



September 29, 2016

California Water Commission
 Attention: Joe Yun
 P.O. Box 924836
 Sacramento, CA 94236

Sent via email to WSIPComments@cwca.gov.

Re: Comments on Revised Proposed Regulations for the California Water Commission's Water Storage Investment Program

Dear Chairman Byrne and Members of the Commission:

On behalf of Defenders of Wildlife, the Natural Resources Defense Council ("NRDC"), Sierra Club California, Friends of the River, Clean Water Action, American Rivers, and our millions of members and activists, we are writing to provide comments on the September 2, 2016 draft of the proposed regulations for the Water Storage Investment Program ("revised regulations"). Our organizations have participated extensively throughout the development of these regulations, including by submitting detailed comments on the original draft regulations (dated January 29, 2016). We appreciate that the California Water Commission ("Commission") has made some positive changes since the January 29, 2016 draft of the proposed regulations, including important improvements related to quantification of net benefits. However, the Commission has failed to provide an adequate opportunity for public review and comment on the revised regulations. In addition, the revised regulations are still deeply flawed and continue to violate the Administrative Procedure Act's ("APA") consistency, clarity, and nonduplication standards. In particular, the revised regulations:

- Are inconsistent with the statutory requirement that projects be ranked through a public process;
- Limit the Commission's role in evaluating and ranking applications in a manner that is inconsistent with Proposition 1;
- Incorporate "water system improvements" into the criteria for project ranking in violation of Proposition 1's requirement that projects be ranked based on their public benefits;

- Fail to adequately address management of public benefits, providing regulatory text that is inconsistent with Proposition 1, duplicative, and will fail to ensure that funded public benefits are realized;
- Address climate change impacts in a manner that is inconsistent with California law, including Executive Order B-30-15 and Assembly Bills 1482 and 2800;
- Include unclear language regarding existing mitigation and environmental compliance obligations;
- Are inconsistent with Proposition 1 by failing to adequately require that applicants monetize impacts and account for those impacts in their net benefits calculation;
- Impermissibly allow applicants to overestimate the economic value of public benefits;
- Include language regarding emergency response public benefits that is unclear and inconsistent with Proposition 1; and
- Unnecessarily incorporate the technical reference document by reference, significantly increasing the likelihood of delay in approval of the regulations.

Each of these issues is discussed in more detail on the pages that follow, as well as in the letters we have previously submitted to the Commission.¹ We strongly urge the Commission to revise the regulations in accordance with these comments prior to submitting them to the Office of Administrative Law (“OAL”) for review. Doing so will help avoid delays in the rulemaking process and help to ensure that the Water Storage Investment Program (“WSIP”) provides the benefits that California voters expected when they voted in favor of Proposition 1.

1. The Commission has failed to provide adequate public review of the revised regulations in violation of the California Administrative Procedures Act.

Contrary to the requirements of the APA, the Commission only provided a 30 day public comment period for the revised regulations. Under the APA, the Commission must provide a 45 day public comment period for the revised regulations, rather than a 15 day comment period, where the revisions to a regulation are both substantial and are not sufficiently related to the original text. Cal. Gov. Code § 11346.8; Cal. Code Regs, tit. 1, § 42. Our organizations also raised this issue in oral comments before the revised regulations were released for public comment and during the comment period. Because the revisions to the regulations are substantial and are not sufficiently related to the original text, unless the Commission re-notices a 45 day public comment period for the revised regulations, OAL should disapprove this regulatory action.

The revisions to the original regulation are clearly substantial under the APA. The revised regulations include more than 500 new pages of regulatory text, worksheets, and tables

¹ Our prior comments are hereby incorporated by reference.

that were not included in the original 32 pages of regulations, including the 430 page technical reference document that is incorporated by reference in the revised regulations.

The revisions to the regulation are also not sufficiently related to the original text to allow a public comment period shorter than 45 days. The new regulatory text includes substantial new regulatory topics that were not included in the original text, particularly with respect to how the Commission will evaluate and score applications. *See* Revised WSIP Reg. § 6008. Indeed, the Commission identified proposed regulations on the subject of “Statutorily mandated regulations for the evaluation of public benefits provided by water storage” as a separate regulatory action from this rulemaking file on page 565 of OAL’s 2016 Rulemaking Calendar.²

At a minimum, the revised regulations “change the subject or issues addressed by the regulations” by adding the new sections regarding the evaluation, scoring and ranking of applications, which trigger the requirement for a 45 day public comment period. *See* State Water Resources Control Board, Order 2014-0028 (*citing Schenley Affiliated Brands v. Kirby*, 21 Cal. App. 3d 177, 193 (1971)). In 2002, OAL determined that a revision that deleted a single sentence of the original regulatory text, thereby removing the next step in the regulatory process, was not sufficiently related under the APA. *See* Decision of Disapproval of Regulatory Action, OAL File No. 02-1025-11 S (Dec. 18, 2002). Similarly, in this case the Commission’s original regulations focused on the quantification of public benefits and application process, and the revised regulations additionally address the evaluation and scoring of applications, which is the next step in the Commission’s process. Indeed, the initial notice of proposed rulemaking (January 2016) states that “[t]his proposed regulation is the first step to establish a program that evaluates public benefits associated with water storage projects and provides up to 50% of the capital costs of those projects.” Notice of Proposed Rulemaking, January 19, 2016 at 3 (“Initial NOPR”).

Moreover, neither the initial NOPR nor the Initial Statement of Reasons (“ISOR”) provide the public with notice that the regulations will cover the issues of evaluating, scoring and ranking of projects by the Commission, which are new issues included in the revised regulations. For instance, the Initial NOPR described the background and effect of the regulations as follows:

The proposed regulations provide the application process and requirements applicants must follow to quantify the public benefits of their proposed water storage projects. Additionally, the proposed regulations include the ecosystem and water quality priorities, as provided by the California Department of Fish and Wildlife (CFW) and the State Water Resources control Board (State Water Board), to be considered by the Commission when evaluating projects that have applied for funding pursuant to Proposition 1.

² The original regulatory language also did not incorporate by reference any documents into the regulations, whereas the revised regulations incorporate more than 500 pages of documents, effectively expanding the regulatory text by more than 500 pages.

Id. Similarly, in the ISOR, the Commission described the purpose of the regulations as establishing the requirements for applicants regarding the application process, identifying the ecosystem and water quality priorities of the State Water Resources Control Board and California Department of Fish and Wildlife, and requiring plans relating to adaptive management to demonstrate the assurance of public benefits. ISOR, January 19, 2016 at 3. The ISOR also explained that “[t]hese regulations cover the application process, quantification of public benefit benefits, and management of public benefits.” *Id.* at 53. However, neither the NOPR nor the ISOR provided notice that the Commission’s evaluation, scoring and ranking of projects would be part of this rulemaking, further evidence that the revised regulations include new issues and therefore require a 45 day public comment period under the APA.

