



December 15, 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](mailto:cwc@water.ca.gov)

**Re: The legality of multiple solicitations and set asides using funds appropriated to Proposition 1, Chapter 8**

Dear Chair Byrne and Commissioners;

The undersigned experts in water law are writing to provide our interpretation of Section 79750 (c) in Chapter 8 of Proposition 1, approved by the voters in November 2014, which differs from that provided by staff counsel at the November 19, 2015 Commission meeting.

Section 79750 (c) of the Water Code reads: "Projects shall be selected by the commission through a competitive public process that ranks potential projects based on the expected return for public investment as measured by the magnitude of the public benefits provided, pursuant to criteria established under this chapter."

At the November 19 meeting, staff counsel interpreted this section as providing "no contemplation of a separate solicitation... all projects have to compete against one another," and that "the statute contemplates comparing every project's public benefits with every other projects public benefits."

In addition, staff counsel noted a key difference between chapter 8 funding and the rest of the bond, stating that "Grant programs have more leeway; regulations have a higher level of scrutiny."

We disagree with counsel's interpretation for the following reasons:

- 1) The language in 79750 (c) is not unique to this chapter of the bond;
- 2) The Legislature has not provided a different interpretation of this chapter;
- 3) Bonds have historically been expended through multiple competitive grant solicitations;
- 4) Projects should be ranked and compared using objective criteria;
- 5) The regulatory nature of Chapter 8 does not require issuance of a single solicitation.

### Language is not unique

Proposition 1 references the need for a competitive process in 11 different places, including Chapters 4 (General Provisions), 6 (Watershed protection), 7 (Integrated Water Management), 9 (Water Recycling) and 10 (Groundwater remediation), as well as Chapter 8. The requirement for a competitive process for awarding bond funding is imbued throughout the bond language.

In addition, each program can amend its guidelines between funding cycles. In Chapter 10 of the bond, for example, \$100 million has been appropriated to the Department of Water Resources (DWR) for “competitive grants for projects that develop and implement groundwater plans and projects...” DWR’s groundwater division has just completed its first funding round of \$10 million, designed to promote local well ordinances, and plans to revise its guidelines and funding proposal for the next round of funding. Each round is competitive, but the Department has set aside funds for specific purposes.

### The Legislature has not provided a unique interpretation for this funding

The Legislative Analyst’s Office provided an overview of the bond and recommendations for its implementation in February 2015. That analysis promoted multiple rounds of funding to ensure accountability and oversight, stating that “evaluation of project outcomes can help inform subsequent decisions on how best to implement later rounds of funding through this bond.<sup>ii</sup>”

### Bonds have historically been expended through multiple solicitations

Propositions 50 and 84, approved by voters in 2002 and 2006, respectively, were structured similarly to Proposition 1. Multiple pots of funding, each administered by a different state agency, were established and agencies issued multiple solicitations<sup>iii</sup>. These bonds have established a pattern that has been followed by other state agencies implementing Proposition 1<sup>iv</sup>. Short of a clear directive in Chapter 8, which is not the case with 79750 (c), a conservative approach is to assume the continuation of past practices.

### Projects can be ranked and compared using standard criteria

Staff counsel appears to believe that projects can only compete with one another, but a common approach for past bond programs has been to use objective criteria to rank proposals competitively. Proposals with the highest ranking qualify for funds, with a cutoff for projects once available grant funds are expended. The use of objective criteria ensures consistency among projects of different sizes and offering different types of benefits, as well as projects submitted at different points in time.

Section 79750 states that projects are ranked on “expected return for public investment as measured by the magnitude of the public benefits provided.” As stated above, other bond chapters that require competitive grants implement a multi-round solicitation and include requirements that funds are maximized to provide the greatest benefit to the people of California.<sup>v</sup> A multi-round solicitation process is the best way to ensure that approved projects

do meet the requirement of providing the largest benefit to the public by allowing project proponents time to fully prepare their proposal, rather than rush to finish before a single solicitation period closes.

In the case of oversubscription, some agencies (Department of Public Health for example) have maintained waiting lists, while others have required resubmittal to be eligible for later rounds of funding<sup>vi</sup>.

The Commission may prefer a single round of funding, but changes in the scope and costs of projects often lead to unexpended bond funds, an outcome best exemplified by Proposition 1 itself, which reallocated \$425million in existing but unspent bond authorizations dating back to 1986. Having a process in place – such as supplemental funding rounds - to reallocate funding would be prudent.

The regulatory nature of Chapter 8 does not require issuance of a single solicitation  
Counsel for the Commission is correct in saying that Chapter 8 is unique because it is a regulatory program. Agencies directing implementation of other chapters of the bond are required to issue project and solicitation guidelines, with specific public notice and meeting requirements. This is also true for Chapter 8 funding. However, the Commission is also required to “develop and adopt, by regulation, methods for quantification and management of public benefits described in Section 79753 by December 15, 2016.<sup>vii</sup>” Regulations must be publicly reviewed and vetted by the Office of Administrative Law according to Chapter 3.5 of the Government Code. The content of the regulations and guidelines are determined by the language in Proposition 1. The difference between the guidelines and regulations lies in their process for adoption, not their content.

We hope that these comments provide some assistance to the Commission, and are happy to answer any questions.

Sincerely,



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Leadership Counsel for Justice and Accountability



Laurel Firestone  
Co-Executive Director and Attorney at Law  
Community Water Center



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<sup>i</sup> Statement of Holly Stout Counsel to the California Water Commission, November 19, 2015, <http://cwc.videosc.com/archives/111915/>.

<sup>ii</sup> *Effectively Implementing the 2014 Water Bond*, Mac Taylor, Legislator Analyst, February 2015, <http://www.lao.ca.gov/reports/2015/budget/water-bond/water-bond-021115.aspx>.

<sup>iii</sup> Some examples: Proposition 50 Funding for Public Water Systems [http://www.waterboards.ca.gov/drinking\\_water/services/funding/Prop50.shtml](http://www.waterboards.ca.gov/drinking_water/services/funding/Prop50.shtml); Proposition 84 Funding for Public Water Systems, [http://www.waterboards.ca.gov/drinking\\_water/services/funding/Prop84.shtml](http://www.waterboards.ca.gov/drinking_water/services/funding/Prop84.shtml); IRWMP, Integrated Regional Water Management Archives; Proposition 50 [http://www.water.ca.gov/irwm/grants/archives\\_p50.cfm](http://www.water.ca.gov/irwm/grants/archives_p50.cfm), Proposition 84 [http://www.water.ca.gov/irwm/grants/archives\\_p84.cfm](http://www.water.ca.gov/irwm/grants/archives_p84.cfm)

Some examples Chapter 6, Sierra Nevada Conservancy, solicitations every 6 months <http://snc.ca.gov/other-assistance/applying-for-a-grant>; State Coastal Conservancy 4 times per year [http://scc.ca.gov/webmaster/ftp/pdf/Prop1\\_Round2\\_Solicitation\\_with\\_Appendices.pdf](http://scc.ca.gov/webmaster/ftp/pdf/Prop1_Round2_Solicitation_with_Appendices.pdf); ; Delta Conservancy annual solicitation <http://deltaconservancy.ca.gov/>; Chapter 5, State Water Resources Control Board, continuous application process

<sup>v</sup> See Chapter 6 Section 79735 “a competitive program to fund multibenefit watershed...projects”; Chapter 10 Section 79774 detailing how projects with cost-sharing components will receive additional consideration.

<sup>vi</sup> Ibid, Proposition 50 Funding for Public Water Systems, Proposition 84 Funding for Public Water Systems

<sup>vii</sup> Water Code 79754 (a).