



October 13, 2015

Joseph Byrne
Chair, California Water Commission
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Sacramento, California 94236-0001

Sent via email

RE: Comments on the October 6, 2015 Draft Water Storage Regulations

Dear Chairman Byrne and Members of the Commission:

On behalf of the Natural Resources Defense Council (NRDC), which has which has 2.4 million members and activists, 380,000 of whom are Californians, I am writing to provide comments on the October 6, 2015 draft water storage regulations that were presented to the Stakeholder Advisory Committee earlier this month. While staff has made substantial progress in drafting the regulations to implement Chapter 8 of Proposition 1 over the past year, the draft regulations are inconsistent with Proposition 1 in several key ways, as discussed below. We urge the Commission to ensure that the draft regulations are revised to be consistent with Proposition 1 before initiating the formal rulemaking progress.

First, the draft regulations violate Proposition 1 by permitting the Commission to fund existing mitigation and compliance obligations, such as existing flow and water temperature regulations. *See* Draft Regulations §§ 6002(c)(6)(iii)(1), 6004(a)(1)(iv), 6004(a)(7)(ii)(5).¹ As we have written previously, Proposition 1 (particularly section 79753(b) of the Water Code) prohibits using public bond monies to pay for existing mitigation and compliance obligations. Yet the proposed regulations would do exactly that, permitting existing requirements or obligations to be public benefits funded by Proposition 1 as long as a third party bears the existing mitigation or compliance obligations. *Id.* For instance, section 6004(a)(1)(iii) requires existing requirements or obligations of the applicant to be included in the without project condition, and requires that the “public benefits claimed must provide an improvement above the existing requirements or

¹ Moreover, several of the water quality priorities identified in section 6005(b) are simply to meet existing mitigation and compliance obligations, particularly where there is a Total Maximum Daily Load established under the Clean Water Act. These need to be revised. In addition, while we strongly support reduced reliance on water supplies from the Delta, reducing demand for Delta water does not actually result in ecosystem improvements in the Delta, and Section 6005(b)(8) of the draft regulations does not require any physical changes in the Delta that are eligible public benefits. This provision must be revised to ensure that a project actually provides ecosystem and/or water quality benefits in the Delta and its tributaries, consistent with Proposition 1. Lastly, staff from the Department of Fish and Wildlife indicated in the prior Stakeholder Advisory Committee meeting that the priorities identified in section 6005(a) are of equal importance, and the regulations (potentially section 6006(a)) should be revised to reflect that these priorities are of equal importance.

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obligations for the identified resource.” Yet section 6004(a)(1)(iv) allows the applicant to include meeting existing compliance or mitigation obligations of a third party as public benefits. This approach is unlawful; for instance, it would allow a CVP contractor to propose that a storage project’s public benefits are simply meeting the existing environmental obligations of the Bureau of Reclamation.

Meeting existing mitigation or compliance obligations simply is not an ecosystem or water quality improvement eligible for public funding under chapter 8 of Proposition 1. It is irrelevant who bears the compliance or mitigation obligations because Proposition 1 requires that the public benefits funded by the bond must be improvements over existing mitigation or compliance obligations. The draft regulations must be revised to require that existing mitigation and compliance obligations, regardless of the party who bears that obligation, are part of the “without project future conditions” baseline and are not eligible for funding as public benefits.²

Second, the draft regulations fail to adequately account for the negative impacts of water storage projects in quantifying the benefits of a project, failing to ensure that the Commission only funds the net improvements of a water storage project. Water Code §§ 79750(b), (c); *see* Water Code §§ 79752, 79753(a). In particular, sections 6004 and 6006 of the draft regulations fail to require the applicant or the agencies to account for environmental impacts of a project in calculating the public benefits of a water storage project. For instance, a storage project could propose to improve upstream water temperatures to benefit salmon and steelhead, yet also reduce water flowing into the Delta, which would negatively impact salmon, longfin smelt, and other species. Section 6004 does not require the applicant to account for and quantify these negative impacts in calculating the public benefits of a project, and section 6006 does not require the Department of Fish and Wildlife (“DFW”) or the State Water Resources Control Board (“SWRCB”) to account for these negative impacts in determining the relative environmental values. By failing to account for these negative impacts, the draft regulations overestimate the public benefits of a project and fail to ensure that a project results in net improvements. Both sections must be revised to ensure that the quantification of benefits accounts for the impacts of a project as well as its benefits.

Third, we strongly disagree that the effects of climate change are too speculative to include in the “without project future conditions,” as staff indicated in our last Stakeholder Advisory Committee meeting. Under the draft regulations, the effects of climate change are not included in the “without project future conditions” baseline for assessing the impacts of a project, and instead are relegated to a sensitivity analysis. *See* Draft Regulations §§ 6004(a)(1)(v), 6004(a)(8). However, in the Bay Delta watershed, both DWR and Reclamation have repeatedly included the effects of climate change in the No Action Alternative under NEPA and CEQA, including in the Revised Draft Environmental Impact Report / Supplemental Draft Environmental Impact Statement for the California WaterFix / Bay Delta Conservation Plan. In addition, the draft regulations largely limit the analysis of the effects of climate change to

² In addition, we strongly urge the Commission to require DWR to provide a default “without project future conditions” baseline for use by applicants, which would provide a common understanding of existing mitigation and compliance obligations and could significantly help smaller projects to prepare their application materials.

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qualitative (rather than quantitative) analysis, and allow an applicant to omit all quantitative sensitivity analysis of the effects of climate change effects. *Id.* at § 6004(a)(8)(i)(1)(e) (“If the applicant determines that the quantitative analysis is not applicable to the proposed project, the applicant shall provide a qualitative analysis or otherwise explain why a quantitative analysis is not applicable.”). The draft regulations also make the sensitivity analysis of climate change effects irrelevant to calculating public benefits of a project; the sensitivity analysis of climate change effects is not actually utilized by DFW and the SWRCB is assessing relative environmental values of a project, *see* Draft Regulations § 6006, nor in the technical review of the application, *see id.* at § 6002(c)(4)(i), nor by the Commission in ranking projects and awarding funding, *see id.* at 6002(c)(6)(ii). The regulations must be revised to ensure that the effects of climate change are accounted for in assessing public benefits.

Finally, we strongly urge the Commission and staff to revise Section 6007 of the draft regulations to specify the minimum requirements of the contracts required under section 79755(a)(2) of the Water Code to manage and ensure public benefits of water storage projects are achieved. While subpart (a) of section 6007 specifies information that the applicant must provide, section 6007 does not specify any requirements regarding these contracts or otherwise specify how the Commission will manage and ensure that public benefits funded by the program will be achieved. These contracts play a critically important role in ensuring the public benefits are actually achieved and to implement adaptive management of those benefits. We strongly recommend adding a new subpart (b) of section 6007 specifying how public benefits will be managed and ensured, including minimum contract terms. Section 6007 should: (1) require public review and comment before a contract is finalized or subsequently amended; (2) require a right of third party enforcement to allow the public to enforce these public benefits; (3) specify how adaptive management will be implemented; and (4) require that monitoring data and reports be made available to the public.

Thank you for consideration of our views. Unfortunately we will be unable to attend the October Commission meeting to discuss these comments in person, but we would be happy to discuss these comments or answer any questions regarding them at the convenience of Commissioners or staff.

Sincerely,



Doug Obegi