Because the more than 500 pages of additions and revisions to the original 32 page regulatory text are substantial and are not sufficiently related to the original regulations, a 45 day public comment period is required. If the Commission fails to provide such notice, OAL should disapprove this regulatory action.

2. The revised regulations are inconsistent with the statutory requirement that projects be ranked through a competitive public process and unreasonably limit public review and comment.

In order to be consistent with the statutory requirement that projects be ranked “through a competitive public process,” *see* Cal. Water Code § 79750(c), the revised regulations must be substantially modified to incorporate meaningful public participation and comment in the Commission’s evaluation and selection of projects for funding. As currently drafted, the revised regulations fail to require meaningful public review and comment in the Commission’s review, evaluation, scoring and ranking process. Instead, the only explicit opportunity for public review and comment in the regulations is after the initial grant awards and just prior to encumbering funds. Revised WSIP Reg. § 6013(c). Second, the draft regulations unreasonably do not allow the public to appeal the staff evaluation and any changes to the public benefit ratio by Commission staff, instead limiting such appeals to the applicant. Revised WSIP Reg. § 6009(a). Such an approach is inconsistent with the statutory obligations established by Proposition 1, which the Commission has repeatedly emphasized throughout the process of developing these regulations. To ensure that the Commission selects projects “through a competitive public process,” the regulations must be substantially revised to allow for meaningful public review and comment on determinations of eligibility, technical review and evaluation, scoring, and ranking of applications, and any appeal process cannot be limited to applicants.

Proposition 1 requires that “[p]rojects 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.” Cal. Water Code § 79750(c). However, the only reference to public hearings in the revised regulations occurs in section 6013(c), as a requirement prior to

encumbering funds.³ The revised regulations do not require or even allow for public review and comment on: the determinations of eligibility and conditional eligibility; the evaluation and assessment of public benefit ratios; the technical review; or the scoring and ranking of projects.

Moreover, the revised regulations eliminate several opportunities for public comment included in the original regulatory language. For instance, sections 6002(a) and (b)(5) of the original regulatory text required the Commission to consider public comments in providing feedback to applicants on their pre-applications, which gave the public an opportunity to provide input at the beginning of the process. Similarly, sections 6002(c)(7)-(9) of the original proposed regulations required public review and input prior to the Commission making initial funding awards and prior to finalizing those initial funding awards, specifically requiring:

- the Commission to post technical reviews and independent reviews on the Commission’s webpage at the same time they are provided to the Commission, and that the initial funding awards be based on the technical reviews and public input to the Commission (Original Proposed WSIP Reg. §§ 6002(c)(7)(A), (C));
- the Commission to post the initial funding decisions on the Commission’s website and provide the public with at least 21 days to review and comment on the initial funding decisions (Original Proposed WSIP Reg. § 6002(c)(8)); and
- the Commission to consider public input prior to finalizing the initial funding decisions (Original Proposed WSIP Reg. § 6002(c)(9)).

All of these important opportunities for public comment were eliminated in the revised regulations, as were the requirements for independent technical review.⁴ Moreover, none of the

³ In pertinent part, section 6013(c) of the revised regulations provides that the Commission cannot encumber funds until “the Commission holds a public hearing allowing for public review and comment on the information required by this subdivision.” This provision does not clearly establish the timing of a Commission hearing to obtain public review and comment, but appears to allow the Commission to hold this hearing several years after making initial evaluations of applications and after making an initial funding award. Such a process is not consistent with the statutory obligation.

⁴ The elimination of independent technical review of the applications in the revised regulations is also very problematic and undermines the transparency and objectivity of the WSIP, which is of critical importance given the \$2.7 billion of public money that will be allocated. Commission staff previously acknowledged that, “[t]o ensure the review by the technical team is fair, objective, unbiased, and technically defensible, independent peer reviewers will be selected to provide an independent and impartial evaluation of the reviews and findings of the technical team and provide assurance of technical quality of the reviews.” *See California Water Commission, Issue Working Session – Independent Peer Reviewers (July 2015)*. DWR has spent years funding and developing certain storage projects that may apply for funding, and some of the same staff may now be reviewing projects that they worked on for DWR. The revised regulations fail to include any provisions regarding conflict of interest and they fail to demonstrate how, in the absence of independent peer review, the Commission will ensure that

new sections in the revised regulations regarding project evaluation, scoring, and ranking require public review or comment. For instance, section 6011 of the revised regulations requires the Commission to consider technical reviews and applicant appeals before making a maximum conditional eligibility determination, but this section does not require (and potentially does not allow) the Commission to consider public comment before making this important determination. Such an approach is inconsistent with the requirements of Proposition 1, which explicitly require a public process for ranking projects.⁵

In order for the revised regulations to be consistent with Proposition 1, we strongly urge the Commission to explicitly require a minimum 30 day period for public review and comment on each of the following: (1) the applicant's determinations of eligibility, claimed public benefits, and public benefit ratios, in order to provide public input to the technical reviewers; (2) the results of the technical review; (3) staff recommendations for initial funding awards, prior to the Commission making such awards; and (4) final funding awards. Because there is extensive documentation associated with each application, and because of the potential for numerous applications to be submitted, it is important to provide the public with adequate time to review the documents and provide meaningful input to the Commission.

Equally important, section 6009(a) of the revised regulations must be substantially modified to allow any member of the public to appeal staff's determinations, and such appeal should not be limited to the public benefit ratio but must include eligibility determinations and other elements of the technical reviews. As currently drafted, only applicants can file an appeal if staff modifies the applicant's public benefit ratio during the evaluation process. Revised WSIP Reg. § 6009(a). However, it is unreasonable to limit such appeals to the applicant, given that these evaluations and public benefit ratios are a critical element of the project ranking process, which must be conducted "through a competitive public process." Cal. Water Code § 79750(c). Even in instances where Commission staff does not modify the applicant's proposed public benefit ratio or other elements of the application, the public must have an opportunity to comment and provide input to the Commission on that information. In order to ensure a robust role for the public, consistent with the requirements of Proposition 1, we strongly urge the Commission to replace "applicant" with "public" throughout section 6009 and to expand the

the reviews are objective and that there are no conflicts of interest (or the appearance of a conflict of interest) with technical reviews by staff of DWR. The regulations should be revised to include provisions regarding conflict of interest, and we request that DWR provide documentation demonstrating how such potential conflicts of interest will be avoided through the evaluation process.

⁵ The Commission has repeatedly emphasized, from the first meeting of the stakeholder advisory group, that the program would include extensive public participation. For instance, the Commission has emphasized that the goal of the program is to "[p]rovide for a transparent public process," that "[t]he Commission is committed to an open public process on all issues" and will "engage the public; stakeholders; and State, federal and local agencies in an open and transparent public process as it develops and implements the program." California Water Commission, Program Goals, Objectives, and Principles (July 2015).

scope of this appeal process to include staff's eligibility determinations and all other elements of the technical review, including staff's component scores per section 6008 and 6011.

