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

The following comments are authored by Gary Mulcahy and submitted on behalf of The Environmental Justice Coalition for Water.

Eligible Projects – Surface Storage: It is clear by the language in the bond measure voted on by California voters, and the resultant statutory language that the Shasta Dam Enlargement project is not eligible, and was intended to be not eligible for any Prop. 1 funding. This is consistent with all previous bond measures that have passed in the last 10 years which provided funding for storage projects but explicitly disqualified the Shasta Dam Enlargement project. The continued inclusion of the Shasta Dam Enlargement project in the list of eligible projects, when it is not, will only lead to more controversy and eventually possible litigation if it remains. It is highly recommended that the Shasta Dam Enlargement project be eliminated from the list of eligible projects, or, in the alternative, a disclaimer that specifically states that the Shasta Dam Enlargement project is NOT eligible for any Prop 1 funds. The reference to PR Code 5093.50 et seq is helpful and necessary because it is actual language in the law. It, by itself however, is not clear enough to the lay person what its actual implication is to possible projects. A clearer statement of the Shasta Enlargement project's ineligibility needs to be made.

Eligible Projects – Ground Water Storage: I believe the proposed clarification is off base, i.e.,:

“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. “

Again, we must talk about the intent of the law as understood by the voters of California when Prop 1 was passed. The actual language of the law is thus:

“Groundwater storage projects and groundwater contamination prevention or remediation projects that provide water storage benefits.”

In the proposed clarification, it would be commonly read and understood that the ‘project sponsor’ would be a ‘banker / seller’, and the external customer would be the ‘consumer / buyer’. Thereby implying that the ‘benefits’ of ground water storage are merely transactions between a buyer / seller. So, it is unclear, just how the proposed clarification actually encompasses all the benefits set out in the language of the law:

“79753. (a) Funds allocated pursuant to this chapter may be expended solely for the following public benefits associated with water storage projects:

(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.”

I believe an expanded clarification is necessary to meet the needs of the statutory intent. Here is a small link that might help get a better perspective. <http://troutheadwaters.com/clubecoblu/what-is-groundwater-storage-and-why-is-it-important/> You can also go to the USGS for ground storage as part of the water cycle <http://water.usgs.gov/edu/watercyclegwstorage.html>.

The remaining definitions in the Eligible Projects document seem to be sufficient.

Public Benefits - Water Quality Improvements:

I can see that staff have struggled somewhat with this whole section, and that is understandable. But, based on the discussions delineated and the resultant proposed definitions, it is apparent that a lot of ‘assumptions’ were made that may or may not have been correct. An example:

“The rationale was that the qualifier “that provide significant public trust resources” was included because the authors did not intend that all water quality benefits should be eligible. Water quality improvements that benefit consumptive water uses are normally paid for by the consumptive water users. The phrasing of the definition suggests that the water quality improvement must originate “in the Delta or in other river systems.” The exact phrasing suggests that groundwater quality benefits are eligible only if they result from improvements in the Delta or other river systems.”

This one is faulty in two parts: It ‘assumes’ that “... the authors did not intend all water quality benefits should be eligible” ..based on the reading of “that provide significant public trust resources”. And, thereby

influenced and impacted the definitions of ‘what is significant’, and how you determined what is a ‘public trust resources.’

The second faulty assumption in the above is the statement “The exact phrasing suggest that groundwater quality benefits are eligible *only if they are result from improvements in the Delta or other river systems.*” (Emphasis added)

I will take these one at a time.

With the codification of the Human Right to Water in Cal Water Code Sec. 106.3 which states in relevant part: “(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.”

Let’s look at this in the context of Public Trust Resources in relation to water quality.

First, let’s get some definitions clear in context:

“**Public..** of, relating to, or affecting all or most of the people of a country or state, etc.” (Merriam Webster..2014) So, the public we are talking about, is the people of the State of California, and people being defined as Human Beings.

“**Trust.. a (1)** : a charge or duty imposed in faith or confidence or as a condition of some relationship (2) : something committed or entrusted to one to be used or cared for in the interest of another” (Merriam Webster..2014)

“**Resource(s)**: (1)(c) a natural feature or phenomenon that enhances the quality of human life” (Merriam Webster..2014)

So, a Public Trust Resource would be a natural feature or phenomenon that enhances the quality of human life (human beings), such as water (which is consumed and used for numerous purposes by Human Beings), that is entrusted to one (in this instance the State) to be used or cared for in the interests of another (in this sense the Public) which brings us back to Human Beings.

