



March 10, 2016

California Water Commission
 Attention: Jennifer Marr
 901 P Street, Room 314
 P.O. Box 924836
 Sacramento, CA 94236

Sent via email to Jennifer.Marr@water.ca.gov and WSIPComments@cwcc.ca.gov

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

Dear Chairman Byrne and Members of the Commission:

On behalf of the Natural Resources Defense Council ("NRDC") and Defenders of Wildlife, and our millions of members and activists, we are writing to provide comments on the proposed regulations for the Water Storage Investment Program ("WSIP"). Our organizations supported and campaigned for Proposition 1, and we have participated extensively throughout the development of these proposed regulations.¹ However, as currently drafted, the proposed regulations fail to comply with the Administrative Procedure Act's consistency, clarity, and non-duplication standards. In particular, the proposed regulations:

- Address the issue of existing environmental mitigation and compliance obligations in a manner that is duplicative, unclear, and inconsistent with the statutory text of Proposition 1;
- Fail to adhere to statutory requirements regarding the inclusion of adverse ecosystem impacts in the quantification of public benefits;
- Inadequately account for the effects of climate change in assessing public benefits, in a manner that is inconsistent with state law and policy;
- Fail to ensure that selected projects are cost-effective and public funding is limited to the least-cost alternative means of providing the public benefits; and,
- Fail to ensure that public benefits are managed in accordance with statutory requirements.

¹ NRDC, Defenders of Wildlife, and several other organizations submitted multiple comment letters during the development of these proposed regulations. We have attached and hereby incorporate those comment letters, and request that the Commission review, consider, and respond in writing to these previous comments.

Each of these issues is discussed in more detail on the pages that follow, as well as in the attached letters submitted previously to the California Water Commission (“Commission”). 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 WSIP provides the benefits that California voters expected when they voted in favor of Proposition 1.

Thank you for consideration of our views.

Sincerely,



Doug Obegi
Natural Resources Defense Council



Rachel Zwillinger
Defenders of Wildlife

I. The proposed regulations address existing environmental mitigation and compliance obligations in a manner that is duplicative, unclear, and inconsistent with the statutory text.

The draft regulations address existing environmental mitigation and compliance obligations in a manner that should lead OAL to reject the regulations for failure to meet the non-duplication, clarity, and consistency requirements of the APA. As explained further below, Proposition 1 prohibits the use of Chapter 8 funds to meet existing environmental mitigation and compliance obligations, and the bond language does not permit existing environmental mitigation and compliance obligations to constitute ecosystem improvements or public benefits. In addition to being inconsistent with statutory obligations, the language in the proposed regulations lacks clarity and leaves open the possibility that the regulations could be interpreted in a manner that conflicts with the statutory text. The proposed regulations also define existing environmental mitigation or compliance obligations in a manner that inconsistent with the statute, and fail to clearly explain applicants' ability to use Chapter 8 funds to meet *new* environmental mitigation or compliance obligations that are associated with providing the project's public benefits.

A. The draft regulations allow the use of Chapter 8 funds to meet existing environmental mitigation or compliance obligations, contrary to the requirements of Proposition 1.

Proposition 1 establishes that Chapter 8 funds cannot be used to meet existing mitigation or compliance obligations. Water Code section 79753(b) explicitly prohibits the use of water bond funds for existing mitigation or compliance obligations with one very narrow exception—if a project that provides new ecosystem improvements also incurs some new mitigation requirements, Chapter 8 funding can be used to pay for those new mitigation requirements. The plain text of the statute makes the narrow scope of this exception clear. It states that “[f]unds shall not be expended pursuant to this chapter for the costs of environmental mitigation measures or compliance obligations except for those associated with providing the public benefits as described in this section.” Cal. Water Code § 79753(b). To suggest that section 79753(b) means that Chapter 8 funds can be used to meet existing compliance or mitigation requirements would render the first half of the provision meaningless, overlooks the fact that the section does not refer to “existing” obligations, and ignores the requirement that public benefits are limited to ecosystem “improvements.”² The legislative history of Assembly Bill 1471 (Rendon) reinforces

² Although section 79753(b) uses somewhat different language from other chapters of the bond, this section still prohibits the use of bond money to pay for existing compliance or mitigation requirements. For instance, whereas section 79732(b) prohibits the use of bond monies to pay for any mitigation measures or compliance obligations by stating that Chapter 6 funds “shall only be used for projects that will provide fisheries or ecosystem benefits or improvements that are greater than required applicable environmental mitigation measures or compliance obligations,” section 79753(b) uses different language because it provides a limited exception allowing bond monies to pay for new mitigation or compliance obligations that are incurred in providing the

this interpretation. The August 13, 2014 Assembly floor analysis for AB 1471 states that the language in Chapter 8 includes requirements, “[p]rohibiting expending bond funds on environmental mitigation, except environmental mitigation associated with providing public benefits.” Assembly Floor Analysis, AB 1471, Concurrence in Senate Amendments, August 13, 2014, at page 2.

Further, section 79753(a) provides that only enumerated public benefits are eligible for funding, and specifies that environmental “improvements” are a public benefit eligible for funding. Cal. Water Code § 79753(a)(1). Merely meeting existing environmental compliance or mitigation obligations is not a water quality or ecosystem “improvement,” and therefore is not a public benefit eligible for funding. Funding for existing environmental compliance or mitigation obligations may improve water supply for the party that has those compliance or mitigation obligations, but it does not result in an environment that is improved compared to what is already required. Using Chapter 8 funds to meet existing environmental compliance or mitigation obligations is simply a private benefit to the entities that are obligated to meet those requirements, rather than a public benefit. 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>. Funding existing compliance or mitigation requirements would constitute an impermissible private benefit, not a public one.³

However, the draft regulations permit Chapter 8 funds to be used to pay for existing environmental mitigation or compliance obligations, in violation of Proposition 1. As such, the draft regulations fail to meet the consistency requirement of the APA because they would contradict the relevant statutory language. *See* Cal. Gov’t Code § 11349(d).

