



CALIFORNIA FARM BUREAU FEDERATION

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Submitted via email

WSIPComments@cw.ca.gov

March 14, 2016

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

Re: Comments on the Water Storage Investment Program Quantification Regulations

Dear Commission Members:

The California Farm Bureau Federation (“Farm Bureau”) is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 53,000 agricultural, associate and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

A final set of adopted WSIP regulations represent an important step toward development of critically important new water storage in California using the \$2.7 billion in continuously appropriated funds committed to that purpose in the Water Quality, Supply, and Infrastructure Improvement Act of 2014. Farm Bureau commends the California Water Commission (“Commission”) and its staff for all of their hard work on this important issue and thanks the Commission for the opportunity to comment on the Commission’s proposed Water Storage Investment Program Quantification Regulations at this time.

Farm Bureau believes that the current proposed regulations are generally consistent with the plain language meaning and intent of the "net improvement" and "public benefits" provisions of Proposition 1. This aspect of the regulations was correctly analyzed in a Water Commission staff “Working Draft Summary” dated August 3, 2015,¹ and was the

¹ See CWC Staff, Working Draft Paper: “Issue Working Session – Environmental Mitigation and Compliance Obligations” (Aug. 3, 2015), (“CWC Staff Recommendation”), at p. 1.

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subject of numerous comments by Farm Bureau, the Association of California Water Agencies, and others during the Commission's extensive Water Supply Investment Program ("WSIP") stakeholder process.²

Earlier iterations of the draft regulations had strayed significantly from the plain language of Proposition 1, including especially section 59753(b) of the Water Code. Section 59753(b) states, clearly and unequivocally, that Chapter 8 funds "shall not be expended [...] for the costs of environmental mitigation measures or compliance obligations except for those associated with providing the public benefits [described in 79753(a)]." The "public benefits" described in 79753(a) are, in turn, "public benefits associated with water projects," as described, in the areas of "ecosystem improvements," "water quality improvements," "flood control benefits," "emergency response," and "recreational purposes." (See Water Code section 79753(a).)

The clear meaning of these provisions was vigorously contested in the WSIP process by a coalition of environmental interests, the net effect of whose preferred reinterpretation of the statute would be to severely limit the ability of Proposition 1 water storage funding to achieve net benefits to fish and the environment over the existing environmental baseline. The clear and unequivocal intent of section 79753(b), however, is that Proposition 1 Chapter 8 be available for public investment in water storage infrastructure capable of providing significant improvements in conditions in the identified public benefit categories—even where such improvements might contribute to improvement in an environmental condition which might directly or indirectly bear upon, or otherwise implicate some component of an existing mitigation or compliance obligation ("shall not be expended ... for the costs of environmental mitigation measures or compliance obligations except for those associated with providing the public benefits [described in 79753(a)]").

If an interested member of the public believes or alleges that some component of the complex suite of existing and legally enforceable mitigation measures and compliance obligations in the existing baseline are not being met, there are appropriate venues and legal options through which such an individual may seek redress. The environmental interests currently opposing Proposition 1 funding for net benefits to the environment over the current, environmental baseline have, indeed, shown little hesitation to exercise such legal options in the past. Notwithstanding, physical and biological realities associated with existing baseline conditions—including current limitations of our existing infrastructure—have sorely challenged by even the best efforts of our regulated communities. Even in the face of deep cutbacks, increasingly stringent restrictions, and elaborate efforts to protect our protected fish species, the reality is that the existing water system is failing from both a water supply and an ecological standpoint. In light of that

² See California Farm Bureau Federation WSIP comments dated October 23, 2015 and December 15, 2015 and Business and Agricultural Coalition WSIP Comments dated August 17, 2015 and Association of California Water Agencies WSIP comments dated October 23, 2015 and December 15, 2015.

reality, we would submit that California voters can very legitimately affirm a desire to invest in improvements in public benefits, over and beyond the current *status quo*—and that they have, in fact, done so in Proposition 1.

Arguing against the intended benefits of Proposition 1, both to water supply and endangered fish species and the environment, the Natural Resources Defense Council (“NRDC”) would utilize the Commission’s regulations to rewrite the text of Proposition 1.³ Remarkably, the NRDC argues that the regulations are inconsistent with the plain language and intent of section 79753(b) because they do not include new language altering and reinterpreting the actual, unequivocal language of the statute itself.⁴ In similar circular fashion, the NRDC points to legislative history language reciting the exact language of the statute *verbatim*, to argue that this language, somehow, negates the same language in the statute.⁵ The NRDC further argues that the language of the regulation should avoid “confusing” the public by amending language that is directly consistent with the statutory language and, instead, incorporating language that reinterprets and substantively changes the plain language of the statute to comport with the NRDC’s own unnatural reading of the statute.⁶

³ See NRDC letter to the Commission dated March 10, 2016.

⁴ See March 10, 2016 NRDC letter to Commission, page 4: “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.”

⁵ See March 10, 2016 NRDC letter, *supra*, at pages 3-4: “To suggest that section 79753(b) means that Chapter 8 funds can be used to meet existing compliance or mitigation requirements [...] overlooks the fact that the section does not refer to ‘existing’ obligations, and ignores the requirement that public benefits are limited to ecosystem ‘improvements.’ [...] 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.”

⁶ See NRDC at pages 5-6: “[Section 6004(a)(7)(A)(5) of the proposed regulation] 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.”

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With all due respect, Farm Bureau submits that such convoluted and counterintuitive reinterpretations of an unambiguous statute were offered during the lengthy WSIP stakeholder process and have been sufficiently entertained by the Commission at this point. Such fundamental changes to the regulations now would not only directly contradict the plain language of the statute, but would also amount to a complete reversal of the public process underlying the development of these regulations. Common sense is a good guide. A majority of the Commission made the right call on these issues in the draft regulations as currently proposed. There is nothing to warrant fundamental modification of the proposed regulations in this critical area. The regulations faithfully meet the APA's non-duplication, clarity, and consistency requirements on the issue of eligible public benefits, and should *not* be countervailed at this late date.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Justine E. Fredrickson', with a long horizontal line extending to the right.

Justine E. Fredrickson
Environmental Policy Analyst

JEF/ph