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VIA ELECTRONIC MAIL ONLY

Mr. Joseph Byrne  
Chairman  
California Water Commission  
P.O. Box 942836  
Sacramento, CA 94299-0001

Subject: Comments on November 19, 2015 Draft Regulations

Dear Chairman Byrne:

The Bureau of Reclamation and DWR cost shared the feasibility and environmental studies of four of the CALFED storage studies from 2006 to 2010. Reclamation continued funding the four studies. Recently, the Sites Joint Powers Authority and Contra Costa Water District have agreed to provide significant funding to complete two studies while Reclamation completes two of the four studies.

Reclamation and DWR have faced many questions and challenges in conducting these studies, and I offer the attached suggestions, thoughts, and insights for consideration by the California Water Commission in formulating rules and regulations for awarding the bond funds authorized by Prop 1 in 2014.

The State Legislation emphasizes the need to leverage private, Federal or local funding. The attached suggestions are also intended for the Commission to consider in order to maximize all sources of funding, coordinate permitting requirements, reduce redundancy or duplication, and ensure compliance.

These suggestions are also intended to reduce costs incurred by the applicant when existing information is readily available for the application, especially since the Commission appears to be limiting funding available for actions required to comply with the regulations.

Please feel free to contact me at [mdenning@usbr.gov](mailto:mdenning@usbr.gov) or 916-978-5060 for any questions or further assistance.

Sincerely,

Michelle H. Denning  
Regional Planning Officer

Attachment

## Attachment

The following suggestions, thoughts, and insights are organized according to the Commission Staff Working Draft, California Code of Regulation, Title 23, Division 7, Chapter 1, except that definitions (Section 6000) are addressed last.

### Section 6001

(a)(1)(A) Add subsection 5. Records related to Federal facilities and their operations consistent with Reclamation Directive and Standard (D&S) SLE 02-01.

(a)(1)(B) Add subsection 1. Federal records protection by Reclamation D&S SLE 02-01 shall be requested directly from Reclamation.

### Section 6002

(b) This section uses “entity”. Is the entity the same as the applicant?

(b)(2) The pre-application should address a description of how the balance of the construction costs would be provided, as well as the long-term operations, maintenance, and replacement operation, maintenance, and replacement (OM&R) costs for the entire project. This is necessary to ensure that bond funds are not invested in projects that fail due to the lack of funding for construction costs allocated to other benefits and a lack of ability to fund the entire OM&R costs.

(b)(2)(I) Should the summary of how the proposed project would or could integrate with existing projects or other projects include confirmation or agreement of the entities responsible for existing or other projects?

(b)(5) Could the recommendations provided by the Commission in response to the pre-application assessment create a liability or responsibility in the event the final application is not ultimately successful in receiving funding when the applicant implements the recommendations? The Commission could simply identify the shortcomings for the applicant to further address.

(c)(2)(B) It would be helpful to state who must sign a resolution and what the resolution must state.

(c)(2)(E) Should also address amount and source of non-Program funding for construction and long term OM&R costs. It is critical to understand the cost effectiveness of the project for other beneficiaries in allocating matching bond funds.

(c)(2)(J) Federal facilities or facilities funded with Federal funds may not require State approvals. This requirement should be qualified to reflect the difference between Federally-owned facilities and other facilities.

(c)(2)(K) Should also address a description of the applicant’s ability to fund total project OM&R.

(c)(2)(M) Here and elsewhere “ecosystem and water quality” is specified. Should it be “ecosystem and/or water quality”?

(c)(2)(Q) While there is a discussion required here and elsewhere related to complying with Federal law, there are no requirements for complying with Federal law nor any requirements for Federal agencies to review, advise, or confirm compliance.

(c)(2)(R) Will Federal agency concurrence be required?

(c)(3) Completeness Review shall be conducted within 45 days of receipt of application, but responses to notifications of an incomplete application are required within 14 days of notification, which could be prior to the close of the application period. The variation in dates will likely be confusing to applicants and difficult for staff. In addition, 14 days to correct a deficiency, which is likely to be serious if staff requests clarification or additional information, may not provide a reasonable amount of time for a reliable response.

(c)(4)(A)2b This language goes beyond the legislation and should either be exactly aligned or stricken as the regulation does not need to restate legislative language.

(c)(4)(A)3 This subsection addresses “environmental documentation” which is defined as California Environmental Quality Act compliance. However, in other sections there is recognition of the need to comply with all Federal law as well, including the National Environmental Protection Act (NEPA). Overall, there appears to be a lack of consistent consideration of compliance with Federal law throughout the regulations.

(c)(5)(A)3 Costs should include construction and OM&R costs.

(c)(5)(A)4 The calculation of a return on investment should be defined or described, particularly when the definition of cost-effective does not require a positive “return”. Is it a return on only the Program funding or the total investment?

