



915 L St., C-425
Sacramento, Ca. 95814
916-447-4956

www.swainsonshawk.org

swainsonshawk@sbcglobal.net

Swainson's Hawk Mitigation Evaluation Project

Phase 1 Executive Report – South Sacramento County and Elk Grove, California
Key Findings and Recommendations, Adopted by FOSH Board, May 13, 2011

- Melinda Dorin Bradbury “A Review of the City of Elk Grove and South Sacramento County Swainson’s Hawk Mitigation Programs” (January 25, 2011)
- Shannon McClure prepared “A Comparison of Swainson’s Hawk Conservation Easements” (Summer 2010).

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Executive Summary with Findings and Recommendations Summary prepared by Judith Lamare, Ph.D. President

Since inception, Friends of the Swainson’s Hawk has had an abiding interest in how well mitigation for Swainson’s Hawk impacts is implemented by lead agencies under CEQA, the California Environmental Quality Act. CEQA provides the key protections for Swainson’s Hawk. This important mitigation program has been a large land conservation program and also permanently protects productive agricultural land.

Our Conservation Strategy requires us to monitor and assess CEQA performance both during project and plan level CEQA review periods and in general. We have a history of getting changes in CEQA mitigation before adoption and of litigating when performance is poor — when we focus on a project. However we can’t be eyes on everything. The systematic review that this project offers a broader base for assessing how we are doing and points to bigger fixes for what is weak in CEQA’s protection of the Swainson’s Hawk.

We offer this executive summary to share the results of our research project with policy makers, local and state government, the interested public, colleagues and partners, and other interested parties. It is also a working document for us to identify steps that FOSH will take to improve the CEQA protections for Swainson’s Hawks.

The present study included review and evaluation of South Sacramento County mitigation programs implemented by the County of Sacramento and City of Elk Grove since 1996. Melinda Dorin Bradbury, environmental consultant, prepared “A Review of the City of Elk Grove and South Sacramento County Swainson’s Hawk Mitigation Programs” (January 25, 2011) and Shannon McClure, McGeorge Law School student intern, prepared “A Comparison of Swainson’s Hawk Conservation Easements” (Summer 2010). These documents form the basis for our findings and recommendations. In addition, our routine monitoring of CEQA

implementation during this time period revealed CEQA problems outside the purview of the consulting studies underway. Our findings and recommendations reflect monitoring and evaluation by our Legal Counsel, James P. Pachl. Thanks go to him, volunteer wildlife biologist Frank Gray, a FOSH Board member.

CEQA is a process for ensuring that lead agencies accurately assess project impacts on the environment and mitigate for those impacts. In the case of Swainson's Hawk, a species listed under the California Endangered Species Act as threatened, California Fish and Game (CDFG) has a role as a trustee agency. A trustee agency is "a state agency having jurisdiction by law over natural resources affected by a project which are held in trust for the people of the State of California." (CEQA Guidelines, Sec. 15386) However, a trustee agency does not determine the project impacts on the resource nor the mitigation required by the project. Consultation between lead agencies and CDFG is the mechanism for achieving range-wide consistency and effectiveness in standards of assessment and mitigation measures. DFG works with local agencies to encourage good mitigation programs. However, this is a weak basis upon which to rest the conservation of a species, as demonstrated in our findings below.

Key Findings

- FOSH found that City of Elk Grove and County of Sacramento have used local ordinances for systematically managing their Swainson's Hawk mitigation under CEQA with significant consultation by California Department of Fish and Game. Approximately 2,724 acres of mitigation land have been permanently conserved. Using consistent standards and transparent methods for assessing and mitigating for the impacts of their development is efficient and more effective for conservation than piece meal mitigation. The programs have been improved since inception and the planning departments have exercised care to document and monitor implementation under the ordinances.
- FOSH found some significant variances and lapses in Fish and Game/lead agency consultation which weakened the programs, and also found that the County did not always conduct CEQA review of local assessment and mitigation programs, while Elk Grove did.
- FOSH found that the City of Elk Grove made available a substantial Swainson's Hawk preserve, in advance of development, and created new habitat by removing a vineyard, and conducting Swainson's Hawk beneficial agricultural activities on 750 acres. This innovative project met developer needs for fee-based mitigation for small projects, and achieved improvements in CEQA mitigation, including
 - avoided temporal loss through "get ahead" mitigation – mitigation occurs before impact;
 - avoided fragmented mitigation parcels with large "edge effects" by acquiring one large parcel;
 - avoided cost uncertainty and fee insufficiency.
- FOSH found substantial deficits in both programs due to early program fee deficiencies and lack of timely land acquisition. The early deficits amount to thousands of acres of mitigation purportedly required as CEQA mitigation measures, but not provided. These programs have since been revised to require developers to provide mitigation land prior to grading permits for projects of 40 acres or more and market rate mitigation fees for smaller projects, but the earlier deficits will likely remain outstanding for perpetuity. This is a classic illustration of the grave weakness of relying on CEQA to mitigate for impacts on wildlife.

