



November 12, 2015

Joseph Byrne, Chair
California Water Commission
Department of Water Resources
1416 Ninth St.
Sacramento, CA 95814
Sent via electronic email to cwc@water.ca.gov

Re: Comments on draft regulations for Proposition 1, Chapter 8

Dear Chair Byrne:

Please accept these comments on behalf of the above-listed environmental groups that have participated in the Stakeholder Advisory Committee (SAC) process since April of this year. We appreciate the efforts of staff to keep both the SAC and the Commission fully informed of the development of the regulations for Chapter 8, as well as the recognition of the Commission at their October meeting that many issues remain to be resolved before the draft is submitted to the Office of Administrative Law.

Our chief concerns, most of which have been previously provided to staff and the Commission, are as follows:

- 1) The regulations as currently written discourage small local storage projects, such as groundwater storage and conjunctive use projects, or sediment removal and remediation, from applying for funding.
- 2) The regulations continue to provide inadequate and confusing direction to applicants about calculation of net environmental benefit, the statutory prohibition on funding existing

environmental compliance and mitigation requirements, and the need to account for negative environmental effects in calculating benefits.

- 3) The expressed intent of the Commission to promote integration of projects is not yet reflected in the regulations.
- 4) Climate change is incorrectly portrayed and inadequately addressed in the draft regulations.
- 5) The reference to the Human Right to Water among the State Board priorities does not sufficiently address the Commission's obligation under Water Code 106.3(b)
- 6) The regulations do not include provisions to ensure public benefits of water storage projects are achieved.

The regulations as currently written discourage small local storage projects, particularly groundwater storage and conjunctive use projects, from applying for funding.

Chapter 8 makes no distinctions about whether small or large projects should be funded, but directs the Commission to rank projects based on expected return for public investment as measured by the magnitude of the public benefits provided. Unfortunately the current process laid out by staff in presentations and draft regulations creates a clear bias for large projects. We recommend the following actions to counter this bias:

- The Technical Review process should be modified to be neutral with respect to the size of any individual project and magnitude of the public benefit provided by that one project. The Technical Review process should instead prioritize the cost effectiveness of providing public benefits. The focus on the magnitude in combination with the fact that the Commission no longer plans to assemble projects into integrated portfolios for consideration, a single large project could appear to be superior to a set of smaller projects that together could deliver an equal or greater magnitude of public benefits. For example, consider a scenario where Project A would yield 100 units of a certain public benefit at a cost of \$10 per unit of benefit, whereas Project B and C and D together would provide 120 units at a per unit cost of \$9. However, because the definition of "cost-effectiveness" is limited to a binary demonstration of least cost project alternative, the potential benefit of a portfolio of smaller projects delivering public benefits at a lower cost per unit is lost in the focus on size. We recommend the Commission include in the Technical Review a more robust consideration of cost-effectiveness that would help achieve the most impactful investment of public funds.
- The decision to hold only one funding round, in fall 2017, will limit the ability of new projects to access funding. Moreover, it is not in the best interests of the Commission or staff to distribute funding in a single round. Holding at least one additional round of funding, perhaps in early 2019, would create a more consistent and manageable workload for staff, provide an opportunity to address shortcomings identified in the initial round, and allow a smaller number

of funding agreements to be executed in a more expeditious manner. It would also provide an incentive to groundwater agencies currently forming pursuant to the Sustainable Groundwater Management Act to act more quickly to adopt fee authority, develop required plans and implement projects. The Commission has until July 2022 to enter into contracts for the full \$2.7 billion. It makes sense to use this time to ensure that a full range of projects can be funded.

- We agree with the California State Association of Counties (CSAC) that there should be a set-aside for small projects in the bond. To determine the size of the cutoff, we reviewed the storage projects that have been identified in individual Integrated Regional Water Management Plans that could have a link to the Delta and its tributaries (Sierra Club, 2015). (We reviewed the staff survey as well, but since it didn't include costs, we were unable to use it.) Here is the cost breakdown of the IRWMP storage projects that had costs attached; the projects' costs totaled over \$1.6 billion.

IRWMP projects potentially eligible for Chapter 8 storage funding			
\$1 million or less	\$1-\$10million	\$10-\$50million	>\$50million
16	43	22	5

While there is no guarantee that all of these projects would apply for or qualify for funding, these projects are not merely speculative. Additionally, the implementation of the Sustainable Groundwater Management Act is already generating significant interest in new groundwater recharge projects that can be expected to result in additional fundable projects. Based on this evidence, we agree with CSAC's recommendation that 10% of the funds be set aside for projects costing \$10 million or less, but also recommend that staff conduct another survey in 2016 to determine whether an additional set-aside for projects costing between \$10 and \$50 million is needed to encourage these projects to apply.

- Similarly, we encourage the Commission to consider allocating funding specifically for groundwater storage and conjunctive use projects to ensure a more diverse portfolio of storage investments. With the increased reliance on groundwater during the current drought, coupled with the passage of the Sustainable Groundwater Management Act, groundwater storage is critical. Moreover, with a clear mandate to maximize public return on investment, groundwater storage and recharge projects could provide six times more storage than surface water storage for the same state investment.¹
- We continue to be troubled by the complexity of the application requirements, which favor high-cost projects that can afford the specialized expertise needed – in particular the difficult task of quantifying public benefits. We think the proposal by the Sacramento Sanitation District to convene a group that can work with DWR to develop quantification methodology is a good one, and urge the Commission to move forward with this proposal.

