

DIVISION OF MULTIBENEFIT INITIATIVES

**Facilitating Improvement of Systemwide Habitat**

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**Acronyms and Abbreviations**

DMI	Division of Multibenefit Initiatives
DWR	Department of Water Resources
NGO	Non-governmental organization
O&M	Operations and Maintenance
Program	FISH Program
PSP	Proposal Solicitation Package



## **1.0 FACILITATING IMPROVEMENT OF SYSTEMWIDE HABITAT**

### **1.1 Division of Multibenefit Initiatives**

The goal of DWR's Division of Multibenefit Initiatives (DMI) is to implement programs and projects that reduce flood risks and provide other benefits such as restored fish and wildlife aquatic and associated habitat, improved fish passage, enhanced fish food web production, and public access. DMI uses multiple programs to implement its goals throughout the Sacramento-San Joaquin Delta (Bay-Delta) and tributary watersheds, including the ~~Floodplain Initiative and~~ Facilitating Improvement of Systemwide Habitat Program (FISH Program). In all programs employed to achieve its multibenefit goal, including the FISH Program, DMI strives to:

- Use public funds for projects that maximize value for Californians and the State's ecosystems.
- Maximize use of available landscapes in the State's waterways and flood system by developing projects that create multiple benefits for people, ecosystems, habitats, and species.
- Recognize the connectiveness of water resources management at the watershed and regional scales and respect regions' unique governance, perspectives, interests, and priorities.
- Advance and develop innovative, science-based methods for implementing habitat restoration and enhancement.

## **2.0 PROGRAM IMPLEMENTATION ALTERNATIVES**

The FISH Program implements multi-benefit projects to restore or enhance aquatic and associated habitat to benefit fish and wildlife while integrating input from local and regional interests, in an equitable manner.

There are several alternatives for implementing the FISH Program, including through state-led projects, directed actions, and proposal solicitations, as described below.

### **2.1 State-Led**

State-led projects are delivered by DWR staff from initiation to design and through construction. DWR Project Managers may also use the State contracting process to hire outside contractors to complete specific elements of a project if DWR staff are unavailable or if a required skillset is not timely available within DWR.

## **2.2 Directed Actions**

Directed actions are specific projects that are awarded funding at the discretion of the DWR Director. These may be projects proposed to DWR either in response to a solicitation from a stakeholder, another government entity, or by DWR programs. Directed actions by DWR may utilize public entity agreements or other State contracting processes to partner with other entities to complete entire projects or to complete separate elements of larger projects. Directed actions include consideration of the other entity's resource and financial capacity, experience, capability, and willingness to take on the work.

## **2.3 Proposal Solicitations**

Proposal solicitations are standard practice for government agencies to make funds available to other public and private entities to complete projects based on competitive ranking. Proposal solicitations generally work well to complete multiple projects across multiple geographic regions and serves to create broad ecosystem benefits.

## **3.0 PROJECT PRIORITIZATION**

The FISH Program will examine several factors when selecting and implementing a project. These factors may take on various degrees of importance based on State and DWR priorities, the needs of the project, and funding sources available. Project prioritization criteria may include, but are not limited to the following:

- Habitat types meeting Conservation Strategy Measurable Objectives
- Acres contributed to Habitat Restoration as outlined in the Term Sheet for Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan or any successors or amends thereto
- Other ecosystem benefits
- Groundwater recharge
- Local and regional interested party needs
- Land use constraints
- State and federal permitting schedules
- Public access opportunities
- Scientific research opportunities
- Total project cost

Scoring criteria and project eligibility requirements for a specific solicitation will be defined in a future Proposal Solicitation Package (PSP).

## **4.0 FUNDING REQUIREMENTS**

The FISH Program receives funds from several sources. These include the State's General Fund, funds received through the payment of fees, and general obligation bond proceeds. Each of these funding sources have different requirements as to what projects or activities may be funded as well as how the funds may be used. DWR will allocate available funding based on the requirements of each funding source and how those funds may best be used. Under no circumstances may an applicant or funding recipient request a different funding source be used for its project. The allocation of funds from a specific funding source to a specific project is within the sole discretion of DWR.

