March 14, 2016

Joe Byrne, Chair
and members
California Water Commission
1416 9th st.
Sacramento, CA 95814

Dear Chair Byrne:

We would like to thank the Commission for the opportunity to comment again on the Water Storage Investment Program's (WSIP) Quantification regulations. These regulations will guide how a very large amount of public money can be invested for public benefits associated with water storage projects.

Throughout the process of drafting these regulations, we have watched and worked with the Commission to help the regulations create a fair program for all projects, not just surface storage reservoirs. It is critical that this money be used for projects that are resilient in the face of climate change, and not just a politically motivated expenditure towards a project that will not help California's water challenges.

We have focused our comments on the following:

- Allowing groundwater projects an even playing field that recognizes their role in helping Californian's cope with long-term droughts
- Ensuring a proper climate analysis that ensures that public benefits can continue for the life of the project
- Assuring consistency with Governor Brown's Executive Order B-30-15 and Assembly Bill 1482
- Keeping public oversight over the management of public benefits through the application process and for the life of the projects
- Guaranteeing consistency with the Water Bond to prevent these projects from just satisfying existing mitigation and compliance obligations of proponents

The Commission needs to focus on what is best for California. We believe that our comments should be adopted and will only allow public funds to go towards worthy projects. We will continue to work with the Commission through the months to come to ensure that only the best projects go forward. We thank you for the consideration of our views on this area. Please feel free to contact us if there are further questions.

Sincerely,

Kyle Jones
Policy Advocate
Sierra Club California

Jennifer Clary
Water Program Manager
Clean Water Action

PROPOSED SECTION 6000

PROPOSED SECTION 6000(a)(39) IS INCONSISTENT WITH WATER CODE SECTIONS 79753(b) AND 79755(a)(2) AS IT ALLOWS FUNDING OF MITIGATION AND COMPLIANCE MEASURES OTHER THAN THOSE ASSOCIATED WITH PROVIDING THE PUBLIC BENEFITS

The proposed WSIP regulations are inconsistent with the language in the Water Bond because they unnecessarily limit the definition of "existing mitigation and compliance obligations." The Water Bond was not designed to provide a public give away of funds to private parties, and the regulations need to be consistent with that message.

The APA requires consistency, meaning the regulations are in harmony with, and have no conflict with existing laws. (Cal. Govt. Code § 11349 subd. (d).) The water bond requires that funds cannot go to mitigation and compliance obligations, except where associated with providing the public benefits. (Cal. Wat. Code § 79753, subd. (b).) Any benefits that a project provides to a private party, such as their mitigation and compliance obligations, needs to be covered by a contract between the private party and the applicant. (Cal. Wat. Code § 79755, subd. (a)(2).)

The proposed definition of "existing mitigation and compliance obligations" in proposed section 6000 (a)(39) needlessly restricts where these mitigation and compliance obligations can be found to "permits, contracts, and grants intended to protect the environment." This restriction could allow for funding of existing mitigation and compliance obligations would be inconsistent with Water Code (WC) section 79753 (b). Any private benefits funded as a result of this limited definition would be inconsistent with WC section 79755 (a)(2).

Existing mitigation and compliance obligations factor into the regulations during the quantification of public benefits in proposed section 6004. That section does not allow existing mitigation and compliance obligations to be included in the without-project future conditions, which serve as the conditions at which to determine a project's impacts. By restricting the definition of existing mitigation and compliance to "permits, contracts, and grants intended to protect the environment," other forms of mitigation and compliance that are not associated with the public benefits will fail to be captured by the without-project future conditions, leading to them being improperly funded by the WSIP.

In the water quality world, violations often result in enforcement orders being issued by the State Water Resources Control Board. It is not clear from the proposed definition whether these orders would fall under a permit, contract, or grant, and yet they still must be complied with. If a project were to fulfill an order, there would be a private benefit that would be funded as a public benefit for water quality. Instead, this order should have been included in the without-project future condition, and a contract with the party for them to cover the costs for the benefit should have been reached. Public funding for this is not consistent with WC 79753 (b).

Similarly, the limitation on benefits to items for environmental benefit produces the same result. It is feasible that permits, contracts, and grants contain provisions that affect the natural environment without being intended to protect the natural environment. Fulfilling these items with water bond money would be inconsistent with WC 79753 (b).

