



October 14, 2015

Joe Byrne, Chair
California Water Commission
1416 9th Street
Sacramento, CA 95814

Dear Chair Byrne:

On behalf of Sierra Club California and its more than 380,000 members, I am writing to offer our comments on the most recent version of California Water Commission's draft regulations for the Water Storage Investment Program that were presented at the Stakeholder Advisory Committee on October 7th.

“Delta Outflow”

This definition is currently tied to the “Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary,” December 2006. The State Board is currently undergoing an update of these water quality standards. This definition should reflect this ongoing process, and leave flexibility to have the new requirements reflected as they become developed.

Existing Mitigation and Compliance Obligations

We appreciate the changes in the regulations that the Commission has made regarding funding existing mitigation and compliance obligations. When mentioning mitigation and compliance that can be funded by the Commission, it should be clarified that only *new* mitigation and compliance can be funded, to further emphasize the requirements of section 79753 (b).

We support the Commission's requirement of the without-project conditions assuming existing mitigation and compliance obligations are met. This ensures that public benefits consist of improvements to the environment while also preventing these public benefits from actually being private benefits. Funding of the existing mitigation and compliance obligations in a manner that relieves either the applicant or an incidental third party of their existing obligations does not provide the public with any actual improvement, and instead provides a private benefit. The regulations should add that no existing mitigation and compliance obligations by the applicants are eligible for funding in any way.

The regulations also should specify that third party incidental beneficiaries, even where benefits are coincidental, should not be funded from the Commission. Instead the statutory requirements that those third parties pay for the benefits that they receive, currently in section 6003 (b) should be controlling in this scenario. (Cal. Wat. Code § 79755 subd. (a)(2).) If those third parties cannot agree to pay now, they should still agree to provide what they have already agreed to provide in the future.

iv. The applicant shall determine if any relevant, existing third party (i.e., not the applicant) mitigation requirements or compliance obligations may affect the without-project future conditions. The without-project future conditions shall include these as existing conditions or future modifications. The applicant ~~may~~ *shall not* include in its quantification of public benefits the identified physical changes created or caused by the proposed project that coincidentally contribute to meeting a third party's requirements or obligations *unless*:

(A) The applicant has entered into a contract per section 79755 (a)(2) for the third party to cover the costs associated with relieving the third party of their existing mitigation or compliance obligations, or

(B) The applicant has entered into a contract with the third party incidental beneficiary that ensures that their existing mitigation and compliance obligations will not be discharged by the applicant, and that any existing plans for mitigation and compliance must still be provided by the third party.

Sierra Club California believes the proposed changes will be necessary to prevent the Commission from providing funds for non-public purposes and prevent any possible collusion to provide private benefits from the Water Bond.

Applications for Projects that Affect Groundwater in Low and Very Low Priority Basins

The Commission is requiring commitments from applicants affecting groundwater levels in low and very low priority basins to develop Groundwater Management Plans under authority from AB 3030. We think it would be more appropriate to have these applicants instead commit to comply with the Sustainable Groundwater Management Act (SGMA). SGMA provides at least two advantages over AB 3030 Groundwater Management Plans: a consistent framework, and State oversight. Currently, DWR is developing the regulations concerning groundwater sustainability plan (GSP) requirements and how they will evaluate GSPs going forward. Committing low and very low priority basins to this process can prevent projects that affect groundwater from causing detrimental impacts on groundwater basins.

Likely, the requirement to comply with SGMA would not be a much bigger challenge for the applicant. In low and very low priority basins, there is less demand on use. These basins are likely at sustainable yield already, allowing them to potentially qualify for an alternative GSP submittal. An optional alternative submittal requires an analysis by a professional engineer to show that the basin has been operated within a sustainable yield for the past 10 years. (Cal. Wat. Code § 10733.6 subd. (b)(3).) The Commission should require SGMA compliance and not fund projects without first making sure that undesirable results do not become a reality in low and very low priority basins.

Climate Change

Currently, the draft regulations require applicants to quantify and monetize public benefits based on historical data, and then qualitatively addressing climate change impacts afterwards. This will provide a necessarily wrong quantification of public benefits, resulting in funding projects that reflect our past conditions, instead of helping California adapt to its new climactic future. We need projects that

recognize that snowpack may be a thing of the past, and that timing of flows will change. This will also fund public benefits that may never be realized as historical scenarios become impossible to replicate.