Section 6004(a)(7)(4) of the draft regulations states that public benefits allocated to the program “Shall not be associated with existing environmental mitigation or compliance obligations except for those associated with providing the public benefits.” This language plainly allows existing environmental mitigation or compliance obligations to constitute public benefits and receive funding from Chapter 8, contrary to Proposition 1. In order for the regulations to be consistent with Proposition 1, the Commission should strike “except for those associated with providing the public benefits” from this section of the regulation.

new ecosystem improvements or other benefits. However, nothing in section 79753(b) would allow bond monies to be used for existing environmental compliance or mitigation obligations. Moreover, nothing in Chapter 8 of the bond requires the Commission to even allow for use of bond monies to pay for these new mitigation or compliance obligations.

³ NRDC, Defenders of Wildlife, and other organizations repeatedly explained throughout the development of these proposed regulations that Chapter 8 funds cannot be used to meet existing environmental mitigation and compliance obligations. *See* attached letters dated July 27, 2015, October 13, 2015, November 12, 2015, and December 10, 2015.

Similarly, section 6004(a)(7)(5) of the draft regulations would allow funding of environmental mitigation or compliance obligations from Chapter 8. While Proposition 1 allows the Commission to fund *new* environmental mitigation or compliance obligations associated with providing public benefits, this section of the draft regulations does not limit funding to *new* environmental mitigation or compliance obligations (as opposed to *existing* environmental mitigation or compliance obligations). In order to be consistent with Proposition 1, the Commission should insert the word “new” before “environmental mitigation or compliance” in this section of the draft regulations.

In order for the regulations to be consistent with Proposition 1, the Commission must revise these sections to prohibit funding existing environmental mitigation or compliance obligations. Failure to do so should lead OAL to reject the regulations under the APA’s consistency standard.

B. The proposed regulations promote further confusion and lack clarity regarding existing environmental mitigation and compliance obligations.

In addition to the problems of consistency with Proposition 1, the draft regulations also violate the APA’s clarity and non-duplication standards with respect to existing environmental mitigation and compliance obligations.

First, by simply restating the statutory language in Section 6002(c)(7)(C)(1) of the draft regulations, the proposed regulations violate the Administrative Procedure Act’s non-duplication standard, which “is intended to prevent the indiscriminate incorporation of statutory language in a regulation.” Cal. Gov’t Code § 11349(f).

Second, several sections of the regulations also does not meet the APA’s “clarity” requirement. “‘Clarity’ means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” *Id.* § 11349(c). In light of the sections of the draft regulations that would improperly allow Chapter 8 funds to be used to meet existing environmental mitigation or compliance obligations (as well as prior Water Commission staff interpretations of Water Code section 79753(b) to similar effect), section 6002(c)(7)(C)(1) may confuse applicants and members of the public, leading them to believe that Chapter 8 funds *can* be used to pay for achievement of existing mitigation and compliance obligations.

Third, as discussed above, in order to comply with the APA’s clarity and consistency requirements, the Commission must make two changes to section 6004(a)(7)(A)(5) of the proposed regulations. The provision currently states that “[t]he portion of public benefit cost shares allocated to the Program . . . [s]hall consider the cost share of environmental mitigation or compliance obligation costs associated with a proposed project component, which shall not exceed the percentage of the public cost allocation for the related public benefit category.” Given the possibility of confusion regarding the use of Chapter 8 funds to meet existing

mitigation and compliance obligations, this section should include the word “new” before “environmental mitigation or compliance obligation costs” so that it clearly indicates that Chapter 8 funds can only be used for environmental mitigation or compliance obligations associated with the provision of the public benefits. This modification will help to ensure that the section meets the clarity requirement and that it is consistent with Water Code section 79753(b). Second, the phrase “a proposed project component” should be replaced with “providing the public benefits” because the meaning of the former phrase is unclear and is not grounded in the statutory text.

C. The definition of “existing environmental mitigation or compliance obligations” is inconsistent with Proposition 1.

The definition of “existing environmental mitigation or compliance obligations” in the draft regulation likewise fails to meet the APA’s consistency and clarity requirements. Section 6000(a)(39) of the proposed regulations states that, “[e]xisting environmental mitigation or compliance obligations’ means legally enforceable requirements or conditions in existing permits, contracts, or grants intended to protect the environment.” However, existing environmental mitigation or compliance obligations include more than just requirements or conditions in permits, contracts, and grants intended to protect the environment. As noted in our prior comment letters, this includes requirements and conditions in Endangered Species Act biological opinions, water rights, licenses issued by the Federal Energy Regulatory Commission and/or State Water Resources Control Board, and water quality standards and certifications, among other requirements and conditions. Because the proposed regulations’ list of sources for existing mitigation or compliance obligations is under inclusive, it would allow existing environmental mitigation or compliance obligations in a biological opinion to be funded from Chapter 8, in violation of Proposition 1.

II. The proposed regulations’ directives regarding the quantification of benefits are inconsistent with the statutory text because they fail to account for adverse ecosystem impacts.

The proposed regulations do not adequately account for the negative impacts of water storage projects in quantifying the benefits of a project, making them inconsistent with Proposition 1. As a result, the draft regulations fail to ensure that the Commission is able to accurately rank projects based on magnitude of public benefits provided and fund only projects that result in net ecosystem and water quality improvements.