Ultimately, we believe that the regulations for the evaluation, scoring and ranking must adhere to the following process to ensure projects are evaluated and ranked through a competitive public process, consistent with Proposition 1:

- (1) Applicants submit their information, which is posted online and made available for public comment and review;
- (2) Staff / technical reviewers assess the application and public comments on the application materials, and make a recommendation to the Commission regarding eligibility, public benefit ratio, scoring, ranking, and initial funding awards;
- (3) The staff recommendation is made available for public review and comment, and the public may provide comments and supporting documentation (akin to that required in section 6009 of the revised regulations);
- (4) The Commission shall consider public review and comment and may direct staff to revise the staff recommendation, if a majority of the Commission votes to change the staff recommendation; and
- (5) Consistent with section 6013 of the revised regulations, the Commission shall consider public comment and agency findings (pursuant to section 6012(g)) prior to making final funding awards and encumbering funds.

The regulations should also specify that the Commission's rankings and determinations must be supported by substantial evidence in light of the information submitted by the applicant, staff recommendations, information from the technical reviews, and public review and comment.

3. The revised regulations are inconsistent with Proposition 1 because they limit the Commission's role in evaluating and ranking applications.

As currently drafted, language in sections 6008 and 6011 is inconsistent with the statutory mandate that projects "shall be selected by the Commission" for funding. Cal. Water Code § 79750(c); *see id.* § 79750(a) (authorizing the Commission to make all determinations, findings and recommendations independent of views of the Director of the Department of Water Resources ("DWR")). Section 6008 and 6011 unreasonably limits the Commission's authority to modify staff determinations regarding scoring and ranking of projects, only allowing the Commission to review and modify a subset of the component scores (water system improvement, implementation risk, resiliency/non-monetized public benefit). Revised WSIP Reg. § 6011(b); *id.* §§ 6008(f)(2), (g)(2), (h)(4). However, the revised regulations do not allow the Commission to modify the score components that account for 60% of the total score in the revised regulations

(the public benefit ratio⁶ and relative environmental value). *Id.* §§ 6008(d) and (e), 6011(a). The Commission’s inability to modify these scoring components is inconsistent with the statutory language requiring that the Commission make these determinations and findings and select projects independently of the views of the Director of DWR and staff.

Similarly, the revised regulations do not appear to allow the Commission to rank projects, instead having the projects ranked by staff. *Id.* § 6011(d) (“Staff shall use the Commission adjusted scores and resulting total expected return on public investment scores to provide the Commission the ranked projects separated into three ranks as follows”). In contrast, the revised regulations require staff to provide “suggested” maximum conditional eligibility amounts, *see id.* § 6011(e), and allow the Commission to adjust those amounts after review of certain factors.⁷ *Id.* § 6011(g).

In order to ensure that the Commission independently makes the findings and determinations required by Proposition 1, including the ranking of projects for funding, sections 6008 and 6011 must be substantially revised. The text of Proposition 1 unambiguously requires that the Commission has the responsibility and duty to independently make determinations as to how best to spend \$2.7 billion of the public’s money.

4. The revised regulations are inconsistent with the statutory text because they rank projects based on the magnitude of water system improvements.

Proposition 1 requires that the Commission only rank projects based on the magnitude of public benefits that the projects provide: “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.” Water Code § 79750(c) (emphasis added). The statute further defines “public benefits” to exclusively mean ecosystem improvements, water quality

⁶ As noted previously, the revised regulations allow the Commission to hear an applicant’s appeal of modifications to the public benefit ratio made by staff during the technical review process, but do not allow the Commission to review or modify the public benefit ratio score in response to public comments or to make a determination on the appeal that grants an appeal in part. *See* Revised WSIP Reg. § 6009(a)(5). This does not appear to be consistent with the statutory requirement that the Commission, not staff, select projects, nor the statutory requirement that the Commission make all necessary findings and determinations independent of the views of the Director. Cal. Water Code § 79750(a),(c).

⁷ We agree with the requirement provided in section 6011(e)(1) that the maximum conditional eligibility amount for any single project shall not equal the total WSIP funding. However, the revised regulations lack clarity as to whether this requirement applies to the Commission’s ultimate determinations in section 6011(g). In order to be consistent with the statutory obligation that the Commission make these determinations, these sections should be revised to ensure that section 6011(e)(1) also applies to the Commission’s final determination of maximum conditional funding eligibility.

improvements, flood control benefits, emergency response, and recreational purposes. Cal. Water Code §§ 79753(a)(1)-(5). The statute is exceedingly clear that the Commission is only permitted to rank proposed projects based on the magnitude of these specifically enumerated public benefits.

The revised regulations are inconsistent with this statutory requirement because they indicate that the Commission will rank projects based on the magnitude of water system improvements that the projects may provide. *See* Revised WSIP Reg. §§ 6007(a)(3), 6007(d) and Table 5, 6008. Water system improvements are not among the public benefits enumerated in Water Code section 79753(a), and the Commission therefore may not consider them when ranking projects.⁸ *See* Cal. Water Code § 79750(c).

In addition, including water system improvements in the ranking and scoring system effectively uses public dollars for private benefits in violation of Proposition 1. Under the revised regulations, water system improvements are principally private benefits relating to water supply for agricultural and urban water users. Revised WSIP Reg. § 6007(c) and Table 5. Including water system improvements in the scoring and ranking system means that projects that yield lower public benefits but higher water supply benefits could rank higher than projects that have greater public benefits: for instance, if a storage project does not increase water supply for private parties (scoring zero on water system improvements) but includes 40 points of public benefits, it would have a total score of 40 points and would rank lower than a project that included 20 points of water system improvement and only 21 points of public benefits. This is inconsistent with Proposition 1. As we noted in our prior comments to the Commission, in the voter pamphlet, the nonpartisan analysis of Proposition 1 made clear that the bond would not fund private benefits of water storage, “such as water provided to . . . customers.” Secretary of State, Official Voter Information Guide, November 4, 2014, Proposition 1, Analysis by the Legislative Analyst, available online at: <http://vigarchive.sos.ca.gov/2014/general/en/propositions/1/analysis.htm>. Because including water system improvements in the project-ranking criteria is inconsistent with the statute, all references to water systems improvements must be stricken from sections 6007 and 6008 of the revised regulations.

In contrast, the revised regulations’ inclusion of water system improvements in the eligibility criteria set forth in section 6006(c)(2) is consistent with the statute and appropriate. *See* Cal. Water Code § 79750(b) (providing that the Commission may fund “public benefits associated with water storage projects that improve the operation of the state water system . . .”). Thus, to be eligible for funding, a proposed project must improve the operation of the state water

⁸ In addition to ranking projects based on the specifically enumerated public benefits, the revised regulations also rank projects based on their resiliency and implementation risk. *See, e.g.*, Revised WSIP Reg. § 6008(b). Ranking project based on resiliency and implementation risk is consistent with the statute because both factors impact the magnitude of the public benefits that the project will provide. *See* Cal. Water Code § 79750(c).

system. Once a project meets that basic requirement, however, it may not be ranked based on the magnitude of its water system improvements.

