



TO: Rachel Ballanti, Acting Executive Officer California Water Commission  
Jennifer Marr, Project Manager, SAC Co-Lead

FROM: Miriam Gordon, Clean Water Action- member WSIP Prop 1 SAC  
Jennifer Clary, Clean Water Action- alternate WSIP Prop 1 SAC

DATE: May 15, 2015

RE: Comments on WSIP action items and documents from May 4, 2015

---

We thank you for the opportunity to provide comment on the three documents that address definitions of terms associated with what **storage projects will be eligible for funding**, what constitutes **public benefits**, and what constitutes the scope of the **Public Trust Doctrine**. Before we respond to those documents specifically, we would like to address some overall process concerns as there has been no opportunity in agendas presented and “homework” assigned to date for us to express these concerns.

## **I. Problems with Proposed Process for Funding**

### **(a) One Grant Round**

No opportunity has been provided to date, or seems to be envisioned, for discussing the Commission’s plan to conduct only one round of grant-making. We feel that this is inappropriate and should at least be discussed with the SAC. If there is only one opportunity for submission of project proposals, the Commission will likely only be seeing proposals for projects that have long been in the development process – such as CALFED projects. This would be an unfortunate outcome since there are projects with significant public benefits that may be less “shovel ready.” Furthermore, as with any new grant or funding program, there is likely to be a huge learning curve by the grant-making agency during the first round of project applications as to the flaws in the proposal process. Having at least one additional round of requests for proposals (RFP) would allow for improvement in the RFP process as well as more time for projects with significant public benefit potential to complete environmental documentation and planning.

### **(b) The Economic Analysis Lacks a Template or Agreed Upon Metrics**

To date, our understanding of the process for project evaluation is that the Commission will provide guidance regarding the approach to conducting the required cost- benefit analysis, but there appears to be no plan to provide a template or any standards for measuring costs and benefits- i.e. no specific metrics. There is a need to ensure that project proposals use a common set of metrics for quantification of costs and benefits, otherwise the Commission will be significantly challenged to provide appropriate evaluation of the projects proposed.



A big concern with respect to costs is that, absent any metrics provided by the Commission, project proponents will not be required to assess external costs to the environment or public. Currently, CALFED surface storage projects (i.e. the federal process) only assessed costs based on costs of construction. This is a short-sighted approach and certainly inconsistent with the clear intent of Chapter 8 of Proposition 1 which includes a long list of eligible projects under section 79751, not just surface water storage. Without consideration of the external environmental impacts or costs of large surface storage projects, the true costs of these projects will not be evaluated and these projects will gain unfair advantage in the overall project evaluation process.

With a draft Project Solicitation Package anticipated to be completed in September, the Commission's proposed timeline does not leave adequate time to develop such a set of metrics, nor do stakeholders have adequate time to conduct research and review and suggest any appropriate models or methodologies. We suggest two options to address this lack of metrics and methodology. First, slow down the timeline and allow for development of a uniform methodology. In the alternative, a second option would be to create an independent review panel for the consideration and evaluation of costs and benefits associated with each proposed project and task the independent panel with assessing the costs and benefits for all projects according to a uniform set of metrics that the panel agrees upon.

## II. Eligible Storage Projects –

**(a) Surface Storage:** There needs to be more clarity that Shasta Dam enlargement is not an eligible project. We appreciate the continued reference throughout the document to the exclusion of certain storage projects from eligibility per the Wild and Scenic Rivers Act -Section 5093.50 et seq of the Public Resources Code. It is appropriate to cite this Act as it is stated clearly in the actual language of Proposition 1 that Section 5093.50 et seq limits what projects will be eligible under Proposition 1. Section 5093.542 of the Code expressly states:

...The Legislature finds and declares that the McCloud River possesses extraordinary resources in that it supports one of the finest wild trout fisheries in the state. Portions of the river have been appropriately designated by the Fish and Game Commission, pursuant to Chapter 7.2 (commencing with Section 1725) of Division 2 of the Fish and Game Code, as wild trout waters, with restrictions on the taking, or method of taking, of fish. The Legislature has determined, based upon a review of comprehensive technical data evaluating resources and potential beneficial uses, that potential beneficial uses must be balanced, in order to achieve protection of the unique fishery resources of the McCloud River, as follows:

(a) The continued management of river resources in their existing natural condition represents the best way to protect the unique fishery of the McCloud River. The Legislature further finds and declares that maintaining the McCloud River in its free-flowing condition to protect its fishery is the highest and most beneficial use of the waters of the McCloud River within the segments designated in subdivision (b), and is a reasonable use of water within the meaning of Section 2 of Article X of the California Constitution.



