



United States Department of the Interior

BUREAU OF RECLAMATION
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IN REPLY REFER TO:

MP-700
 PRJ-1.10

VIA ELECTRONIC MAIL ONLY

Mr. Joseph Byrne
 Chair, California Water Commission
 P.O. Box 942836
 Sacramento, California 94236-0001

Subject: Bureau of Reclamation Comments on Draft California Code of Regulations, Title 23

Dear Mr. Byrne:

The Bureau of Reclamation appreciates the opportunity to provide comments and concerns regarding the recently revised Draft California Code of Regulations, Title 23. Waters. Division 7. Chapter 1, Water Storage Investment Program. As you are aware, Reclamation and others have been studying the technical, environmental, economic, and financial feasibility of four storage projects identified in the 2000 CALFED Record of Decision (ROD) and the 2004 Public Law 108-361 since 2003. Our comments are focused on the potential effect of the regulations on the federal feasibility studies and Reclamation's potential cost-share partners.

Background

When Congress authorized Reclamation to conduct feasibility studies of four storage projects identified in the CALFED ROD, Reclamation and the California Department of Water Resources (DWR) collaborated to jointly implement the entire storage program. Reclamation and DWR jointly funded storage studies intending to meet both Federal and State requirements. One major component, primarily lead by DWR, was to develop the common analytical tools and assumptions needed to determine the costs and benefits of each project to assure broad acceptability of analytical results and directly comparable results. By doing so, the agencies assured that no one project would be justified in a way that unduly undermined another project or unduly overstated benefits. In 2010, the California Water Commission invited both Reclamation and DWR experts to present the feasibility and environmental study processes that the agencies were implementing.

When the State passed a suite of laws in 2009 commonly referred to as the "water package," funding for DWR's cost share ceased. However, Reclamation continued to advance four of the storage studies, consistent with the common assumptions and other agreements with DWR, and entered into cost share agreements with local project proponents to fund studies no longer funded

by DWR. The draft regulations and Technical Reference Document represent a significant change from previous requirements defined and described by State agencies for many years.

Current Status

The following table summarizes the current status of each CALFED storage project study.

| Storage Project | Study Cost-Share Partners | Current Status | Potential Water Supply Beneficiaries |
|-----------------------------------|---|--|--|
| Shasta Enlargement | Reclamation | Final Reports with Congress; draft legislation | Central Valley & State Water Project (CVP & SWP) contractors |
| Temperance Flat | Reclamation and San Joaquin Valley Water Infrastructure Authority | Final Reports in executive review | CVP & SWP contractors south of the Delta; Tribes |
| Sites | Reclamation and Sites Project Authority | Draft Reports in development | CVP & SWP contractors; other Sac Valley water users; Tribes |
| Los Vaqueros Enlargement, Phase 2 | Reclamation, Contra Costa Water District, additional Bay Area water districts | Draft Reports in development | Select CVP & SWP contractors in the Bay Area; San Joaquin Valley refuges; CVP San Joaquin Valley contractors |

Note: Reclamation is not authorized to study the feasibility of the In-Delta Project.

Summary Comments and Considerations

Reclamation has provided a detailed evaluation of the differences between the requirements in the TRD and the work that Reclamation and partners have already conducted or are conducting. In addition, we have reviewed the revised regulations and offer the attached, summarizing our review and comments.

Overall, our findings are that the prescriptive approach to including specified climate change and sea level rise assumptions in 2030 and 2070 baseline conditions will require applicants to conduct extensive, time-consuming, and costly analysis in a very short period of time. We are concerned that the requirements may not be adequately developed and reviewed in order to effectively inform the California Water Commission (CWC) decisions. We are also concerned that projects that are further along in the Federal process are potentially at a disadvantage. Our formal comments on the TRD, submitted separately, provide further elaboration.

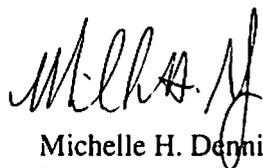
We have additional concerns related to applying economic values to potential benefits in the prescribed 2030 and 2070 conditions, and recommend a more conservative approach. Estimating economic conditions into the future is very difficult and further complicated by the potential worldwide effects of climate change on market conditions, population growth and location, and innumerable related conditions. Since benefit values are the primary driver of a cost allocation, developing or assigning values is extremely controversial, and introducing further uncertainty is likely to cause significant challenges to funding decisions and agreements with other cost-share partners.

