

April 16, 2013

To: Sue Sims, Executive Officer, California Water Commission
From: Maureen King, Office of the Chief Counsel, Department of Water Resources

**RE: Statutory Interpretation Issues, Section 79746 of Chapter 8 of SB X7-2,
Codified in California Water Code at Sections 79740 et seq. “The Act”**

Considerable discussion at Water Commission meetings has surrounded the meaning of “public benefits” under the Act. Specifically, at the March 20, 2013 meeting, the Commission addressed the question of how to allocate public funds for ecosystem benefits under Section 79746. We have attempted here to present a legally defensible interpretation of this section that explains how the two parts of this section interact and inform public asset allocation for ecosystem improvements.

Section 79746 provides as follows:

“79746 (a) The public benefit cost share of a project funded pursuant to this chapter, other than a project described in subdivision (c) of Section 79741, may not exceed 50 percent of the total costs of any project funded under this chapter.

(b) No project may be funded unless it provides ecosystem improvements as described in paragraph (1) of subdivision (a) of Section 79743 that are at least 50 percent of total public benefits of the project funded under this chapter.” (Emphasis added)¹

Subsection (a)

- Subsection (a) is fairly clear: it limits the amount of public funding that may be expended for any project under the Act to a maximum of fifty percent of the *total cost of the project*. For example, if the total cost of a project funded under this Chapter is \$1,000,000, the maximum public contribution would be \$500,000. But it is important to note that because the 50% rule is a cap, the public contribution percentage could also be less.

Subsection (b)

- The plain meaning rule supports an interpretation of Section 79746 (b) in which “50%” modifies “the total public benefits of the project funded under this chapter” not “the project” overall.
 - As such, whatever percentage is determined to be appropriate for public cost-share funded under subsection (a), *at least* half of that amount must be attributable to ecosystem benefit improvements.

¹ Section 79743 defines “ecosystem improvements” to include: “changing the timing of water diversions, improvement in flow conditions, temperature or other benefits that contribute to restoration of aquatic ecosystems and native fish and wildlife, including those ecosystems and fish and wildlife in the Delta.”

Discussion

Subsection (b) establishes a threshold for eligibility for funding based on a project’s ecosystem improvement component. Section 79743 lists five types of public benefits that may be funded under Chapter 8—one of which is ecosystem improvements. Under Section 79746 (b), while a project may possibly provide public benefits in any of the five public benefit categories—at least 50% of them must be ecosystem improvements for the project to be eligible for funding.

The Commission has asked for clarification on the on how the 50% threshold in subsection (b) interacts with the cap on public funding under subsection (a), and in particular, how these two subsections influence the amount of public funds that must be applied to ecosystem improvements in a particular project. As illustrated in the table below, the outcome in terms of public funding for ecosystem benefits is tied to the percentage of public funding approved under subsection (a) and will vary depending on the percentage approved for a particular project. The chart also illustrates in Scenario C how a project with less than 50% of the public benefits devoted to ecosystem improvement is ineligible for funding under subsection (b).

Hypothetical Funding Outcomes for Project with Total Cost of \$1,000,000 Under Section 79746

	Scenario A	Scenario B	Scenario C
Total Project Cost	\$1,000,000	\$1,000,000	\$1,000,000
Eligible Public Benefits under 79746 (a) (As % of Total Project Cost)	\$500,000 (50%)	\$300,000 (30%)	\$500,000 (50%)
Proposed Ecosystem Benefits (% of Public Benefits)	\$250,000 (50%)	\$150,000 (50%)	\$100,000 (20%)
Meets Subsection 79746 (b) 50% threshold	Yes	Yes	No – But Commission may fund lesser % under Subsection (a) to meet 50% requirement under Subsection (b)
Maximum Public Funding	\$500,000	\$300,000	\$200,000
Note: Under Section 79746 (a) the percentage of public cost share may vary from 1-50% of the total project cost. The maximum public benefits that may be funded for any project is 50% of the total project cost.			

Summary and Conclusions

- Section 79746 (a) establishes that no more than 50% of the total cost of any project may be paid for with public funds under the Act.
 - This means there may be a range of acceptable public cost shares in any project between 1 and 50%.
- Section 79746 (b) establishes a rule: to be eligible for funding under the Act, ecosystem improvements must constitute at least half of the public benefits funded for the particular project under subsection (a).
- The plain meaning rule supports an interpretation of Section 79746 (b) in which “50%” modifies “the total public benefits of the project funded under this chapter” not “the project.” This interpretation links subsection (a) and (b) and harmonizes the parts of Section 79746.
- Therefore, the percentage of dollars attributable to ecosystem public benefits in any particular project should be at least 50% of whatever the percentage of public cost share is determined to be under Section 79746 (a).

Canons of Statutory Interpretation— In trying to determine the meaning of this section it is helpful to bear in mind several canons of statutory construction that a court would apply when reviewing the Commission’s implementation of the Act. These ‘canons’ are the rules a court uses determine what the legislature meant by particular statutory language when parties argue over its meaning. Th Statutory Interpretation Memoe overriding objective of the court in construing a statute is to ascertain the legislature’s intent so as to effectuate the purpose of a statute.² First, a court will ordinarily defer to the plain meaning of words and accepted rules of grammatical construction. Second, the court will try to reach a statutory construction that harmonizes various sections of the law to achieve a coherent whole. Third, legislative history may be considered, as extrinsic evidence of legislative intent to the extent that a proponent can show the material was considered by or at least made available to the Legislature as a whole. This means for example, that testimony by an individual legislator or other involved party regarding their subjective understanding of intent would not be admissible evidence of legislative intent.³ A Committee report, on the other hand addressing the statute’s purpose would be.

² Smith v. Superior Court (2006) 39 Cal. 4th 77.

³ Kaufman & Broad Communities, Inc. v. Performance Plastering Inc., supra. ; See also, City of King City. Community Bank of Central California (2005).