

Title 23

Division 7. California Water Commission

Chapter 1

NOTICE OF PROPOSED RULEMAKING

The California Water Commission (Commission) will conduct a public hearing at the time and place noted below to consider the adoption of regulations for the special application for early funding, which are currently in effect as emergency regulations adopted on August 19, 2020 and effective on August 31, 2020 (OAL File 2020-0821-04E). The proposed regulations provide a process for a special application for early funding to allow the California Water Commission to award early funding to projects that received a Maximum Conditional Eligibility Determination (MCED) in the Water Storage Investment Program (WSIP). The proposed regulations do not change the total amount available to a project from the WSIP, nor do the proposed regulations constitute a new solicitation for projects that did not receive an MCED.

OPPORTUNITY FOR PUBLIC COMMENT

Public Hearings. The hearing will be held in accordance with the requirements set forth in Government Code section 11346.8. In accordance with Governor Newsom's Executive Orders N-29-20 and N-33-20, as well as recommendations from the California Department of Public Health, this hearing will not have a physical location. This will be a remote-only hearing, conducted via a web-based videoconferencing service called Zoom. The hearing details are as follows:

Date: January 20, 2021

Time: 9:30 a.m.

Zoom details will be released with the public agenda for this meeting, which will be released at least ten (10) days in advance of the hearing.

This item may be considered at any time during the regularly scheduled meeting of the Commission. Please consult the agenda, which will be available at least ten (10) days before January 20, 2021, to confirm the time at which this item will be considered. The agenda will be posted at <http://cwc.ca.gov>.

Sections Affected: Proposed adoption of California Code of Regulations, title 23, section 6010 (f), (g), and (h).

WRITTEN COMMENT PERIOD AND SUBMITTAL OF COMMENTS

Interested members of the public may present comments orally or in writing at the hearing and may provide comments by postal mail or by electronic submittal before the hearing. The public

comment period for this regulatory action will begin on November 27, 2020. To be considered by the Commission, written comments not physically submitted at the hearing, must be submitted on or after November 27, 2020 and received no later than 5:00 pm on January 13, 2021 and must be addressed to the following:

California Water Commission
901 P Street, Room 314
P.O. Box 924836
Sacramento, CA 94236

-or-

cwc@water.ca.gov

Please note that under the California Public Records Act (Government Code §6250 *et seq.*), written and oral comments, attachments, and associated contact information (e.g., address, phone, email, etc.) become part of the public record and can be released to the public upon request.

The Commission requests, but does not require, that written and email statements on this item be filed at least 10 days prior to the hearing so that Commission staff and Commissioners have additional time to consider each comment. The Commission encourages members of the public to bring to the attention of staff, in advance of the hearing, any suggestions for modification of the proposed regulatory action.

Additionally, the Commission requests, but does not require, that persons who submit written comments to the Commission reference the title of the proposal in their comments to facilitate review.

AUTHORITY AND REFERENCE

Authority Cited: Sections 79705, 79711, 79750, 79751, 79752, 79753, 79754, 79755, and 79757, Water Code. Reference: Sections 79705, 79711, 79751, 79755, 79757, 10733.2, and 10753.7, Water Code.

DOCUMENTS INCORPORATED BY REFERENCE

No documents are incorporated by reference in the regulations.

INFORMATIVE DIGEST OF PROPOSED ACTION AND POLICY STATEMENT OVERVIEW PURSUANT TO GOVERNMENT CODE SECTION 11346.5(a)(3)

Background and Effect of the Proposed Rulemaking

This notice of proposed rulemaking will make permanent an existing emergency regulation, adopted by the Commission on August 19, 2020, which became effective on August 31, 2020.

The proposed regulations provide a process for a project proponent who did not obtain early funding in the original application review to obtain early funding if the project meets the existing requirements of Section 6010 of the regulations and if the Commission grants the early funding request. The proposed regulations do not result in a re-examination of the merits of a project, nor do they change the total amount of funding a project may receive from the program if the project meets all of the statutory requirements of Water Code section 79755. The proposed regulations only make early funding, which is a portion of the total amount of the maximum eligibility amount, available to those projects that did not receive early funding during the initial application review in 2018.

Objectives, Benefits, and Policy Statement Explaining the Specific Benefits Anticipated from the Proposed Regulatory Action

The proposed regulations will establish the procedure for proponents of water projects to request early funding from the Commission, consistent with the Water Storage Investment Program regulations. These projects are suffering from COVID-19 economic circumstances which require additional available funding earlier, which was the subject of the emergency regulations.