5. The revised regulations' approach to management of public benefits is inconsistent with the statute and will fail to ensure that funded public benefits accrue.

The approach to management of public benefits in the revised regulations is inconsistent with the statute. First, Water Code section 79754 states that, “[i]n consultation with the Department of Fish and Wildlife, the state board, and the Department of Water Resources, the commission shall develop and adopt, by regulation, methods for quantification and management of public benefits described in Section 79753 by December 15, 2016.” The revised regulations include over 400 pages of regulatory text regarding methods for quantification of public benefits. Yet there is almost no regulatory text describing methods for management of public benefits.⁹ The failure to include meaningful methods for management of public benefits in the regulations is inconsistent with the clear statutory mandate in Water Code section 79754.¹⁰

Instead of describing methods for management of public benefits, the revised regulations selectively repeat language from the statute without further elaboration. *See* Cal. Water Code § 79755(a)(3) (no funds may be allocated until “project applicant has entered into a contract with each public agency identified in Section 79754 that administers the public benefits . . . to ensure that the public contribution of funds pursuant to this chapter achieves the public benefits identified for the project); Revised WSIP Reg. §§ 6014(b) (project “shall enter into a contract with CDFW, the State Water Board, and the Department to administer the public benefits of the project”), 6014(d) (“The funding agreement shall . . . describe how the funding recipient will ensure the public benefits identified for the project are achieved.”). These provisions appear to violate the APA’s nonduplication standard, as they duplicate statutory language without useful clarification or elaboration.

The revised regulations are also inconsistent with the statute because they shift responsibility for management and achievement of public benefits of storage projects from the expert agencies (the California Department of Fish and Wildlife (“CDFW”), the State Water Resources Control Board (“Board”), and DWR) to the Commission. Proposition 1 requires that the project applicant must enter into a contract with CDFW, the Board, and DWR “to ensure that the public contribution of funds pursuant to this chapter achieves the public benefits identified

⁹ As discussed further below, section 6014(d) of the revised regulations states that funding agreements with the Commission will “describe the conditions under which the Commission may rescind Program funding if the project does not provide the identified public benefits.” Conditioning funding on the provision of public benefits could be an acceptable method for management of public benefits. However, the revised regulations are devoid of information regarding the circumstances under which repayment of disbursed funds would be required and other details that are necessary to make this provision meaningful.

¹⁰ There is also no indication that, as required by the statute, the Commission consulted with CDFW, the Board, or DWR regarding methods for management of public benefits.

for the project.” Water Code § 75755(a)(3). Yet the revised regulations merely indicate that the projects have to enter into contracts with these agencies “to administer the public benefits of the project.” Revised WSIP Reg. § 6014(b). Instead of requiring that the contracts with the expert agencies describe how the public benefits will be achieved, the revised regulations indicate that funding agreements with the Commission will include this information. *Id.* § 6014(d) (“The funding agreement shall . . . describe how the funding recipient will ensure the public benefits identified for the project are achieved.”). This approach, which appears to move responsibility for contractual oversight of the provision of public benefits from the expert agencies to the Commission, is inconsistent with the statute. The revised regulations must make clear that information to ensure projects achieve the identified public benefits will be included in contracts with the expert agencies, and not merely in the funding agreements with the Commission.

The revised regulations include promising language regarding the Commission’s ability to require repayment of disbursed funds if a project does not provide the identified public benefits. Revised WSIP Reg. § 6014(d) (“The funding agreement shall also describe the conditions under which the Commission may rescind Program funding if the project does not provide the identified public benefits.”). Conditioning funding on provision of the identified public benefits could be an appropriate method for management of public benefits. However, to make this provision meaningful, the regulations must explain the circumstances under which repayment would be required and provide details regarding how a determination regarding repayment would be made. Additionally, section 6014(d)’s exclusive focus on rescission is problematic because a project applicant could spend all of its Chapter 8 funds before it is clear that the project fails to provide the identified public benefits. To ensure the Commission has continued authority to manage and enforce public benefits, section 6014(d) should clarify that the Commission will seek either rescission or reimbursement of dispersed funds.

In previous comments, we explained that the regulatory provisions related to management of public benefits are essential for ensuring that Chapter 8 funds are managed in a transparent manner, and that the public benefits promised by project applicants materialize. To strengthen the original draft of these regulations, we suggested that the revised regulations should provide details regarding the management-focused contracts that the projects are required to enter into with CDFW, the Board, and DWR pursuant to Water Code section 79755(a)(3). In particular, we suggested that the regulations should, at minimum: (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 the public benefits; (3) specify how adaptive management will be implemented; and (4) require that monitoring data and reports be made available to the public. These are critically important elements of a regulation to manage public benefits, as required by Proposition 1, yet the revised regulations omit all of these elements. We again suggest that the regulations be revised to include these minimum terms for the contracts between the projects and the expert agencies.

6. The revised regulations still inappropriately address the effects of climate change on the potential benefits and impacts of storage projects.

As prior comments by our organizations and other groups have noted, the proposed climate change analysis fails to fully account for the effects on climate change on projects' benefits and impacts. While the revised regulations do expand the timeline under which climate change is analyzed, they are still inconsistent with existing law because they allow the applicant to calculate project benefits through 2120 despite truncating the analysis of climate change arbitrarily and indefensibly at 2085. Additionally, the revised regulations appear to average the effects of climate change, resulting in an inaccurate hydrology that is inconsistent with existing law and prior analyses.

- A. The revised regulations are inconsistent with Executive Order B-30-15 and Assembly Bills 1482 and 2800 because they limit climate analysis to 2030 and 2070 while allowing public benefits to be assessed until 2120.

Executive Order B-30-15 requires agencies to include climate change when accounting for their investments and infrastructure projects, and to employ full life-cycle cost accounting. Governor's Exec. Order No. B-30-15 (Apr. 29, 2015). AB 1482 requires climate adaptation to be maximized wherever feasible and applicable, including drought resiliency that climate change will bring. Cal. Pub. Res. Code § 71154. AB 2800 mandates that state agencies take into account the future impacts of climate change when planning, designing, building, operating, maintaining, and investing in state infrastructure. Chapter 580, Statutes of 2016, § 2 (Assem. Bill No. 2800 (2015-2016 Reg. Sess.) § 2).

Section 6004(a)(1)(D) of the revised regulations requires applicants to use datasets developed for the WSIP that model future climate conditions based on two points, 2030 and 2070. These points will be used against a historical reference period so that climate impacts will be analyzed for 30 years around those points, extrapolating climate impacts through 2085. In contrast, section 6004(a)(3) and (4)(D) of the revised regulations allow applicants to develop and monetize project benefits through 2120, with the final 35 years of climate change going unanalyzed.

