



January 5, 2015

Members of the California Water Commission and
Sue Sims, Executive Officer
California Water Commission
% California Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236

**Subject: Comments and Recommendations to the California Water Commission on
Quantification of Public Benefits of Storage Projects, Chapter 8 of the 2014
Water Bond**

Dear Ms. Sims:

On behalf of the Environmental Water Caucus, we provide you and the California Water Commission with comments on Chapter 8 of the 2014 Water Bond, along with recommendations on draft regulations and grant application guidelines worked on by the California Water Commission through late 2013. It is our understanding that while the Commission suspended work on the regulations and guidelines in late 2013, commissioners will resume their deliberations and formulation of regulations and guidelines during 2015 with hopes of completing the regulatory and application package by early 2016.

The Environmental Water Caucus seeks to achieve comprehensive, sustainable water management solutions for all Californians. Our 34 member groups and Indian tribes employ political, legal and economic strategies to restore ecological health, improve water quality and protect public trust values throughout the San Francisco Bay and Sacramento-San Joaquin Delta estuary and the Central Valley/Sierra Nevada watersheds of the Delta.

The California Water Commission is tasked by Chapter 8 of the 2014 Water Bond to formulate grant program regulations and guidelines that help California achieve statewide water storage goals. After reviewing the Commission's minutes and agenda materials concerning water storage

strategies from 2011 through earlier this year, including preliminary drafts of regulations, guidelines, and background materials about the quantification of public benefits for storage projects prior to passage of Proposition 1, the Commission's deliberations needs to:

- Articulate California's overall water policy framework in Chapter 8-related regulations and guidelines.
- Clarify the meaning of public benefits.
- Craft guidelines and regulations to obtain the widest possible range of storage project types for the Delta/Central Valley/Sierra Nevada watershed.
- Write guidelines and regulations that address over-appropriated streams in the Delta's Central Valley watershed by rewarding projects in the application evaluation stage that need no additional water rights permits that involve new diversions, new re-diversions, new places of use, and new purposes of use.
- Define health and safety uses of public water storage in drought periods in the regulations as a public benefit of storage projects that contribute to drought resilience.
- Assure accountability of grantees to public benefits criteria over the life of their projects.

1. The Water Commission should look beyond the 2014 Water Bond for guidance with setting goals and objectives for the Chapter 8 water storage grant program.

Reviewing Commission deliberations recorded in meeting minutes since 2011 we see a distinct tilt toward surface and pumped groundwater storage/conjunctive use projects in its formulation of Chapter 8 regulations and grant application guidelines. The Commission may prefer to interpret Chapter 8's provisions narrowly. On the other hand, the EWC urges that the Water Commission will incorporate statewide water policy goals to give users of both the regulations and grant application guidelines full policy context for their proposed projects. The State of California has a rich framework of water policy goals that should guide formulation and presentation of Chapter 8 regulations and grant application guidelines. We recommend the following policies and goals because DWR and the Commission are tasked with devising criteria for selecting projects and DWR will be the entity administering grant agreements and monitoring them for compliance. This policy framework includes, but is not limited to:

- The Delta Policy portion of the Delta Reform Act of 2009 (Water Code Sections 85020 through 85023, and starting with **achievement of the coequal goals** of Water Code Section 85054) contains numerous goals pertinent to implementing Chapter 8 of the 2014 Water Bond. These sections include the requirement of Section 85021 to **reduce reliance on the Delta in meeting California's future water supply needs** (and whose strategy specifies "investing in improved regional supplies, conservation, and water use efficiency").
- Water Code Section 85023 states: "**The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta.**" The effect of this Delta Reform Act policy statement is broad, plenary. It should be

reproduced and acknowledged in Chapter 8 regulations and guidelines so that all who apply for grant funds understand this framework and purpose of the 2014 Water Bond.¹

- California Fish and Game Code Sections 5937 and 5946 require that **owners of dams must keep fish populations below their dams in good condition**. A variety of fish population measures are available to project quantitative benefits of instream flow release commitments from proposed storage projects and whose parameters may be incorporated as performance measures into grant agreements for compliance monitoring.
- California Fish and Game Code Section 6902(a) states that it is **California’s goal “to significantly increase the production of salmon and steelhead trout** by the end of the Century,” creating “a program that strives to double the current natural populations of salmon and steelhead resources.”²
- The 1992 Central Valley Project Improvement Act requires the US Interior Department to undertake actions that will **double the populations of anadromous fish species that migrate through the Delta** as compared with their historical average populations between 1967 and 1991.³
- The federal Clean Water Act requires that **the navigable waters of the United States, including California, not be degraded**, and that **the regulation of water quality constituents be based on the “most sensitive” beneficial use among those occurring in a particular water body**.