The APA mandates consistency with existing laws and enabling legislation. The proposed WSIP regulations do not adhere to this mandate. Consistency regarding existing mitigation and compliance is critically important as it prevents public funding from becoming a private gift. The regulations as drafted should be rejected in favor of language that reflects the statute.

PROPOSED SECTION 6000(a)(39) LACKS CLARITY AS INTENDED TO PROTECT THE ENVIRONMENT AND IS NOT EASILY UNDERSTOOD

The definition of "existing mitigation and compliance obligations" limits these obligations to items intended to protect the environment. The regulations do not clearly indicate how an item intended to protect the environment is defined.

The APA requires regulations to be easily understood by the persons directly affected by them in order to satisfy the clarity requirement. (Cal. Govt. Code § 11349, subd. (c).) In this case, the phrase "intended to protect the environment" is unclear. For example, would operational requirements contained in a permit for flood control be intended to protect the environment?

The provision in WC 79753 (b) against existing mitigation and compliance obligations does not specify that these obligations must arise from items intended to protect the environment. This addition to the regulations should be removed as it lacks clarity and adds to confusion.

PROPOSED SECTION 6000(a)(71) SHOULD BE AMENDED TO REMOVE THE 100 YEAR LIMIT AS THE TERM IS LATER PROVIDED IN PROPOSED SECTION 6004

As stated below, the planning horizon may need to change for the regulations to have consistency and clarity with climate change laws. Proposed section 6000 (a)(71) should reflect this as well. The 100-year limit included in the definition is redundant as the 100 year limit is also a requirement in proposed section 6004 (a)(4)(B). The timing of the planning horizon is better analyzed in that proposed section, not the definition.

PROPOSED SECTION 6002

PROPOSED SECTION 6002(b) SHOULD BE MODIFIED TO PREVENT ELIGIBLE PROJECTS FROM BEING UNNECESSARILY DISQUALIFIED

Proposed Section 6002 (b) creates a framework for a mandatory pre-application process. Here, applicants will go through an initial round of eligibility by Commission staff, public comment, and Commission comment. The reason for this process is that the Commission can weed out projects that are not eligible, thus saving applicants who may not have eligible projects time and money.

This process also has the effect of limiting the field of potential applicants by requiring applicants to meet Commission pre-application deadlines. Projects who are eligible for funding may be able to meet the full application deadlines but not the pre-application deadlines. While it is preferable that these projects be deemed eligible before the full application, there is little harm to the Commission or public from them risking being deemed ineligible after expending their own resources for the full application.

While there is a benefit in having an initial round of public and Commission vetting for a project, the unintended consequence of disqualifying potential applicants is worrying. This section should be amended so that the pre-application is encouraged, but not mandatory. This will allow projects to still achieve benefits and protections of the pre-application, while also ensuring that eligible projects can still move forward if they can be ready for the full application process.

PROPOSED SECTIONS 6002(c)(4) SHOULD INCLUDE A STAFF FINDING OF ELIGIBILITY

Currently, the eligibility review requires documentation by project applicants, but no staff evaluation of the documentation, nor any finding that the project is eligible. This section should be amended to include staff review and to require staff to make a finding that the applicant has complied with the requirements of the review and is in fact eligible.

CALIFORNIA AND FEDERAL WILD AND SCENIC RIVERS ACTS

We would like to align our comments with the comments made by Friends of the River regarding proposed section 6002 and project eligibility with respect to the California and Federal Wild and Scenic Rivers Acts.

PROPOSED SECTION 6002(c)(7) SHOULD INCORPORATE 60 DAYS FOR PUBLIC COMMENT PRIOR TO MAKING AN INITIAL FUNDING DECISION TO ALLOW THE PUBLIC TIME TO MEANINGFULLY COMMENT ON ALL APPLICATIONS

The proposed regulations do not include a public comment period in the full application process until after the Commission makes an initial funding agreement, before making a final funding decision. This allows the Commission to make critical choices of what projects are eligible for public scrutiny and support. As beneficiaries of the bond, the public should have a place at the table and be able to weigh in on all projects in a set period during which they can go over the various reviews and provide feedback and oversight. This needs to be done before the Commission makes its initial funding decision as to ensure that the information the Commission is receiving is accurate.