Proposition 1 makes clear that Chapter 8 funds may only be used for projects that “provide a *net* improvement in ecosystem and water quality conditions.” Cal. Water Code § 79750(b) (emphasis added). Additionally, Chapter 8 states that funds “may be expended solely for public benefits associated with water storage projects,” *id.* § 79753(a), that projects must be ranked according to the *magnitude* of the public benefits provided, *id.* § 79750(c) (emphasis added), and that funded projects must provide “measurable improvements to the Delta ecosystem

or to the tributaries to the Delta,” *id.* § 79752. Together, these provisions clearly indicate that the Commission must rank projects based on the size or extent of the public benefits they provide and must ensure that funded projects result in *net* ecosystem and water quality improvements.

According to the Merriam Webster Dictionary, “net” is defined to mean “free from all charges or deductions.” The inclusion of the adjective “net” to describe the kind of improvement in ecosystem and water quality conditions means that the negative impacts to (or deductions from) the ecosystem and water quality conditions must be accounted for when determining the kind of improvement (or benefit) provided by the project. Moreover, the use of the term “magnitude,” which is defined as “size or extent,” in relation to the public benefit provided requires that size or the extent of the public benefit must be determined by the Commission.

To comply with these statutory requirements, the Commission’s regulations must account for the negative impacts of water storage projects in quantifying the benefits of a project. Otherwise, the regulations will lead applicants to overstate the potential benefits of projects, resulting in flawed project rankings and the possibility that projects that do not result in net improvements could receive funding. For example, a storage project could propose to improve upstream water temperatures to benefit salmon and steelhead, yet also reduce water flowing into the Delta, which would negatively impact salmon, longfin smelt, and other species. The draft regulations must ensure that the quantification of benefits accounts for the adverse impacts of a project (such as reduced flows into the Delta), or the ecosystem benefits of the project will be substantially overstated and the Commission will be unable to accurately rank projects and ensure that they provide “a net improvement in ecosystem and water quality conditions.” Water Code § 79750(b).

The proposed regulations, however, fail to require applicants to account for the negative impacts of projects when quantifying the project’s benefits. This problem occurs in several sections of the draft regulations, and raises issues of both clarity and consistency. First, section 6002(c)(4)(B)(2) requires that applications be reviewed to ensure that they provide measureable improvements to the Delta ecosystem or tributaries to the Delta; however, as noted above, Proposition 1 requires that projects provide that funded projects result in a “net improvement in ecosystem and water quality conditions.” Water Code § 79750(b). Second, section 6004(a)(4) of the draft regulations directs applicants to “estimate the monetary value of physical benefits” of a project. Although section 6004(a)(3) considers both negative and positive impacts of a storage project,⁴ section 6004(a)(4) completely ignores the monetary value of any negative physical impacts. Rather than focusing on the monetary value of physical benefits, the regulations should require applicants to estimate the monetary value of *net physical changes* or *net physical benefits*, thereby accounting for both positive and negative changes. Third, section 6004(a)(6) requires the applicant to compare benefits to costs for a project; this section should be revised to “Compare Net Benefits to Costs.” Fourth, section 6006 of the draft regulations does not require the Department of Fish and Wildlife or the State Water Resources Control Board to account for

⁴ Section 6004(a)(3) states that the calculation of potential physical benefits “should” consider any negative impacts. This section must be revised to require such analysis, replacing “should” with mandatory language such as “shall.”

negative impacts in determining relative environmental values, undermining the Commission's ability to properly prioritize projects. To ensure that the proposed regulations are consistent with Proposition 1 and meet the clarity standard of the APA, the Commission should modify these sections of the draft regulations so that they explicitly require quantification of projects' net benefits, including negative impacts.⁵

III. The draft regulations inappropriately address the effects of climate change on potential benefits and impacts of storage projects

As we and other stakeholders have discussed in our prior comments, the draft regulations fail to adequately account for the effects of climate change in quantifying public benefits. We generally agree with the comments of the Union of Concerned Scientists regarding the analysis of climate change under the draft regulations, and briefly summarize our concerns below.

First, section 6004(a)(4)(I) of the draft regulations truncate analysis of the effects of climate change in 2050, even though DWR staff have previously informed the Commission that hydrologic and temperature modeling of the effects of climate change is available through 2099. The effects of climate change are likely to become significantly more pronounced after 2050, and freezing the effects of climate change in 2050 is completely unjustified, inappropriate, and inconsistent with state and federal policies regarding analyzing the effects of climate change. Similarly, by freezing the effects of climate change in 2050, the potential public benefits of a project are likely to be inaccurate because the modeling will ignore the best available science on the likely effects of climate change on hydrology and temperature after 2050. The Commission must ensure that the quantification of benefits and costs uses similar time series, either by requiring climate change analysis through 2099, or limiting the analysis of costs and benefits to 2050 or 50 years by revising the definition of the planning horizon in section 6000(a)(71).

Second, section 6004(a)(8) of the draft regulations requires a sensitivity analysis of the effects of a range of climate change scenarios to address "Sources of Uncertainty." Yet the draft regulations do not provide that this information will be used by the Commission in assessing public benefits, cost-effectiveness, or any aspect of their decision-making. Moreover, the effects of climate change are no more uncertain than many of the other aspects of assessing public benefits and impacts out to 100 years, such as the value of water, regulatory changes to protect the environment, or population growth. The Commission must revise the regulations to ensure that these analyses of climate change are actually used in assessing applications and making determinations of which projects to fund from Chapter 8. And as noted above, given the uncertainties further out into the future, the Commission should consider limiting the planning horizon to 50 years by revising the definition of the planning horizon in section 6000(a)(71).

⁵ This issue has also been addressed in multiple previous comment letters, and we request that the Commission review the attached letters along with these comments.

IV. The draft regulations fail to adequately ensure Commission only funds projects whose benefits outweigh their costs and limit funding to the least-cost alternative means of providing the public benefit

Proposition 1 requires that the Commission determine that funded projects are cost-effective. Water Code § 79750(b). The draft regulations define “cost-effective” as follows:

“Cost-effective(ness)” means a demonstration that a proposed project’s cost is the least-cost feasible means of providing the same or greater amount of benefit. Cost-effectiveness can apply to the project as a whole (total costs to provide the full set of benefits) or to an individual public benefit relative to the Program cost share for that public benefit.

