

# April 15<sup>th</sup> Meeting

## California Water Commission

### Issue Working Session

#### Issue Summary

California Water Code Section 79753 defines five categories of public benefits: ecosystem improvements, water quality improvements, flood control benefits, emergency response, and recreation purposes. The legislature's definitions of these public benefits are vague at times, creating both room and necessity for interpretation regarding exactly what benefits fit within the guidance provided by the statute for each category. Which benefits to count in a particular category is an important question, because the statute requires:

- The Commission to select *projects through a competitive public process that ranks potential projects based on the expected return for public investment as measured by the magnitude of the public benefits provided* (§79750 (c)),
- The state cost share not exceed 50 percent of the total costs of any project funded (with a potential exception for conjunctive use and reservoir reoperation projects) (§79756 (a)),
- The ecosystem improvements provided by a funded project must be at least 50 percent of total public benefits of the project funded (§79756 (b)).

Given these mandates, the definition of what can be counted within a particular benefit category may influence the ranking of projects; the share of public benefits that are indicated for ecosystem purposes; and the share of cost allocated to public and other benefits.

The tables that follow provide a summary of what the statute includes within a particular public benefit category, what clarification should be provided in the WSIP Guidelines, and how a particular public benefit could be defined for the purposes of allocating benefits to project costs.

The contents on the following pages were also informed by discussions with the Commission and Issue Papers developed in 2012 and 2013, as appropriate.

**Table 1. Ecosystem Improvements**

<b>Public Benefit Category:</b>	<b>Ecosystem Improvements</b>
<b>Section in Statute:</b>	§79753 (a) (1)
<b>Language in Statute:</b>	Ecosystem improvements, including changing the timing of water diversions, improvement in flow conditions, temperature, or other benefits that contribute to the restoration of aquatic ecosystems and native fish and wildlife, including those ecosystems and fish and wildlife in the Delta.
<b>Initial Clarification of Language in Statute:</b>	<p>Ecosystem improvements, including:</p> <ul style="list-style-type: none"> <li>• Changing the timing of water diversions that contribute to the restoration of aquatic ecosystems and native fish and wildlife , including those ecosystems and fish and wildlife in the Delta</li> <li>• Improvement of flow conditions, temperature, or other benefits that contribute to the restoration of aquatic ecosystems and native fish and wildlife, including those ecosystems and fish and wildlife in the Delta</li> </ul>
<b>Summary of 2013 Discussions:</b>	<p>Previous issues raised by staff included:</p> <ul style="list-style-type: none"> <li>• Special status of <b>native</b> fish and wildlife – Should only benefits to native fish and wildlife be counted? Should economic benefits caused by ecosystem improvements for non-native species, such as striped bass, be included?</li> <li>• Eligibility is unclear for restoration of terrestrial habitat or creation of new aquatic habitat – Should restoration of terrestrial habitat be eligible? Also, should creation of artificial aquatic ecosystems, for example, in a reservoir, be eligible?</li> <li>• Wildlife refuges – Improved water supply reliability for refuges is perceived by many to be an important ecosystem objective. New storage could provide water supply for refuges. Should water supply benefits for refuges be counted as ecosystem, or water supply? Note that this decision could hinge on the previous issue, are refuge wetlands aquatic or terrestrial ecosystems?</li> </ul> <p>In 2013, staff proposed two alternative definitions:</p> <ol style="list-style-type: none"> <li>1. Any economic benefits that result from “the restoration of aquatic ecosystems and native fish and wildlife” are ecosystem benefits.</li> <li>2. A benefit should be categorized based on the type of benefit obtained, regardless of whether or not it was enabled by restoration of aquatic ecosystems and native fish and wildlife.</li> </ol> <p>As an example, water users might obtain more water supply if special status fish populations were recovered. This would be an ecosystem benefit under 1 but a water supply benefit under 2.</p> <p>No resolution or agreement was reached during previous discussions.</p>

**Table 1. Ecosystem Improvements (cont'd)**

<b>Additional Considerations:</b>	<ol style="list-style-type: none"><li>1. Agency Team members believe the bond language seems clear that ecosystem improvements must be for the restoration of <i>native</i> fish and wildlife.</li><li>2. More discussion is needed with the Agency Team to determine eligibility of ecosystem improvements resulting in terrestrial habitat or creation of new aquatic habitat.</li><li>3. The word “including” suggests that a variety of ecosystem benefits might be included. What else could be included or not included within “other benefits”?</li><li>4. Section 79753 (b) prohibits bond funds being expended for the costs of environmental mitigation measures or compliance obligations, except for those associated with providing the public benefits.</li></ol>
<b>Proposed Clarifications to Definition:</b>	TBD

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**Table 2. Water Quality Improvements**