These are goals found in existing law. The taxpayers of California deserve assurances that their public trust resources are protected according to the fundamental policies and goals that past California voters and past legislatures have enacted. We recommend you employ these legislative goals and policies as your framework to formulate Chapter 8 regulations and guidelines. It is also

¹ Additional reference materials for defining public trust concepts may be found in Delta Stewardship Council, *The Delta Plan*, Chapter 3, p. 74; Jan S. Stevens, “Applying the Public Trust Doctrine to River Protection,” *California Water Plan Update 2005*, Vol. 4, pp. 393-400, accessible online at <http://www.waterplan.water.ca.gov/docs/cwpu2005/vol4/vol4-environment-applyingpublictrustdoctrine.pdf>; and Paul S. Kibel, “Instream Flow and the Public Trust: Statutory Innovation in California’s 2009 Delta Reform Act,” 13 *Water Resources Committee Newsletter* 4 (ABA, Jan. 2011). Accessible online at <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1445&context=pubs>.

² California Fish and Game Code Section 6902(a). This law was enacted in 1988; while we are well past the end of the previous century, no consistent progress has been made toward this goal. The fact that this goal has not yet been achieved does not mean it recedes from public view. Chapter 8 presents an opportunity for storage projects (though not necessarily ones located in rivers, nor ones underground) to contribute to increasing salmon and steelhead production. There may be other opportunities to aid salmon through stored water such as restoration of mountain meadows to increase natural storage in the upper watershed, despite looming loss of snowpack.

³ Central Valley Project Improvement Act of 1992, Section 3406(b)(1). Accessible online at http://www.usbr.gov/mp/cvpia/title_34/public_law_complete.html.

usually standard boilerplate language for grant agreements that grantees must comply with all federal, state, and local laws.

- 2. We recommend the Water Commission write the guidelines and regulations to ensure they obtain the widest possible range of storage project types for the Delta/Central Valley/Sierra Nevada watershed in applications submitted, beyond the usual groundwater/surface/conjunctive use triad that focuses on dams and water banks.**

We recommend the Commission incorporate in its regulations criteria that protect and restore hydrologic connections throughout the Delta's Central Valley watershed between surface and ground water resources on which both riparian ecosystems and many agricultural and urban communities depend. Such connections can be enhanced and improved by protection of natural headwater origins in mountain meadows, forests, foothills, and wetland habitat through restoration, acquisition, and easements. Such headwaters projects should be a high priority to use Chapter 8 funds for Sierra and Cascade mountain/foothill watershed natural storage projects given the threats to natural storage capacity and loss of snowpack to climate change on these watersheds' capacity to store water for later use.

- 3. We recommend the Water Commission make clear that it may be difficult, or in some cases, impossible to quantify some project benefits, but that qualitative public benefits and costs will be taken into account. These assurances should be spelled out in the application guidelines.**

In reviewing the Commission's consultant report by CH2M Hill it is evident in the minutes that some Commissioners have concerns about separating out the various public benefits criteria stated in Chapter 8 of the 2014 Water Bond in specific situations. One example is whether an action to improve water quality benefits may contribute to a fish population growing as conditions improve, and the problem posed by the legislation is whether that is an "ecosystem benefit" or a "water quality benefit." The legislation has imposed an artificial construct on the public benefit criteria, apparently for the sake of having separate categories by which to evaluate projects; economists generally consider the criteria listed in Chapter 8—ecosystem, water quality, recreation, flood protection, and emergency response improvements—as examples of ecosystem services generally.

Section 79753 defines "ecosystem improvements" specifically as "including changing the timing of water diversions, improvement in flow conditions, temperature, or other benefits that contribute to restoration of aquatic ecosystems and fish and wildlife in the Delta." This is a Delta-centered definition. We urge the Water Commission to ensure that the regulations interpreting Chapter 8 specify that improvement in flow conditions in the Delta refers to both

increased inflow as well as increased outflow, consistent with State Water Board acknowledgement of the need for increased flows into and through the Delta.⁴

The Water Commission should craft its implementing regulations and program application guidelines to take account of intangible values associated with environmental and cultural resources. The values of sacred places and passive active recreation are examples of such intangibles.

4. Address over-appropriated streams in the Delta's Central Valley watershed by rewarding projects in the application evaluation stage that need no additional water rights permits that involve new diversions and re-diversions, new places of use, and new purposes of use, new storage amounts or diversion rates.