Determination of Inconsistency and Incompatibility with Existing State Regulations Pursuant to Government Code section 11346.5(a)(3)(D)

The proposed regulations establish a procedure for water storage proponents to obtain early funding from the Water Storage Investment Program. None of the proposed regulations are inconsistent or incompatible with existing state regulation. The Commission has developed these regulations in alignment with existing state law and regulations that govern an open and transparent process for addressing state governmental agencies.

The Commission developed the proposed regulations to be consistent with the following sections of California Code: Government Code sections 11340.5 and 11342.600 requiring any rule of general application to be adopted as a regulation.

The proposed regulations are uniquely applicable to the applicants in the Water Storage Investment Program who did not receive early funding awards in 2018. In addition to the consistency of the regulatory policies with the implementing statute, the policies are also consistent with existing laws and regulations that relate to the specific policies discussed below.

During the process of developing the proposed regulatory action, Commission staff has conducted a search of any similar regulations on this topic and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

Mandated by Federal Law or Regulations

The proposed regulations are not mandated by federal law or regulations but are required because of duties imposed on the California Water Commission via federal law.

Comparable Federal Regulations

The proposed regulation implements a new process for water projects to obtain early funding from the Water Storage Investment Program. These regulations do not have a federal counterpart, and do not impact, duplicate, or conflict with Federal regulations or statutes.

Summary of Existing Laws and Regulations Related Directly to the Proposed Rulemaking

The Water Storage Investment Program 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 application. 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 five percent (5%) 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 the California Code of Regulations governs the conditions that must be met before the Commission will award funding for environmental documentation and permits. The proposed 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.

Other Statutory and Legal Requirements

California Government Code section 11340.5 states:

- (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

California Government Code section 11342.600 defines a regulation as:

...[E]very rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

Because the proposed regulatory action is a “standard” adopted to “govern its procedure”, the Commission needs to undertake a rulemaking to ensure the process it implements is consistent with Government Code section 11340.5.

FISCAL IMPACT DETERMINATION REGARDING THE PROPOSED ACTION

Local Mandate (Government Code section 11346.5(a)(5))

Pursuant to Government Code sections 11346.5(a)(5) and (a)(6), the Executive Officer has determined that the proposed regulatory action would not create costs to covered State agencies. The proposed regulatory actions would not create costs or savings in federal funding to the State, costs or mandate to any local agency or school district, whether or not reimbursable by the State pursuant to Government Code, Title 2, division 4, part 7 (commencing with section 17500) or other nondiscretionary costs of savings to State or local agencies.

The regulation does not impose a mandate on any private individual, business or local government. The regulations govern three existing applicants to the Water Storage Investment Program.

The determinations of the Commission’s Executive Officer concerning the costs or savings necessarily incurred by public agencies and private persons and businesses in reasonable compliance with the proposed regulatory action are presented below:

- Cost to any Local Agency or School District Requiring Reimbursement Pursuant to Government Code section 17500 *et seq.*: None.
- Cost or Savings for State Agencies: None.
- Other Non-discretionary Costs or Savings on Local Agencies: None.

Significant Statewide Adverse Economic Impact Directly Affecting Business, Including Ability to Compete

The Executive Officer has made an initial determination that the proposed regulatory action would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states, or on representative private persons.

Cost Impacts on Representative Private Persons or Businesses

In developing this regulatory proposal, Commission staff evaluated the potential economic impacts on representative private persons or businesses. The commission is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Effect on Small Business

The Executive Officer has also determined, pursuant to California Code of Regulations, title 1, section 4, that the proposed regulatory action would not affect small businesses because the projects do not meet the qualifications of a small business.

Business Reporting Requirements

The administrative requirements of the proposed regulations do not apply to business or private individuals. Therefore, there is no reporting requirement that applies to businesses.

Housing Costs

The Executive Officer has also made the initial determination that the proposed regulatory action will not have a significant effect on housing costs.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS/ASSESSMENT PREPARED PURSUANT TO GOVERNMENT CODE SECTION 11346.3(b)

Effect on Jobs/Businesses

The Executive Officer has determined that the proposed regulatory action would not affect the creation or elimination of jobs within the State of California, the creation of new businesses or elimination of existing businesses within the State of California, or the expansion of businesses currently doing business within the State of California.

Benefits of the Proposed Regulation

The objective of the proposed regulations is to ensure a level playing field and a consistent process for any California water storage project proponent seeking early funding from the Water Storage Investment program who did not receive an early funding award during the initial application review in 2018.