Draft regulations, § 6000(a)(23). However, this definition fails to require that the benefits of a project actually exceed the costs of the project, which is wholly inconsistent with the plain meaning of “cost effective” in the text of Proposition 1. As discussed below, we agree that the least-cost feasible alternative is an important consideration in making funding decisions. However, the project benefits must outweigh the project costs to be eligible for funding. The regulatory definition must be revised to ensure that only projects whose benefits outweigh their costs are eligible for funding, in order to be consistent with Proposition 1.

That said, we strongly believe that funding from Proposition 1 should be limited to the least-cost feasible means of providing the public benefit. For instance, where installation of a temperature control device on an existing dam can provide a similar water temperature benefit at a fraction of the cost of constructing a new dam, the public benefit should be limited to the cost of constructing the temperature control device.

Although the draft regulations require the applicant to determine the least-cost feasible means of providing the public benefit, *see* draft regulations section 6004(a)(4)(E)-(F), it is not clear that the public funding provided by Chapter 8 is limited to the least cost alternative means of providing that benefit. In particular, section 6004(a)(7) must be revised to require that the public benefits be limited to the least-cost feasible means of providing the public benefit. Otherwise, it appears that projects could receive funding in excess of the least-cost alternative, wasting taxpayer monies from Proposition 1 that generate no public benefits.

V. The draft regulations fail to ensure that funded public benefits are effectively managed.

Pursuant to Proposition 1, funding for a project cannot be allocated until the project applicant has entered into a contract with the state agency charged with administering the project’s public benefits. Cal. Water Code § 79755(a)(3). This essential statutory requirement is designed “to ensure that the public contribution of funds pursuant to this chapter achieves the public benefits identified for the project.” *Id.* Commission staff has acknowledged that the

“[r]equired provisions of contracts between projects and state agencies must be set forth in regulation,” and providing clear guidance to project applicants and participating agencies is critical to ensuring that public benefits are effectively managed. *See* Presentation Slides from Dec. 2015 California Water Commission Meeting at 9, available at https://cwc.ca.gov/Documents/2015/12_December/December2015_Agenda_Item_8_Attach_1_WSIP_Updates_Final.pdf.

However, the proposed regulations merely selectively duplicate language from Water Code section 79755(a)(3) and fail to specify the elements that must be included in contracts between project applicants and public agencies. Specifically, section 6007(c) of the proposed regulations states that “any project funded under the Program shall enter into a contract with the California Department of Fish and Wildlife, the State Water Resources Control Board, and the Department of Water Resources to administer the public benefits of the project,” but does not elaborate on the contracts’ contents. *See also* Proposed WSIP Reg. § 6003(b)(2) (duplicating language from Water Code section 79755(a)(3) without further elaboration). These provisions appear to violate the APA’s non-duplication standard, and also create a substantial risk that the public benefits promised by Proposition 1 may never accrue.

During a Commission meeting on December 16, 2015, Commission staff suggested that details regarding the required contents of the contracts between project applicants and public agencies may be included in a second set of regulations that the Commission will develop in the future. For the sake of clarity, we strongly urge that the contract requirements be addressed comprehensively in one set of regulations, rather than being partially addressed in both.

Whether the contracts are addressed in the current proposed regulations or in a future set, the regulation 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 requirements will help to ensure that Chapter 8 funds are managed in a transparent manner, and that public benefits promised by project applicants actually materialize.

In addition to inadequately addressing contract components for the management of public benefits, section 6007 of the proposed regulations suffers from two additional flaws. First, section 6007(b) of the proposed regulations requires annual submission of reports detailing project operations, providing documentation of public benefits provided, and describing changes in the amount or type of public benefits and why those changes occurred. We appreciate that the Commission included language in the proposed regulations explicitly recognizing that the reports will be made publicly available. However, section 6007(b) still permits the Commission to make a “determination on a case-by-case basis that the reports can be provided less frequently or are no longer necessary.” While we are confident that current Commission members would use this authorization responsibly, we are concerned about leaving unknown future Commission members with unbounded discretion to excuse project applicants from submitting these

important reports. The reports are essential for ensuring transparency and public participation in the implementation of Proposition 1, and their submission should be required annually for the life of the project, without exception.

Second, the Commission should make two changes to section 6007(e) of the proposed regulations, which focuses on funding agreements between the Commission and project applicant, to ensure effective management of public benefits. Section 6007(e) of the proposed regulations currently states that the Commission “may” seek rescission of dispersed funds if the project fails to provide the identified public benefits. The permissive word “may” should be replaced by the mandatory word “shall” to ensure that funded public benefits actually accrue. Additionally, section 6007(e)’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 6007(e) should clarify that the Commission will seek either rescission *or reimbursement* of dispersed funds.



July 27, 2015

Joe Byrne, Chair
California Water Commission
1416 9th Street
Sacramento, CA 95814

RE: Consideration of Existing Compliance and Mitigation Requirements for Proposition 1 Water Storage Regulations

Dear Chairman Byrne and Commission Members:

On behalf of the Natural Resources Defense Council, Defenders of Wildlife, American Rivers, The Nature Conservancy, Audubon California, and Clean Water Action we are writing regarding how the Commission's water storage regulations should address existing environmental compliance and mitigation requirements. Our organizations supported and campaigned for Proposition 1 last year, and we continue to work to ensure that the bond is effectively implemented. It has recently come to our attention that Commission staff has interpreted Chapter 8 to mean that funding from the bond could be used to meet *existing* environmental compliance and mitigation requirements. Such an interpretation is wholly inconsistent with the text and legislative history of Proposition 1. The Commission's final regulations implementing Proposition 1 must ensure that funding from Chapter 8 cannot be used to meet existing mitigation or compliance obligations. These funds must be used for storage projects that provide meaningful environmental and water quality "improvements" and other public benefits, not existing mitigation or compliance obligations.