(b) No dam, reservoir, diversion, or other water impoundment facility shall be constructed on the McCloud River from Algoma to the confluence with Huckleberry Creek, and 0.25 mile downstream from the McCloud Dam to the McCloud River Bridge; nor shall any such facility be constructed on Squaw Valley Creek from the confluence with Cabin Creek to the confluence with the McCloud River.

The proposed clarification of the definition of eligible storage projects is not clear enough on this point. It lists Shasta Enlargement among the CALFED projects and states that “To be eligible, each CALFED surface storage project must demonstrate that it is not prohibited by Public Resources Code Section 5093.50 et seq.” This is misleading in that it seems to leave open the idea that Shasta Dam enlargement could be eligible if it demonstrates it can meet the terms of Section 5093.50 et seq. Simply put, it cannot. This language should be redrafted as follows: “Shasta Enlargement is expressly prohibited by Section 5093.542 of the Public Resources Code.”

**(b) Ground Water Storage:**

The proposed clarification of the definition of eligible groundwater storage projects contradicts the clear intent and language of the law and is therefore inappropriate. We take issue with this language:

“**Groundwater storage Projects** – For the purposes of the WSIP, groundwater storage projects are those that bank water for the project sponsor and/or for external customers in an aquifer for later withdrawal by the project sponsor or external customers. Such projects shall include contractual arrangements with the external customers that detail the water supply accounting and withdrawal obligations and conditions.”

Groundwater banks are clearly an eligible storage project, but not the only eligible type of groundwater project. The actual language in Proposition 1 does not imply that the storage must benefit the external customers or sponsors of the project. The law clearly determines that only public benefits should be funded from chapter 8 and Section 79753 provides that public benefits include:

- (1) Ecosystem improvements, including changing the timing of water diversions, improvement in flow conditions, temperature, or other benefits that contribute to restoration of aquatic ecosystems and native fish and wildlife, including those ecosystems and fish and wildlife in the Delta.
- (2) Water quality improvements in the Delta, or in other river systems, that provide significant public trust resources, or that clean up and restore groundwater resources.
- (3) Flood control benefits, including, but not limited to, increases in flood reservation space in existing reservoirs by exchange for existing or increased water storage capacity in response to the effects of changing hydrology and decreasing snow pack on California’s water and flood management system.
- (4) Emergency response, including, but not limited to, securing emergency water supplies and flows for dilution and salinity repulsion following a natural disaster or act of terrorism.



(5) Recreational purposes, including, but not limited to, those recreational pursuits generally associated with the outdoors.”

Therefore, the proposed clarification is too narrowly focused on groundwater banks and storage that benefits project sponsors and external customers.

Furthermore, we believe the clarification should reference projects designed to avoid or address “undesirable results” as defined in the 2014 California Sustainable Groundwater Management Act (SGMA). “Undesirable results” are defined in SGMA, Part 2.74 of the California Water Code, as:

... one or more of the following effects caused by groundwater conditions occurring throughout the basin:

- (1) Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon. Overdraft during a period of drought is not sufficient to establish a chronic lowering of groundwater levels if extractions and recharge are managed as necessary to ensure that reductions in groundwater levels or storage during a period of drought are offset by increases in groundwater levels or storage during other periods.
- (2) Significant and unreasonable reduction of groundwater storage.
- (3) Significant and unreasonable seawater intrusion.
- (4) Significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies.
- (5) Significant and unreasonable land subsidence that substantially interferes with surface land uses.
- (6) Depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water addressing “undesirable results.”

SGMA implementation projects should be fundable under Chapter 8 of Proposition 1.

**(c) Conjunctive Use Projects-** “reservoir reoperation projects” should include those that facilitate groundwater recharge.

