

## CALIFORNIA WATER COMMISSION

### STATEMENT OF PROPOSED EMERGENCY REGULATORY ACTION

#### Emergency Action to Add Section 6010 (f), (g), and (h) to Title 23, California Code of Regulations

Re: Special Application for Early Funding to Ensure Fiscal Success of Projects in the Water Storage Investment Program

Date of Emergency Statement: August 20, 2020

I. Statement of Facts Constituting the Need for Emergency Regulatory Action

COVID-19 is a respiratory disease caused by a novel coronavirus and transmitted by person-to-person contact and community spread. The COVID-19 outbreak has been characterized as a pandemic by the World Health Organization and determined by the federal Centers for Disease Control and Prevention (CDC) to be a serious public health risk. Federal, state, local, and tribal public health guidance regarding the COVID-19 emergency is evolving rapidly and requires quick action by government entities to reduce the spread and public health impact of the virus. One notable side effect of these efforts is the impact on the California economy.

On March 4, 2020, Governor Gavin Newsom declared a State of Emergency to exist in California as a result of the threat of COVID-19. The Governor issued Executive Order N-33-20 on March 19, 2020, ordering all individuals living in the state of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors. This "stay home order" has resulted in approximately 4.5 million people receiving unemployment benefits through July 30, 2020, and a related economic downturn to the California economy. The Legislative Analyst estimated on April 15, 2020, that lower revenues to California as a result of changes in the economy will amount to "tens of billions of dollars across a multiyear period." These reduced revenues impact the ability

of public agencies to operate and their credit worthiness as an operating partner.

Emergency regulations are necessary for the California Water Commission (Commission) to address the economic hardship confronting the applicants to the Water Storage Investment Program (WSIP) caused by the COVID-19 pandemic. Financing for the proposed water storage projects has become increasingly difficult to obtain in the current economy. 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. Absent emergency regulations, the economic hardship facing the projects will compromise project viability and the fundamental principle of voter-approved Proposition 1, which is that “safeguarding California’s supply of clean and safe water for homes, businesses, and farms is an essential responsibility of government, and critical to protecting the quality of life for all Californians.” (California Water Code section 79701(a).)

Generally, WSIP project proponents are revenue-based public agencies funded largely by individual customers in California. During the COVID-19 crisis, these agencies are maintaining service to as many people as possible, suspending shut-offs for nonpayment, and allowing Californians to forego payments for utilities, knowing they may not be paid for some time. In an April 20 letter to Congressional leadership, the Association of California Water Agencies—which represents 455 public water agencies responsible for 90 percent of the water delivered in California—sought federal financial assistance in the face of increased costs and decreased revenues. The letter included a request for a \$100 billion relief fund specifically for local governments, in particular special districts and cities, to utilize for continuation of essential services, such as water and wastewater operations across the country. Given the industry’s fiscal predicament, the Water Commission will help WSIP applicants maintain momentum on water storage projects by

advancing the availability of State funding. The assistance will help avoid jeopardy to projects that promise to improve regional water resilience.

On May 11, proponents of six of the eight WSIP-funded projects sent a letter to the Water Commission chairman, asking that the Commission consider making emergency and temporary modifications on a project-by-project basis in implementation of the WSIP funding due to the COVID natural disaster. The proponents stated that “we are concerned that the uncertain financial times ahead could cause delays to these projects that you have previously determined create an important statewide benefit.” In particular, the proponents asked the Commission to consider four potential changes: modification of early funding conditions, increased release frequency or waiver of retention on early funding, provision of additional flexibility within the early funding agreements, and incorporation of COVID-19 related impacts into pre-established deadlines.

Two of the potential beneficiaries of the emergency regulations confirmed to Commission staff that severe economic challenges threaten the viability of their projects. The Inland Empire Utilities Agency (IEUA) indicates that its member agencies are facing revenue shortfalls. These shortfalls are not anticipated to be short-term issues. IEUA adopted rates in Fall 2019, but deferred rate increases for a year at its scheduled May 6 meeting in recognition of the hardships facing its customers. Additionally, IEUA may consider deferring non-critical projects. IEUA staff indicate that early funding would ensure that revenue shortfalls do not prevent the Chino Basin project from moving forward. Additionally, the Willow Springs project has an immediate cashflow need. The project proponent indicates its financing partner is reassessing all of its business models based on COVID-19 impacts. Early funding would keep the Willow Springs project moving forward with planning activities and feasibility study needed to meet the statutory deadline of January 1, 2022.

The Commission finds that conducting a regular rulemaking action and the time needed to allow the regular rulemaking would result in the failure of the regulated community to receive the funding in a timely

manner. This regulation must take effect with sufficient advance time to allow the changes to be effective in achieving the goal of the regulations: to ensure sufficient funding is available to complete draft environmental documentation and feasibility studies to allow projects to remain in the WSIP and to help ensure the resilience of water supplies into the future. The Commission published this notice and proposed emergency regulations with its agenda for its August 19, 2020 meeting and included an item on the agenda titled "Action Item: Notice of Proposed Emergency Regulations and Informational Update on the Water Storage Investment Program."

## II. Proposed Emergency Regulations

The California Water Commission will consider requests from current applicants that received a maximum conditional eligibility determination from the Commission during the evaluation of the applications for funding in 2018 but did not receive funding for the completion of environmental documentation pursuant to Title 23, California Code of Regulations, section 6010. The Commission will evaluate the requests based on presentations by the applicants and Commission staff regarding project status and progress since the maximum conditional eligibility determination.