- FOSH found it was not able to track the comparison of habitat quality at each site developed with each site at which mitigation occurred. A core CDFG criterion for habitat preservation is that the mitigation occur within a few miles of the developed site on like habitat. CDFG’s identification of target areas for Elk Grove and Sacramento County mitigation land acquisitions provided a useful tool – an envelop within which mitigation lands could be located without project by project evaluation. The target area maps locate “pre-approved” mitigation lands that are contiguous with existing mitigation areas so that fragmentation of mitigation is avoided. While the pre-approved CDFG envelop for mitigation lands provides assurances, FOSH was unable to track all mitigation lands dedicated, and found some instances where the envelop was ignored. Lead agency discretion to approve mitigation land does not allow enough assurances that double-dipping (inappropriate stacking of easements), or poor match of quality or distance between developed and mitigation lands do not occur.

- FOSH is concerned that land dedications for mitigation be on land otherwise not encumbered and otherwise developable. We found some inconsistencies and have concerns about conservation easements. In general, easements examined in South Sacramento County and Elk Grove programs study were not as complete nor as restrictive as our model easement and those typically used in Yolo County. These concerns include:

- easements that allow water transfers for up to five years;
- easements that do not require CDFG as a third party beneficiary;
- easements not prohibiting “double-dipping” – that is, use of the land for more than one species.

- FOSH found that there have been anomalies and exceptions to sound mitigation practice that have marred local government performance. These include:

- Lack of consistency in complying with Fish and Game guidance. Both jurisdictions allowed mitigation on lands outside the target areas identified by CDFG as appropriate for mitigation of development inside their respective jurisdictions. In two notable cases, these deviations resulted in lower quality habitat and cheaper mitigation prices that undermined the program over a period of time. We saw no evidence that CDFG approval was sought or given for these exceptions.

- County use of a zoning-based formula to improperly assess impacts and to greatly reduce mitigation obligation for foraging habitat with zoning designations of A-20 and AR-20 and below, without regard for actual conditions of land use;

- City of Elk Grove holding conservation easements on mitigation land without third party beneficiary to enforce and guarantee;

- Lack of adequate tracking mechanisms at DERA, County of Sacramento Department of Environmental Review and Assessment, so that FOSH was unable to examine mitigation obligations and implementation on an unknown number of projects.

- FOSH found that CDFG approved Swainson’s Hawk mitigation credits at mitigation banks can seriously complicate assessment of CEQA mitigation by the two jurisdictions in this study when the mitigation banks available offer only vernal pool/annual grassland type habitat and important Swainson’s Hawk foraging habitat on farmland is being displaced by urban development.

- First, it is unclear why DFG has approved Swainson’s Hawk credits at mitigation banks established for wetland species with a service area well beyond that habitat type.
- Second, the banks compete with the local programs, and in at least one case the mitigation bank option has undermined the success of the local program with a high quality Swainson’s Hawk preserve.

- Third, CEQA mitigations for local infrastructure projects, school district projects and others falling outside the purview of local government CEQA review and compliance are taking place at mitigation banks, with no regulatory oversight or evaluation as to the “like habitat” and distance criteria.
- Fourth, mitigation banks with Swainson’s Hawk credits can have impacts on local mitigation programs by offering lower quality mitigation land at greater distance from nesting sites than local ordinance options. CDFG should consider CEQA review for any decisions to allow Swainson’s Hawk mitigation credits at mitigation banks established for other purposes.
- FOSH supports adoption of a multi species habitat conservation plan for South Sacramento County to replace the present programs as a necessary evolution to more comprehensively planned and managed preserve lands with greater sustainable habitat value. While we reserve judgement on the details of the South Sacramento County Habitat Conservation Plan, the present system of scattered, small conservation easements, is not a quality program. (Elk Grove’s Delta Breeze preserve is the exception.) As Bradbury points out: “Habitat compensation in the County needs to have centralized oversight to ensure preserve design is the best for Swainson’s Hawks and to ensure one entity is tracking all jurisdictions and facets of the program.”