Chapter 8 of Proposition 1 generally provides that water bond funding will be used for water quality and ecosystem "improvements," that bond funds generally will not be used for environmental mitigation or compliance obligations, and that any project that is funded by Chapter 8 must result in measureable improvements in the Delta ecosystem or tributaries to the Delta. Cal. Water Code §§ 79750(b), 79752, 79753(a), (b). As discussed in more detail below, it would clearly violate Proposition 1 to use funds from Chapter 8 to pay for existing environmental compliance or mitigation obligations.

First, section 79753(b) explicitly prohibits the use of water bond funds for existing mitigation or compliance obligations with one very narrow exception—if a project that provides new ecosystem improvements also incurs some new mitigation requirements, Chapter 8 funding can be used to pay for those new mitigation requirements. The plain text of the statute makes the narrow scope of this exception clear. It states that “[f]unds shall not be expended pursuant to this chapter for the costs of environmental mitigation measures or compliance obligations except for those associated with providing the public benefits as described in this section.” *Id.* § 79753(b). To suggest that section 79753(b) means that Chapter 8 funds can be used to meet existing compliance or mitigation requirements would render the first half of the provision meaningless, overlooks the fact that the section does not refer to “existing” obligations, and ignores the requirement that public benefits are limited to ecosystem “improvements.”¹ The legislative history of Assembly Bill 1471 (Rendon) reinforces this interpretation. The August 13, 2014 Assembly floor analysis for AB 1471 states that the language in Chapter 8 includes requirements, “[p]rohibiting expending bond funds on environmental mitigation, except environmental mitigation associated with providing public benefits.” Assembly Floor Analysis, AB 1471, Concurrence in Senate Amendments, August 13, 2014, at page 2.

Second, section 79753(a) provides that only enumerated public benefits are eligible for funding, and specifies that environmental “improvements” are a public benefit eligible for funding. Cal. Water Code § 79753(a)(1). Merely meeting existing environmental compliance or mitigation obligations is not a water quality or ecosystem “improvement,” and therefore is not a public benefit eligible for funding. Funding for existing environmental compliance or mitigation obligations may improve water supply for the party that has those compliance or mitigation obligations, but it does not result in an environment that is improved compared to what is already required. The nonpartisan analysis of Proposition 1 in the voter pamphlet 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,

¹ Although section 79753(b) uses somewhat different language from other chapters of the bond, this section still unambiguously prohibits the use of bond money to pay for existing compliance or mitigation requirements. For instance, whereas section 79732(b) prohibits the use of bond monies to pay for any mitigation measures or compliance obligations by stating that Chapter 6 funds “shall only be used for projects that will provide fisheries or ecosystem benefits or improvements that are greater than required applicable environmental mitigation measures or compliance obligations,” section 79753(b) uses different language because it provides a limited exception allowing bond monies to pay for new mitigation or compliance obligations that are incurred in providing the new ecosystem improvements or other benefits. However, nothing in section 79753(b) would allow bond monies to be used for existing environmental compliance or mitigation obligations. Moreover, nothing in Chapter 8 of the bond requires the Commission to even allow for use of bond monies to pay for these new mitigation or compliance obligations.

July 27, 2015

Proposition 1, Analysis by the Legislative Analyst, available online at:

<http://www.voterguide.sos.ca.gov/en/propositions/1/analysis.htm>. Funding existing compliance or mitigation requirements would constitute an impermissible private benefit, not a public one.

Our organizations supported Proposition 1 in part because Chapter 8 required a competitive process for funding cost-effective storage projects, including both surface and groundwater storage projects, which requires significant environmental *improvements* in order to be eligible for funding. Using Chapter 8 funding to pay for existing environmental mitigation and compliance obligations is wholly inconsistent with the text and legislative history of Proposition 1, and subverts the will of the people. In order to comply with Proposition 1, the Commission must ensure that the final regulations for water storage funding do not permit funds to be used to pay for existing environmental compliance or mitigation requirements.

Thank you for consideration of our views. We would be happy to discuss this further at your convenience.

Sincerely,



Doug Obegi
Senior Attorney
Natural Resources Defense Council



Michael Lynes
Director of Public Policy
Audubon California



Rachel Zwillinger
Water Policy Advisor
Defenders of Wildlife



Jennifer Clary
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Sandi Matsumoto
Associate Director
The Nature Conservancy



October 13, 2015

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

Sent via email

RE: Comments on the October 6, 2015 Draft Water Storage Regulations

Dear Chairman Byrne and Members of the Commission:

On behalf of the Natural Resources Defense Council (NRDC), which has which has 2.4 million members and activists, 380,000 of whom are Californians, I am writing to provide comments on the October 6, 2015 draft water storage regulations that were presented to the Stakeholder Advisory Committee earlier this month. While staff has made substantial progress in drafting the regulations to implement Chapter 8 of Proposition 1 over the past year, the draft regulations are inconsistent with Proposition 1 in several key ways, as discussed below. We urge the Commission to ensure that the draft regulations are revised to be consistent with Proposition 1 before initiating the formal rulemaking progress.