(c)(5)(A)5 The definition of cost-effectiveness is inconsistent with the definition used for on-going CALFED storage project feasibility studies that have been conducted with the Department of Water Resources, Contra Costa Water District, and the Sites Joint Powers Authority. The definition provided in the working draft is more consistent with a methodology to estimate the economic value of a benefit for which there is no market to establish the value. Cost effectiveness is a term used to describe the relationship of the cost of a benefit to the value of the benefits; and Federal agencies use a benefit to cost ratio as a measure of cost effectiveness or efficiency. When the least-cost method is used to estimate the value of a benefit, it is assumed the value is equal to the least-cost and the benefit to cost ratio for that particular benefit would be one.

(c)(5)(A)11 The definitions for technical, managerial, and financial capacity should be included in the definitions section, and the methods or evidence of this capacity should be disclosed for the applicants to provide sufficient information for the review. Some applicants may be

newly-formed authorities with little direct financial capacity; and the membership may be very large requiring a significant amount of information for consideration.

(c)(5)(B) Will the technical review period include the time needed for peer review?

(c)(5)(C) A complete definition of a technical reviewer could be helpful, and could streamline this part of the draft regulations.

(c)(5)(D) The definition would assist in understanding the role of staff, agencies, and consultants with regard to the technical review.

(c)(5)(F) If an applicant fails to respond to requests for corrections and updates, shouldn't that application be denied? Is it possible for a non-responsive applicant to receive Program funding?

(c)(6)(A) The definition of technical reviewer and relationship to staff would improve clarity. Peer reviews are expensive, time consuming, and focused. It is worth considering focused peer reviews on specific aspects. For example, will a peer review be required of the financial capability determination, the science supporting the net benefit determination, the legal compliance, or more? Experts tend to be fairly narrow in focus; therefore, many experts will be needed to address all aspects of the technical review. In addition, most peer reviews are conducted to answer very specific questions, especially in areas of uncertainty. A clear description of the purpose of the peer review and a definition of peer review would assist applicants in understanding where to invest more time and energy in their applications. Some projects may have received some type of peer review already, and they should be incorporated into the results of the review process.

Some projects may have received extensive scrutiny prior to submission. For example, most projects that include a Federal partner will have undergone three levels of review: Technical, Legal, and Policy. These reviews may occur at three levels within the Federal agency as well (e.g. Regional Office, Policy Office, Commissioner's Office). The existence of this level of oversight could be factored into the level and extent of the technical and peer reviews.

(c)(7)(B)1 Text will need to be updated if the definition of cost-effective is updated.

(c)(7)(B)4 This is more typically the definition of cost-effective. Reclamation has been challenged to clearly identify net environmental benefits at times. In particular, environmental impacts to resources other than the benefiting resources are typically not provided an economic value due to the cost and time required to develop that value. Consideration of the total mitigation cost estimate as a proxy for the value of the impacts may be useful. Gaining broad agreement regarding net public benefits across the technical and peer reviewers, as well as regulating agencies may, be difficult and is likely to skew recommendations to smaller projects with smaller and more localized impacts, as opposed to larger projects with geographically large impact areas.

A definition of return on investment is needed for public benefits. Projects that meet the current definition of cost-effectiveness could easily have a negative or zero return on investment. As a

measure of financial feasibility and to assure the State does not strand assets, a positive cost benefit ratio and return on investment for the total project may be useful to indicate that the cost share partners are able to fund the construction costs allocated to non-public benefits, as well as the entire OM&R cost for the life of the project.

How would the technical reviewers evaluate the financial feasibility of a project if Program funds provided are less than assumed in the applicant's proposed cost allocation?

(c)(7)(B)10 Will Federal agencies be consulted to validate that the project is consistent with all applicable laws and regulations?

(c)(7)(C)1 Define compliance obligation. This subsection could be reworded for clarity once definitions are complete and by referencing baseline conditions.

(c)(9) The term "next" could use some context and the relationship of the statement in (8) that the applicants and public shall have at least 21 days to respond to initial funding decisions.

#### Section 6003

(a)(2)(A) Some applicants may be newly-formed and not have audited financial statements. Would member entity audited financial statements be accepted?

(a)(2)(C) The technical review section for initial selection requires validation of compliance with all State and Federal law, and this section indicates that additional related information may be required. It is unclear then what the initial validation will be based upon.

(b) The decision to conditionally fund a project could affect the amount of funding offered to other projects, which could then affect their feasibility as it is likely that applications will request more than the funding available. This would be a type of "encumbrance" of funding.

(b)(1) Will applicants and beneficiaries have the authority to enter into contracts if all parties affected by and/or regulating the project have not settled or issued permits?

(b)(5) It will be difficult for the large projects with system-wide benefits to comply in a timely manner.

(d) How will the commission decide on funding for permits? Is there guidance for the applicant requesting the funding?

(e)(1) The items should "have been submitted [to and approved by] the Commission."

(e)(6) What type of costs might be eligible for reimbursement?