The climate-change focused sections of the revised regulations are an improvement from the previous draft,¹¹ but are still wholly insufficient to be consistent with the climate investment requirements in law. As proposed, there is potentially a 35-year period after 2070 in which

¹¹ For instance, we support the Commission's requirement that analysis of project resiliency to more extreme climate change scenarios be part of the scoring and ranking system, since this analysis is critical to assessing the magnitude of public benefits of storage projects in the future. Revised WSIP Reg. § 6007(e)(1).

project benefits will be analyzed with a 2070 climate baseline, despite the fact that modeling and analysis of climate change effects after 2070 is available. Allowing public benefits to be determined without accurately accounting for continuing climate change will make it extremely likely that the predicted public benefits will not reflect reality.

Investing Chapter 8 funds without adequate analysis of climate change impacts is inconsistent with AB 1482, AB 2800, and EO B-30-15, and must be rejected. The WSIP must either continue to find scientifically defensible methods for analyzing climate change impacts through 2120, or limiting the planning horizon to the time period for which climate analysis is available.

- B. The revised regulations' averaging of climate change effects is scientifically indefensible, arbitrary, and inconsistent with Executive Order B-30-15 and Assembly Bills 1482 and 2800.

Climate change is likely to induce a dramatic shift in hydrology for California. Higher temperatures will decrease the snowpack and move the timing of runoff from snowmelt to the spring instead of summer. Precipitation will be more volatile, with more years of drought followed by wetter wet years. All projects applying for Chapter 8 funds must properly analyze how likely changes from climate change will impact purported benefits.

The methodology used for climate change is provided in Section 2.12 of the draft technical reference document. The document indicates that it takes the average of the change in precipitation from different climate change scenarios. Draft technical reference document at 2-18. This method will not provide sufficient information to guide investments as required by law, and is scientifically indefensible.

Variability is a natural feature of California's hydrology. We regularly experience a range of dry years, normal years, wet years, and prolonged drought. Climate change is likely to exacerbate the differences between these years, with drier dry years and wetter wet years. *See* Department of Water Resources, California Climate Science and Data (June 2015) at 5 (stating that, "[m]ore intense dry periods are anticipated under warmer conditions, leading to extended, more frequent droughts."); DWR, Water Plan Update 2013 at 5-11 ("Many alternative scenarios of future climate are considered in order to represent extended droughts and climate change. The concept is not to plan for any one given future, but to identify strategies that are robust across many scenarios."); *id.* at 5-18 (showing greater variability in precipitation under climate change model scenarios compared to historical record). Many studies have shown that climate change is likely to increase the frequency and intensity of droughts and flooding. *See, e.g.,* Pagan et al. 2016. *Extreme hydrological changes in the southwestern US drive reductions in water supply to Southern California by mid century.* Environ. Res. Lett. 11 (2016) 094026, doi: 10.1088/1748-

9326/11/9/094026; Null, Sarah and Viers, Joshua (2013), *In bad years; Water year classification in nonstationary climates*, *Water Resour. Res.* 49, doi: 10.1002/wrcr.20097.

Unfortunately, the Commission's approach appears to be inconsistent with the likely changes in climatic variability that climate change will cause. For instance, analysis of the Commission's climate change modeling by MBK engineers appears to show that in 2030, wet years will be largely unchanged while drier years become wetter. There appears to be no change in the variability of water year types or the frequency of droughts and floods, in contrast to other analyses and modeling by the State of California. For instance, the Commission's modeling appears to be inconsistent with the DWR's climate change modeling for WaterFix/BDCP, which indicated that dry years would become drier and wet years would become wetter. Neither the Commission nor DWR has explained the reason for the stark discrepancy between these model results. Simply averaging projected precipitation of climate change will not actually show how climate change will affect California, just as averaging out historical precipitation in California would not tell the story of California hydrology.

The WSIP climate analysis needs to provide precipitation analysis that acknowledges the likely changes in the variability of California's hydrology. The Commission and the public need to know how the public benefits of storage projects are likely to respond through increased frequencies of drought and flood conditions in order to make investment decisions. The failure to do so is likely to result in unrealistic assessment of project benefits and impacts.

7. The revised regulations lack sufficient clarity to ensure consistency with Proposition 1's requirement that meeting existing mitigation and environmental compliance obligations is not a public benefit.

Our organizations have repeatedly emphasized that the regulations must ensure that meeting existing environmental mitigation and compliance obligations does not constitute providing public benefits that can be funded by this program, and our prior comments to the Commission have been incorporated into this letter by reference. The revised regulations and draft technical reference document still fail to meet the clarity standard of the APA regarding this issue.

While the changes to the definition of "existing environmental mitigation and compliance obligations" in section 6001(a)(32) of the revised regulations are clearly warranted, they still fail to explicitly include biological opinions under the Endangered Species Act and the definition must be revised. As we previously commented on December 10, 2015 and on March 10, 2016, the definition in the originally proposed regulatory text unreasonably excluded many existing environmental mitigation and compliance obligations.¹² Based on the text of the revised

¹² In addition, the draft technical reference document provides an incomplete list of the requirements of the existing biological opinions, omitting several RPA actions relating to water

regulation and the references in the draft technical reference document, we understand this term to include requirements in biological opinions issued under the Endangered Species Act, even though the word “biological opinion” is not included in this explicit list.¹³ See Draft technical reference document at 2-8 to 2-10, 4-23, 4-27. Nonetheless, in order to ensure clarity and consistency with Proposition 1, the Commission must explicitly add “biological opinion” to the definition in section 6001(a)(32).¹⁴

In addition, we believe that the changes to section 6004(a)(7)(A) of the revised regulations provide far greater clarity and are generally consistent with the requirements of Proposition 1; this section requires that new mitigation or compliance obligations can be funded from the bond, but meeting existing environmental compliance and mitigation obligations cannot be funded. Revised WSIP Reg. § 6004(a)(7)(A)(4)-(5). Similarly, page 5-12 of the draft technical reference document provides a good example of how meeting existing environmental compliance obligations does not constitute a public benefit:

Also, avoided costs are sometimes not fundable public benefits by the WSIP because they are associated with compliance obligations. For example, an applicant might expect high costs to comply with a future instream flow requirement, so it plans to use some of the proposed project’s water for instream flows. If so, the project water supply used to avoid the cost would not be associated with a net improvement in physical benefit conditions; that is, the project is providing the same physical benefit that would be provided in the without-project condition.