The 21-day public comment period is also too short for the public to weigh in effectively. Much of the information on these projects will be highly technical, and there will be numerous projects undergoing review. The Spring 2015 Scoping Survey found 89 projects initially. (Cal. Water Comm., *Proposition 1 – Water Storage Investment Program: Project Scoping Questionnaire* (May 2015) <https://cwc.ca.gov/Documents/2015/05_May/May2015_SACMeeting_ScopingSurveyResults.pdf>.) There may be many more projects that actually seek funding through the application process, all with detailed information to understand and respond to. At least 60 days is needed for the public to have a chance to provide input in a meaningful way.

PROPOSED SECTION 6004

PROPOSED SECTIONS 6004(a)(4)(B) AND 6004(a)(4)(I) ARE INCONSISTENT WITH EXECUTIVE ORDER B-30-15, ASSEMBLY BILL 1482 AND WATER CODE SECTION 79750(b) BECAUSE IT FAILS TO MAXIMIZE DROUGHT RESILIENCY ASSOCIATED WITH CLIMATE CHANGE

The proposed WSIP regulations do not properly analyze climate change for the entire period at which benefits can accrue. This is inconsistent with recently passed legislation and orders by Governor Brown. The failure to meaningfully include climate change in the regulations will lead to funding of public benefits that will never be realized.

As stated, the APA requires consistency with existing laws. Assembly Bill 1482 (AB 1482) added requirements for state agencies to plan for and maximize climate adaptation where applicable and feasible. (Assem. Bill No. 1482 (2015-2016 Reg. Sess.) § 2.) Pertinent to the WSIP, drought resiliency related to climate change must be addressed. (Cal. Pub. Res. Code § 71154, subd. (e).) Executive Order (EO) B-30-15, by Governor Brown, mandates that climate change be taken into account for planning and investment decisions. (Governor's Exec. Order No. B-30-15 (Apr. 29, 2015).) WC section 79750 (b) appropriated money for the WSIP, only for public benefits. Proposed section 6004 (a) ignores the mandates in AB 1482 and EO B-30-15 by allowing for climate change and drought resiliency analysis to stop at mid-century while allowing project benefits to continue to accrue to the 2120s. In turn, this violates WC section 79750 (b) by not ensuring that funds go towards public benefits.

ASSEMBLY BILL 1482

AB 1482 requires climate adaptation to be maximized wherever feasible and applicable, including drought resiliency that climate change will bring. (Cal. Pub. Res. Code § 71154.) Climate change will induce a dramatic shift in hydrology for California. Higher temperatures will decrease the snowpack and move the timing of runoff from snowmelt to the spring instead of summer. While precipitation totals are projected to remain the same, precipitation volatility will increase, meaning more years of drought followed by wetter years. Any project must properly analyze how this likely climate scenario will impact any purported benefits. The CWC can feasibly improve their regulations to maximize climate adaptation required by AB 1482 for both climate extremes but also for the entire benefit period.

EXECUTIVE ORDER B-30-15

Executive Order B-30-15 requires agencies to include climate change when accounting for their investments and infrastructure projects, and to employ full life-cycle cost accounting. (Governor's Exec. Order No. B-30-15 (Apr. 29, 2015).) This requires that investments, such as the WSIP take climate change into account for the entirety or their investment, not just half of that investment.

WATER CODE SECTION 79750(b)

Funding for the WSIP was appropriated in this section for "the public benefits associated with water storage projects." This requires that public money be spent in a manner that ensures these benefits are actually achieved. A lack of adequate climate analysis will overstate benefit resiliency to the changing future, resulting in funding be earmarked towards benefits that can never be maintained.

WATER STORAGE INVESTMENT PROGRAM CLIMATE PROVISIONS ARE INADEQUATE

Current proposed section 6004 (a) requires applicants to determine the climate impacts to their projects, but does not require these impacts to be calculated or applied after 2050, even though the projects themselves can claim benefits to the state for at up to 100 years until 2120. Additionally, the regulations request project proponents utilize a "median" or middle-of-the-road climate change scenario (with no change in average rainfall), rather than scenarios that reflect the potential for more severe conditions, to ensure that water systems would be built in a manner that would be resilient to not only average conditions but also to more extreme conditions.

Under the existing regulatory scheme, a surface storage project could claim to provide $20 million in ecosystem benefit annually by providing a cold water pool for salmon habitat. This could be analyzed to be feasible under 2050 conditions. But as the temperature continues to warm, the project may no longer be able to provide this benefit for the full 100 years as temperatures increase and the snowpack decreases. This lack of climate analysis might lead to an overfunding for a benefit by hundreds of millions of dollars in this scenario.