In any future proposal solicitations seeking applications for a competitive solicitation, the specific funding source(s) will be clearly stated along with any specific requirements and restrictions of the funds. Currently, the FISH Program anticipates disbursing funds from the General Fund and pursuant to general obligation bond initiatives: Proposition 1 (Wat. Code, § 79700 et seq.); Proposition 68 (Pub. Resources Code, § 80000 et seq.); and, Proposition 13 (Wat. Code § 79000, et seq.). Regardless of the funding source(s), the funding recipient will be required to enter into a funding agreement with DWR. A specific funding agreement template will be provided as an appendix to any future PSP published by DWR. Below are several requirements that will be within a funding agreement with DWR. This list is not exhaustive.

### **4.1 Requirements for All State Funding Sources**

#### **4.1.1 Reimbursement**

Except as permitted by statute and as set forth in Appendix A of these Guidelines, any funding agreement that disburses funds from any State funding source must do so in arrears, meaning on a reimbursement basis. ~~Advance payments are not permitted absent specific, applicable statutory authority allowing for advance payment. Any statutorily authorized advance payments may be limited in amount or be subject to other restrictions or conditions. Whether any advance payments are permitted, and under what conditions it will be permitted, will be set forth in any applicable PSP or funding agreement.~~

#### **4.1.2 Indemnify and Hold Harmless**

As part of the funding agreement, funding recipients shall indemnify and hold harmless the State, its officers, agents, and employees from any and all liability from any claims and damages (including inverse condemnation) arising from the planning, design, construction, repair, replacement, rehabilitation, maintenance, and operation of the project, and any breach of the funding agreement.

### **4.1.3 Conflict of Interest and Confidentiality**

All participants are subject to State conflict of interest laws. Failure to comply with these laws, including business and financial disclosure provisions, will result in the proposal being rejected and any agreement being declared void. Other legal action may also be taken. Applicable statutes include, but are not limited to, Government Code section 1090 and Public Contract Code sections 10410 and 10411.

As part of the conflict-of-interest requirements, individuals working on behalf of a funding recipient may be required by the State to file a Statement of Economic Interests (Fair Political Practices Commission Form 700) if it is determined that an individual is a consultant for Political Reform Act purposes.

Funding recipients should be aware that when submitting a proposal to the State, they will waive their rights to the confidentiality of the contents of the proposal. All proposals, as well as all project materials maintained by the State are subject to disclosure pursuant to the California Public Records Act (Gov. Code, § 6250 et seq.).

### **4.1.4 Labor Code Compliance**

As part of the funding agreement, the funding recipient shall agree to be bound by all the provisions of the Labor Code regarding prevailing wages and shall monitor all contracts subject to reimbursement from the funding agreement to assure that the prevailing wage provisions of the Labor Code are being met. Current Department of Industrial Relations (DIR) requirements may be found at: <http://www.dir.ca.gov/lcp.asp>. For more information, please refer to DIR's Public Works Manual at: <http://www.dir.ca.gov/dlse/PWManualCombined.pdf>. The funding recipient will also affirm that it is aware of the provisions of section 3700 of the Labor Code, which requires every employer to be insured against liability for workers' compensation or to undertake self-insurance.

### **4.1.5 California Environmental Quality Act (CEQA)**

All activities funded pursuant to the FISH Program must comply with CEQA. (Pub. Resources Code, § 21000 et seq.), Any work that is subject to CEQA and funded under a funding agreement shall not proceed until documents that satisfy the CEQA process are received by DWR and DWR has completed its CEQA compliance. Any work funded under the FISH Program that is subject to CEQA shall not proceed until and unless approved by DWR; such approval is fully discretionary. Any work subject to CEQA that proceeds prior to DWR completing its CEQA compliance responsibilities will not be reimbursed, and that amount will be deducted from any awarded funds.

If CEQA compliance by the funding recipient is not complete at the time a funding agreement is executed by the parties, once DWR has considered the environmental documents, it may decide to require changes, alterations, or other mitigation to the Project; or to not fund the Project. Should DWR decide to not fund the Project, the funding agreement shall be terminated.

