



## FRIENDS OF THE RIVER

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California Water Commission  
P.O. Box 942836  
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March 14, 2016

Re: Water Storage Investment Program Quantification Regulations

Friends of the River was pleased to serve on the Commission's Water Storage Investment Program Stakeholder Advisory Committee, has reviewed the program regulations, and offers the following comments on the wild & scenic river code provisions of the regulation.

To summarize, the proposed Water Commission regulations would do the following:

CALFED definition: The California Water Commission's January 29, 2016, proposed Water Storage Investment Program Quantification Regulations do not include the Shasta Dam raise within the definition of CALFED storage projects (§6000(a)(12)) for Commission purposes.<sup>1</sup> Since the Shasta Dam raise is not eligible for bond funding under the bond and existing law, and the CALFED storage projects are included in the list of eligible project types in the regulations (§6001(b)(2)(A)) and have special treatment for types of eligible applicants (§6001(b)(1)(G)), it makes sense to construct a definition that excludes ineligible projects in the broader CALFED group that might be defined by others.

Eligibility Review: §6002(c)(4)(B)(1) requires the Commission to review funding eligibility to avoid adverse effects to rivers protected within the California and National Wild & Scenic Rivers Acts. Projects that fail to meet §6002(c)(4) standards are not reviewed further (§6002(c)(5)(a)).

We presume the regulations contemplate that projects with a review stopped at this stage are ineligible for Commission funding. If this is incorrect, then *language in the regulations should be added here to clarify that projects that fail to meet the §6002(c)(4)(B)(1) and (2) [provides measurable improvements to the Delta ecosystem or to the tributaries to the Delta] test remain ineligible for funding and further Commission review and technical review in the absence of a showing that they have become eligible.*

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<sup>1</sup> The 2000 CALFED Record of Decision, after screening out a number of other potential surface-storage projects, selected a smaller subset of projects for additional feasibility reviews under the beneficiaries-pay principle. They include the projects in the Commission's proposed CALFED definition.

We do have some additional suggestions for clarifying regulation language in this area.

Here's the Commission's significant proposed Wild & Scenic River Acts (WSRA) regulation language:

§6002(c)(4)(B). Each complete application's submitted documentation shall be reviewed for Program eligibility and confirmed during the technical review in accordance with subsections 1–2 below:

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 section 79711(e) and 79751(a);

This is a fairly general and perhaps approximate summary of the tests required by the bond act and related state and federal wild & scenic rivers acts for project legality and funding eligibility. But this language is worth a closer look.

*Bond Language:*

The California Water Bond Act (Proposition 1) and Public Resources Code (PRC) California Wild & Scenic Rivers Act (CalWSRA) chapter's effective prohibition of the Shasta Dam raise and of storage projects affecting national and CalWSRA chapter rivers is more detailed than the proposed regulations. Here's the bond language:

Chapter 4, 79711(e) Nothing in this division [bond act] shall be construed to affect the California Wild and Scenic Rivers Act (Chapter 1.4 (commencing line 5 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 line 7 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 second half of this portion of the bond language (adverse-effect-on-values-afforded-protection funding prohibition) tracks to some degree with the proposed regulations. It is the first half of the bond act language (not affecting state and federal WSRA's) that may not be fully clear in the regulations.

*Applicability of proposed regulations to national wild & scenic rivers:*

For national wild & scenic rivers, the second-half bond language (adverse-effect-on-protected rivers) tracks reasonably well with the regulations and National Wild & Scenic Rivers Act.

For example, it is unlikely that applicants seeking bond funds will be able to receive required federal permits, permissions, or assistance to dam and impound National Wild & Scenic Rivers (See Section 7 National Wild & Scenic Rivers Act). Commission review to establish whether such

permits are available is certainly implied by the proposed eligibility regulations. Screening out illegal projects or projects ineligible for funding (and in this case both) is in the interest of the Commission.