First, the draft regulations violate Proposition 1 by permitting the Commission to fund existing mitigation and compliance obligations, such as existing flow and water temperature regulations. *See* Draft Regulations §§ 6002(c)(6)(iii)(1), 6004(a)(1)(iv), 6004(a)(7)(ii)(5).¹ As we have written previously, Proposition 1 (particularly section 79753(b) of the Water Code) prohibits using public bond monies to pay for existing mitigation and compliance obligations. Yet the proposed regulations would do exactly that, permitting existing requirements or obligations to be public benefits funded by Proposition 1 as long as a third party bears the existing mitigation or compliance obligations. *Id.* For instance, section 6004(a)(1)(iii) requires existing requirements or obligations of the applicant to be included in the without project condition, and requires that the “public benefits claimed must provide an improvement above the existing requirements or

¹ Moreover, several of the water quality priorities identified in section 6005(b) are simply to meet existing mitigation and compliance obligations, particularly where there is a Total Maximum Daily Load established under the Clean Water Act. These need to be revised. In addition, while we strongly support reduced reliance on water supplies from the Delta, reducing demand for Delta water does not actually result in ecosystem improvements in the Delta, and Section 6005(b)(8) of the draft regulations does not require any physical changes in the Delta that are eligible public benefits. This provision must be revised to ensure that a project actually provides ecosystem and/or water quality benefits in the Delta and its tributaries, consistent with Proposition 1. Lastly, staff from the Department of Fish and Wildlife indicated in the prior Stakeholder Advisory Committee meeting that the priorities identified in section 6005(a) are of equal importance, and the regulations (potentially section 6006(a)) should be revised to reflect that these priorities are of equal importance.

NRDC comments to California Water Commission regarding October 2015 draft water storage regulations
October 13, 2015

obligations for the identified resource.” Yet section 6004(a)(1)(iv) allows the applicant to include meeting existing compliance or mitigation obligations of a third party as public benefits. This approach is unlawful; for instance, it would allow a CVP contractor to propose that a storage project’s public benefits are simply meeting the existing environmental obligations of the Bureau of Reclamation.

Meeting existing mitigation or compliance obligations simply is not an ecosystem or water quality improvement eligible for public funding under chapter 8 of Proposition 1. It is irrelevant who bears the compliance or mitigation obligations because Proposition 1 requires that the public benefits funded by the bond must be improvements over existing mitigation or compliance obligations. The draft regulations must be revised to require that existing mitigation and compliance obligations, regardless of the party who bears that obligation, are part of the “without project future conditions” baseline and are not eligible for funding as public benefits.²

Second, the draft regulations fail to adequately account for the negative impacts of water storage projects in quantifying the benefits of a project, failing to ensure that the Commission only funds the net improvements of a water storage project. Water Code §§ 79750(b), (c); *see* Water Code §§ 79752, 79753(a). In particular, sections 6004 and 6006 of the draft regulations fail to require the applicant or the agencies to account for environmental impacts of a project in calculating the public benefits of a water storage project. For instance, a storage project could propose to improve upstream water temperatures to benefit salmon and steelhead, yet also reduce water flowing into the Delta, which would negatively impact salmon, longfin smelt, and other species. Section 6004 does not require the applicant to account for and quantify these negative impacts in calculating the public benefits of a project, and section 6006 does not require the Department of Fish and Wildlife (“DFW”) or the State Water Resources Control Board (“SWRCB”) to account for these negative impacts in determining the relative environmental values. By failing to account for these negative impacts, the draft regulations overestimate the public benefits of a project and fail to ensure that a project results in net improvements. Both sections must be revised to ensure that the quantification of benefits accounts for the impacts of a project as well as its benefits.

Third, we strongly disagree that the effects of climate change are too speculative to include in the “without project future conditions,” as staff indicated in our last Stakeholder Advisory Committee meeting. Under the draft regulations, the effects of climate change are not included in the “without project future conditions” baseline for assessing the impacts of a project, and instead are relegated to a sensitivity analysis. *See* Draft Regulations §§ 6004(a)(1)(v), 6004(a)(8). However, in the Bay Delta watershed, both DWR and Reclamation have repeatedly included the effects of climate change in the No Action Alternative under NEPA and CEQA, including in the Revised Draft Environmental Impact Report / Supplemental Draft Environmental Impact Statement for the California WaterFix / Bay Delta Conservation Plan. In addition, the draft regulations largely limit the analysis of the effects of climate change to

² In addition, we strongly urge the Commission to require DWR to provide a default “without project future conditions” baseline for use by applicants, which would provide a common understanding of existing mitigation and compliance obligations and could significantly help smaller projects to prepare their application materials.

NRDC comments to California Water Commission regarding October 2015 draft water storage regulations
October 13, 2015

qualitative (rather than quantitative) analysis, and allow an applicant to omit all quantitative sensitivity analysis of the effects of climate change effects. *Id.* at § 6004(a)(8)(i)(1)(e) (“If the applicant determines that the quantitative analysis is not applicable to the proposed project, the applicant shall provide a qualitative analysis or otherwise explain why a quantitative analysis is not applicable.”). The draft regulations also make the sensitivity analysis of climate change effects irrelevant to calculating public benefits of a project; the sensitivity analysis of climate change effects is not actually utilized by DFW and the SWRCB is assessing relative environmental values of a project, *see* Draft Regulations § 6006, nor in the technical review of the application, *see id.* at § 6002(c)(4)(i), nor by the Commission in ranking projects and awarding funding, *see id.* at 6002(c)(6)(ii). The regulations must be revised to ensure that the effects of climate change are accounted for in assessing public benefits.

Finally, we strongly urge the Commission and staff to revise Section 6007 of the draft regulations to specify the minimum requirements of the contracts required under section 79755(a)(2) of the Water Code to manage and ensure public benefits of water storage projects are achieved. While subpart (a) of section 6007 specifies information that the applicant must provide, section 6007 does not specify any requirements regarding these contracts or otherwise specify how the Commission will manage and ensure that public benefits funded by the program will be achieved. These contracts play a critically important role in ensuring the public benefits are actually achieved and to implement adaptive management of those benefits. We strongly recommend adding a new subpart (b) of section 6007 specifying how public benefits will be managed and ensured, including minimum contract terms. Section 6007 should: (1) require public review and comment before a contract is finalized or subsequently amended; (2) require a right of third party enforcement to allow the public to enforce these public benefits; (3) specify how adaptive management will be implemented; and (4) require that monitoring data and reports be made available to the public.