Draft technical reference document at 5-12. This language is a model of clarity. In order to avoid any misunderstanding and ensure consistency with Proposition 1, we recommend that the Commission replace the vague phrase “associated with” in section 6004(a)(7)(A)(4) with the text “for meeting,” so that this section of the regulation unambiguously requires that meeting existing environmental compliance and mitigation obligations is not a public benefit.

temperature requirements below CVP/SWP reservoirs. See Draft technical reference document at 2-9. We also strongly encourage the Commission to identify important SWRCB water rights orders and decisions with minimum instream flows or water temperature requirements in the technical reference document, such as Water Rights Order 90-5.

¹³ Complying with a biological opinion is a requirement of an incidental take statement or incidental take permit under the ESA.

¹⁴ Relatedly, we understand the definition of “CALFED surface storage projects” in section 6001(a)(10) to exclude raising Shasta Dam, because this project is ineligible for funding because it would violate section 79751(a) and section 79711(e) of the Water Code. However, the use of the word “includes” in the definition creates potential ambiguity, and in order to meet the clarity standard of the APA, we recommend that the Commission replace the word “includes” with the word “means.”

However, in other respects the regulatory materials are inconsistent, unclear, and fail to adequately ensure that meeting existing environmental mitigation and compliance obligations do not constitute public benefits. For instance, the revised regulation and draft technical reference document fail to ensure that existing mitigation and environmental compliance requirements are fully implemented in the “without project” condition. *See* Draft technical reference document at 2-9 to 2-10 (claiming that RPAs may not be fully implemented in the future); *id.* at 4-87 (simply restating the statutory language, which our prior comments noted is inconsistent with the APA). This language in the draft technical reference document, which does not require applicants to model full compliance with existing environmental compliance and mitigation obligations in the “without project” condition, means that physical changes attributed to the project that are modeled between the “without project” and “with project” conditions will include meeting existing environmental mitigation and compliance obligations, and that such physical changes could be considered a public benefit. In contrast to this language regarding not meeting existing requirements under the Endangered Species Act in some years, the draft technical reference document directs applicants to assume full implementation of the Sustainable Groundwater Management Act by the dates specified in that Act. *See* Draft technical reference document at 2-11, 4-27.¹⁵ In order to be consistent with the statutory requirements and the regulatory text; the draft technical reference document must be revised to assume full implementation of existing environmental compliance and mitigation obligations under the Endangered Species Act and other laws, like SGMA, under the “without project” conditions.¹⁶

8. The revised regulations make progress toward ensuring the quantification of net benefits, consistent with Proposition 1, but the revised regulations and technical reference document fail to adequately monetize impacts and account for those impacts in the net benefits calculation.

The revised regulation and technical reference document do a much better job of directing applicants to account for the adverse impacts of projects, in order that the Commission will assess the potential “net” benefits of storage projects as required by Proposition 1. Cal. Water Code § 79750(b). For instance, section 6004 of the revised regulations requires the

¹⁵ In addition, the draft technical reference document states that the “without project” condition must include “required operations related to the Delta, the Biological Opinions, the CVP, and SWP as summarized in Section 4.2, General Project Analysis.” Section 4.2 does not appear to summarize these requirements.

¹⁶ There is also language in the draft technical reference document suggesting that the Commission intends to rely exclusively on applicants and the public to identify existing mitigation and environmental compliance obligations. Draft technical reference document at 8-2 (“The portion of the public benefit cost share allocated to the WSIP shall . . . [n]ot be associated with existing environmental mitigations or compliance obligations identified by the applicant in the application or brought to the attention of the Commission during the evaluation and decision-making process . . .”). This approach is unacceptable, as the Commission has an independent duty to ensure that Chapter 8 funds are not used to meet existing mitigation and environmental compliance obligations.

applicant to quantify the net physical and economic benefits of a project, which “. . . shall be calculated using the physical, chemical, or biological change in each benefit resource condition that is created by or caused by the proposed project, less any negative impacts created or caused by the proposed project as compared to the without-project conditions at the same reference point.” Revised WSIP Reg. § 6004(a); *see id.* §§ 6004(a)(3), (a)(3)(B); Draft technical reference document at 4-90, 7-1. Importantly, the revised regulations require the applicant to monetize any adverse effects of a storage project that are less than fully mitigated, and it requires that, “[f]or each benefit category, the applicant shall display the net benefit (monetized benefit minus monetized unmitigated impact).” Revised WSIP Reg. § 6004(a)(4)(K).

We are concerned, however, that some applicants may miss the requirements to subtract the monetized unmitigated impact from the net benefits calculation because it is only mentioned once in section 6004(a)(4)(K). Moreover, the draft technical reference document only addresses the monetization of project benefits, and Chapter 5 entirely fails to address the monetization of project impacts. *See* Draft technical reference document, Chapter 5. The draft technical reference document, if it remains incorporated in the regulations, must be revised to be consistent with the regulations and address the monetization of both project benefits and project costs.

In addition, the inclusion of the word “includes” in the definition of “public benefits” is not sufficiently clear and creates ambiguity where none exists under the statute. Revised WSIP Reg. § 6001(a)(63). Proposition 1 unambiguously identifies only five categories that may be considered public benefits and states that public funding may “solely” be used for these public benefits. *See* Cal. Water Code § 79753(a). In order to meet the clarity standard of the APA and comply with Proposition 1, the word “includes” in section 6001(a)(63) must be deleted and replaced with “means” or a similar word.

Finally, we note that the draft technical reference document recommends that ecosystem improvements calculated in terms of increased escapement of salmon each year provides exceedingly high values. *See* Draft technical reference document at 5-31 (recommending the use of \$100,000 per fish for winter run or spring run Chinook salmon escapement each year, and \$2,500 per fish for fall run Chinook salmon). The draft technical reference document does not appear to justify these values, and it is likely to result in wildly inflated values for the ecosystem benefits of storage projects.¹⁷ However, if this is the value that the State recommends in this

¹⁷ The more detailed estimate in Appendix E appears to dramatically overstate the costs and lacks references for key values, particularly the estimate of \$8.6-\$14.5 billion plus \$85 million annual cost for “Reduce hydrodynamic and biological impacts of exporting water through Jones and Banks. (Medellin-Azura et. Al 2013).” Draft technical reference document, Appendix E at E-7. The cited reference is not included in the references cited in Appendix E or elsewhere in the document, and the basis for this number is unclear. To the extent that this reference is to the cost of constructing the California WaterFix project or BDCP, such an approach is wholly inappropriate because that project does not contribute to recovery of the species and is likely to result in adverse effects to winter run Chinook salmon and other salmon migrating through the Delta.

proceeding, the State has no basis for objecting to the use of similar values in other proceedings, including proceedings before the Board.

9. The revised regulations fail to ensure that public funding is limited to the minimum reasonable value of the benefit and appears to allow applicants to overestimate the economic value of the public benefits.

