we know this is a problem wider than just our agency is experiencing.

Lastly, one other issue that's plaguing many of us is agencies' staffing inefficiencies. They're not all the same, but some regulatory agencies appear to lack adequate staff to process permits in a timely and predictable manner. The earlier you engage regulatory agencies in a process the better your project will be. But it's very difficult to engage their staffers earlier for a lack of resources.

Given the volume of applications that permitting authorities receive, some have responded by allowing applicants to contract and pay to fund full-time employment on the authority's staff. As part of our strategy to expedite permitting, we pay for a full-time staff member at the U.S. Fish and Wildlife Service, the California Department of Fish and Wildlife and the San Francisco Regional Water Quality Control Board. Sometimes this works to expedite the process and there's been other times when it still doesn't help the situation."

Commissioner Flanigan: "I'd like to take a look at all three of those."

Ms. Richardson: "We can help. We can provide whatever information you like. We have much more than I just read."

Notes

1 Chris Stone. Assistant Deputy Director. Los Angeles County Department of Public Works. Los Angeles, CA. February 23, 2017. Written testimony to the Commission.

2 Vincent Gin. Deputy Operating Officer for Watershed and Planning Division. Santa Clara Valley Water District. Christopher Hakes. Assistant Operating Officer for Water Utility Capital Division. San Jose, CA. February 23, 2017. Written testimony to the Commission. Pages 11-16. <http://www.lhc.ca.gov/studies/activestudies/statepermitting/WitnessTestimony/SCVWDFeb2017.pdf>. Accessed March 20, 2017.

Chris Stone. Assistant Deputy Director. Los Angeles County Department of Public Works. Los Angeles, CA. February 23, 2017. Written testimony to the Commission. Pages 2-5. <http://www.lhc.ca.gov/studies/activestudies/statepermitting/WitnessTestimony/StoneFeb2017.pdf>. Accessed March 20, 2017.

Maureen Spencer. Operations and Environmental Manager. Santa Barbara County Department of Public Works. Santa Barbara, CA. February 23, 2017. Written testimony to the Commission. Pages 1-10. <http://www.lhc.ca.gov/studies/activestudies/statepermitting/WitnessTestimony/SpencerFeb2017.pdf>. Accessed March 20, 2017.

Dr. Ana M. Alvarez. Deputy General Manager. East Bay Regional Park District. Oakland, CA. December 30, 2016. Letter to Commission Chair Pedro Nava. Pages 1-4. Accessed March 20, 2017. <http://www.lhc.ca.gov/studies/activestudies/statepermitting/PublicComments/EBRPD.pdf>. Accessed March 20, 2017.

3 Karen Keene. Senior Legislative Representative. Cara Martinson. Federal Affairs Manager and Legislative Representative. California State Association of Counties. Sacramento, CA. December 5, 2016. Personal communication.

4 Naomi Feger. Director. Planning Division. San Francisco Bay Regional Water Quality Control Board. Oakland, CA. December 20, 2016. Personal Communication.

5 Thomas B. Fayram. Deputy Public Works Director. Santa Barbara County Department of Public Works. Maureen Spencer. Operations and Environmental Manager. Santa Barbara County Department of Public Works. Santa Barbara, CA. December 29, 2016. Also: Chris Stone. Assistant Deputy Director. Los Angeles County Public Works Department. Los Angeles, CA. Patricia Wood. Senior Civil Engineer. Los Angeles County Department of Public Works. January 3, 2017. Personal communications.

6 Chris Stone. Assistant Deputy Director. Los Angeles County Department of Public Works. February 23, 2017. Testimony to the Commission. Also written communication to Commission staff, May 16, 2017. Also: Kevin Hunting. Chief Deputy Director. Department of Fish and Wildlife. April 27, 2017. Oral communication. Also, Fish and Game Code Section 5937.

Little Hoover Commission Members

CHAIRMAN PEDRO NAVA (*D-Santa Barbara*) Appointed to the Commission by former Speaker of the Assembly John Pérez in April 2013 and reappointed by Speaker of the Assembly Anthony Rendon in 2017. Government relations consultant. Former state Assemblymember from 2004 to 2010. Former civil litigator, deputy district attorney and member of the state Coastal Commission. Elected chair of the Commission in March 2014.

