

September 16th Meeting

California Water Commission

Issue Working Session – Environmental Mitigation and Compliance Obligations

Objective

Discuss interpretation of Water Code Section 79753(b) *Funds shall not be expended pursuant to this chapter for the costs of environmental mitigation measures or compliance obligations except for those associated with providing the public benefits as described in this section.*

Summary

The use of public funds for environmental mitigation and compliance obligations is addressed in three chapters of Proposition 1: Sections 79709(c) (Chapter 4-General Provisions), 79732(b) (Chapter 6-Watershed Protection), 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 “required” fisheries or ecosystem improvements. Significantly, Chapter 8 neither requires projects to exceed the regulatory baseline nor specifies when that baseline is measured. These differences suggest 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 include 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, the statute does not mention the significance of who the mitigation or compliance obligation is imposed upon, the applicant or a party unrelated to the project but with obligations within the project study area.

Option 1 (Staff Recommended)

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. Staff recommends the Commission use its discretion in considering funding projects that provide public benefits and the environmental mitigation measures and compliance obligations associated with providing public benefits, even if those public benefits assist in existing environmental compliance, but do not necessarily exceed existing regulatory compliance requirements.

Given the complexity of defining without- and with-project future conditions and the complex regulatory framework within the State, project benefits and associated mitigation and compliance obligations should be considered on a case-by-case basis and a one-size-fits-all-approach is not considered to be appropriate in the interpretation of Water Code Section 79753(b). Further complicating the consideration of mitigation and compliance obligations is the question of who the obligation is imposed upon, the project applicant or an unrelated third party with obligations within the proposed project study area.

Staff recommends that project benefits be determined by analyzing the differences between the with-project future condition and the without-project future condition. The Commission should have the discretion to determine what public benefits best achieve the intent of Chapter 8 and priorities of the State, and determine to what degree the public benefits of a project and any mitigation and compliance obligations associated with providing those public benefits should be supported by public funding.

Option 2

The Commission develops the regulations establishing a rule that funds shall not be used to pay for existing environmental compliance or mitigation requirements. Existing requirements would be defined as those mitigation or compliance obligations in place at the time the funding is granted. The public benefits funded would be quantified above existing compliance obligations, whether those obligations were imposed upon the applicant or an unrelated third party in the project area. In areas where existing compliance targets are not being met, the project applicant would have to assume existing targets are being met and quantify public benefits above those targets.

It should be noted that Options 1 and 2 require different without project conditions assumptions, please see Issue Summary regarding without-project conditions.