Key Recommendations

- At minimum, California Department of Fish and Game should adopt a Conservation Strategy for Swainson’s Hawk in California and a riparian habitat conservation strategy to serve as guidance to lead agencies in determining impacts and providing mitigation under CEQA.
- We want to redress the significant mitigation deficit of ±3,800 acres accumulated over the last 15 years in South Sacramento County. FOSH recommends that various methods be considered for funding additional land acquisition, and that the South Sacramento County HCP include the objective of acquiring Swainson’s Hawk habitat (through means other than developer fees) to erase the past mitigation land deficit of 3,800 acres. FOSH shall seek partnerships and foundation funding to achieve this goal.
- FOSH recommends that any fee-based Swainson’s Hawk mitigation program under CEQA include a “stay ahead” requirement and a requirement that permits not be issued if the program does not have adequate land under easement to fully mitigate already permitted projects.
- FOSH recommends lead agencies provide more transparency to their mitigation monitoring. Fee-based programs should have an annual audit and report to the governing body; we also recommend that report include a report on all mitigation required that is to be met outside the fee program. Summary documents reporting on all CEQA Mitigation Monitoring Reports should be available to the public for review.
- FOSH should implement a phase 2 study at the County of Sacramento, Department of Environmental Review and Assessment, to determine the impact of mitigation 1) based on DERA’s “small parcel” solution method of assessing impacts; and 2) implemented outside the ordinance program reviewed in the current study. As stated in Bradbury’s report “All of the CEQA documents for South Sacramento County need to be reviewed to determine how mitigation was implemented for projects that did not pay into the Swainson’s Hawk Mitigation Fund.” Further deficits may be documented through this study.

- FOSH should apply the same methodology used in the present study to evaluate mitigation programs at other jurisdictions including Rancho Cordova and Yolo County.
- FOSH should use mapping and GIS tools to compare the built with conserved areas in relation to nesting sites to further evaluate local CEQA program impacts on species conservation, and to look at fragmentation versus consolidation of habitat lands.
- FOSH should request changes at CDFG regarding mitigation credits for Swainson's Hawk. Specifically, we recommend that:
 - DFG approval of Swainson's Hawk credits at mitigation banks be subject to CEQA;
 - DFG not approve any mitigation credits for Swainson's Hawk outside the Valley floor;
 - DFG evaluate and publish their legal authority to approve such credits; and
 - DFG establish consistent criteria and standards for mitigation banks that provide mitigation for impacts on Swainson's Hawks to ensure that projects are not mitigated with habitat of poorer quality than that destroyed.
- DFG exercise sufficient control over sale of Swainson's Hawk credits to ensure that their use is consistent with DFG guidance for mitigation of projects in terms of proximity and quality of habitat. At minimum, bank marketing information must advise project proponents and lead agencies about the specific characteristics of the habitat available for purchase.

Also, FOSH should work with other interested parties to build coalition support for these recommendations and to assess what else DFG can do to improve performance of mitigation banks in serving economic development and conservation goals.

- FOSH recommends that state policymakers fund creation and maintenance of a state level clearinghouse, funded by CEQA fees, with mandatory reporting of all conservation easements by lead agencies and mitigation bank owners so that all easements can be publicly known and tracked at one location. Such a clearinghouse should be publicly accessible to provide transparency and full disclosure on all conservation easements. The state should consider legislation that would require CDFG as a third party beneficiary on any conservation easements intended for wildlife conservation to ensure that as the trustee agency, CDFG is able to enforce easements in perpetuity.
- FOSH recommends that conservation easements be carefully considered as the basic conservation tool to protect Swainson's Hawk. The consulting study prepared for this project recommended against easements because of:
 - small size and fragmentation of mitigation parcels, with more edge effects and potential future conflicts in land use;
 - lack of affirmative management for Swainson's Hawk needs;
 - mitigation ratio at 1:1 removes half the available habitat without improvements in quality on the preserved half;
 - inability to determine and quality-control easements outside of an approved Habitat Conservation Plan or Natural Communities Conservation Plan.
- FOSH recommends that the following provisions become standard for Swainson's Hawk conservation easements:
 - a) no degradation of water quality and no alteration of natural watercourses, no transfer of water rights;