It is clear that the decisions to be made by the CWC are critically important to the State, which are therefore critically important for the Nation. Reclamation appreciates the complexity of water management in the State and the challenges of selecting and implementing huge infrastructure projects. And it is clear from the legislation that the State must partner with other organizations willing to fund project construction, operations, maintenance, and replacement costs.

Rather than taking applications, the CWC could consider proposals to enter into partnerships to implement projects with public benefits and improvements to the State water management system. Those proposals that appear to match the goals and objectives of the State could then be further developed to determine the amount of funding the State should invest in each project. The further development could be completed in partnership with the potential cost-share partners. At that time, the climate change analysis may be more fully developed and vetted.

Please see the more detailed comments attached for your consideration. If you have any questions, please contact me at mdenning@usbr.gov or 916-978-5060.

Sincerely,



Michelle H. Denning
Regional Planning Officer

Attachment

Reclamation Comments
Draft California Code of Regulations, August 2016
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The following comments or concerns are presented in the order the topic is presented in the draft regulation. Some comments provide some clarification, others present concerns related to the ability of project applicants to meet the regulation and the effect on their ability to cost share with the Federal government to implement one or more of the CALFED storage projects. Reclamation comments on the Draft Technical Reference Document are incorporated by reference.

Article 1 Purpose and Definitions

Section 6001 Definitions

The CALFED surface storage projects are defined in the CALFED Record of Decision, Federal law, and numerous court proceedings. While convenient to re-define for the purposes of drafting the regulations, it would be confusing in future years to have State regulations identify a conflicting definition.

Cost allocation is the process of allocating joint and separable costs to project purposes, such as water supply or flood control. Once allocated to project purposes, costs are sub-allocated (in the case of water supply) and/or assigned to specific beneficiaries, such as power users.

The definition of emergency response could address the applicant's ability to identify specific beneficiaries. For example, emergency response that addresses the overall salinity conditions in the Delta for the benefit all users of Delta water supply is different than water supply set aside for a specific region in the event of an emergency.

The definition of environmental documentation only references to CEQA, while Section 6011 (c) (9) the Commission must determine that the "proposed project is consistent with all applicable laws and regulations". Proposition 1 does not specify that CEQA must be completed at the time of application, only that a publically available environmental document must be available. For federal projects, NEPA documents should be considered acceptable for application.

The definition of feasible has been deleted, but it is a basic eligibility requirement.

The definition of net improvement is challenging. It is difficult to develop a formula that can quantify the sum of all improvements minus "any negative outcomes". For example, a project may be able to provide very significant improvements for conditions affecting anadromous fish survival, but golden eagle nesting sites may be affected. However, it is possible to assess the positive and negative effects on an anadromous fish population and report and claim only the net improvements to that population.

Immediacy of benefit and realization of benefit appear to share the same definition.

Local and Regional surface storage projects appear to share the same definition.

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The definitions of with and without conditions require evaluations at 2030 and 2070 with climate change and sea-level rise. Reclamation has submitted extensive comments and concerns on the detailed requirements in the Draft Technical Reference Document (TRD). The conditions at those times are so speculative that a quantitative analysis of all affected resources is difficult and may be nearly meaningless. CWC staff have attempted to reduce the impact of such requirements on the applicants by prescribing a singular climate change and sea-level rise scenario. However, this has further reduced the value of the required analysis. In order to evaluate the positive and negative impacts of a proposed project on the physical and human environment, assumptions about all physical, social, and economic conditions must be made. While staff have developed assumptions related to hydrology, they have not provided other assumptions. These other assumptions are so variable, contingent, and speculative that Reclamation conducts sensitivity analysis around certain key assumptions. Quantitative sensitivity analysis around the range of potential climate and sea level rise have been prepared for each of the large storage projects and as a part of the Sacramento and San Joaquin Rivers Basin Study developed in collaboration with the Department of Water Resources (DWR) and stakeholders throughout the two basins. We recommend using the baseline conditions identified through the Common Assumptions jointly developed by DWR and Reclamation to assure consistent analysis.