A detailed explanation of the benefits of the proposed regulation is in the Initial Statement of Reasons, under "Purpose of Proposed Regulations."

DISCLOSURES REGARDING THE PROPOSED ACTION

The proposed regulation does not award funding from WIIN Act sources. Rather, it ensures water projects from California that apply for funding from the Federal government pursuant to the WIIN Act are consistent with California's stated goals and policies related to water storage.

The following summarizes the sections of the proposed regulation and the potential categories of economic and fiscal impact:

Section 6010(f): provides one additional opportunity to apply for early funding for projects that did not apply or did not receive early funding pursuant to certain criteria.

Section 6010(g): requires staff to provide an update on the project at the scheduled Commission meeting before the Commission hears the request from the applicant.

Section 6010(h): requires the Commission to decide whether to award funding.

Costs potentially resulting from these regulations are:

Costs to local agencies to prepare information, submit information, and attend the Commission meeting.

The following are conclusions of an economic and fiscal impact analysis for the proposed regulations:

The proposed regulation will not result in a significant or permanent change in the number of jobs within the state.

No creation or elimination of businesses within the state would occur as a result of this proposed regulation.

The proposed regulation would not affect the competitive advantages or disadvantages of businesses within the state.

The proposed regulation would not significantly affect investment in the state.

Incentives for innovation in business products, materials, or processes would not be affected.

ALTERNATIVES STATEMENT

The Commission must determine that no reasonable alternative considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

AVAILABILITY OF DOCUMENTS AND AGENCY CONTACT PERSONS

Commission staff has prepared an Initial Statement of Reasons for the proposed regulatory action, which includes a summary of the economic and environmental impacts of the proposal. The report is entitled "Initial Statement of Reasons."

Copies of the ISOR and the full text of the proposed regulatory language may be accessed on the Commission's website listed below, or may be obtained from Kimberly Muljat, California Water Commission, 901 P Street, Sacramento, California, 95814, (916) 651-7501.

The following materials are available for public review:

- Text of Proposed Regulation
- Notice of Proposed Rulemaking
- Initial Statement of Reasons

- Materials Relied Upon
- Form 400
- Form 399
- Final Statement of Reasons (upon completion)
- Final Text of Regulation (upon completion)

These materials may be viewed in two ways:

- Visiting the Commission's website (<http://cwc.ca.gov>)
- Arranging an in-person review. Please contact Kimberly Muljat (contact information provided above).

Final Statement of Reasons Availability

Upon its completion, the Final Statement of Reasons (FSOR) will be available and copies may be requested from the agency contact persons in this notice or may be accessed on the Commission's website (<http://cwc.ca.gov>).

Agency Contact Persons

Inquiries concerning the substance of the proposed regulatory action may be directed to:

Holly Stout
California Water Commission
901 P Street, Room 314
P.O. Box 924836
Sacramento, CA 94236
916-651-0156

cwc@water.ca.gov

Further, the agency representative to whom nonsubstantive inquiries concerning the proposed administrative action may be directed to:

Kimberly Muljat
California Water Commission
901 P Street, Room 314
P.O. Box 924836
Sacramento, CA 94236
916-651-7501

The Commission staff has compiled a record for this rulemaking action, which includes all the information upon which the proposal is based. This material is available for inspection upon request to the contact persons.

Internet Access

This notice, the Initial Statement of Reasons, and all subsequent regulatory documents, including the FSOR, when completed, are available on the Commission's website for this rulemaking at <https://cwc.ca.gov>.

HEARING PROCEDURES

The public hearing will be conducted in accordance with the California Administrative Procedure Act, Government Code, title 2, division 3, part 1, chapter 3.5 (beginning with section 11340).

Following the public hearing, the Commission may adopt the regulatory text as originally proposed, or with nonsubstantial or grammatical modification. The Commission may also adopt the proposed regulatory language with other modifications if the text as modified is sufficiently related to the originally proposed text that the public was adequately placed on notice and that the regulatory language as modified could result from the proposed regulatory action; in such event, the full regulatory text, with modifications clearly indicated, will be made available to the public, for written comment, at least 15 days before it is adopted.

The public may request a copy of the modified text from the Commission contact persons listed in this notice.

The hearing location is wheelchair accessible. At the hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The Commission requests but does not require that persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

CALIFORNIA WATER COMMISSION

Joseph R. Yun
Executive Officer

Date: November 16, 2020