Thank you for consideration of our views. Unfortunately we will be unable to attend the October Commission meeting to discuss these comments in person, but we would be happy to discuss these comments or answer any questions regarding them at the convenience of Commissioners or staff.

Sincerely,



Doug Obegi



November 12, 2015

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

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

Dear Chair Byrne:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Similarly, the draft regulations fail to account for the adverse impacts of new storage projects in calculating the net benefits eligible for funding, as required by Proposition 1. For instance, a storage project could propose to improve upstream water temperatures to benefit salmon and steelhead, yet also reduce water flowing into the Delta, which would negatively impact salmon, longfin smelt, and other species. Section 6004 does not require the applicant to account for and quantify these negative impacts in calculating the public benefits of a project, and section 6006 does not require the Department of Fish and Wildlife (“DFW”) or the State Water Resources Control Board (“SWRCB”) to account for these negative impacts in determining the relative environmental values. Sections 6004 and 6006 must be revised to require that these negative impacts are accounted for in calculating the public benefits eligible for funding, so that the Commission funds net improvements.

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

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

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

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

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

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

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

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

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

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

⁴ *Small Water Systems Program Plan*,

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

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

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

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

Pursuant to section 79755(a)(3) of the Water Code, project applicants must enter into contracts with public agencies “to ensure that the public contribution of funds pursuant to this chapter achieves the public benefits identified for the project.” Section 6007 of the draft regulations attempts to implement Water Code section 79755(a)(3), but is devoid of information or requirements regarding the contracts, and does not specify how the Commission will manage and ensure that public benefits funded by the program will be achieved. Because the contracts required by Water Code section 79755(a)(3) play a critically important role in ensuring the public benefits are actually achieved, we strongly recommend adding a new subpart (b) of Section 6007 specifying how public benefits will be managed and ensured, including minimum contract terms. Among other things, Section 6007 should: (1) require public review and comment before a contract is finalized or subsequently amended; (2) require a right of third party enforcement to allow the public to enforce these public benefits; (3) specify how adaptive management will be implemented; and (4) require that monitoring data and reports be made available to the public. Further, the submission of reports pursuant to Section 6007(a)(5) of the draft regulations should continue for the life of the project, irrespective of any Commission determination regarding the necessity of those reports.

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

Sincerely,



Kyle Jones
Policy Advocate
Sierra Club California



Miriam Gordon
California Director
Clean Water Action/Clean Water Fund

Rachel Zwillinger
Water Policy Advisory
Defenders of Wildlife

Doug Obegi
Staff Attorney, Water Program
Natural Resources Defense Council

Steve Rothert
California Regional Director
American Rivers

Colin Bailey
Executive Director
Environmental Justice Coalition for Water

Sandi Matsumoto
Associate Director, California Water Program
The Nature Conservancy



December 10, 2015

Joseph Byrne
Chair, California Water Commission
1416 9th Street
Sacramento, CA 95814

Sent via email to: cwc@water.ca.gov

RE: Comments on November 2015 Draft Water Storage Regulations

Dear Chairman Byrne and Members of the Commission:

On behalf of the Natural Resources Defense Council (NRDC) and Defenders of Wildlife, we are writing to provide comments on the November 24, 2015 draft water storage regulations. As discussed briefly below, in several critically important respects the draft regulations are inconsistent with the requirements of Proposition 1 and sound public policy. In our public comments and in prior letters to the Commission, we have discussed in detail most of the issues below. Instead of restating those issues from our prior comment letters, we have focused on developing the recommended edits to the draft regulations that are attached to this letter. We strongly urge the Commission to make changes to the draft regulations at the December Commission meeting, consistent with the recommendations in the attachment to this letter, to ensure consistency with Proposition 1 before initiating the formal rulemaking progress.

First, the draft regulations allow the Commission to spend bond monies to pay for existing environmental mitigation and compliance obligations, in violation of Proposition 1. As discussed in detailed comments by NRDC and other organizations dated November 12th, October 13th, and July 27th, Proposition 1 prohibits using bond monies to pay for existing environmental compliance and mitigation obligations.

Second, while the draft regulations require identification of adverse ecosystem impacts of a storage project, they fail to require the applicant and Commission to include those impacts in the quantification of benefits; as a result, the draft regulations do not quantify the net benefits of projects and fail to adequately account for environmental impacts of a project. This issue has likewise been raised in multiple prior letters to the Commission. As a result, the draft regulations overstate the potential benefits of projects, resulting in a flawed ranking of projects.

Third, the draft regulations fail to specify critically important requirements of the contracting process to ensure public benefits are achieved. Among other deficiencies, the draft regulations fail to specify that the public – which is paying for these public benefits -- has access to the

*Comments on November 24, 2015 draft Proposition 1 Water Storage Regulations
December 10, 2015*

reports of public benefits and has a role in adaptive management of public benefits in the future. Our prior letters to the Commission provide the rationale why these changes are necessary and appropriate.

Fourth, the draft regulations unreasonably limit the agency technical reviews and peer reviews of applications by limiting those reviews to methodology and quality control. These reviews must also include substantive review of the applications' conclusions and claimed public benefits.

In addition, we continue to have significant concerns with the climate change analysis identified in the draft regulations, including: (1) limiting climate change effects to 2050, even for modeled public benefits that exceed that date, consistent with DWR staff's presentation on the availability of that modeling; (2) lack of clarity ensuring that the climate change analysis is downscaled to the watershed level, consistent with staff's statement at the prior meeting; (3) inconsistency with the State's guidelines on climate change modeling, including both wetter and drier scenarios; and (4) the lack of integration of sensitivity analysis on climate change into the quantification of public benefits. To address these concerns, we generally support the recommended edits to the draft regulation developed by the Union of Concerned Scientists.