#### Section 6004

(a)(1) We do not recommend including potential climate change and sea-level rise in the with-and with-out conditions. We recommend a sensitivity analysis based upon the analysis of 18 scenarios conducted for the Sacramento and San Joaquin River Basins Study prepared by DWR

and Reclamation. This will provide a consistent approach for all projects at a lower cost, and it will ensure the two major water purveyors in the system will not object to how benefits and impacts to the water system are characterized as a result of the climate change analysis selected by the applicant.

(a)(1)(B) It will be important that DWR and Reclamation confirm or validate the analysis; therefore, we suggest a sensitivity analysis based upon the joint DWR and Reclamation Sacramento and San Joaquin River Basins Study.

(a)(1)(C) The studies for the CALFED storage projects that have proceeded under Federal funding in the absence of a state cost share do not include this analysis, and Reclamation, as the Federal lead for NEPA does not agree with this approach. Please see recommendations described above.

(a)(1)(D) Requiring specific climate change conditions without related market impacts will undermine the purpose of this section.

(a)(3)(A)3 Same comment as above.

(a)(4)(C) We recommend using the Federal discount rate prepared annually by Reclamation. Many of the detailed requirements of this section will drive re-analysis for projects that have progressed far enough to be ready for submission on the Commission's schedule. Redoing the analysis to comply with the detailed level of these regulations will delay the projects; possibly creating a circumstance that the application cannot be ready on time.

(a)(4)(E) The least-cost alternative means methodology requires an evaluation of alternatives that would likely be implemented in the absence of the proposal. The Commission may want to define "likely" in this context.

(a)(4)(F)3 The definition of willingness to pay should be more specific.

(a)(5)(D) There should be an option to allow for Reclamation approval since we have spent millions of dollars in both State and Federal appropriations developing designs and cost estimates that meet Reclamation and Federal standards. Changing that now for large projects is too expensive and time-consuming.

(a)(6)(B) This does not describe a return on investment, but it is the definition of the efficiency of the investment. Using the least-cost method and evaluating the cost-benefit ratio by benefit type could result in a negative return on investment by this definition. The financial and economic approach described in the draft regulations does not reflect the economic and financial benefits of multi-purpose projects. We suggest looking at cost effectiveness for the project as a whole.

(a)(8)(A) We recommend using the Sacramento and San Joaquin River Basins Study.

### Section 6005

- (a) We appreciate the Commission including maintaining and restoring groundwater levels and conditions as a broad public benefit. Developing the economic value may be challenging.

### Section 6007

- (b) Benefits may not accrue in every year and some years may have negative benefits in order to achieve large benefits in other years. For example, surface or groundwater projects could store water in wet years to provide flow and/or colder water in dry and critical years. In addition, regulatory requirements will change, and could reduce or improve benefits. The draft regulations allow for the Commission to rescind funds if public benefits are less than contracted. The regulations may need to address the corollary if benefits exceed the contracted amount.

### Section 6000

Anadromous definition does not conform with widely accepted and published definitions. Trout in the McCloud River migrate up from Shasta Reservoir to spawn and could, therefore, be considered anadromous by the draft definition.

Attraction flow should refer to anadromous fish.

Beneficiary should include the concept that the recipient accepts the benefits.

CALFED definition should include reference to the Record of Decision.

CALFED Surface Storage Projects were defined in the Record of Decision signed by both State and Federal agencies and should not be re-defined just to simplify the regulations or guidelines. We suggest using the phrase “eligible CALFED Surface Storage Projects”.

Capital costs should include “land acquisitions” rather than site acquisitions.

The definition of cost effective is inaccurate. Least-cost is not considered cost effective if the benefits do not out-weigh the cost. For example, an 8 ounce jar of mayonnaise costing \$4 is not a cost-effective purchase when you can purchase a 16 ounce jar for \$6. The later definition of return on investment is more a definition of cost-effective.

Dewatering should be tied to a stream or river.

Emergency response should allow for stored water dedicated for the emergency once the emergency is declared. This will result in a lower cost allocation to the emergency benefit while still allowing for the supplies to be available when needed. Emergency response should include direct delivery for health and safety.

Encumbered should be defined as activities that are initiated by a Commission decision.

The Entrainment definition could include trout in the McCloud River that move downstream into Shasta Reservoir to feed.

Environmental documentation should include both State and Federal compliance documents.

The existing environmental mitigation or compliance obligation definition is inconsistent with how the phrase is described in the draft regulation at Section 6004.

The definition of feasible does not need to include the subjective “reasonable period of time” as the economics of the project will reflect the effect of time.

The definition of flood control benefits is an action that could provide the benefit. These benefits are typically characterized in terms of life and property protected.

Ecological functions definition should stand alone.

There should be a definition of “project” that could allow a package of actions to be submitted together in one application.

The definition of restore should describe “prior”.

The definition of willingness to pay should reference beneficiaries as there may be some non-Californians that benefit (power?).