#### **4.1.6 Competitive Bidding and Procurement**

A funding recipient's contracts with other entities for the acquisition of goods, services, and construction of public works with funds provided by the State must be in writing and shall comply with all applicable laws and regulations regarding the securing of competitive bids and undertaking competitive negotiations. If a funding recipient does not have a written policy to award contracts through a competitive bidding or sole source process, the Department of General Services' State Contracting Manual rules must be followed. They are available online at: <https://www.dgs.ca.gov/OLS/Resources/Page-Content/Office-of-Legal-ServicesResources-List-Folder/State-Contracting>.

#### **4.1.7 Confidentiality**

Funding recipients should be aware that when submitting a proposal or other documents in support of a project to the State, they will waive their rights to the confidentiality of the contents of the documents. Once a decision on a final funding decision has been made by DWR, the documents are subject to disclosure pursuant to the California Public Records Act (Gov. Code, § 62507920.000 et seq.).

#### **4.1.8 Real Property Acquisition / Easements**

For real property acquisitions, a funding recipient must submit an appraisal for review and approval by the Department of General Services (DGS) or DWR's Real Estate Branch prior to reimbursement or depositing State funds into an escrow account. Appraisals must comport with the standards set forth by DGS and may be found at: <https://www.dgs.ca.gov/RES/RES/Real-Estate-Services-Division-Resources-List-Folder/Appraisal-Services-Resources>.

Where a funding recipient acquires real property in fee title or funds improvements to real property using State funds, an appropriate easement or other title restriction providing for floodplain preservation, wildlife habitat conservation, or other appropriate restriction for the subject property in perpetuity shall be recorded. The easement or other title restriction must be in first position ahead of any recorded mortgage or lien on the property unless this requirement is waived by the State.



For an acquired easement under an agreement, a funding recipient shall agree to monitor and enforce the terms of the easement, unless the easement is subsequently transferred to another land management or conservation organization or entity with State permission, at which time monitoring and enforcement responsibilities will transfer to the new easement owner.

## **4.2 Requirements for General Obligation Bond Funds**

FISH Program funding may be derived from the sale of tax-exempt general obligation bonds, also referred to as GO Bond Funds or Proposition funds. In addition to the requirements applicable to all state funding sources set forth above, there are some unique requirements set forth either in State law or by (federal) Internal Revenue Service regulations applicable to all GO Bond funds. Other requirements may also be set forth in the specific bond act and these requirements will be stated in any future PSP allocating funds from a specific GO Bond.

### **4.2.1 Income Restrictions**

Any capital asset acquired or constructed in any part with GO Bond funds may not be used to generate income of any kind. The funding recipient shall agree that any refunds, rebates, credits, or other amounts (including any interest) accruing to or received by the funding recipient pursuant to the FISH Program shall be paid by the funding recipient to the State, to the extent that they are properly allocable to costs for which the funding recipient has been reimbursed by the State pursuant to a funding agreement. Additionally, all disbursements from the State to the funding recipient must be deposited in a non-interest-bearing account.

### **4.2.2 General Overhead and Indirect Costs**

GO Bond funds may only be used for direct project costs. General overhead and indirect costs will not be paid. "Indirect Costs" means those costs that are incurred for a common or joint purpose benefiting more than one cost objective and are not readily assignable to the funded project (i.e., costs that are not directly related to the funded project). Examples of Indirect Costs include: central service costs; general administration of the funding recipient; non-project-specific accounting and personnel services performed within the funding recipient's organization; depreciation or use allowances on buildings and equipment; the costs of operating and maintaining non-project-specific facilities; tuition; conference fees; and, generic overhead or markup. This prohibition applies to the funding recipient and any subcontract or sub-agreement for work on the funded project that will be reimbursed by the State.

## **APPENDIX A – ADVANCE PAYMENT REQUIREMENTS FOR DEPARTMENT OF WATER RESOURCES AWARDED AND ADMINISTERED FUNDING**

Advance payments under State funding agreements are prohibited unless authorized by statute. Below are the procedures by which an entity may apply for and receive advance pay of their award from DWR. Please be aware that access to and the use of advance payment is a privilege and not a right. As a recipient of advance payment, you have a fiduciary duty to the people of the State.