Recent analyses have demonstrated that California's rivers and streams, including those throughout the Delta watershed, have over five times more consumptive water rights claimed than there is stream flow in average years to serve those claims.⁵ This reality distorts California water supplies in the perceptions of decision makers at all levels of government statewide: they believe they are entitled to more water than may be there for anyone to divert given current conditions. Supplies are now widely considered unreliable, and it is perceived that more capture of runoff to storage is needed to address drought conditions when they arise. The droughts experienced in the last 15 years have certainly demonstrated that the state's two big systems have insufficient storage to outlast droughts of modest to long durations; hence the pressing need for greater conservation, recycling, efficiency, and innovative approaches to storage that do not rely on 20th century approaches to the problems of 21st century California. Given the aggregate size of 2014 water bond funds dedicated to storage, California will not be able to build its way out of its perceived storage deficiency, either.

We strongly recommend the Commission craft regulations that encourage storage projects and methods that do not rely on new or amended water rights claims that would increase their face

⁴ State Water Resources Control Board, *Development of Flow Criteria for the Sacramento-San Joaquin River Delta Ecosystem*, August 2010, pp. 4, 5. "There is sufficient scientific information to support the need for increased flows to protect public trust resources; while there is uncertainty regarding specific numeric criteria, scientific certainty is not the standard for agency decision making." (p. 4) and "Recent Delta flows are insufficient to support native Delta fishes for today's habitats. [citation] Flow modification is one of the immediate actions available although the links between flows and fish response are often indirect and are not fully resolved. Flow and physical habitat interact in many ways, but they are not interchangeable." Accessible online at http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/final_rpt.shtml.

⁵ Stroshane, T., *Testimony on Water Availability for Trinity, Sacramento, and San Joaquin River Basins Tributary to the Bay-Delta Estuary*, Submitted by the California Water Impact Network, on behalf of California Sportfishing Protection Alliance, and AquAlliance on October 26, 2012, for Workshop #3: Analytic Tools for Evaluating Water Supply, Hydrodynamic, and Hydropower Effects on the Bay-Delta Plan. Accessible online at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/comments111312/tim_stroshane.pdf; and see T.E. Grantham and J.H. Viers, "100 years of California's water rights system: patterns, trends and uncertainty," *Environmental Research Letters* 9(2014), doi:10.1088/1748-9326/9/8/084012.

value to the holder, or add new points of diversion, re-diversion, places of use, or purposes of use to the permits for the project.

5. Define health and safety uses of public water storage in drought periods in the regulations as a public benefit of storage projects that contribute to drought resilience.

The State Water Resources Control Board in its various drought-related orders used “health and safety” as at least one justification for modifying, and usually reducing Delta outflow or salinity standards in the Delta in order to boost state and federal exports. We are unaware of any definition of this justification in law or regulation.

We recommend that the California Water Commission include in implementing regulations and grant program guidelines for Chapter 8 a definition of “health and safety” and reward projects that contributes to meeting health and safety needs and priorities during drought periods, and that such benefits be rewarded to applications that can demonstrate increased contributions to Delta watershed-focused drought resilience. This benefit, it seems to us, could be subsumed within or even added to the goal of implementing reduced Delta reliance depending on project characteristics.

6. We recommend the Water Commission work with Department of Water Resources staff to develop grant agreements and development management capacity pursuant to Chapter 8 public benefits criteria that will need to be monitored and enforced long-term.

Section 79752 of the Water Bond states “a project shall not be funded pursuant to this chapter unless it provides measurable improvements to the Delta ecosystem or to the tributaries to the Delta.” Given the large sums of taxpayer funds involved, there must be transparency and accountability in the monitoring and enforcement of grant conditions to grantee projects, and it must be practiced long-term by DWR. Reducing reliance on the Delta can and should be measured as the volume of water no longer imported by an entity that imports water currently from the Delta via the state or federal water projects. The ecosystem benefit should be measured by documenting the timing and magnitude of additional Delta inflow and outflow past Chipps Island that resulted from any reduction of imports from the Delta brought about by an eligible Chapter 8 proposal. It will be important for DWR and the Commission to ensure through monitoring and compliance provisions that this outflow occurs, that the project generating them is properly credited only as they occur, and that such flows are not treated as “abandoned waters” that available for capture and export from the Delta. Monitoring and enforcement will be central to assuring accountability of projects claiming this benefit over the life of the project.

We look forward to continued participation in the California Water Commission’s development of Chapter 8 regulations and proposal guidelines to implement the 2014 Water Bond. If you have questions about this letter, please contact Conner Everts at (310) 394-6162 x111 (or email connere@gmail.com), or Tim Stroshane at (510) 524-6313 (or email tim@restorethedelta).

Thank you for considering these comments, and we look forward to working with you in the months ahead.

Sincerely,



Conner Everts



David Nesmith

Co-Facilitators
Environmental Water Caucus