<b>Public Benefit Category:</b>	<b>Water Quality Improvements</b>
<b>Section in Statute:</b>	§79753 (a) (2)
<b>Language in Statute:</b>	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.
<b>Initial Clarification of Language in Statute:</b>	<p>Water quality improvements, including:</p> <ul style="list-style-type: none"> <li>• Water quality improvements that provide significant public trust resources in the Delta</li> <li>• Water quality improvements that provide significant public trust resources in other river systems</li> <li>• Water quality improvements that clean up and restore groundwater resources</li> </ul>
<b>Summary of 2013 Discussions:</b>	<p>In 2013, staff proposed the following:</p> <p><i>Only benefits caused by water quality improvement in the Delta or in other river systems should be eligible, and of these, only benefits from enhanced fishing, recreation, or preservation of nature, or benefits that are caused by the clean up or restoration of groundwater resources, should be eligible.</i></p> <p>The rationale was that the qualifier “that provide significant public trust resources” was included because the authors did not intend that all water quality benefits should be eligible. Water quality improvements that benefit consumptive water uses are normally paid for by the consumptive water users. The phrasing of the definition suggests that the water quality improvement must originate “in the Delta or in other river systems.” The exact phrasing suggests that groundwater quality benefits are eligible only if they result from improvements in the Delta or other river systems.</p> <p>Guidance from the Director of the Department of Water Resources suggested the statute should be interpreted broadly in regards to water quality. Staff also noted that the proposed language might result in overlap between ecosystem benefits and water quality benefits.</p>
<b>Additional Considerations:</b>	<ol style="list-style-type: none"> <li>1. Currently, staff are not applying the “provide significant public trust resources” to water quality improvements that clean up and restore groundwater resources based on how the statute was written.</li> <li>2. What is “significant”? It may not be possible to establish a fixed standard for what is significant, but this term allows the Commission to make value judgments that some public trust resources are more significant than others or that there may be variations between similar public trust resources. The Commission could use the overarching language in Proposition 1 (Chapters 4 and 8) to support final decisions.</li> </ol>

**Table 2. Water Quality Improvements (cont'd)**

<p><b>Additional Considerations (cont'd):</b></p>	<p>3. What are public trust resources?</p> <p>A definition of public trust resources was not provided in the Water Quality, Supply, and Infrastructure Improvement Act of 2014. The concept of “public trust resources” derives from the public trust doctrine. It is not distilled in a single law or policy statement. Rather, it is a guiding principle for government based on various statutory directives, common law and the State Constitution. Agencies have historically defined it in ways that fit the needs of their mandates and comport with evolving common law holdings. For example, SB 1 (2009) required the State Water Resources Control Board (Water Board) to develop new flow criteria to protect public trust resources in the Delta ecosystem pursuant to the Water Board’s public trust obligations. In developing these criteria, the Water Board articulated that the purpose of the public trust is to protect commerce, navigation, fisheries, recreation, ecological values, and fish and wildlife habitat.</p> <p>The concept of public trust uses is also fluid insofar as case law outlining its contours continues to evolve.<sup>1</sup> In the 1986 Racanelli case, the California Supreme Court was asked whether and to what extent water quality is itself a public trust resource. Specifically it addressed whether water users bear responsibility for water quality issues caused by their upstream diversions. The Court concluded that the public trust doctrine allows state water regulators to modify previously issued water rights in permits in the interest of protecting the water quality values of the Delta.<sup>2</sup></p> <p>For the purposes of Proposition 1, should water quality improvements that support a purpose mentioned above qualify as a public benefit? Under Racanelli, this would seem to be a permissible inclusion.</p> <p>On the other hand, if water quality itself is a public trust resource, then all water quality benefits might be counted as public benefits. If water quality is a public trust resource in California, then perhaps all economic benefits caused by water quality, including benefits to urban and agricultural water users, could qualify as eligible public benefits under the Act. However, if benefits from water quality improvements can qualify, what was the legislature’s purpose in adding the qualifying phrase “that provide significant public trust resources”? Did they believe that some water quality benefits do not provide public trust resources?</p>
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<sup>1</sup> The California Supreme Court has made it clear that objective of the public trust is always evolving so that a trustee is not burdened with outmoded classifications favoring the original and traditional triad of commerce, navigation and fisheries over those uses encompassing changing public needs. See National Audubon Society v. Superior Court, supra, at p. 434.

<sup>2</sup> United Sates v. State Water Res. Control Bd., 227 Cal. Rptr.161 at pp. 200-201. Referred to colloquially as the “Racanelli decision”.