### **Application Process**

Upon approval of the final award, DWR shall notify the awardee in writing of its award and the opportunity to apply for advance payment. The Notice of Award shall include an advance payment form. The awardee shall have up to 90 calendar days from the date of the Notice of Award to return the form and provide all applicable backup documentation. If the awardee fails to return all completed forms and backup documentation within 90 calendar days, **the awardee has forfeited the right to request advance payment for its award.** If documents are incomplete or inadequate, DWR shall reach out as soon as it is aware of the issue to notify the awardee of the issue. Failure of the awardee to respond to DWR requests for clarification or further documentation shall result in a denial of the request for advance payment.

DWR will notify the awardee within 90 calendar days of receipt of a **complete** advance payment request on its final decision. DWR's final decision is not appealable. An awardee's application for advance pay must include its most recent financial documents that include sufficient detail to enable DWR to determine the financial and institutional capacity of the awardee, the details of the use of any authorized advance payment, and to determine the risk being taken by DWR on behalf of the taxpayers and/or bond holders providing the funds. Failure to provide adequate documentation shall result in the awardee being deemed ineligible for advance payment. To apply for advance payment, the awardee must:

- Submit a statement of need explaining its need for advance payment. The awardee must submit the most recent three years of verifiable documentation supporting its claim. These may include:
  - Most recent audited financial statements.
  - Revenue and cost statements.
  - Other financial statements, including bank statements.
  - Tax returns.
- Submit a statement explaining the awardee's ability to manage the approved project and its finances. The awardee must submit verifiable documentation supporting its claim. These may include:
  - Audit reports or other financial reviews completed within the last three years.
  - List of its other projects (current and past) including scope, duration, and funding partners.
  - Organization chart of employees responsible for approved project.
- Submit a detailed work plan, budget, and schedule showing how the advance payment will be used. These will need to break down activities and corresponding expenditures on a quarterly basis.
  - For habitat restoration projects, if not previously identified in the awardee's application, the awardee will need to list which threatened and/or endangered species under the federal Endangered Species Act (16 U.S.C. § 1531, et seq.) or California Endangered Species Act (Fish & G. Code, § 2050 et seq.), for which

the project is providing habitat.

- For non-profit (private) awardees, demonstrate its good standing as a tax-exempt organization.
- For non-profit (private) awardees, submit verification that all advanced State funds provided shall be deposited into a separate federally insured bank account that either tracks interest earned, or is non-interest-bearing, as required by DWR.

Some of these documents (e.g., detailed work plan, budget, and schedule) may have been included in your initial application for funding. It is not necessary to resubmit these documents, but if there have been changes since the initial application, please document those changes when submitting your request for advance payment.

### **Approval Process**

Once DWR has received a **complete** application for advance payment, it shall inform the awardee within 90 calendar days of its decision. The final decision will be in writing and will either be a denial or approval of the request. **This decision is not appealable.**

If the awardee's request is denied, the awardee may request the reason(s) for denial from DWR. If the awardee's request is approved, the awardee will be notified of the amount approved and the conditions of approval. The maximum amount that may be awarded is 25% of the full award amount or the project's reasonable needs based on an immediate six-month planning period, whichever is the lesser amount. The project's immediate six-month need will be based on the awardee's submissions during the application process.

The notification shall also state the frequency of the accountability and progress reports to be submitted, the timeline by which advance payment funds are to be spent, and any other restrictions deemed necessary by DWR. Accountability report and progress report templates shall be provided to the awardee. The awardee must respond within fourteen calendar days accepting the terms of the advance payment; failure to notify DWR within fourteen calendar days shall be considered as the awardee's refusal to accept the advance payment terms, and the awardee shall no longer be eligible for advance payment. Be aware that although advance payment has been authorized, no disbursement of funds can occur until a funding agreement incorporating the terms and conditions of the advance payment's use has been executed.

### **Use of Advance Payment**

Advance payment funds may be used for any eligible project costs as set forth in your funding agreement and its work plan except for the purchase of real property or interests in real property. Those expenses must use the existing State process whereby the real property purchase price (plus escrow fees) is deposited into a qualified escrow account after State review of DWR and/or Department of General Services-approved appraisals. The "purchase" only includes the amount deposited into a qualified escrow account or costs associated with obtaining financing. This does not include those items necessary and directly related to the due diligence for acquisition of real property or interests in real property (e.g., appraisals, environmental assessments, legal fees, surveys, recording fees, etc.); these may be paid for with advance payment funds.

