



# CALIFORNIA FARM BUREAU FEDERATION

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December 7, 2016

California Water Commission  
P.O. Box 924836  
Sacramento, CA 94236

Re: Comments on 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 48,000 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.

### **I. Introduction**

The California Farm Bureau Federation (“Farm Bureau”) appreciates the opportunity to comment on the Commission’s November 22, 2016 draft of its “Quantification Regulations” for the Water Storage Investment Program, and appreciates the hard work invested by both the Commission and its staff to date in developing these regulations. The Commission’s final adopted and codified regulations will represent a critical milestone on the road to increased water supply reliability and restored ecosystem health in California.

While Farm Bureau continues to have concerns in some areas of the regulations as described below, we are pleased to see major improvements in the November 22, 2016 draft of the regulations. While there has been considerable debate throughout this process, with the latest draft of the regulations we feel that the Commission is reaching a point of equilibrium and the most important objective now is to simply follow through and adopt a workable set of regulations for water storage investment that can faithfully carry out of the will of California’s electorate in enacting Proposition 1. In that spirit, Farm Bureau’s primary concern at this point is that the Commission meet its statutory

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deadline to adopt regulations by December 15, 2016. With respect to the most recent draft of the regulations, Farm Bureau offers the following specific comments:

## **II. Consistency with Proposition and the Intent of the Electorate**

### **A. Treatment of Environmental Mitigation and Compliance Obligations**

#### **1. Textual Consistency with the Statutory Language of Water Code section 79753(b)**

Farm Bureau is pleased to see that the Commission's November 22, 2016 language in section 6004(a)(7)(4) at last incorporates the textual language of Water Code section 79753(b) on the important issue of fundable environmental mitigation and compliance obligations associated with the public benefits. As reflected in the repeated comments of several Commissioners, such consistency is indeed necessary to ensure a defensible and legally valid regulation. At this point, the Commission's technical "clarification" of the Commission's interpretation of the scope of that language is much more constrained than Section 79753(b) requires. Nonetheless, we consider the technical approach outlined in sections 6003(a)(1)(AA), 6004(a)(1), and 6004(a)(1)(E) of the November 22<sup>nd</sup> draft regulation to be a critical step forward to the extent that approach provides a clear and specific methodology to determine what *is* and what *is not* a fundable public benefit "associated with" one or more of the public benefits.

Although Farm Bureau continues to dispute the legal and policy position that there is any actual prohibition in Chapter 8 of Proposition 1 against broadly funding *any* net physical improvements so long as these improvements are "associated with the public benefits," Farm Bureau recognizes that the current draft language gives meaning to the words "except for those [environmental mitigation or compliance obligations] associated with providing the public benefits." Moreover, as distinguished from some previous iterations, this draft has the distinct virtue of aligning with the Commission's express direction to staff on this point at its November 15, 2016 meeting—which is certainly a positive development overall.

#### **2. "Existing" versus "New" Environmental Mitigation and Compliance Obligations**

Farm Bureau remains concerned that the defined term "existing environmental mitigation or compliance obligations," in sections 6001(a)(32), 6003(a)(1)(V) and (AA), continues to introduce an implied distinction between "existing" and "new" mitigation and compliance obligations that is *not* found in Proposition 1. While, as noted, the current language of 6004(a)(7)4. and the technical approach laid out in sections 6003(a)(1)(AA), 6004(a)(1) and 6004(a)(1)(E) have helped to provide some clarity, the word "existing" remains a source of potential confusion elsewhere in the draft regulations that will now carry into implementation. Given this latent ambiguity, it will be now imperative that the Commission preserve reasonable project-specific discretion to

properly dispose of unique facts and circumstances as these emerge from the actual application process.

### **3. Consistency with Other Important Priorities of Proposition 1**

In addition to the improvements in sections 6004(a)(7)4., 6003(a)(1)(AA), 6004(a)(1) and 6004(1)(E), as noted in Section 2.a.i. above, Farm Bureau commends the Commission on the current draft's treatment of "Eligibility and Completeness" and "Commission Maximum Conditional Eligibility Determination," specifically as these sections relate to various important statutory priorities including "improvements to the Delta ecosystem," "improv[ing] the operations of the state water system," "provid[ing] net improvement in ecosystem and water quality conditions," "advanc[ing] the long-term objectives of restoring ecological health and improving water management for beneficial uses of the Delta." Farm Bureau similarly appreciates the current draft's treatment of "magnitude of benefits" (including "spatial and temporal scale"), "relative environmental value," and "integration/flexibility" in the "Technical Review" and "Scoring" sections. These elements not only directly reflect important priorities in Proposition 1, but also indirectly align with compelling state policy as reflected in the California Water Action Plan<sup>1</sup> and the "co-equal goals" of the 2009 Delta Reform Act.<sup>2</sup>

