

## **August 19<sup>th</sup> Meeting**

### **California Water Commission**

### **Issue Working Session – Environmental Mitigation and Compliance Obligations**

#### **Objective**

Discuss how existing environmental mitigation and compliance obligations should be considered for calculating the magnitude of public benefits provided and associated public funding cost share.

#### **Summary**

The use of public funds for environmental mitigation and compliance obligations is addressed in three chapters of Proposition 1: Sections 79709(c)-General Provisions (Chapter 4-Watershed Protection), 79732(b) (Chapter 6), and 79753 (b) (Chapter 8-Water Storage). Of the three provisions, only the guidance in Section 79753 of Chapter 8 is directly relevant to Chapter 8 programs. As part of the General Provisions, section 79709(c) applies to all of the chapters in Proposition 1, including Chapter 8. However, Section 79709(c) is expressly limited to funds expended for any acquisition of water, and therefore would only apply to Chapter 8 projects if they meet this criterion.

All of these sections require that projects provide fisheries or ecosystem improvements to be eligible for funding. However, these sections have important differences in terms of defining the regulatory baseline and when the baseline is measured to determine improvements. Section 79709(c) in Chapters 4 establishes a rule that limits funding to projects providing fisheries or ecosystem improvements that exceed those required by mitigation or compliance obligations at the time the funding is granted. Section 79732(b) in Chapter 6 likewise limits funding to projects providing fisheries or ecosystem improvements, but it is silent about when the baseline is measured. Significantly, Chapter 8 neither requires projects to exceed the regulatory baseline nor specifies when that baseline is measured. Under the rule of statutory construction, this omission highlights the fact that the Legislature may have intended to create a different rule in Chapter 8 to determine eligibility rules for projects that improve the environment.

Section 79753 in Chapter 8 generally prohibits the use of bond funds to pay for the cost of environmental mitigation measures or compliance obligations, with the exception of those costs associated with providing public benefits described under this Chapter. Unlike in Chapters 4 and 6, the language in Chapter 8 contains neither requirement that the improvement exceed the existing regulatory baseline, nor temporal references limiting funding to measures/obligations that come into existence after the date of funding. Rather it states a broad exception allowing for the funding of such measures and obligations if they are related to providing any of the public benefits enumerated in Chapter 8, which included ecosystem improvements and water quality improvements. This exception is important because it may give the Commission flexibility to consider projects for funding that make ecosystem and water quality improvements that assist in environmental compliance, but that do not necessarily exceed existing regulatory requirements.

Further complicating the consideration of existing regulatory requirements and compliance obligations within the context of the Water Storage Investment Program (WSIP) is that many obligations are currently not being met (i.e., noncompliance is a part of the existing condition) and plans for meeting the compliance obligations are not defined, so future compliance is unknown. Additionally, some compliance obligations could be characterized as “system” obligations. System obligations likely do not have only one option for achieving compliance, but compliance could be a result of coordinated, related actions in various locations (i.e., compliance obligations of the Central Valley Project or State Water Project).

In the National Marine Fisheries Service’s (NMFS) 2009 Biological Opinion (BO) on Chinook Salmon, Steelhead, and Sturgeon, NMFS indicates that several actions are identified that allow agencies to have options for alleviating stressors and that the agencies may select an option that is most practical and there is opportunity to identify alternative actions. “NMFS cares only that the stressor be sufficiently reduced” and less about the option selected. It will be difficult for potential WSIP project applicants to know how the Department of Water Resources (DWR) and/or the Bureau of Reclamation (Reclamation) will ultimately implement the requirements of the BOs because most activities are still being formulated. For example, the NMFS BO calls for providing fish passage at Shasta, Nimbus, and Folsom dams, compliance obligations such as these could not conceivably be included in WSIP project without- or with- project conditions, because no actions have been identified by DWR or Reclamation with sufficient detail or likelihood of implementation for project applicants to include them in their without- and with-project conditions.

WSIP staff recommend that project applicants use best available information to determine their without-and with-project conditions and future projections of those conditions. Where compliance obligations are currently not being met and there is no identified action (an action that is sufficiently detailed as to make inclusion in project modeling possible and an action that has a high likelihood of being implemented, i.e., authorized and funded) to meet the compliance obligation, project proponents have no choice but to use the existing, noncompliance condition as the without-project condition. If the project helps achieve an existing compliance obligation and the improvement falls within one of the public benefit categories identified in the Water Code, the improvement caused by the project could be considered a public benefit and could be eligible for WSIP funding.

Staff have considered if all mitigation measures and compliance obligations associated with providing public benefits should be treated equally. Some compliance obligations are the result of actions such as court orders and State Water Board decisions and identify clear responsible parties and punitive/corrective actions. Other compliance obligations are the results of identifying general compliance standards, such as Total Maximum Daily Loads (TMDLs) and flow or temperature needs of ecosystems. Staff recommends evaluating compliance obligations on a case-by-case basis, but in general the following rules and examples may help inform these discussions:

- Actions to meet existing compliance obligations that clearly have an identified responsible party or parties and clear and required measures for achieving an identified result (like a court

decision or a State Water Resources Control Board or regional board order) will not be considered for public funding.

For example, in a court decision Agency A was identified as the responsible party for contaminating the underlying groundwater basin and ordered that contaminant levels be brought to a specific level. Agency A submits an application for WSIP funding to remediate and restore groundwater in the basin. As an identified responsible party, Agency A would be ineligible for WSIP funding to clean up groundwater contamination to the level ordered. Remediation above the level ordered and restoration of groundwater levels would be eligible for WSIP funding.

- Actions to meet existing compliance obligations that are general standards and do not have a clearly identified responsible party or parties or clearly identified required actions will be considered for public funding.

As another example, Agency B has a surface storage project on the Lazy River. The Lazy River is identified on California's CWA Section 303(d) list as impaired for salinity and an existing compliance target is identified for the Lazy River downstream of the proposed reservoir location. Agency B plans to release water from the new storage project to improve salinity conditions, although the project does still not allow for the compliance condition to be met. These salinity improvements would be considered to be a public benefit if they improve public trust resources from existing conditions, and such benefits would be eligible for WSIP funding.

Many water bodies (e.g., the Delta and Lower San Joaquin River) currently exceed water quality standards (impaired water bodies) for various pollutants, and probably would continue to be impaired with any proposed project. A strict position on not funding compliance obligations could imply that no improvements provided by the proposed project to that water body would be fundable.

**Questions for Consideration:**

- Should compliance obligations be considered differently depending on how they are imposed? (i.e., legal mandates from regulatory agencies versus general standards or objectives)? Is the suggested guidance on WSIP funding eligibility for meeting existing compliance guidance acceptable?
- How should the baseline for existing compliance obligations be determined?