



Association of California Water Agencies

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Sent via ELECTRONIC MAIL to cwc@water.ca.gov

August 12, 2015

The Honorable Joseph Byrne, Chair
California Water Commission
1416 9th Street
Sacramento, CA 95814

Re: Association of California Water Agencies' Comments regarding California Water Commission Staff Working Draft Paper "Issue Working Session – Environmental Mitigation and Compliance Obligations"

Dear Chair Byrne and Commission Members:

The Association of California Water Agencies ("ACWA") appreciates the opportunity to comment on the California Water Commission ("CWC," or "Commission") staff working draft paper titled "Issue Working Session – Environmental Mitigation and Compliance Obligations" dated August 3, 2015 ("Staff Recommendation"). ACWA represents nearly 430 public water agencies that collectively supply approximately 90% of the water delivered for domestic, agricultural and industrial uses in California.

ACWA actively participated in the development of Proposition 1 and advocated for the inclusion of Chapter 8's \$2.7 billion to be allocated for the "public benefits associated with water storage projects that improve the operation of the state water system, are cost effective, and provide a net improvement in ecosystem and water quality conditions, in accordance with [Chapter 8]." (Water Code § 79750(b).) This letter provides ACWA's comments on the Staff Recommendation's interpretation of Water Code section 79753(b). Section 79753(b) reads as follows:

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.

CWC staff interprets this provision as "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.” (Staff Recommendation, at p. 1.) ACWA supports the CWC staff interpretation. As the Commission knows, Chapter 8 identifies the fundable public benefits as ecosystem improvements, water quality improvements, flood control benefits, emergency response and recreation. (Water Code § 79753(a).) Section 79753(b) provides 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.” (Emphasis added.) The Staff Recommendation’s interpretation is consistent with the statute as well as the intent of Chapter 8 to fund the public benefits of storage projects that improve the operation of the state water system and provide a net improvement in ecosystem and water quality conditions.

Other stakeholders have recently commented that the final WSIP regulations should prohibit the Commission from funding public benefits that are used to meet existing mitigation and compliance obligations. These stakeholders argue that the exception in Section 79753(b) is limited to the potential use of Chapter 8 funds to pay only for new mitigation measures or compliance obligations that are incurred in providing new public benefits, and that the satisfaction of existing mitigation and compliance obligations cannot be characterized as an improvement. This interpretation is contrary to the plain language of Chapter 8 and would significantly restrict the Commission’s ability to fund public benefits that improve the operation of the state water system and provide net improvements in ecosystem and water quality conditions, particularly in dry years.

First, in contrast with other sections of Proposition 1, Chapter 8 is clearly written to give the Commission the discretion to fund costs as long as they are associated with providing the five categories of public benefits. As the Staff Recommendation observes at page 1:

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. (Emphasis added.)

Second, preserving the Section 79753(b) exception’s applicability to all net ecosystem and water quality improvements is essential to ensure that the Commission retains the discretion to be able to fund projects that can provide the greatest magnitude of public benefits. When analyzing the net improvements to ecosystem and water quality conditions that a project may provide for purposes of Chapter 8, in cases where standards are not currently being met, “project proponents

have no choice but to use the existing, noncompliance condition as the without-project condition.” (Staff Recommendation, at p. 2.) Moreover, as explained in the Staff Recommendation: “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).” (*Ibid.*) If a proposed project can contribute to the achievement or improved maintenance of an existing compliance obligation and those improvements fall within the public benefit categories identified in Chapter 8, the Commission should retain the discretion to fund those public benefits. This interpretation reflects the structure and intent of Proposition 1, as well as the non-partisan Legislative Analyst’s Office analysis of Proposition 1 provided to the voters by the Secretary of State.¹

ACWA strongly supports the Staff Recommendation’s interpretation of Water Code section 79753(b) as it is based on the plain language of Proposition 1 and is consistent with intent of Chapter 8 to fund public benefits of storage projects that improve the operation of the state water system and provide a net improvement in ecosystem and water quality conditions. ACWA appreciates the substantial ongoing efforts of the Commissioners and CWC staff related to the WSIP, and we stand ready to continue to work with the Commission as it moves forward with the development of the WSIP regulations and guidelines. If you have any questions regarding this matter, please contact me at AdamW@ACWA.com or (916) 441-4545.

Sincerely,



Adam Walukiewicz
Regulatory Advocate

cc: The Honorable Joe Del Bosque, Vice-Chair; The Honorable Andrew Ball, Commissioner; The Honorable Daniel Curtin, Commissioner; The Honorable Paula Daniels, Commissioner; The Honorable Maria Herrera, Commissioner; The Honorable David Orth, Commissioner; The Honorable Armando Quintero, Commissioner; Ms. Paula Landis, Executive Officer; Ms. Rachel Ballanti, Assistant Executive Officer; Ms. Jennifer Marr, Supervising Engineer

¹ “***\$2.7 Billion for New Water Storage.*** The bond includes \$2.7 billion to pay up to half of the cost of new water storage projects, including dams and projects that replenish groundwater. This funding could only be used to cover costs related to the “public benefits” associated with water storage projects, including restoring habitats, improving water quality, reducing damage from floods, responding to emergencies, and improving recreation. 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).” (Secretary of State, Official Voter Information Guide – November 4, 2014, *available at* <http://www.voterguide.sos.ca.gov/en/propositions/1/analysis.htm>.) (Second emphasis added.)