

Issue Paper 1. CWC Public Benefits Discussion: Water Quality Benefits

The Issue

Exactly what water quality benefits should be eligible for public funding under SBX7-2 (the Act)?

Background

The Act's definition of an eligible water quality public benefit is:

Water quality improvements in the Delta, or in other river systems, that provide significant public trust resources, or that clean up and restore groundwater resources.

Staff has struggled with this definition for two reasons:

- 1) The Act does not define public trust resources. Public trust resources certainly include the Delta or river systems, but it is not clear how a water quality improvement would . . . "provide public trust resources". *Public trust uses* have included navigation, fishing, recreation, and preservation of nature,¹ and under the Racanelli decision, a jury found that the public trust doctrine "allows regulators to modify water rights to protect the water quality values" of the Delta.¹
- 2) The phrasing of the definition leaves open the possibility that any projects that "clean up and restore groundwater resources" might be eligible, depending on how the language is interpreted. Consider these alternative definitions:
 1. *Water quality improvements in the Delta, or in other river systems, that either 1) provide significant public trust uses, or 2) clean up and restore groundwater resources.*
 2. *Water quality improvements either in the Delta, or in other river systems, so long as these are significant public trust resources, or that clean up and restore groundwater resources.*

Staff's proposed option #1

Under one interpretation, the first rephrasing clarifies the intent of the Act:

"Water quality improvements in the Delta, or in other river systems, that either 1) provide significant public trust uses, or 2) clean up and restore groundwater resources."

Under this view, the qualifying phrase "that provide significant public trust resources" was included because **the legislature did not intend that all water quality benefits should be eligible, but rather only those that provide public trust resources** (probably what was meant was public trust *uses*). These uses have included navigation, fishing, recreation, and preservation of nature.¹ Under this view, only such benefits, or benefits that are caused by the clean up or restoration of groundwater resources, should be eligible. The phrasing of the definition suggests that the water quality improvement must originate "in the Delta or in other river systems" and the exact phrasing suggests that groundwater quality benefits are eligible only if they result from improvements in the Delta or other river systems.

¹ California State Lands Commission, 2012. The Public Trust Doctrine.

http://www.slc.ca.gov/policy_statements/public_trust/public_trust_doctrine.pdf. Accessed September 26, 2012.

This interpretation is consistent with current practice, in that water quality improvements that benefit consumptive water uses are often paid for by the consumptive water users. For example, Reclamation law generally regards water user benefits, including water quality, as reimbursable.

Example projects for option #1

Based on the staff proposal described above, the following examples help illustrate how the proposal would be applied to projects.

1. A project provides Delta inflow that improves Delta water quality, which in turn benefits fisheries and the quality of water exported for direct urban use. Only the fishery benefits are eligible for public funding.
2. A project provides Delta inflow that improves Delta water quality, which in turn benefits fisheries and the quality of water exported for urban use. Part of the urban water supply is recharged to a local groundwater basin and helps restore quality in the basin. Both the fisheries benefit and the benefit from improved groundwater quality are eligible.
3. A project south of Delta cleans up a local river water supply to provide for groundwater recharge, and groundwater quality is improved.
 - a. Case 1: The applicant can clearly demonstrate that the project also provides measurable improvement to the Delta ecosystem or tributaries (per §79742), therefore the project and its water quality benefits are eligible.
 - b. Case 2: The applicant cannot establish a clear and defensible link to Delta improvement, therefore the project is not eligible per §79742.

Staff proposed option #2

Under a second option, rephrasing 2 above was likely intended. The phrase “provide significant public trust resources” was included in the legislation to ensure that the Delta and any other river systems that are significant public trust resources would be included in the definition; the phrase was included just as a contrast to groundwater resources, which may not be clearly recognized as a public trust resource under California law.

Water quality improvements either in the Delta, or in other river systems, so long as these are significant public trust resources, or that clean up and restore groundwater resources.

Under this interpretation, **any water quality benefit would be eligible, even if it is obtained by a consumptive water user.** Water supply benefits such as increased Delta exports enabled by more Delta outflow would not generally be eligible, but water quality benefits obtained by consumptive water users such as benefits of reduced salinity (including benefits from clean up and restoration of groundwater resources), would be eligible.

Example projects for option #2

The following examples help illustrate how the proposal would be applied to projects.

1. A project provides Delta inflow that improves Delta water quality, which in turn benefits fisheries and the quality of water exported for direct urban use. Both benefits are eligible.
2. A project provides Delta inflow that improves Delta water quality, and some of the additional inflow is diverted for water supply. The water supply benefit is not eligible, but the water quality benefits for the exporters are eligible.
3. A project south of Delta cleans up a local river water supply to provide for groundwater recharge, and groundwater quality is improved. The result is the same as for staff proposed option #1.