¹ Debra Perrone and Melissa Rhode (2014). Stanford Water in the West Research Brief – Storing Water in California: What Can \$2.7 Billion Buy Us?

The regulations continue to provide inadequate and confusing direction to applicants about calculation of net environmental benefit, the statutory prohibition on funding existing environmental compliance and mitigation requirements, and the need to account for negative environmental effects in calculating benefits.

As our organizations have repeatedly explained, Proposition 1 prohibits using bond funds to pay for achievement of existing environmental compliance and mitigation obligations, requiring that funds be used to pay for new environmental benefits. However, the draft regulations (October 6, 2015) fail to comply with Proposition 1 because they would permit bond funds to be used to pay for meeting existing environmental obligations. The regulations (including section 6004(a)(1)(iv)) must be revised to prohibit meeting existing environmental compliance or mitigation obligations as a public benefit eligible for funding. In addition, we strongly encourage the Commission to provide potential applicants with a default “without project future conditions” baseline, which includes existing environmental compliance and mitigation obligations, in order to provide applicants with guidance on existing compliance and mitigation obligations and to make it easier for smaller projects to compete for funding.

Similarly, the draft regulations fail to account for the adverse impacts of new storage projects in calculating the net benefits eligible for funding, as required by Proposition 1. 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. Sections 6004 and 6006 must be revised to require that these negative impacts are accounted for in calculating the public benefits eligible for funding, so that the Commission funds net improvements.

The expressed intent of the Commission to promote integration of projects is not yet reflected in the regulations.

The Commission has expressed an interest in integrated projects - which also reflects Actions 2 and 9 in the California Water Action Plan² - but the regulations currently don’t provide any direction or incentive for this. Staff had expressed an intention to develop project portfolios that demonstrate how projects fit in with existing infrastructure. An update on this effort would be helpful.

² Action 2 - Increase regional self-reliance and integrated water management across all levels of government; Action 9 - Increase operational and regulatory efficiency.

Climate change is incorrectly portrayed and inadequately addressed in the draft regulations

The draft regulations fail to incorporate the impacts of climate change into with and without project conditions, and do not require any consideration of the effects of climate change in the quantification of future public benefits. Although the draft regulations encourage (but do not require) applicants to perform a sensitivity analysis of the impacts of climate change, that sensitivity analysis is never used in the calculation of public benefits. The scientific community no longer recommends using historic data alone to predict future conditions³, and robust models are available to assist applicants in integrating climate change into future project conditions. We agree with the detailed comments of the Union of Concerned Scientists on this subject to better inform the Commission's choices in moving forward.

The reference to the Human Right to Water among the State Board priorities does not sufficiently address the Commission's obligation under Water Code 106.3(b)

The Human Right to Water priority from the Water Board, while welcome, does not accurately reflect the actual language in the Water Code, which states that every human being as the right to "safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes" and issues a clear directive to state agencies to "consider" this state policy when revising, adopting, or establishing policies, regulations, and grant criteria.

The Commission clearly has a responsibility to consider how this priority can be applied to their program; we offer the following suggestion for doing so:

- The Division of Drinking Water at the State Water Board maintains a list of public water systems⁴ that fail to deliver safe drinking water to their customers. The Board has committed to providing public assistance to these communities to ensure that their challenges are addressed and they are able to provide safe and affordable water in their service area. Not all of the communities on the list qualify as disadvantaged but most do. The Board is implementing a technical assistance program targeted at the communities on the list, and have pledged to prioritize projects benefitting these communities in the distribution of Proposition 1 funding. We recommend that the Commission give priority to projects that provide safe and affordable drinking water to disadvantaged communities on this list.
- Projects should proactively demonstrate the potential for addressing the needs of disadvantaged communities. The full application requirement (6002 (c)) should include a bullet requiring the project proponent to identify any communities from the Small Water Systems Program Plan that are within or near the identified or potential service area of the project. For identified communities, the project proponent should further articulate either how they will

³ "Stationarity is Dead" P.C.D. Milly et. al., Science Magazine, February 2008

⁴ *Small Water Systems Program Plan*,

http://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/Smallwatersystems.shtml

address community water needs or why they have chosen not to. At a minimum, this information can be used as a tool for prioritizing projects.

- Projects identified as addressing the Human Right to Water must provide real and sustained benefits; that is, they must result in the permanent provision of safe and affordable drinking water to a community or communities on the list.

The regulations do not include provisions to ensure public benefits of water storage projects are achieved

Pursuant to section 79755(a)(3) of the Water Code, project applicants must enter into contracts with public agencies “to ensure that the public contribution of funds pursuant to this chapter achieves the public benefits identified for the project.” Section 6007 of the draft regulations attempts to implement Water Code section 79755(a)(3), but is devoid of information or requirements regarding the contracts, and does not specify how the Commission will manage and ensure that public benefits funded by the program will be achieved. Because the contracts required by Water Code section 79755(a)(3) play a critically important role in ensuring the public benefits are actually achieved, we strongly recommend adding a new subpart (b) of Section 6007 specifying how public benefits will be managed and ensured, including minimum contract terms. Among other things, 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. Further, the submission of reports pursuant to Section 6007(a)(5) of the draft regulations should continue for the life of the project, irrespective of any Commission determination regarding the necessity of those reports.

We appreciate the efforts of staff and the Commission to integrate our concerns into the regulations, and plan to provide line-item edits to the revised regulations once they are released.

Sincerely,



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