



March 21, 2023

Matthew Swanson, Chair
California Water Commission
P.O. Box 942836
Sacramento, California 94236-0001

Transmitted via email to: CWC@water.ca.gov

**RE: Public Comments on Draft Contract for Administration of Public Benefits
for the Proposed Harvest Water Project**

Dear Chair Swanson and Members of the Commission:

On behalf of the Natural Resources Defense Council, Defenders of Wildlife, Sierra Club California, the Bay Institute, California Sportfishing Protection Alliance, Friends of the River, and Golden State Salmon Association, we are writing to provide public comments on the draft contract for administration of public benefits for the proposed Harvest Water storage project under Proposition 1 (“Draft Contract”). These contracts are critically important because they provide the primary mechanism for ensuring that the public benefits that have been promised in exchange for billions of dollars in taxpayer funding from Proposition 1 actually are provided each and every year. While we appreciate the opportunity to provide comments on this Draft Contract, given the importance of these agreements, the 14-day public review period of the Draft Contract is inadequate. In addition, all draft contracts must be subject to adequate public review, and the terms of the Draft Contract must be revised to provide adequate transparency and mechanisms to ensure that public benefits accrue annually as promised.¹

¹ Our organizations have not necessarily taken a position on the substantive merits of the proposed Harvest Water project and are not doing so with this letter. Instead, because this is the first Draft Contract and we anticipate it will be used as a template for other agreements, and because at least some of the other proposed projects under Proposition 1 have substantially reduced the public benefits they are now proposing to provide, our comments focus on the adequacy of the terms of this Draft Contract to ensure that public benefits from all of the Proposition 1 projects are provided.

First, we strongly urge the Commission and implementing agencies to provide the Commissioners and the public with a minimum of 30 days to review and comment on each of the draft contracts for the administration of public benefits. The current 14-day period to review more than 100 pages of dense language in this Draft Contract is inadequate for meaningful public review, and it is not entirely clear whether the Commission will provide public review and comment on each draft contract for the administration of public benefits. In addition, we urge the Commission to improve its process of providing public notice when these draft contracts will be available for public review, as the Commission's webpage does not easily or clearly inform the public of the deadline for public comments on this Draft Contract.²

Second, the Draft Contract must be revised to require public review and comment regarding contract amendments and the adaptive management process. As currently written, the Draft Contract lacks transparency, allowing the agencies to agree to eliminate public benefits without any public review. Most notably, section 8.6 of the Draft Contract explicitly allows the parties to negotiate contract amendments that significantly reduce or eliminate the public benefits required by the contract, without requiring any opportunity for public review or comment on such contract amendments. Similarly, the Draft Contract provides for no public review or participation in the adaptive management process (Exhibit B) or the public benefit dispute process (section 5), despite the fact that these processes can fundamentally alter the public benefits provided by a project. Given the billions of dollars of taxpayer money being provided to ensure specific public benefits from these projects, at a minimum the Draft Contract must be revised to provide for public review and comment on contract amendments, the public benefit dispute process, and the adaptive management process before any changes to the required public benefits are agreed to.

Third, the Draft Contract does not provide adequate mechanisms to ensure that public benefits actually occur each year as promised in exchange for billions of dollars in taxpayer funds. For instance, in some cases it appears that the performance thresholds (the promised public benefits) are greater than the adaptive management triggers, and the Draft Contract appears to prevent state agencies from taking action to enforce the full public benefits (performance thresholds), instead only allowing enforcement of the adaptive management triggers. Similarly, in several instances there are no adaptive management triggers for 10 to 20 years (such as §§ 3.3.5 and 3.4.1.2), and in other instances the adaptive management triggers are based on 5 year reviews, which also appear to prevent state agencies from taking action to ensure all of the promised public benefits are provided each and every year. Moreover, in some instances the performance thresholds and adaptive management triggers fail to adequately account for baseline conditions and ensure that the project provides benefits in excess of the baseline; for instance, section 4.1.1 of the adaptive management plan identifies a public benefit of 700 "additional" sandhill cranes

² In addition, we note that this and other Draft Contracts and any amendments thereto likely constitutes a project under the California Environmental Quality Act, mandating public review and opportunities for public comment.

from the project, but section 4.1.2.1 identifies a performance threshold of 700 total sandhill cranes on program habitat, rather than requiring 700 additional sandhill cranes. The Draft Contract must be revised to ensure that public benefits will be enforced on an annual basis.

More generally, we are greatly concerned that the proposed public benefits under the Draft Contract – and for other projects under Proposition 1 – are substantially lower than those promised in 2017 when the Commission made its funding awards, and relatedly that many of the public benefits are proposed to be delayed until year 10 or 20 of project implementation (rather than in year 1, as was analyzed by the Commission in 2017). For instance, the presentation slides show that the Draft Contract would result in approximately half as much recycled water for sandhill crane habitat, less improvement in Cosumnes River flow (and delays achieving full benefits to year 16), and reduces passive and active wetland habitat and substantially delays achieving these benefits compared to what was promised in 2017. These proposed reductions to public benefits from these projects warrant significant and meaningful review by the Commission and public, and may result in some projects no longer being eligible for state funding.

In addition, the Draft Contract fails to define the term of this agreement, which is critical to understanding the length of public benefits provided under the agreement. This is particularly important given the lengthy delays in providing public benefits proposed under this Draft Contract compared with the Commission’s 2017 findings.

Finally, we urge the Commission and implementing agencies to revise section 7 of the Draft Contract to provide the public a right to enforce the terms of the contract and to include rescission of all public funding as a remedy for breach of contract.

Thank you for consideration of our views.

Sincerely,



Doug Obegi
Natural Resources Defense Council



Ashley Overhouse
Defenders of Wildlife



Erin Woolley
Sierra Club California



Gary Bobker
The Bay Institute

Comments on Draft Agreement for Administration of Public Benefits from the Proposed Harvest Water Project
March 21, 2023



Chris Shutes
California Sportfishing Protection Alliance



John McManus
Golden State Salmon Association



Ron Stork
Friends of the River