As noted above, attached to these brief comments are suggested edits to the draft regulations to address these concerns. Please contact us at your convenience if you have any questions or would like to discuss this further.

Sincerely,



Doug Obegi
Natural Resources Defense Council



Rachel Zwillinger
Defenders of Wildlife



Steve Rothert
American Rivers

Enclosure

NRDC, Defenders of Wildlife, and American Rivers
Proposed Amendments to November 2015 Draft Water Storage Regulations

December 10, 2015

Page 4: Amend the definition of “existing mitigation or compliance obligations” to be inclusive, not narrowly defined, and specifically identify biological opinions, water rights, licenses (FERC and SWRCB), water quality standards, etc. Eliminate the word “enforceable” to avoid disputes over whether existing permit and condition terms are enforceable and by whom.

(40) “Existing environmental mitigation or compliance obligations” means ~~enforceable~~ requirements or conditions including those in existing biological opinions, water rights orders and decisions, licenses, water quality standards, water quality certifications, permits, contracts, or grants intended to protect the environment.”

Page 17: Amend the references to the Wild & Scenic Rivers Act to ensure consistency with Prop. 1.

“(1) Does not adversely affect any river afforded protection in the California Wild and Scenic Rivers Act or the Federal Wild and Scenic Rivers Act pursuant to California Public Resources Code section 5093.50 et seq or 16 U.S.C. § 1271 et seq. as required by Water Code sections 79711(e) and 79751(a);”

Page 17: Amend the scope of the technical review of applications so that it is not limited to quality control, but actually evaluates the merits of the application.

“(A) The following items shall be reviewed and evaluated ~~from a quality control perspective~~ from applications that are deemed complete and meet basic eligibility requirements by the review outlined in sections 6002(c)(3) and 6002(c)(4) during the technical review period:”

Page 18: Amend the scope of the technical review so that it is not limited to evaluation of the methods used, but actually evaluates the conclusions reached.

“(E) The technical reviewers shall evaluate the methods, assumptions and conclusions ~~(extent to which assumptions were stated, scientific principles of ecosystems and water quality that were used, data sources identified, model/process used, internal consistency)~~ used in the quantification of public benefits required by section 6004. For ecosystem improvement benefits and water quality improvement benefits, the technical reviewers from the California Department of Fish and Wildlife and State Water Resources Control Board shall also evaluate the benefits as they relate to the ecosystem and water quality priorities and relative environmental values.”

Page 25: Amend the regulation’s monetization of project benefits, in order to ensure that applicants monetize the net physical changes, including negative impacts of a project, not just the benefits of a project:

(4) Monetize the Value of Net Project Physical Changes Benefits. The applicant shall estimate the monetary value of net physical changes benefits in accordance with subsections (A) – (H) below. The appropriate level of analysis for monetizing each public benefit type depends on the magnitude of that public benefit compared to all public benefits or the size of the proposed project. If physical benefits cannot be monetized, the applicant shall provide justification why and include a qualitative description of the benefits.

Page 26: Amend the public benefits that can be allocated to the program to exclude all existing mitigation or compliance obligations, consistent with Proposition 1.

4. Shall not be associated with an applicant's existing environmental mitigation or compliance obligations;

Page 26: Amend the public benefits that can be allocated to the program to include new environmental mitigation or compliance obligation costs that are associated with the public benefits of a project, consistent with Proposition 1.

(5) Shall consider the cost share of new environmental mitigation or compliance obligation costs associated with a proposed project component providing the public benefits, which shall not exceed the percentage of the public cost allocation for the related public benefit category.

Page 32: Amend the reporting requirements so that reports regarding project operations and public benefits are submitted annually for the life of the project, without exception, and clarify that the reports will be made available to the public.

(b) Any project funded under the Program shall, on an annual basis commencing with the end of the first full year of operation, submit a report to the Commission and the public agencies identified in Water Code section 79754. The report shall include, at a minimum, a description of actual project operations, documentation of annual public benefits provided, and description of any changes in the amount or type of public benefits and why those changes occurred. The reports shall be submitted annually for the life of the project ~~or until such time as the Commission makes a determination that the reports can be provided less frequently or are no longer necessary.~~ This and any additional reporting requirements shall be implemented through the funding agreement or agency contracts specified in Water Code 79755(a)(3). The reports will be made available to the public.

Page 32: Amend the provision regarding contracts with public agencies to include minimum contract terms and procedures that will help to ensure the identified public benefits are achieved.

(c) Per section 6003(b)(2), any project funded under the Program shall enter into a contract with the California Department of Fish and Wildlife, the State Water Resources Control Board, and the Department of Water Resources to administer the public benefits of the project. These contracts shall

supersede any preliminary operations, monitoring, and management commitments made in this section under subsection (a). These contracts shall, at minimum:

- (1) Be subject to public review and comment before being finalized or amended;
- (2) Include a right of third party enforcement to allow the public to enforce the public benefits;
- (3) Specify how adaptive management will be implemented to secure the identified public benefits; and
- (4) Require that all monitoring data and reports be made available to the public.

Page 32: Amend the section on funding agreements to clarify that the Commission will seek rescission or reimbursement of dispersed funds if projects fail to provide the identified public benefits.

(e) Per section 6003(e), any project funded under the Program shall enter into a funding agreement with the Commission. The funding agreement shall include language consistent with the requirements of the contracts and permits identified in subsections (c) and (d) and describe how the funding recipient will ensure the public benefits identified for the project are achieved. The funding agreement shall also describe the conditions under which the Commission ~~may~~shall rescind or require reimbursement of Program funding if the project does not provide the identified public benefits.