

**Open Space (OS) Draft Mitigation Policy
Meeting 12-8-16**

**COMMENTS
For the Record**

REQUESTED CHANGE IN DRAFT POLICY

OS should not permit mitigation projects on property with OS easements.

REASONS:

- 1) Public perception of mitigation is negative because it is often perceived as enabling development which is detrimental to the environment. Example: the “Roblar Rd. Quarry project.”
- 2) The very complex business of selling mitigation does not justify distracting staff from the OS mission.
- 3) Engaging in the “business of mitigation sales” exposes OS to liability and negligence in the use of tax payers’ money. *Reference: Case # M74696 Monterey County Superior Court.*

Questions for County Counsel:

1) How will OS solve the following problem:

Background - OS has provided the State (Caltrans) with mitigation and it appears OS anticipates doing business with Caltrans in the future.

Caltrans has a new contract and requires all mitigation purchases to use this contract. (It would be highly unlikely that OS would be a party to this new contract.) For a copy of this contract for your review contact:

Office of Service Contracts, Division of Procurement and Contracts
California Department of Transportation
1727 30th Street, MS 65, Sacramento, CA 95816
Email - Rachel.Lopez@DOT.CA.GOV
Office - (916) 227-6115

Can OS do business with the State given the requirement of using the State contract and the State’s “inability” to be flexible?

2) Is it correct that OS will be exposed to potential liability given the following policy?
OS says they will accept no liability in respect to mitigation projects, however, OS is stating in their policy that they “retain control of the project.

3) Is OS exposing themselves to potential liability by pursuing the following project?

OS wants to have willows planted at their Estero location for a Caltrans mitigation project. Caltrans did this type of mitigation project at another coastal location, feral hogs crossed Hwy. 101 and a motorcyclist was paralyzed when he hit the hogs. The courts made a \$8.6 million award to the cyclist because Caltrans’ created an attractive nuisance with their mitigation project.
Reference: Case # M74696 Monterey County Superior Court.

3. Will the State “subordinate” to the OS easement? (State agencies are often one of the permitting agencies requiring mitigation.)

Please provide responses to the “**Questions for County Counsel:**” to: Nancy Summers <summersng@saber.net> and OS. Thank you.