It is essential that the public funding of public benefits be limited to the least costly means of providing the public benefit, and that applicants not pick and choose the highest potential value for the public benefits. This ensures that the State efficiently spends limited taxpayer monies and does not pay more than what is reasonably needed to obtain those public benefits. However, the regulations do not effectively establish this important limitation. The draft technical reference document provides useful language requiring applicants to calculate the least cost alternative means of providing a public benefit, *see* Draft technical reference document at 5-13, and the revised regulations likewise require the applicant to calculate the least cost alternative, *see* Revised WSIP Reg. § 6004(a)(4)(E). However, the revised regulatory text and draft technical reference document fail to ensure that the public share of funding is limited to the minimum reasonable value of the benefit (potentially the least cost alternative), and in other respects both the text and document appear to be internally inconsistent.

First, while one section of the revised regulations requires the applicant to calculate the least cost alternative means of providing the total physical benefit, the very next subpart of that section does not require calculation of the least cost alternative. *Compare* Revised WSIP Reg. § 6004(a)(4)(E) (requiring calculation of the least cost alternative) *with id.* § 6004(a)(4)(F) (allowing the applicant to use “one or more of the following approaches”: avoided cost,¹⁸ least cost alternative, or willingness to pay to calculate the monetized benefit). As discussed below, the draft technical reference document also requires the applicant to calculate the least cost alternative. Section 6004(a)(4)(F) of the revised regulations must be modified to require the calculation of the least cost alternative for each benefit category.

Second, section 6004(a)(4)(E) of the revised regulations requires calculation of the least cost alternative for the “total physical benefits,” rather than requiring calculation of the least cost alternative for each of the public benefits. The draft technical reference document is also internally inconsistent and inconsistent with the regulatory text on this point: page 5-13 requires the applicant to calculate the least cost alternative means of providing the net benefit for each

¹⁸ In addition, some of the language regarding avoided costs appears highly problematic. For instance, the draft technical reference document inappropriately concludes that, “[i]f another existing or planned water storage project would be modified or eliminated due to the proposed water storage project, an applicant can count an avoided cost benefit; see Section 5 for a discussion of avoided cost.” Draft technical reference document at 3-5. Such an approach would appear to allow two storage projects to claim avoided costs for eliminating the other project while assuming the same public benefit in each case, effectively double counting benefits and reducing costs.

benefit category, *see* Draft technical reference document at 5-13, yet it also requires the applicant to calculate the least cost alternative means of providing the total physical benefits, *see id.* at 9-1. Page 5-13 of the Draft technical reference document provides the correct approach. For instance, where a project provides ecosystem benefits from improved water temperatures and recreation benefits, the least cost alternative should not require a single alternative to provide both benefits, but instead look at the least cost alternative for providing the temperature benefit (such as a temperature control device) and the least cost alternative for providing the recreation benefit. In order to be consistent and clear, the revised regulatory text and draft technical reference document must be modified to be consistent with the approach on page 5-13 of the draft technical reference document (calculating the least cost alternative means for each benefit category).

Third, while the revised regulations provide for multiple methods of calculating the value of the benefit, the revised regulations do not appear to require the applicant to use the minimum reasonable monetized value of the benefit. For instance, if an applicant estimates the value of ecosystem benefits using avoided cost, least cost alternative, and willingness to pay (per section 6004(a)(4)(F)), nothing in section 6004 or elsewhere in the revised regulations appears to require the applicant to use the minimum reasonable value in calculating the public benefit. In other words, if the applicant or Commission determines that the least cost alternative means of providing a public benefit is \$100M and the willingness to pay estimate is \$1B, the revised regulations do not appear to require the applicant or the Commission to use \$100M as the value of the public benefit. Instead, the revised regulations include a vague statement requiring the applicant to justify the approach used. Revised WSIP Reg. § 6004(a)(4)(G); Draft technical reference document at 5-11. Without a requirement to use the minimum reasonable value of the benefit, the calculation of least cost alternatives and other alternative approaches to valuation appears to be useless. The Commission must revise section 6004(a)(4) to require that the applicant use the minimum reasonable value for each benefit category.

Finally, the revised regulations unreasonably restrict the ability of staff to modify the valuation of public benefits. Section 6007(b)(1)(B) requires that the technical review “shall rely on information supplied by the applicant and may perform independent calculations. If a public benefit ratio component is not supported by the information submitted in the application, technical reviewers may adjust it.” It is inappropriate to require staff to “rely on the information supplied by the applicant;” instead, this section must be revised to require the technical reviewers to “consider the information supplied by the applicant and the public” and to “independently evaluate the information that is provided.”¹⁹

¹⁹ We believe that the revised regulations inappropriately struck language from the originally proposed regulatory text that directed the technical reviewers to “evaluate the methods, assumptions, and conclusions used in the quantification of public benefits.” Original Proposed WSIP Reg. § 6002(c)(5)(E). We strongly encourage the Commission to include this prior language.

10. The revised regulations include language regarding emergency response public benefits that is unclear and inconsistent with the statute.

The revised regulations and incorporated technical reference document include several problematic provisions related to emergency response benefits that must be remedied.

First, the definition of “emergency response” in section 6001(a)(29) of the revised regulations is inconsistent with the statute because it indicates that emergency response water provided “to customers,” rather than to the public, is a public benefit that is eligible for funding. In particular, section 6001(a)(29) states that “emergency response water (i.e., water from dedicated emergency storage) supplied to customers for human health and safety purposes during declared emergencies will be considered a public benefit under this category.”²⁰ Under Proposition 1, however, water supplied “to customers” is a private benefit that is not eligible for funding. *See* Cal. Water Code § 79753(a) (“Funds allocated pursuant to this chapter may be expended solely for the following public benefits associated with water storage projects”) (emphasis added); Secretary of State, Official Voter Information Guide, November 4, 2014, Proposition 1, Analysis by the Legislative Analyst, available online at: <http://vigarchive.sos.ca.gov/2014/general/en/propositions/1/analysis.htm> (describing water provided to customers as a private benefit that is ineligible for bond funds). To ensure that the regulations are consistent with the statutory text, the words “to customers” must be deleted from section 6001(a)(29).

Second, the revised regulations are unclear and internally inconsistent regarding the requirements for emergency response public benefits. Section 6001(a)(29) of the revised regulations states that emergency response public benefits provide “an amount of water storage or supply dedicated to emergency response purposes that are outside of normal facility operations or average water supply for all other purposes (i.e., water supply is reduced for the expected (average) amount of water used for emergency purposes).” This definition requires that, to be eligible for funding for an emergency response public benefit, a project must dedicate a specific amount of storage or water supply that will be available in an emergency. In contrast, the draft technical reference document indicates that a project can receive funding for emergency response public benefits without dedicating a quantity of water or storage for that purpose:

Any proposed water storage project demonstrating the benefits above can claim a Delta emergency response benefit, but only to the extent that the proposed project will be operated to provide the benefit. There must be a commitment that defines

²⁰ Similarly, the draft technical reference document is unclear regarding the potential beneficiaries for drought emergency water supplies, and the ambiguous language could be interpreted to permit funding for emergency water supply benefits that only accrue to private interests. *See* Draft technical reference document at 4-154. To be consistent with the statute, the regulations and technical reference document should indicate that water supplies that are funded as emergency response public benefits must be reserved and available for general public use and may not be available only to project customers.

the amount or share of available stored water to be provided. This does not mean that water supply must be dedicated or reserved in storage for emergency supply. For example, the commitment could state that half of the stored supply at the time of the Delta event will be made available.