**Table 2. Water Quality Improvements (cont'd)**

<b>Proposed Clarifications to Definition:</b>	TBD
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**Table 3. Flood Control Benefits**

<b>Public Benefit Category:</b>	<b>Flood Control Benefits</b>
<b>Section in Statute:</b>	§79753 (a) (3)
<b>Language in Statute:</b>	Flood control benefits, including, but not limited to, increases in flood reservation space in existing reservoirs by exchange for existing or increased water storage capacity in response to the effects of changing hydrology and decreasing snow pack on California’s water and flood management system.
<b>Initial Clarification of Language in Statute:</b>	Not needed
<b>Summary of 2013 Discussions:</b>	There was some discussion as to whether the State should fund flood damage reduction benefits for federal properties. No issues papers or further record of past discussion was found.
<b>Additional Considerations:</b>	<ol style="list-style-type: none"> <li>1. What types of actions or outcomes are permissible under the “but not limited to” language? <ul style="list-style-type: none"> <li>○ Would all of the following qualify as flood control benefits? <ul style="list-style-type: none"> <li>▪ Any increase in existing flood reservoir space either by reoperation (including forecast coordinated operations) or reservoir enlargement</li> <li>▪ New flood reservation space (as in new storage facilities)</li> <li>▪ Attenuation of damaging flood flows</li> <li>▪ Reducing potential flood damage by capturing excess flood flows for groundwater recharge</li> <li>▪ Any structural and nonstructural action that reduces the risk to human life, health, and safety from flooding, including protection of public safety infrastructure</li> <li>▪ Any structural and nonstructural action that reduces the risk of flood damage</li> <li>▪ Any structural and nonstructural action that reduces the operations and maintenance costs of the flood management system</li> </ul> </li> </ul> </li> </ol>
<b>Proposed Clarifications to Definition:</b>	Flood control benefits, include, but are not limited to, increases in flood reservation space in existing reservoirs by exchange for existing or increased water storage capacity in response to the effects of changing hydrology and decreasing snow pack on California’s water and flood management system. This includes any flood control benefits that accrue from the reduction or prevention of the detrimental effects of flooding either through structural actions or nonstructural actions. Flood control benefits can be measured through a reduction in life risk, flood damages, flood response costs, and/or operations and maintenance costs.

**Table 4. Emergency Response**

<b>Public Benefit Category:</b>	<b>Emergency Response</b>
<b>Section in Statute:</b>	§79753 (a) (4)
<b>Language in Statute:</b>	Emergency response, including, but not limited to, securing emergency water supplies and flows for dilution and salinity repulsion following a natural disaster or act of terrorism.
<b>Initial Clarification of Language in Statute:</b>	Not needed
<b>Summary of 2013 Discussions:</b>	No record found.
<b>Additional Considerations:</b>	<ol style="list-style-type: none"> <li>1. Staff is assuming statute as written refers to providing emergency water supplies and flows <b>to the Delta</b> for dilution and salinity repulsion. SAC agreed that this was Delta-specific.</li> <li>2. What types of actions or outcomes are included or not included in the “but not limited to”?</li> <li>3. What about actions that secure water supplies for other purpose following a natural disaster or act of terrorism?</li> <li>4. Drought Supply – The SAC did not think actions such as providing drought emergency water supplies should be a qualified action. Staff generally tends to think this could be a qualified action for health and safety purposes only.</li> <li>5. Fire Suppression, including fire following earthquakes – Could water supply for fire suppression be qualified? Or should it be explicitly stated as not included?</li> </ol>
<b>Proposed Clarifications to Definition:</b>	TBD

**Table 5. Recreational Purposes**

<b>Public Benefit Category:</b>	<b>Recreational Purposes</b>
<b>Section in Statute:</b>	§79753 (a) (5)
<b>Language in Statute:</b>	Recreational purposes, including, but not limited to, those recreational pursuits generally associated with the outdoors.
<b>Initial Clarification of Language in Statute:</b>	Not needed
<b>Summary of 2013 Discussions:</b>	<p>In 2013, staff believed that reservoir and flow-based recreation such as fishing, boating and swimming that directly result from the proposed project would qualify. Less clear to them was whether recreation that results from the use of a water supply, such as improvements to or increased use of public parks, public swimming pools, or golf courses would qualify.</p> <p>Following discussions with the Commission, staff proposed the following:</p> <p><i>Recreation benefits include outdoor recreation activities associated with natural water bodies such as rivers, streams, lakes, wetlands, and the ocean. Benefits from outdoor recreation at man-made reservoirs are included if the reservoirs are directly affected by the proposed project and are open to the public. Recreation benefits from water supply provided for golf courses, swimming pools, or private, water-based theme parks do not qualify for Chapter 8 funding because these are water supply benefits. Recreation benefits that result from water delivered through a municipal water supply system, such as to a public park that is not itself part of the proposed project, are water supply benefits and do not qualify for Chapter 8 funding.</i></p>
<b>Additional Considerations:</b>	<ol style="list-style-type: none"> <li>1. How/should recreation at wildlife refuges be added to the 2013 proposed language?</li> <li>2. Do we need to further define the types of actions or outcomes that are included or not included in the “but not limited to”?</li> </ol>
<b>Proposed Clarifications to Definition:</b>	<p>Recreational purposes, include, but are not limited to, those recreational pursuits generally associated with the outdoors which include outdoor recreation activities associated with water bodies (such as rivers, streams, lakes, wetlands, and the ocean) and wildlife refuges that are accessible to the public. Recreational benefits must be directly affected by the proposed project and open to the public. Recreation benefits do not include those benefits that may result from water delivered through a municipal water supply system, such as to a public park that is not itself part of the proposed project, golf course, swimming pool, or water-based theme park.</p>