Similarly, only looking at middle of the road climate conditions will overstate project benefits in the future. At the January 20, 2016 Water Commission hearing, DWR staff explained that climate projects show that precipitation will become more volatile, with longer, drier dry periods and more intense rainfall. According to DWR's California Climate Science and Data for Water Resources Management, "more intense wet periods are anticipated under warmer conditions" and "[e]xtremes on the wet end of the spectrum are also expected to increase." (Dept. of Water Res., *California Climate Science and Data for Water Resources Management* (June 2015) p. 15 (*available at* https://cwc.ca.gov/Documents/2016/01_January/January2016_Agenda_Item_14_Attach_1_CAClimateScienceandData.pdf).)

By continuing to rely on average historical precipitation only, as proposed section 6004 (a) does, a projects flood control benefits might fail to be properly analyzed. A surface storage project that provides a flood control benefit reasonably will not be valued as high in a future where it is dry 80% of the time and spilling over in more heavy rains the other 20% of the time.

Consistency with AB 1482, EO B-30-15, and WC 79750 (b) requires that public benefits that the CWC are eligible to fund undergo a meaningful climate analysis for the entire life cycle of the benefit that maximizes drought resiliency that climate change will certainly bring. Anything less than this conflicts with the law and should be rejected by OAL.

To ensure consistency, we propose that the planning horizon for which projects can claim benefits be limited to the point at which climate change modeling is unavailable. The proposed regulations stop climate analysis at 2050, which should be the stopping point at which benefits can accrue, unless more robust climate modeling can be developed. The precipitation portion of the climate analysis must be refined to capture the reality that while rain totals may stay the same, these rains will come as drier dry years and wetter wet years.

PROPOSED SECTIONS 6004(a)(3) AND (4) ARE INCONSISTENT WITH WATER CODE SECTION 79750(b) BY FAILING TO PROPERLY ACCOUNT FOR ADVERSE IMPACTS IN A WAY THAT DOES NOT ENSURE NET ENVIRONMENTAL BENEFITS

WC section 79750 (b) provides funds to the Commission for public benefits that provide a net improvement to ecosystems and water quality. Proposed sections 6004 (a)(3) and (4) allow an applicant to subtract impacts from proposed benefits and then monetize the remainder. This process ignores the impacts of the benefits that the California Environmental Quality Act (CEQA) does not address and ignores the costs of the impacts. This also does not create an accurate comparison between impacts and benefits to ensure net improvements.

CEQA requires an applicant to mitigate impacts associated with their project, but does not cover all impacts in their entirety. Impacts may be unmitigated entirely through a statement of overriding considerations. (*See* Cal. Pub. Res. Code §§ 21080, 21081.)

The current proposed regulations are not clear in that they require all impacts to be identified and mitigated, including those that may not be required in environmental documentation. What impacts are identified are somehow subtracted from the benefits, without any clear way of determining how the impacts and the benefits correlate to each other.

These negative impacts that are not required to be mitigated under CEQA or are not mitigated under CEQA should be identified and then monetized. Then, the applicant should compare the costs to provide the benefits with the costs of the impacts associated with providing the benefits to ensure accurate comparison. Without the monetization of impacts, the statute's requirement of net improvements cannot be guaranteed.

For consistency with the Water Bond, the proposed regulations should be strengthened to ensure that all negative impacts must be identified. Those impacts must be monetized separately from the project benefits, then the impacts and benefits should be weighed to insure a net improvement.

PROPOSED SECTION 6004(a)(4)(B) LACKS CLARITY SINCE A 100-YEAR LIMIT ON PROJECT LIFE IS PURPORTED TO REDUCE SPECULATION YET CLIMATE UNCERTAINTIES ARE ALLOWED TO EXIST

The proposed WSIP regulations are lack clarity in that they select a 100-year limit for projects to accrue benefits for the purpose of removing speculation in the accrual of these benefits, yet admit that climate uncertainty is too great to properly analyze for the entire time period. By not including climate effects that will likely reduce benefits, it is no longer clear why the 100-year limit removes speculation as is purported.

The clarity requirement of the APA requires regulations to be easily understood by the persons directly affected by them. (Cal. Govt. Code § 11349, subd. (c).) OAL has interpreted this requirement to require the language of the regulation to not conflict with the effect or reason of the regulation. (Cal. Code Regs., tit. 1, § 16, subd. (a)(2).)