VICE CHAIRMAN SEAN VARNER (*R-Riverside*) Appointed to the Little Hoover Commission by Governor Edmund Brown Jr. in April 2016. Managing partner at Varner & Brandt LLP where he practices as a transactional attorney focusing on mergers and acquisitions, finance, real estate and general counsel work. Elected vice chair of the Commission in March 2017.

SCOTT BARNETT (*R-San Diego*) Appointed to the Commission by former Speaker of the Assembly Toni Atkins in February 2016. Founder of Scott Barnett LLC, a public advocacy company, whose clients include local non-profits, public charter schools, organized labor and local businesses. Former member of Del Mar City Council and San Diego Unified School District Board of Trustees.

DAVID BEIER (*D-San Francisco*) Appointed to the Commission by Governor Edmund G. Brown Jr. in June 2014. Managing director of Bay City Capital. Former senior officer of Genentech and Amgen. Former counsel to the U.S. House of Representatives Committee on the Judiciary. Serves on the board of directors for the Constitution Project.

IVETA BRIGIS (*D-Los Gatos*) Appointed to the Commission by Governor Edmund G. Brown Jr. in April 2017. Open Sourcing People Operations Program lead at Google Inc. since 2014.

SENATOR ANTHONY CANNELLA (*R-Ceres*) Appointed to the Commission by the Senate Rules Committee in January 2014. Elected in November 2010 and re-elected in 2014 to represent the 12th Senate District. Represents Merced and San Benito counties and a portion of Fresno, Madera, Monterey and Stanislaus counties.

ASSEMBLYMEMBER CHAD MAYES (*R-Yucca Valley*) Appointed to the Commission by former Speaker of the Assembly Toni Atkins in September 2015. Elected in November 2014 to represent the 42nd Assembly District. Represents Beaumont, Hemet, La Quinta, Palm Desert, Palm Springs, San Jacinto, Twentynine Palms, Yucaipa, Yucca Valley and surrounding areas.

DON PERATA (*D-Orinda*) Appointed to the Commission in February 2014 and reappointed in January 2015 by the Senate Rules Committee. Political consultant. Former president pro tempore of the state Senate, from 2004 to 2008. Former Assemblymember, Alameda County supervisor and high school teacher.

ASSEMBLYMEMBER SEBASTIAN RIDLEY-THOMAS (*D-Los Angeles*) Appointed to the Commission by former Speaker of the Assembly Toni Atkins in January 2015. Elected in December 2013 and re-elected in 2014 to represent the 54th Assembly District. Represents Century City, Culver City, Westwood, Mar Vista, Palms, Baldwin Hills, Windsor Hills, Ladera Heights, View Park, Crenshaw, Leimert Park, Mid City, and West Los Angeles.

SENATOR RICHARD ROTH (*D-Riverside*) Appointed to the Commission by the Senate Rules Committee in February 2013. Elected in November 2012 to represent the 31st Senate District. Represents Corona, Coronita, Eastvale, El Cerrito, Highgrove, Home Gardens, Jurupa Valley, March Air Reserve Base, Mead Valley, Moreno Valley, Norco, Perris and Riverside.

JANNA SIDLEY (*D-Los Angeles*) Appointed to the Little Hoover Commission by Governor Edmund Brown Jr. in April 2016. General counsel at the Port of Los Angeles since 2013. Former deputy city attorney at the Los Angeles City Attorney's Office from 2003 to 2013.

HELEN TORRES (*NPP-San Bernardino*) Appointed to the Little Hoover Commission by Governor Edmund Brown Jr. in April 2016. Executive director of Hispanas Organized for Political Equality (HOPE), a women's leadership and advocacy organization.

Full biographies are available on the Commission's website at www.lhc.ca.gov.

“Democracy itself is a process of change, and satisfaction and complacency are enemies of good government.”

*Governor Edmund G. “Pat” Brown,
addressing the inaugural meeting of the Little Hoover Commission,
April 24, 1962, Sacramento, California*