



August 14, 2020

Armando Quintero, Chair
California Water Commission
P.O. Box 942836
Sacramento, California 94236-0001

Sent via email to cwc@water.ca.gov

RE: Comments on Proposed Water Storage Investment Program Emergency Regulations

Dear Chair Quintero and Members of the Commission:

On behalf of the Natural Resources Defense Council, Defenders of Wildlife, Sierra Club California, Friends of the River, The Bay Institute, and Golden State Salmon Association, we are writing to provide comments on the proposed Water Storage Investment Program draft emergency regulations. We support the Commission's proposed regulations insofar as it would allow applicants who did not previously apply for an award of early funding to do so, provided that all documentation and materials that are submitted to the Commission are also required to be shared with the public at least ten days in advance of the meeting at which the Commission will consider the request for early funding. However, we oppose the proposed regulation's approach of allowing projects that previously were denied funding from applying a second time, as there is no justification for the use of an emergency regulation to give such applicants a second try to apply for funding. We therefore urge the Commission to revise the proposed regulation so that: (1) section 6010(f) only applies to applicants who did not previously apply for early funding; and (2) section 6010(f)(3) requires that this information is provided to the public at least ten days prior to the Commission meeting.

First, the materials prepared by Commission staff make clear that it is inappropriate under the Administrative Procedures Act to use an emergency regulation to allow applicants who had previously unsuccessfully applied for early funding a second opportunity to apply for early funding. For instance, the statement of facts constituting the need for emergency regulatory action states that,

The continued uncertainty associated with the COVID-19 pandemic is jeopardizing the viability of the water storage projects that sought to complete the environmental documentation without State assistance. The current emergency was not anticipated during the initial application phase by the applicants, who will now need substantial help financing the environmental documentation phase of each of their projects.

California Water Commission, Statement of Proposed Emergency Regulatory Action, at 2 (emphasis added). The Commission's statement of Proposed Emergency Regulatory Action also states that,

Recent information from WSIP applicants indicates that funding for environmental permitting and documentation may be in jeopardy because of the economic downturn associated with the COVID-19 pandemic. Applicants to the WSIP are required to complete this documentation before they may receive any funds for construction for the proposed projects. **When applicants applied to the program in 2018, several did not apply for funding for completion of environmental documentation because the financial situation of their particular public agency made funding from the State unnecessary. However, the current economic impacts of the COVID-19 pandemic have made it necessary for those projects to approach the Commission for funding to complete the environmental documentation.**

Id. at 8 (emphasis added).

Neither of these justifications applies to applicants who previously applied to the Commission for early funding for environmental documentation and whose request for funding was not granted by the Commission. The Commission has failed to justify the need for an emergency rulemaking that includes applicants who previously applied for early funding that was not granted by the Commission. Equally important, the Commission has already determined that such applicants did not deserve early funding, and the current pandemic does not justify providing such applicants with a second chance to obtain millions of taxpayer dollars. As a result, the Commission cannot use the emergency rulemaking procedures of the California Administrative Procedures Act unless the regulation is amended to be limited to those applicants who did not previously apply for early funding.

In particular, permitting the applicants for the Temperance Flat Dam project to apply a second time for early funding is highly inappropriate and there are high risks that doing so would result in a waste of millions of dollars of taxpayer funding. The Commission has previously determined that there are “high implementation risks” for Temperance Flat, including “a high risk of being unable to build or operate the project,” that the costs of the project are greater than the benefits of the project, and a “high implementation risk that the applicant will not be able to meet the project schedule,” including the need to obtain necessary permits and begin the process of complying with CEQA. See California Water Commission, Technical Review, Temperance Flat Dam, May 25, 2018. The Commission considered these and other factors and did not award early funding to Temperance Flat. Those implementation risks have not diminished and instead have been magnified by recent decisions, including the decision by the applicants to defer the federal feasibility study for the project, and the public reports that many water districts are not financially supporting Temperance Flat.

Second, we urge the Commission to amend section 6010(f)(3) to explicitly require that any documents or materials that are submitted to the Commission will also be made available to the public at least ten (10) days prior to the meeting at which the Commission will decide whether to award early funding. This proposed amendment to the regulations would make them consistent with other provisions in the Commission’s existing regulations, which require that information relating to maximum conditional eligibility amounts, including the requested amount of early funding, be provided to the public at least ten (10) days before the Commission meeting to decide on that project. See Cal. Code Regs., tit. 23, §

6011(g). This change would help ensure that the public has adequate time to review this information before the Commission acts and ensure that this emergency regulation is consistent with the Commission's existing regulations.

While we oppose the proposed regulation as drafted, we have recommended two amendments to the proposed regulation to address our concerns. First, in order to comply with the Administrative Procedure Act and to avoid the waste of taxpayer dollars, the Commission should amend the regulation to only apply to applicants that have not previously applied for early funding, and to exclude applicants who have already applied for early funding. Second, the Commission should amend the regulation to explicitly require that all documentation and information that is submitted to the Commission regarding a request for early funding be provided to the public at least ten days in advance of the Commission's meeting to consider that request. With those changes, we could support the proposed regulation.

Thank you for consideration of our views. Please contact us at your convenience if you have any questions or would like to discuss this further.

Sincerely,



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