- b) no alteration of surface topography and no natural resource development;
- c) no antennas/towers/windmills, no vehicles and no paving;
- d) limited hunting and fishing;
- e) limited agricultural use (e.g. no rice, restrictions on crops like corn and safflower that have very limited utility for Swainson’s Hawks);
- f) list of known prior encumbrances;
- g) CDFG as a third-party beneficiary with the right of enforcement;
- h) Non-profit conservation organization hold, monitor and enforce easement;
- i) annual monitoring compliance reports available to the public; and
- j) prohibition on stacking Swainson’s Hawk easements on agricultural easements unless specific additional management practices and habitat enhancements are also required.

Further Discussion of Key Issues.

To further understand our findings and recommendations, please read our consulting reports and our comment letters on the environmental review of the Florin-Vineyard Gap Community Plan. What follows is a summary of our concerns on four problems found in this evaluation: 1) the “small parcel” formula used in the Florin-Vineyard Gap Community Plan to substantially underestimate the impacts on Swainson’s Hawk and to minimize the mitigation obligation; 2) a brief description of the Bryte Ranch Mitigation Bank used by some Elk Grove projects; 3) a brief description of the MacKenzie conservation easement; and 4) the historic mitigation land deficits. These four problems illustrate what we see as gaps and loopholes in an otherwise acceptable local government CEQA mitigation practice. These problems make it difficult for legitimate and better quality mitigation solutions to be economically successful.

1. The Florin-Vineyard Gap Problem – Need for Revisions to “Small Parcel Solution”

The Florin-Vineyard Gap Community Plan (3,677 acres in southeast Sacramento County) and Final Environmental Impact Report were adopted December 15, 2010 with a formula for assessing Swainson’s Hawk impacts based on parcel zoning rather than habitat value. This assessment method is contrary to CEQA and itself never went through CEQA review. While the County has claimed that CDFG supported the use of this method to assess impacts, CDFG’s letter commenting on the formula did not address its use in a community plan with large areas of open land suitable for foraging. FOSH has filed a CEQA lawsuit challenging the adoption of this plan and EIR. More detailed documents can be found on our website.

In 2006, the County’s Department of Environmental Review and Assessment began using a formula based on zoning to determine mitigation obligation when rezoning large agricultural land holdings to smaller ones. The formula is also useful in the case of small parcel splits for creation of Ag/Res development. However, when used to assess impacts over a large open area of A-20 and AR-20 properties that have not previously paid mitigation upon rezone from larger agricultural holdings, the result is a very obvious violation of CEQA which requires habitat assessment based on land use, not zoning.

The County and CDFG need to reevaluate this issue and change the formula in light of legal standards and fairness to the Swainson's Hawk. It is worth noting that the City of Elk Grove has not attempted to bypass CEQA in managing its Swainson's Hawk mitigation obligations.

2. The Bryte Ranch Mitigation Bank Problem

Bryte Ranch is a 577 acre mitigation bank consisting of a vernal pool complex with associated upland grassland established in 2002 with 157 vernal pool mitigation credits. In 2004, California Department of Fish and Game approved 431 Swainson's Hawk mitigation credits at this site. The City of Elk Grove has since approved 179 acres of Swainson's Hawk mitigation at the bank for projects in their jurisdiction. For this study, FOSH did a site visit to evaluate the habitat and found it to be poor quality for Swainson's Hawks. FOSH requested records from CDFG on the biological rationale for the credits, and for the monitoring surveys, but has not been given these documents to date.