It is unfathomable to even consider that water itself is not considered a public trust resource. There is no other resource on the planet that is more important than water, aside from the oxygen we breathe.

Included in eligible storage projects are: ground water storage, and local and regional surface storage projects, which, in most cases are implemented to provide a reliable water supply for local and regional consumption and use. The proposed public trust resource definition would apply to those projects, as well as all others, thereby limiting their eligibility.

Aside from that, 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 Human Right to Water.

Granted, there are other provisions of Prop 1 that deal specifically with drinking water (and we are not talking just about drinking water here), but this is the only section that deals specifically with eligible storage projects. Therein lays the problem with the limited definition of public trust resource.

1. **“Significant”** - What is “significant”?

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.” .

Here you have overreached. The law specifically stated that you were to ‘consult’ with the Dept of Fish and Wildlife, the State Board, and the Department of Water Resources in order to develop and adopt methods of quantification and management of public benefits, and that the regulations shall include the relative environmental value of ecosystem benefits provided by Dept. of Fish and Wildlife, and the priorities and relative environmental value of water quality benefits as provided by the state board.

The law did not tell you to rely solely upon them, nor to adopt them as your ‘Holy Grail’ of what meets the standard of ‘significant.’ It said, you shall ‘include’, meaning in conjunction with other benefits, and it said to consult, meaning ask for input but make your own decision.

This whole acceptance of what is ‘significant’ needs to be rethought and brought to the SAC for further discussion.

It is also, ‘significant’ to note, that the Human Right to Water code specifically states”

106.3(b) All relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water described in this section.

So, how is the Human Right to Water (HRTW) relevant to the proposed guidelines? You have two seriously intertwined qualifiers, i.e., Water Quality and Recreation. If you limit the guidelines for Water Quality to your interpretation of what a public trust resource is, then you jeopardize the health and welfare of those participating in Recreational activities designated in this section.

Recreational or other activities commonly done interacting with bodies of water: Swimming, bathing, sports-fishing and subsistence fishing, cooking, and just about any other use you can think of that human beings would interact with a body of water, whether a lake formed by a surface storage facility, a well sunk into a ground water storage to draw water, a family outing to the marsh or wetlands, etc.

So, it is clear that sec 106.3 of the Water Code is applicable. “... *every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.*”

Based on the above, and in addition to the Human Right to Water arguments, the whole proposed clarification for this particular topic needs to be rethought, and redone.

The second faulty assumption shows there is not a clear understanding of this law:

“The exact phrasing suggests that groundwater quality benefits are eligible *only if they are result from improvements in the Delta or other river systems.*”

But, you have resolved that already by dividing out in clear language the Water Quality “or” specific to each, the Delta, other river systems, and ground water restoration.

Comments on the Public Trust Section 79753(a):

Statute:

79753(a) Funds allocated pursuant to this chapter may be expended solely for the following public benefits associated with water storage projects: ... (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.

Proposed regulations:

- a. “Public Trust Doctrine” means the legal doctrine that certain natural resources are held by the State of California in trust for the benefit of current and future generations
- b. “Public trust resources” means those resources held in trust for the public by the state of California under the Public Trust Doctrine. For the purposes of implementing Water Code Div. 26.7, Ch. 8, the public trust resources associated with water quality improvements are:
 - 1. Fisheries
 - 2. Fish and wildlife, including terrestrial, aquatic, and marine species
 - 3. The preservation of areas subject to the public trust doctrine in their natural state, so that they may serve, for example, as ecological units for scientific study, as open space, or as habitat for fish and wildlife
 - 4. Recreation, including water contact and non-water-contact recreation in or on a navigable body of water
- c. “Water quality improvements” means one or more improvements, above that required by compliance obligations, in the quality of water in the Delta or other river systems. “Quality of the water” has the meaning set forth in subdivision (g) of section 13050 of the Water Code.

See above arguments under Public Benefits -Water Quality Improvements on Human Right to Water: Water Code 106.3, and after reviewing those arguments - ask yourself.. does the above proposed legislation and definitions meet the threshold of ‘...*safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.*’ Because, that is the threshold you will need to meet under 4. Recreation because that is exactly some of the uses that will be done.

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