During any period in which a funding recipient is using advance payment, it shall submit an accountability report and a progress report to its grant manager for review and approval. These reports must be submitted on the time schedule set forth in the funding agreement but

shall be no less frequently than once per quarter (i.e., every three months). If a funding recipient is late in submitting any of its required reports, it is grounds for termination of its privilege to continue using advance payment on its existing project and any potential future projects that may receive funding from DWR. Accountability Report and Progress Report templates shall be provided to each funding recipient.

Accountability reports are intended to demonstrate the proper use of the State's fiscal resources. Accountability reports must include:

- All supporting documentation of funds spent (e.g., receipts, invoices, etc.).
- Any updates to the project's projected spending plan for the next three months, six months and for the remainder of the project's implementation period.
- If applicable, a statement that the funds have been deposited and use of advance payment funds were withdrawn from a federally insured, non-interest-bearing account and is separate from other funding sources.
- If applicable, documentation of interest earned during the reporting period. Any interest earned shall be considered part of the funding award and shall be used towards the project.

Progress reports are intended to demonstrate the proper implementation of the project.

Progress reports must include:

- Actions taken by the funding recipient on the project.
- A statement of milestones achieved, and problems encountered on the project.
- A statement of whether the project is on schedule.
- If the project is not on schedule, the reasons for the delay and proposed remedy(-ies), and an updated schedule.

### **Request for Further Advance Payments**

Once the initial authorized advance payment has been spent by the funding recipient, further advance payments may be allowed. Further use of advance payments by a funding recipient may only be granted if there was prudent use of the initial advance payment, adherence to all corresponding requirements (e.g., timely submission of deliverables and reports), and compliance with all requirements in the funding agreement, and it is permitted by statute. Further advance payments may be requested in writing up to 90 days in advance of the anticipated exhaustion of the initial amount advanced. However, unless requested by the DWR or if there has been a change in circumstances, no additional documentation need be submitted. Further advance payments shall only be permitted in the amount of a project's reasonable needs based on an immediate six-month planning period, or 25% of the full award amount, whichever is the lesser amount. However, under no circumstances may advance payments result in the reduction or elimination of the amount of required withholding (retention) or any required cost share amount. Any determination regarding further advance payment(s) must be made in writing.

### **Emergency Advance Payment Requests**

During the course of implementing a project, a funding recipient may have an emergency arise that may significantly affect its cash flow or available capital. In this case, it may be possible to award a funding recipient and advance payment based on emergency needs. An "emergency" is a sudden, unexpected occurrence, beyond the control of the funding recipient. A funding recipient's mismanagement of its resources or lack of sufficient planning does not constitute an emergency. If a funding recipient has previously been denied a request for advance payment, it is not eligible to receive an emergency advance payment. A

request for emergency advance payment is open to any funding recipient that has been previously awarded advance payment (whether it accepted it or not), and any funding recipients that did not apply for an advance when permitted to do so.

To make a request for an emergency advance payment, a funding recipient will need to provide a statement explaining the nature of the emergency and how that emergency necessitates the need for advance payment, along with supporting documentation. If the funding recipient has not previously applied for advance payment, all the documentation required for an initial application for advance payment must be submitted as well. Approval and use of an emergency advance payment is subject to the same requirements as listed above and while DWR shall endeavor to expedite an emergency request, there is no guarantee that funds can be disbursed more quickly than the usual State process.

### **Reduction of Withholding Amount**

Funding agreements are required to have a minimum withholding amount of ten percent (10%) of the total award amount pending the satisfactory completion of the project and submission of all deliverables. (Gov. Code, § 10346; State Contract Manual, vol. 1, § 7.33.) This minimum amount is required unless there is statutory authority permitting a reduction or elimination of the withholding amount.

Water Code section 550 permits DWR to reduce or eliminate the withholding amount for funding agreements with local public agencies that have been approved and receive an advance payment, and the project's purpose is to (1) restore habitat for threatened or endangered species, and/or (2) improve flood protection. For any such project that has also been awarded an amount of \$10,000,000 or more, the withholding amount shall be reduced to five percent (5%) and set forth in the funding agreement.