Bryte is outside the target area established by CDFG for Elk Grove mitigation and inconsistent with the type of habitat that development in Elk Grove destroyed. One hundred of the 179 acres mitigated for at Bryte Ranch were located west of Highway 99 in the high density nesting area of Elk Grove. Seventy-nine acres developed were located east of 99, somewhat closer and somewhat more like the habitat found at Bryte Ranch. Since DFG had approved the credits with a service area including the city of Elk Grove, the City accepted the argument that DFG had approved mitigation at that site. This example highlights the way that DFG approved mitigation credits can undermine local conservation efforts and contradict their own guidance to local government.

This case illustrates a number of issues with CEQA mitigation and how mitigation credits can be a problem. FOSH disagrees with Elk Grove's decision to allow mitigation at Bryte Ranch, particularly after the Elk Grove preserve had been established. Elk Grove should not approve mitigation credits at Bryte Ranch unless the habitat for which the credits are mitigating is of like kind and within 5 miles.

3. The MacKenzie Conservation Easement Problem

The MacKenzie Conservation Easement is a case where the County of Sacramento did not use its ordinance policy to determine mitigation obligation for several projects, but instead accommodated local landowners in a scheme to create their own mitigation. The result was mitigation that contradicted DFG guidance on the Sacramento County program, and provided "cut-rate" mitigation that undermined success of the County's own fee program. On the plus side, the easement is held by Sacramento Valley Conservancy, has some positive qualities and is in a location where there are nesting Swainson's Hawks.

The MacKenzie preserve is 34 acres, bounded by Twin Cities Road on its longest side. It is bordered on the east by Ag/Res development. One of the parcels it mitigates is adjacent. Though it is zoned Ag-80, the General Plan shows it as Ag/Res. There is potential for ag/res development to expand and compromise the habitat value of this parcel in the future. The parcel is small and not adjacent to other preserved lands. However, is part of a large ag landscape that could ultimately be permanently preserved.

The projects mitigated at this site were typically recipients of the County's generous "small parcel solution," discussed above as a formula used to discount impact assessment based on the zoning of the parcel. So projects totaling nearly 120 acres of impact used one 34 acre parcel to mitigate for all their impacts on Swainson's Hawk foraging.

"☐ The projects that mitigated at the site paid a fraction of the cost that projects paid using the Swainson's Hawk Mitigation Fund during the same time period;

☒ The site is outside the CDFG preapproved areas in Figure 2;
☒ Turn-key projects are normally a relatively quick turnaround, but projects were mitigating at the site over several years.”
(excerpt from Bradbury, “A Review of the City of Elk Grove and South Sacramento County Swainson’s Hawk Mitigation Programs” (January 25, 2011))

4. Acknowledgement and Redress of the Sacramento County and Elk Grove Mitigation Deficits; Issue of Historic Mitigation Ratios.

FOSH has been concerned about the historic deficit in mitigation provided by fee programs that failed. Both Elk Grove and the County of Sacramento collected fees for the purpose of acquiring mitigation land but did not acquire the land during the early 2000s. This is typical of early CEQA mitigation programs and led to program revisions to ensure that land not fees are the basis for the mitigation program. Jurisdictions with deficits have not acknowledged or addressed how to erase the deficit.

Also, FOSH has calculated the deficit by assuming a 1:1 mitigation ratio for land developed during this period in Elk Grove and the County of Sacramento. The ratio is based on California Department of Fish and Game, CDFG, 1994, “Staff Report Regarding Mitigation for Impacts to Swainson's Hawk.” This report was the standard upon which mitigation was typically calculated during the pre 2005 period we are addressing. One-to-one is the ratio for easement to mitigate for development within one mile of Swainson’s Hawk nesting.

The Sacramento County Planning director responded to our draft report by stating that:

“Prior to the adoption of a 1:1 mitigation ratio standard in late 2005, there were no mitigation ratio requirements specified in the ordinance or otherwise required.” The County believes that prior to 2005, it was using a .5:1 ratio for mitigating Swainson’s Hawk impacts. The current deficit under this assumption would be approximately 520 acres.

This example demonstrates the kind of inconsistency and poor performance that can result when a state level protection issue – Swainson’s Hawk protection — is implemented by local governments under CEQA, without state regulatory oversight and approval. While there has been much to applaud in the cooperative and collaborative approach between California Fish and Game and County of Sacramento and Elk Grove, there have also been serious lapses without apparent remedy. FOSH will continue to look for effective ways to ensure that CEQA mitigation for impacts on Swainson’s Hawk is fair and protective of the species.