While there cannot be certainty about what climate change has in store for us, the Commission needs to provide a clear signal that probable climate impacts need to be used for determining the without project condition. The Commission should work with DWR to provide one model that all projects must conform too. This will create one set of conditions that applicants will build their public benefits on what they can provide going forward. These costs committed upfront by the Commission and offset by not needing to pay for modeling through reimbursement to applicants for developing their own models individually later. While this may be harder for projects to comply with, or may be tougher for projects based on separate models to conform to, it should not diminish the fact that this is public money for public benefits. The public needs to have their money go towards benefits that can be realized in the face of climate change.

Quantification and Monetization of Impacts to Provide “Net Improvement in Ecosystem and Water Quality Conditions”

A requirement of the Water Bond is that funds provide a “net improvement in ecosystem and water quality conditions.” (Cal. Wat. Code § 79750 subd. (b).) The Commission is requiring applicants to quantify the difference between with and without project conditions, but only requires the consideration, not the quantification, of the impacts of the project. This will not ensure compliance as impacts associated with providing the benefit must be fully quantified and monetized as well. Even mitigated impacts are only mitigated to less than significance under CEQA. Any remaining costs associated from impacts must be lessened from the amount of public benefits eligible for funding.

(3) Calculating Physical Benefits. The applicant shall quantify the physical benefits that would be provided by the proposed project by calculating the physical changes between the with-project future conditions and without-project future conditions. The calculation of physical benefits ~~should consider any effects on~~ *shall quantify all impacts caused by* physical public benefits, including any non-mitigable impacts.

It should be added in the monetization subdivision that:

(4) Monetize the Value of Project Benefits. The applicant shall, to the extent defensible, estimate the monetary value of physical benefits *and impacts* in accordance with subsections i-viii below. The appropriate level of analysis for monetizing each public benefit type depends on the magnitude of that public benefit compared to all public benefits or the size of the project. If physical benefits *or impacts* cannot be monetized, the applicant shall provide justification why and include a qualitative description of the benefits *or impacts*. *The final monetary value of the public benefits will consists of the physical benefits minus the impacts caused to the environment.*

Allowing for funds to be spent on a project without fully accounting for the impacts would violate the net improvement requirement and should not be allowed.

Managing Public Benefits: Minimum Contract Terms and Third Party Beneficiary Contracts

In section 6007 of the regulations, the Commission should include minimum contract terms to ensure the compliance with this section. Because funding from the Water Bond is for public benefits, the

Commission should specify in the regulations that all contracts for funding are third party beneficiary contracts, with the public as the intended beneficiary. Applicants and the public should be aware and it should be made clear that the public has standing to sue for any breach of contract should the applicants fail to provide any public benefits as indicated in any final funding agreements.

The Commission Should Consider Technical Assistance and a Separate Timeline for Smaller Projects

Small projects, primarily groundwater projects, have been underrepresented in the scoping surveys sent around by the Commission. SGMA was enacted in 2014, with a requirement that GSPs contain recharge areas within the basins. (Cal. Wat. Code § 10727.4 subd. (b).) These plans will come out for the basins in critical conditions of overdraft by 2020. (*Id.* at § 10720.7 subd. (a)(1).) We think that there is a huge opportunity for investment that the Commission should not ignore.

Small groundwater recharge projects, often in the low tens of millions of dollars, will provide tremendous benefits in basins that need them most. The Commission should work together with DWR to encourage planning efforts to develop recharge projects earlier in the process. Additionally, the Commission should consider creating a separate timetable for smaller projects, setting aside a portion of available funds for projects that are not as ready now.

Smaller projects need more time to adapt and design their projects around Commission regulations, and could benefit from optional guidance on economics and other technical specifications that could be provided in technical appendices. The opportunity to provide long-term groundwater storage in the sorely needed and varying parts of the state, for smaller scale investments should not be missed.

Sierra Club California thanks you for the consideration of our views. Please feel free to contact us if there are further questions.

Sincerely,



Kyle Jones
Policy Advocate