

July 29, 2015



Joe Byrne, Chair  
and members  
California Water Commission  
1416 9<sup>th</sup> st.  
Sacramento, CA 95814

Dear Chair Byrne:

Below are our comments regarding the debate about the interpretation of Section 79753, subdivision (b) of the Water Bond, as brought up in the July working session.

A statute is interpreted in a way that best effectuates the Legislature's intent in enacting the law. (*People v. Gray* (2014) 58 Cal. 4th 901, 906.) Plain meaning of the statute controls where there is no ambiguity, taking into account the whole statutory scheme and the placement of the same words within the statutes. (*Ibid.*)

Section 79753, subdivision (b) states that "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." (Cal. Water Code § 79753, subd. (b).) A plain interpretation of this Section would be a limited exception from the general theme of the bond that funds cannot go towards any environmental mitigation. The limited nature of the exception being limited to "associated with providing the public benefits" suggest that fulfilling existing mitigation or compliance obligations cannot be a funded public benefit since this Section requires that funding mitigation or compliance obligations be associated with providing a benefit which does not yet exist. This exception would allow for funding to be provided for construction mitigation costs for the public benefits associated with a project, but should not allow for funding to pay for existing obligations to be fulfilled as the negative impact created by the public benefits did not cause those mitigation or compliance obligations to arise. The intent contained in this Section is an unambiguous exception.

Staff has suggested that Section 79753, subdivision (b) needs to be distinguished in light of other provisions of the Water Bond. In the Water Bond, there is a general theme that funds cannot be expended for environmental mitigation measures or compliance obligations. (*See* Cal. Water Code §§ 79709, subd. (c), 79732, subd. (b), 79737, subd. (f).) In contrast, Section 79753, subdivision (b) creates an exception to this general rule, providing for funding of mitigation and obligations created by the public benefits provided. It is insufficient to just suggest that the Legislature could have used the existing language in the other parts of the Water Bond, as those would fail to encompass that Section 79753, subdivision (b) creates an exception to a restriction, and not a restriction itself.

Additionally, other parts of the Water Bond deal with different funding opportunities. Chapter 6 specifically focus more on habitat restoration than Chapter 8. By borrowing the language of Chapter 6 to create the exception in Chapter 8, the Legislature would fail to allow all public benefits associated with water storage

projects, such as flood control and recreation, to be eligible for the exemption created in Section 79753, subdivision (b), despite the language not discriminating between the types of benefits itself.

Allowing an interpretation to allow for funding of existing mitigation or compliance obligation would create an absurd result where the Commission would allow for funding of private benefits as a public benefit. Section 79752, subdivision (a) defines public benefits as ecosystem and water quality *improvements*. (Cal. Water Code § 79753, subs. (a)(1), (2) (italics added).) Fulfilling existing mitigation and compliance obligations, however, would not be a public benefit as they would not contribute to an improvement to the ecosystem or water quality where it should already be in a certain condition. Instead, the project would be merely providing a private benefit to those who already need to ensure mitigation and compliance occur. Adopting this interpretation would allow funding in conflict with Section 79753, and violate the Administrative Procedure Act (Cal. Govt. Code § 11342.2.)

Even if there were ambiguity in Section 79753, subdivision (b), legislative history would be used to assist interpretation, and legislative history supports our interpretation. (*See San Leandro Teachers Assn. v. Governing Bd.*, (2009) 46 Cal. 4th 822, 832-833.) The Assembly Floor Analysis prepared by the Assembly Water, Parks, and Wildlife Committee describes AB 1471 as “prohibiting expending of bond funds as environmental mitigation, except environmental mitigation associated with providing public benefits.” (Assem. Committee on Water, Parks and Wildlife, analysis on Concurrence in Sen. Amendments on Assem. Bill No. 1471 (2013-2014 Reg. Sess.) Aug 13, 2014, p. 2.) As the committee identified, Section 79753, subdivision (b) was a narrow exception for mitigation associated with public benefits.

Legislative history also supports an interpretation that does not allow for the funding of private benefits. The analysis in the Secretary of State ballot pamphlet reconfirms that Water Bond funding under Chapter 8 is not to go to private benefits by stating that “local governments and other entities that rely on the water storage project would be responsible for paying the remaining project costs. These costs would generally be associated with private benefits (such as water provided to their customers).” (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) according to the analysis of Proposition 1 by the Legislative Analyst, at <<http://www.voterguide.sos.ca.gov/en/propositions/1/analysis.htm>> [as of July 28, 2015].) Adopting an interpretation that would allow for the funding of private benefits would be in direct violation of the Water Bond, and impermissible as previously stated.

We thank you for the consideration of our views on this area. Please feel free to contact us if there are further questions.

Sincerely,



Kyle Jones  
Policy Advocate  
Sierra Club California