Draft technical reference document at 4-152 (emphasis added). In light of this inconsistency, the regulations are extremely unclear regarding the requirements for eligible emergency response public benefits. Further, the approach in the draft technical reference document is inconsistent with Proposition 1 because it would allow projects to claim emergency response public benefits that they will not be able to provide in an emergency. According to the draft technical reference document, for example, a surface storage project could claim public benefits and receive funding for providing 25% of its stored supply during a Delta event. But if the relevant reservoir is drawn down to 15% of capacity at the time of the event, the amount of water available for emergency response could be insignificant. To make the regulations clear and to ensure that funded projects provide meaningful public benefits, the Commission must make the language regarding emergency response public benefits in the technical reference document consistent with the language in section 6001(a)(29) of the revised regulations.

Third, the revised regulations are inconsistent with the statute because the technical reference document indicates that water supply provided during drought is eligible for funding as an emergency response public benefit. *See* Draft technical reference document at 4-154. While Water Code section 79753(a)(4) does not provide an exhaustive list of eligible emergencies, the included example—“securing emergency water supplies and flows for dilution and salinity repulsion following a natural disaster or act of terrorism”—makes clear that emergency response public benefits are intended to address abrupt, potentially catastrophic events. Droughts, in contrast, are an expected part of our hydrologic variability and should be accounted for in project operations. Further, the definition of “drought emergency” in the draft technical reference document is unclear. The document states that “[d]rought emergencies can be assumed to occur during a critical year if it is the third or later year of any multi-year drought period that occurs in the hydrologic dataset used in the project’s operations analysis.” *Id.* Because “drought period” is not defined, however, it is impossible to understand what counts as an eligible drought emergency. To ensure the regulations are consistent with the statute and clear, we recommend removing the discussion of drought emergencies from the technical reference document and clarifying that drought response is not eligible for funding as an emergency response public benefit.

11. The technical reference document should not be incorporated by reference in the regulations.

The revised regulations incorporate the technical reference document into the regulations by reference. Revised WSIP Reg. § 6003(a)(1)(P). “Material proposed for ‘incorporation by reference’ shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations.” Cal. Code Regs., tit. 1, § 20. Accordingly,

OAL will review the entire technical reference document to make sure it complies with necessity, authority, clarity, consistency, reference, and nonduplication standards set forth in California Government Code section 11349.1(a).

As currently written, however, the draft technical reference document is unlikely to withstand OAL review because it is inconsistent, unclear, and duplicative. As discussed above, language regarding climate change, existing mitigation and compliance obligations, and emergency response public benefits in the draft technical reference document is inconsistent with the text of Proposition 1 and other laws. *See supra* Section 6 (explaining that climate change methodology in the draft technical reference document is inconsistent with California law); Section 7 (explaining that discussion of existing mitigation and compliance obligations in the draft technical reference document is inconsistent with Proposition 1); Section 10 (explaining that discussion of emergency response public benefits in the draft technical reference document is inconsistent with Proposition 1).

The draft technical reference document is also riddled with statements that lack clarity. For example, it states that “[a]pplicants must incorporate relevant information that is publicly available for the local watershed/region into their without-project future conditions analysis.” Draft technical reference document at 2-6. Yet a project applicant has no way to know what information is “relevant,” what it means for information to be “publicly available,” and how they should define the “local watershed/region.” There are many other unclear statements in the draft technical reference document that will make it impossible for project applicants to easily understand the steps they should take to quantify public benefits. *See, e.g., supra* Section 10 (explaining that discussion of drought emergencies is unclear).

Finally, the draft technical reference document duplicates statutory text without providing any additional clarification, in violation of the nonduplication standard, and also unnecessarily duplicates language from the draft regulations. The following text is illustrative of the duplication problem:

Water Code Section 79750(b) states that funding is appropriated to “the commission for public benefits associated with water storage projects.” Fundable public benefits must be associated with a water storage project, and fundable ecosystem improvements must “contribute to restoration of aquatic ecosystems and native fish and wildlife” [Water Code Section 79753, subd. (a)(1)]. Additionally, funds shall not be expended “for the costs of environmental mitigation measures or compliance obligations except for those associated with providing the public benefits” as described in Water Code Section 79753(b).

Water Code Section 79754 provides that “the commission shall develop and adopt, by regulation, methods for quantification and management of public benefits... The regulations shall include the priorities and REV of ecosystem improvements as provided by the Department of Fish and Wildlife and the

priorities and REV's of water quality benefits as provided by the state board." The ecosystem priorities and REV's allow for a wide range of fundable ecosystem improvements. The priorities and the criteria used to determine the ecosystem REV, as developed by DFW, are provided in the regulation and below for reference.

Draft technical reference document at 4-87.

Incorporating the technical reference document into the regulations by reference is also unnecessary. Even without the technical reference document, the regulations include an extensive description of methods for quantification of public benefits, as required by Water Code section 79754. *See* Revised WSIP Reg. § 6004. Additionally, adhering to the methods set forth in the technical reference document is principally, if not entirely, optional. According to section 6004(a) of the revised regulations:

To comply with this section, the applicant shall select the most appropriate method described in the Technical Reference to quantify the physical and economic magnitude of the net public and non-public benefits of the proposed project. An applicant may also select a method not included in the Technical Reference if the method is conceptually sound and adequately described and documented in its Program application.

The draft technical reference document includes similar language indicating that an applicant is required to utilize the methods set forth in the technical reference document, unless the applicant chooses to use an alternative method not included in the document. *See, e.g.*, Draft technical reference document at 2-10 ("Applicants shall use the data and model products provided in Appendix A. If the model products provided do not adequately describe the without-project future conditions relevant to the project, applicants may also use other tools or models to complete the description of the without-project future conditions."); *id.* at 2-22 ("When possible, the applicants shall use the data and methods provided in this document. In circumstances when use of available data and methods is not possible, applicants are required to provide information and justification on their sources of data and methods.").

Because incorporating the technical reference document into the regulations is unnecessary and will likely cause significant problems with OAL's review of the revised regulations, we urge the Commission to make the technical reference document available as guidance for applicants and not incorporate the document into the regulations.

NGO Comments on Revised WSIP Regulations
September 29, 2016

Thank you for considering our comments. We look forward to continuing working with you to improve the revised regulations, and would welcome further conversations regarding the issues raised in this letter.

Sincerely,



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