The Initial Statement of Reasons (ISR) explains that proposed section 6004 (a)(1)(B) provides an upper limit of 100 years for cost and benefit in order to ensure that highly speculative benefits will not be counted. To support this timeframe, a 1983 federal guideline is cited. In proposed section 6004 (a)(4)(I), however, the ISR states that climate impacts will not be counted after 2050 due to the uncertainty regarding the impacts.

There is a conflict in stating that project benefits can accrue only for 100 years to avoid speculation in one part of the regulations, yet state that impacts that will likely negatively impact those benefits are too uncertain to calculate beyond 2050. The ISR is clear in its intent, yet the proposed language does not achieve this effect. In order to reduce speculation of benefits, the time frame used should capture all uncertainties and not ignore climate change. The CWC should require either a more robust climate analysis or shorten the time benefits can accrue, as suggested above.

PROPOSED SECTION 6004(a)(5) NEEDS TO INCORPORATE THE DECOMMISSIONING OF THE PROJECT WHEN ESTIMATING PROJECT COSTS TO MAINTAIN CONSISTENCY WITH EXECUTIVE ORDER B-30-15

Proposed section 6004 (a)(5) contains items that must be included in project costs, but it is not clear that project decommissioning is included as well. As noted, Executive Order B-30-15 mandates "full life-cycle cost accounting. (Governor's Exec. Order No. B-30-15 (Apr. 29, 2015).) This means that the cost should include everything from construction to operations and maintenance during the project life to decommissioning when the project is no longer functional. The regulations need to make clear that this cost must be included as well.

PROPOSED SECTION 6004(a)(5) SHOULD REQUIRE APPLICANTS TO MAINTAIN A DECOMMISSION TRUST TO ENSURE PROJECT REMOVAL WHEN THE PROJECT IS NO LONGER FUNCTIONAL AND AVOID TAXPAYER BURDEN

All infrastructure has a period at which it can no longer serve its intended purpose or provide public benefit. Often, costs associated with decommission projects are not factored into the initial project cost, and are not provided for. An example of this can be found in the recent need for the state to provide $250 million to remove dams that no longer provide a benefit on the Klamath River. The Commission should require, as a condition of funding, funds for project decommissioning to be placed in a trust so that those costs do not fall on the public when they need to be removed.

PROPOSED SECTION 6004(a)(7) IS INCONSISTENT WITH WATER CODE SECTION 79750(b) BY NOT LIMITING FUNDS TO THE LEAST-COST ALTERNATIVE

We would like to align our comments here with the comments made in part IV. of the letter by the Natural Resources Defense Council and Defenders of Wildlife.

PROPOSED SECTION 6004(a)(8)(A)(2) LACKS CLARITY AS FUTURE PROJECTS CONTAINED IN A CUMULATIVE IMPACTS ANALYSIS ARE NOT UNCERTAINTIES BUT ARE REASONABLY FORESEEABLE PROBABLE PROJECTS

Proposed section 6004 (a)(8)(A) asks applicants to run projects through a sensitivity analysis that is designed to guide the Commission where changes to the public benefits may change due to uncertainty. This stated effect of the regulation does not make sense when paired with future projects contained in a cumulative impacts assessment under CEQA. The Office of Planning and Research's CEQA Guidelines include in the cumulative impacts analysis as "reasonably foreseeable probable future projects." (Cal. Code Regs., tit. 14, § 15355, subd. (b).) When the impacts from the future projects are deemed to be cumulatively considerable with any impacts from the proponent's project, those impacts must be mitigated. (*Ibid.*) The Supreme Court noted that the future projects in a cumulative impacts analysis cannot be speculative. (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2012) 52 Cal.4th 155, 174-175, fn. 10.)

Since the CEQA guidelines and case law hold that these projects are certain enough to require mitigation and are not based on any type of speculation, it is not clear why they would be considered uncertain in these regulations. These projects need to be factored into the with and without-project future conditions so that their probable impacts to the applicant's purported public benefits can be analyzed. These impacts can change the benefits and how much funding the project can receive and should be included before the benefits are monetized.

PROPOSED SECTION 6007

PROPOSED SECTION 6007 FAILS TO ENSURE PROPER MANAGEMENT OF PUBLIC BENEFITS

We would like to align our comments with the comments made in part V. of the letter by the Natural Resources Defense Council and Defenders of Wildlife.