Article 2. Application Process
Section 6003 Application Submittal

(a) The regulations identify a minimum length of time that the solicitation may be open. Reclamation has analyzed the difference in requirements between the Draft TRD requirements and the feasibility and environmental analysis conducted to-date for the large storage projects. Our experience is that short time frames can increase costs due to paying overtime and paying for the most senior staff to improve the quality of the first draft of an analysis or document. Applicants may expend large sums of money to produce an application within 5 months of the regulations being finalized, and disadvantaged communities may struggle to fund the effort. For the purposes of planning, budgeting, and funding, identifying both an opening and closing date is preferable.

Applicants will find it difficult to create an executive summary that is only ten pages for a complex multipurpose storage project and will need a larger number of pages to adequately represent the project feasibility study to the Commission, particularly if the Commissioners are limited to the information presented in the Executive Summary in order to adjust staff rankings of the projects.

(I) As drafted, this subsection overly simplifies or places additional limitations not intended by the legislation. The specific text from Proposition 1 is: "Nothing in this division shall be construed to affect the California Wild and Scenic Rivers Act (Chapter 1.4 (commencing with Section 5093.50) of Division 5 of the Public Resources Code) or the federal Wild and Scenic Rivers Act (16 U.S.C. Sec. 1271 et seq.) and funds authorized pursuant to this division shall not be available for any project that could have an adverse effect on the values upon which a wild

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and scenic river or any other river is afforded protections pursuant to the California Wild and Scenic Rivers Act or the federal Wild and Scenic Rivers Act." (emphasis added)

The subsection could be revised to: Explanation that the project does not have an adverse effect on the values upon which a wild and scenic river or any other river is afforded protections pursuant to the California or federal Wild and Scenic Rivers Acts.

(S) The Commission has received input from members of the public that it is not appropriate to consider improvements to the State's water management system for beneficial uses of the Delta in its decision-making. Reclamation has long studied projects with two or more primary purposes and supports a requirement that proposed projects include public benefits while also improving the state's water management system. However, the improvements to the system should not be limited to beneficial uses of the Delta as it unnecessarily excludes the San Joaquin River and a significant portion of the Central Valley Project.

Section 6004 Requirements for the Quantification of Benefits

We repeat our comments made with regard to the approach to address climate change and sea level rise.

(a)(1)(B) It is unclear if actions and assumptions related to the Sustainable Groundwater Management Act would be considered reasonably expected. Implementation of the Act in the San Joaquin Valley will have a major impact on the value of surface water deliveries in the Valley.

(a)(3) The requirement to "account for any negative physical changes or impacts that are not fully mitigated" will be difficult to identify and quantify. One challenge is that full mitigation cannot be accurately claimed until the impact and mitigation occur and results are monitored for an appropriate duration of time.

(a)(3)(B) Does not seem entirely consistent with the definition of "net improvement."

(a)(4) It might be helpful to specify in the summary paragraph whether or not the requirements are for both public and "private" benefits.

(a)(4)(E) This would be a very time consuming and expensive analysis if required for all benefits. If this applies to water supply, the Commission should allow for valuing the reliability of the least cost alternative under a wide range of future conditions.

(a)(4)(K) Monetization of impacts or negative impacts is difficult, controversial, and time-consuming. This is particularly challenging given the legal issues surrounding a determination that an impact has been "fully mitigated". How will an applicant place an economic value to the impact to cultural resources? An approach that measures the degree to which the Commission believe the applicant has or will apply due diligence to fully mitigate an impact may be helpful.

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(a)(4)(E) Project cost estimates and designs developed and intended to be implemented by the Federal government should not require the added step of review and signature by state licensed experts.

(a)(6)(B) An additional factor to reflect the likelihood of additional public benefits that would be achieved beyond those funded by the Commission (i.e. leverages other funding sources for public benefits) would help differentiate projects.

(a)(8)(A) In addition to comments above regarding required climate change analysis, the uncertainty analysis should include a wider range of climate uncertainty than warmer/drier and cooler/wetter.