### **III. Defining Public Benefits**

#### **(a) Ecosystem Improvements:**

We take issue with staff suggestion in Table 1 under “Additional Considerations” that “water quality and recreation benefits caused by ecosystem improvements should be categorized as ecosystem improvement.” Here, staff is lumping together three categories of improvements that are listed separately in legislation. We disagree with this categorization and assert that water quality and recreation benefits should also be considered ecosystem improvement. They each should be measured separately as determined by statute.



Therefore, we disagree with the first benefit example provided in the table. Sport fishing recreation benefits, and other recreation benefits such as flows for kayakers, reservoirs for boaters, should be considered only as recreation benefits, not as ecosystem improvements.

However, the proposed clarification seems appropriate.

### **(b) Water Quality Improvements**

This section develops significant background and consideration for what constitutes improvements to **public trust resources** that will be eligible for funding. In discussing the public trust, the Commission relies on the interpretation of caselaw and staff recommends that public trust resources be interpreted to focus on fishery protection, fish and wildlife conservation, preservation of waterways in their natural state, and recreation. The Public Trust Doctrine is not a single statute nor is it static. – it’s a living concept that evolves from caselaw and legislation.

The Human Right to Water (HRTW) is a principle that recently went into effect (January 2013) and is enshrined in the California Water Code, Section 106.3, which provides “(a) It is hereby declared to be established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.” This principle expresses a concept that is so akin to the idea of the Public Trust Doctrine that there are fundamental natural resources that belong to all and should be protected for the benefit of all. The fact that no court decisions have yet been made regarding the HRTW is not a reason to assume it’s not part of the public trust. Every storage project designated eligible in this section will have a water supply element to it that includes, drinking, cooking, bathing or other use that falls within the purview of the HRTW. A clarification that ignores the drinking water/ HRTW aspect of the public trust contradicts the clear guidance of Section 106.3(b) of the the HRTW statute which requires that relevant state agencies, including the Department of Water Resources, to consider the HRTW when developing new policies or regulations. Therefore, we recommend that the proposed clarification for Guidelines include implementation of the Human Right to Water as part of the list of public trust resources.

However the statute identifies two types of water quality improvements and this document ignores the second, which is to “**cleanup and restore groundwater resources.**” The staff draft does not comment on this form of water quality improvement. Again, we view the HRTW as applicable here since Section 106.3(b) requires relevant state agencies, including the Department of Water Resources, to consider the HRTW when adopting new policies and regulations. In these new funding policies, the Commission must adhere to the principles of the Human Right to Water in determining what improvements to water quality are most important. Because sufficient groundwater of adequate quality is the most affordable source of water supply for small communities, a clarification is needed to be clear that projects for the cleanup and restoration of groundwater resources should prioritize the HRTW.

In the discussion of “**Significant**” - **What is “significant”?** – the staff document suggests:

**Water quality improvements that provide public trust resources will be determined to be “significant” if a resource was specifically identified in the California Department of Fish and**



Wildlife (CDFW) or State Water Resources Control Board priorities. For example, “fisheries” have been identified as a public trust resource for this program and CDFW has identified Delta smelt as a priority species in its priorities, water quality improvements that improve conditions for Delta smelt will be identified as providing “significant public trust resources.” .

This interpretation seems unfounded. Section 79754 requires the Commission to develop and adopt methods of quantification and management of public benefits in consultation with the Department of Fish and Wildlife and the Department of Water Resources and it requires that the regulations include the relative environmental value of ecosystem benefits provided by Department of Fish and Wildlife, and the priorities and relative environmental value of water quality benefits as provided by the state board. Nothing in the law says the Commission must rely solely upon these priorities, nor to adopt them as what meets the standard of ‘significant.’ This whole acceptance of what is ‘significant’ needs to be rethought and brought to the SAC for further discussion.

Again, we believe that Section 106.3(b) of the Water Code, the HRTW, must be included in the consideration of what is “significant.” The law requires the Department to consider the HRTW whenever “revising, adopting, or establishing policies, regulations, and grant criteria...”

**(d) Flood Control Benefits-**

Flood control benefits do not have to be just related to water storage space in a reservoir. Additional benefits should be listed, such as a bypass that slows down water, infiltrates water, and/or reduces flood risk; and setback levies that slow down flows and/or allow groundwater recharge.

**(f) Recreational Purposes**

We believe that recreational benefits that result from water delivered through a water system, including municipal water systems and by irrigation districts, should not be included- like public parks, golf courses, swimming pools.