## III. Documents Relied Upon Supporting Regulation Change

- (1) Order of the State Public Health Officer, California Department of Public Health, March 19, 2020
- (2) Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission, CDC, March 12, 2020
- (3) Legislative Analyst Office, "State Budget Effects of Recent Federal Actions to Address COVID-19"
- (4) Legislative Analyst Office, "Overview of Employment Development Department Response to COVID-19," July 30, 2020

## IV. Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

(a) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

The Commission expects the costs to the State will be a maximum of approximately \$41,087,165 in the form of early funding provided to the projects that did not receive early funding in 2018. However, this does not represent an additional expenditure in excess of the projects' potential expenditures if the statutory requirements of Water Code section 79755 are completed. Rather, these funds represent a portion of what the applicants are eligible to receive from the already-determined maximum conditional eligibility amount.

(b) Nondiscretionary Costs/Savings to Local Agencies:

This emergency regulation could assist local agencies that are applicants to the WSIP to save funds to ensure the continued functioning of the agency while also moving forward with the proposed projects. Although the funding would be for reimbursement only, having the funds in a relatively short amount of time could help ensure the long-term viability of local agencies.

(c) Programs Mandated on Local Agencies or School Districts:

None.

V. Authority and Reference

The Commission adopts this emergency regulation pursuant to the authority vested by section 79754 of the Water Code and to implement, interpret, or make specific sections 79750, 79751, 79754, 79755, 79756 and 79757 of the Water Code.

VI. Section 48 Statement of Emergency

Government Code section 11346.1(a)(2) requires that, at least five working days prior to the submission of the proposed emergency action

to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6. The Commission has complied with Government Code section 11346.1(a)(2) by providing a copy of this notice to each person who has requested notification of Commission actions in advance of the meeting at which the emergency regulations will be discussed at the August 19, 2020 Commission meeting.

## Informative Digest

The COVID-19 outbreak has been characterized as a pandemic by the World Health Organization and determined by the federal Centers for Disease Control and Prevention to be a serious public health risk. The Governor's March 19, 2020, Executive Order requires all individuals residing in California to stay at home except as needed to maintain continuity of operations of the federal critical infrastructure sectors. Federal, state, local, and tribal public health guidance regarding the COVID-19 emergency is evolving rapidly and requires quick action by government entities to mitigate the economic impact of the virus.

The Water Storage Investment Program (WSIP) implements Proposition 1, Chapter 8 that provided \$2.7 billion for public benefits of water storage projects. To implement this chapter, the Commission adopted program regulations, as required in Chapter 8, then proceeded with a solicitation and application review. The language in Water Code section 79755(a) prevents the Commission from making final awards until the applicant has finalized environmental documentation, completed permits, obtained 100 percent of the non-public cost share, and has executed contracts with applicable State agencies for the administration of public benefits. While section 79755 (c) prevents a final award until the project is construction ready, it allows for early funding of projects to assist with work related to completion of environmental documentation and permits. Program regulations implemented the early-funding provision by requiring applicants to request early funding in their initial applications. Four of the eight applicants that completed the review process requested early funding in their applications. In July 2018, the Commission made maximum conditional eligibility determinations (MCEDs) for eight projects providing enough information and assurances that projects could proceed to complete the statutory requirements. The Commission also made three early funding awards. Early funding is a portion of a project's MCED that applicants may spend prior to final award. Early funding is capped at 5 percent of the MCED to limit stranding of funds if a project does not progress to final award.

Existing law provides applicants the ability to obtain funding for environmental documentation. Water Code section 79755(c) states "Notwithstanding subdivision (a), funds may be made available under this chapter for the completion of environmental documentation and permitting of a project." Existing section 6010 of Title 23 of California Code of Regulations governs the conditions that must be met before the Commission will award funding for

environmental documentation and permits. The proposed emergency regulations allow for those applicants meeting the existing requirements to request funding for environmental documentation and permits based on changed circumstances created by the COVID-19 pandemic.

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. These projects are important to the long-term water resilience of California communities and ecosystems.

The benefits anticipated from the emergency regulations include the long-term viability California's water systems from the addition of water storage.

The proposed addition of section 6010 (f), (g), and (h) to Title 23, California Code of Regulations grants the Commission the authority to consider providing funding for the completion of environmental documentation to those projects that did not previously receive it. The additional subsections provide the process and parameters the Commission will use to implement the new application process to ensure a fair and transparent process for the applicants and the public while also addressing the need of the applicants. The new subsections will also ensure the funding is made available as expeditiously as possible by streamlining the application and evaluation process.

Section 6010(f) will make one additional application for early funding available to project applicants that have not already received early funding through the Water Storage Investment Program and sets forth the process to request early funding by the applicants. Applicants must notify the Commission of the intent to request additional early funding at least fifteen (15) days in advance, the applicant must present the request to the Commission, and provide any materials the applicant will present to the Commission at least ten (10) days in advance of the Commission meeting to ensure an open and public process is

associated with the request. This section will allow the applicant to approach the Commission at its earliest convenience.

Section 6010(g) states what actions the Commission will take when an applicant fulfills the requirements of section 6010(f). Commission staff will provide an update about the applicant's project to the Commission, including a status overview and update of any information submitted by the applicant. This will help the Commission be completely informed about the project before committing additional funds to the project.

Section 6010(h) explains how the Commission will make its decision. The Commission will make its decision of whether to award early funding on the same basis contained in section 6010 (a) – (e) that applied to projects that applied for early funding at the same time the application was submitted in August 2017. The Commission may consider the current status of the project, including progress made since the maximum conditional eligibility determination. If the Commission decides to allow funding for completion of environmental documentation, the applicants would use existing regulatory provisions to complete funding agreements.

Commission staff is not aware of and has found no other state regulation relating to this emergency regulation and therefore concludes that the proposed regulation is neither inconsistent nor incompatible with existing state regulations.