

Mitigation Endowment Facts



SB 1094 (Kehoe, 2012) modifies the requirements for mitigation endowments (Gov. Code, §§ 65965-65968).

Please note: Although SB 1094 removes the requirement for a state agency, including the California Department of Fish and Wildlife (CDFW), to exercise due diligence in reviewing the qualifications of an entity to manage endowments, this bill does not change CDFW's regulatory authority under the California Endangered Species Act to approve or deny an entity to hold an endowment or land.

Definition of endowment¹: "Endowment" means the funds that are conveyed solely for the long-term stewardship of a mitigation property. Endowment funds are held as charitable trusts that are permanently restricted to paying the costs of long-term management and stewardship of the mitigation property for which the funds were set aside. Endowments shall be governed by the underlying laws, regulations, and specific governmental approvals under those laws and regulations pursuant to which the endowments were exacted, consistent with subdivision (b) of Section 65966 and with the Uniform Prudent Management of Institutional Funds Act (Part 7 (commencing with Section 18501) of Division 9 of the Probate Code). Endowments do not include funds conveyed for meeting short-term performance objectives of a project.

Requirements of the endowment²:

- The endowment shall be held, managed, invested, and disbursed solely for, and permanently restricted to, the long-term stewardship of the specific property for which the funds were set aside; and

¹ Gov. Code, § 65965, subd. (a)

² Gov. Code, § 65966, subd. (b)

- The endowment shall be calculated to include a principal amount that, when managed and invested, is reasonably anticipated to cover the annual stewardship costs of the property in perpetuity.

Endowment holder criteria³: The endowment must generally be held by one of the following:

- The agency or agencies that required the mitigation;
- The governmental entity, special district, or nonprofit organization that either holds the property, or holds an interest in the property, for conservation purposes; or
- The governmental entity or special district that retains the property after conveying an interest in the property for conservation purposes if that governmental entity or special district is protecting, restoring, or enhancing the property that was retained.

Endowment holder exceptions⁴: If any of the following exceptions apply, the endowment may be held by another qualified entity not listed above:

- An endowment held by an entity other than the state or holder of the mitigation property as of January 1, 2012.
- An endowment that is held by another entity, qualified under this bill and pursuant to the terms of a **natural community conservation plan (NCCP)** or a state **safe harbor agreement**. To apply this exception, the implementation agreement (for approved NCCPs), the planning agreement (for not-yet-approved NCCPs), or the safe harbor agreement shall address qualifications of the endowment holder, capitalization rate, return objectives, and the spending rule and disbursement policies.
- If existing law prohibits the holder of the mitigation property to hold the endowment, including for-profit entities.

³ Gov. Code, § 65968, subd. (b)(1)

⁴ Gov. Code, § 65968, subd. (b)(2)

- If the project proponent and the holder of the mitigation property or conservation easement agree that a community foundation or a congressionally chartered foundation shall hold the endowment.
- If the mitigation property is held or managed by a federal agency.
- If any of the same mitigation property is required to be conveyed pursuant to both a federal and state governmental approval, and the federal agency does not approve one of the entities.

Information the endowment holder shall provide⁵: The entity wishing to hold an endowment shall certify to the project proponent or the holder of the mitigation property or a conservation easement, and to CDFW that it meets all of the following requirements:

- The holder has the capacity to effectively manage the mitigation funds.
- The holder has the capacity to achieve reasonable rates of return on the investment of those funds similar to those of other prudent investors for endowment funds and shall manage and invest the endowment in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances, consistent with the Uniform Prudent Management of Institutional Funds Act (Part 7 (commencing with Section 18501) of Division 9 of the Probate Code).
- The holder utilizes generally accepted accounting practices as promulgated by either of the following:
 - The Financial Accounting Standards Board or any successor entity for nonprofit organizations.
 - The Governmental Accounting Standards Board or any successor entity for public agencies, to the extent those practices do not conflict with any requirement for special districts in Article 2 (commencing with Section 53630) of Chapter 4 of Part 1 of Division 2 of Title 5.

⁵ Gov. Code, § 65968, subd. (e)

- The holder will be able to ensure that funds are accounted for, and tied to, a specific property.
- If the holder is a nonprofit organization, a community foundation, or a congressionally chartered foundation, it has an investment policy that is consistent with the Uniform Prudent Management of Institutional Funds Act (Part 7 (commencing with Section 18501) of Division 9 of the Probate Code).

Mitigation agreements⁶: Mitigation Agreements are defined to mean either:

- A written agreement between the project proponent and the entity qualified to hold the property and the endowment, which is submitted to the state or local agency for the purpose of obtaining any permit, clearance, or mitigation approval from that state or local agency; or
- A written agreement between the project proponent and the entity qualified to hold the property, including any agreement with an entity qualified to hold the endowment, which is submitted to the state or local agency for the purpose of obtaining any permit, clearance, or mitigation approval from that state or local agency.

Additionally, a mitigation agreement shall govern the long-term stewardship of the property and the endowment.

Mitigation agreements may not include provisions or terms that waive or exempt the parties from the requirements of Government Code Sections 65965-65968.

Specifically naming an endowment holder⁷: CDFW cannot designate a particular endowment holder as a condition of approval within an ITP or other permit, clearance, agreement, or mitigation approval.

State agency one-time fee⁸: CDFW may require a one-time fee from an entity applying to hold mitigation lands, as long as CDFW can demonstrate its actual review of qualifications and approval of holders.

⁶ Gov. Code, § 65965, subd. (f)

⁷ Gov. Code, § 65968, subd. (k)

⁸ Gov. Code, § 65966, subd. (f)

Endowment holders are required to submit annual fiscal reports⁹: To ensure the endowment is managed in accordance with California law, the endowment holder shall prepare and submit an annual fiscal report to CDFW. The annual fiscal report shall contain at a minimum the following eight elements:

- The balance of each individual endowment at the beginning of the reporting period.
- The amount of any contribution to the endowment during the reporting period including, but not limited to, gifts, grants, and contributions received.
- The net amounts of investment earnings, gains, and losses during the reporting period, including both realized and unrealized amounts.
- The amounts distributed during the reporting period that accomplish the purpose for which the endowment was established.
- The administrative expenses charged to the endowment from internal or third-party sources during the reporting period.
- The balance of the endowment or other fund at the end of the reporting period.
- The specific asset allocation percentages including, but not limited to, cash, fixed income, equities, and alternative investments.
- The most recent financial statements for the organization audited by an independent auditor who is, at a minimum, a certified public accountant.

Mandated CDFW due diligence for landholders¹⁰: A state or local agency shall exercise due diligence in reviewing the qualifications of a governmental entity, special district, or nonprofit organization to effectively manage and steward land, water, or natural resources.

State or local agency limitation¹¹: Nothing in this section shall prohibit a state or local agency from determining that a governmental entity, community foundation, special district, a congressionally chartered foundation, or nonprofit organization meets the

requirements of this section and is qualified to hold the endowment, or including a provision in the mitigation agreement.

These requirements for mitigation endowments are for a 10-year period (sunset date of January 1, 2022) at which time the Legislature may revisit the matter (Gov. Code, § 65968, subd. (I).)

⁹ Gov. Code, § 65966, subd. (e)

¹⁰ Gov. Code, § 65967, subd. (c)

¹¹ Gov. Code, § 65968, subd. (h)