Article 3. Commission Methodology and Evaluation Criteria
Section 6006 Eligibility and Completeness

(c) Given that the requirements for an application are extensive, and that 14 days to cure what staff advise is an incomplete application is short, it would be helpful to provide examples of extenuating circumstances that the Commission would consider in determining if an incomplete package should be included in the technical review.

(c)(2)(A) As drafted, this subsection overly simplifies or places additional limitations not intended by the legislation. The specific text from Proposition 1 is: "Nothing in this division shall be construed to affect the California Wild and Scenic Rivers Act (Chapter 1.4 (commencing with Section 5093.50) of Division 5 of the Public Resources Code) or the federal Wild and Scenic Rivers Act (16 U.S.C. Sec. 1271 et seq.) and funds authorized pursuant to this division shall not be available for any project that could have an adverse effect on the values upon which a wild and scenic river or any other river is afforded protections pursuant to the California Wild and Scenic Rivers Act or the federal Wild and Scenic Rivers Act."

The subsection could be revised to: Does not have an adverse effect on the values upon which a wild and scenic river or any other river is afforded protections pursuant to the California or federal Wild and Scenic Rivers Acts.

(c)(2)(D) Is the cost effective determination just for public benefits, or overall?

(c)(3)(A) 14. Feasibility study components have not been defined or described.

Section 6007 Technical Review

Table 1 and Table 2. In general, it appears that there could be overlap between the two and that benefits could be double-counted where agency mission's and priorities overlap. In addition, valuing the number of priorities claimed without considering the quality could dilute real physical benefits. For example, would addressing 3 problems in a mediocre manner outweigh addressing 2 problems in a significant manner?

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Table 5. This table displays water system improvement metrics and includes average end of May storage and end of September storage. How will the numbers be valued? High end of year storage may indicate a reduced risk of M&I water supply the next year, but could be created by limiting M&I or agricultural water supply in the current year. High end of year storage may be an indicator of reservoir water temperature available for fall releases, but it could indicate less available storage space to capture water if the following wet season is truly wet. High end of year storage could equate to high releases to meet the flood control diagram. With climate change, the determination that high or low end of year storage is positive or negative may switch.

(c)(3)(e)(1)(A) The review of sources of uncertainty analysis may want to address how conflicting risks have been identified by differing applicants.

Section 6008 Scoring

(c)(2) Rounding numbers may not be desirable, particularly for the lower value categories.

Article 4. Conditional Eligibility and Funding Process

Section 6011 Commission Maximum Conditional Eligibility Determination

(b)(1). Given the extensive analysis and information required of the applicant, it is unclear why the Commissioners must be limited to using the information in the 10-page executive summary to adjust the water system improvement score.

(c)(8) Given the rigorous analysis required of the applicant to demonstrate and value public benefits under a wide range of conditions, the demonstration rather than the appearance of feasibility would be more consistent with assuring that the benefits could be achieved.

(c)(10) The Commission and staff are likely able to determine that "the proposed project is consistent with all applicable laws and regulations" of the state, but, based upon the application requirements, it is unclear who or how a determination of consistency with federal laws and regulations will be made.

(d) It is possible that no project will score 85 or higher, or even 70 or higher. A percentage or curve may be helpful. The challenge is most likely related to the requirement to net out "any" negative impacts that cannot be "fully mitigated".

(g)(1)(B) The reference to a "collective suite of projects" is unclear. Is this the applicant's suite of projects or is this all of the projects that may receive bond funding?

Section 6013 Funding Agreements

(a)(1)(A-C) Probably should incorporate the concept of member agencies as some applicant organizations may not have audited financial statements at the time of application.

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(c)(1) Some variance would need to be included in order to address a facility that would be a part of the Central Valley Project.

(c)(2) Can this proceed prior to completing CESA and water right hearings?

(c)(5) This can take numerous years and not all permits and local approvals are required up-front.

Section 6014 Managing Public Benefits

(a-d) These subsections are written as if a project were a person or an entity. Given that the applicant may not be the owner/operator of a facility, identifying specific long term responsibilities is important.

Article 5. General Provisions

Section 6015 Confidentiality

(a)(2)(B) Include documents prepared by or for Federal agencies.

(b) Requests for information related to confidential information does not provide adequate time and is too informal to ensure protection of critical infrastructure.