With regard to the actual bond-language standard, the Interagency Wild & Scenic River Reference Guide “Q&A, Protective Management” notes that there are two<sup>2</sup> kinds of river values under the National Wild & Scenic Rivers Act:

Free-flowing Values. The free-flowing characteristics of eligible river segments cannot be modified to allow stream impoundments, diversions, channelization and/or rip-rapping to the extent authorized under law.

River-related Values. Each segment shall be managed to protect ORVs [Outstandingly Remarkable Values] (subject to valid existing rights) and, to the extent practicable, such values shall be enhanced.

In part because of the federal “values” definition, storage projects for which an application has been sought for Commission funding on national wild & scenic rivers are likely be *ineligible* under the bond language by failing the bond language “adverse effect on the values” test, in addition to any federal permit denials that they might experience.

There is an additional WSRA item of potential importance outside of the formal proposed Commission WSRA regulations. U.S. Forest Service and Bureau of Land Management policy is to provide interim protection to rivers found eligible (or eligible and suitable) by these agencies to be added to the national wild & scenic river system. While outside of the bond’s chapter 4 language, the Commission review of a project’s prospects of achieving required permits properly should take note of this policy by these two federal land-management agencies.

*Applicability to California WSRA Public Resources Code (PRC) chapter rivers:*

It is encompassing the full breadth of CalWSRA PRC chapter bond-language applicability where the proposed Commission regulations may fall short.

The most obvious operative sections from the CalWSRA PRC chapter follow:

PRC §5093.50 It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the California Constitution.

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<sup>2</sup> There are actually three federal WSRA values, free flowing, outstandingly remarkable values, and water quality. *Personal communication, Jackie Dietrich, USFS Interagency Council.*

PRC §5093.542 (b) No dam, reservoir, diversion, or other water impoundment facility shall be constructed on the McCloud River from Algoma to the confluence with Huckleberry Creek, and 0.25 mile downstream from the McCloud Dam to the McCloud River Bridge; nor shall any such facility be constructed on Squaw Valley Creek from the confluence with Cabin Creek to the confluence with the McCloud River.

PRC §5093.61 All departments and agencies of the state shall exercise their powers granted under any other provision of law in a manner that protects the free-flowing state of each component of the system and the extraordinary values for which each component was included in the system. All local government agencies shall exercise their powers granted under any other provision of law in a manner consistent with the policy and provisions of this chapter [the PRC code wild & scenic river chapter].

So the bond language has more specific circumstances and consequences than articulated in the proposed regulations. For example: (1) there is state policy that certain rivers (clearly including those in the state wild & scenic river PRC chapter where the policy lies) be preserved in a free-flowing state; (2) there's a specific provision of the PRC CalWSRA chapter that effectively prohibits the expansion of the Shasta Reservoir; (3) there is a specific provision of the PRC CalWSRA chapter pertaining to state designated wild & scenic rivers that requires state agencies and departments (presumably, including the Commission as well) to protect the free-flowing status of these rivers, and (4) local governments (institutions likely to seek bond funding) are required to follow the provisions and policy of the PRC CalWSRA chapter.

To summarize, examples 1, 2, & 4 pertain to any waterways that the legislature has required in the PRC CalWSRA chapter to remain free-flowing (these need not be rivers designated to be in the system, but include rivers such as the McCloud that are protected in the code without formal designation). Example 3 pertains to any designated CalWSRA wild and scenic rivers but not directly to CalWSRA-chapter-protected but not-designated rivers.

*Proposed revised language and observations:*

It might be helpful if the proposed regulations track more closely with the statutory framework. One simple way to make the regulations more closely track the statutory framework would be to *add the words “, including its free-flowing character,” between “adversely affect” and “any river” in §6002(c)(4)(B)(1) of the proposed regulations.*

Such an addition would provide some additional clarity to the Commission's proposed regulations without requiring any lengthy recitals of either the bond language or the state and federal WSRAs.

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