#### **B. Schedule**

A workable set of regulations that leads to expeditious disbursement of funds to eligible projects should be the central goal of the Commission's process. A reasonably transparent public process is certainly part of such a process, as the public indeed has a significant stake in the Commission's process. At the same time, permitting, funding, and building badly needed improvements to our existing water system will itself be a herculean task where the stakes for project applicants and the State of California, as long-term financial partners and investors in selected projects, are extraordinarily high. Farm Bureau urges the Commission to look for all possible means to avoid extraneous process and additional burdens and delays in implementation that could hinder, rather than advance the intent of the voters with respect to Proposition 1's fundamental goals to provide "more reliable water supplies, the restoration of important species and habitat, and a more resilient and sustainably managed water infrastructure."<sup>3</sup> Moving forward with an adopted set of defensible regulations is a first important step toward achieving these fundamental goals. Efficient process, however, should remain a top priority for the Commission, not only as the Commission approaches this endpoint in its rulemaking process, but also and *especially* in actual program implementation.

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<sup>1</sup> See sections 6000 ("Purpose and Definitions") ("Chapter 2 of Proposition 1, Water Code section 79701(e), declares the will of Californians that funding within Proposition 1 is provided to obtain three objectives of the California Water Action Plan: more reliable water supplies, restoration of important species and habitat, and more resilient and sustainably managed water infrastructure"). See, also, section 6011(h) ("Commission Maximum Conditional Eligibility Determination").

<sup>2</sup> See Water Code sections 85054 and 85304.

<sup>3</sup> See, *supra*, §6000, Water Code § 79701(e).

### **C. Quantitative Objectivity**

Farm Bureau notes and applauds staff's efforts in the November 22, 2016 draft regulations to improve the quantitative precision of the Commission's process. Such quantitative objectivity will be important to advance expeditious implementation of the Water Storage Investment Program by eliminating unnecessary subjectivity and controversy, supporting the Commission in the exercise of its discretion, and prescribing a defensible technical approach for the difficult "apples-to-oranges" comparisons among projects that might otherwise challenge program applicants and the Commission in their task. Examples include the use of approved model products and established processes for the treatment of environmental mitigation and compliance obligations associated with public benefits, in addition to various quantitative features of the proposed "Technical Review" and "Scoring" process.

### **D. Certainty *versus* Flexibility**

To enable local beneficiaries to anticipate and adequately assess the risks and benefits associated with investment in a proposed project, the Commission's approach to public benefits assumptions, required analyses, and underlying baseline issues must provide a level of reasonable certainty. A measure of such certainty can presently be found in some positive new features of the November 22<sup>nd</sup> relating to prescribed model products, required analyses, and greater quantitative precision. Given the diversity of potential project types and the substantial cost and complexity of the Commission's application process, while affording a stable set of ground rules, the Commission's process must at the same time provide some flexibility in the face of potential remaining uncertainties. Staff has clearly endeavored to build some such flexibility into the "Eligibility and Completeness," "Technical Review," and "Scoring" sections of the regulations. As the Commission closes its rulemaking process, how to strike an optimum balance between reasonable certainty and some flexibility will now become another critical task for program implementation.

### **E. Agency Findings**

For a functional program and a viable application process, it would be very helpful to include in the Commission's final adopted regulations some express clarification that the references to "the requirements of Water Code section [79753 / 79750, *et seq.*]" and "consistent with Water Code section 79753" in the "Agency Findings" of the draft regulations mean, specifically, "the requirements of Water Code section [79753 / 79750, *et seq.*]" and "consistent with Water Code section 79753" as those provisions of the Water Code are ultimately interpreted in the regulations adopted by the Commission after consultation with the Department of Fish and Wildlife, the State Water Resources Control Board, and the Department of Water Resources pursuant to Water Code section 79754.<sup>4</sup>

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<sup>4</sup> See Water Code, § 79754 ("In consultation with the Department of Fish and Wildlife, the state board, and the Department of Water Resources, the commission shall develop and adopt, by regulation, methods for

Farm Bureau believes that such clarifying language could be important to foster necessary certainty and avoid any risk of inconsistent statutory interpretation by the consulting agencies that could, in turn, delay or unduly complicate the application process. For purposes of the California Administrative Procedures Act, since this interpretation should in fact be inferred to apply by operation of law, such clarification should be either “nonsubstantial” or “sufficiently related” to the Commission’s original notice, within the meaning of Government Code section 11336.8, to avoid the need for an additional 15-day notice period. On the other hand, if the Commission believes this *would* be a “substantial and insufficiently related” change, Farm Bureau does *not* wish that this or any other issue should *delay* the Commission’s regulations at this point, and would instead merely highlight for the Commission the need for close interagency coordination and consistency on the approach to “public benefits” as another key issue for successful implementation.

### III. CONCLUSION

In summary, Farm Bureau greatly appreciates the changes in section 6004(a)(7)(4) of the November 22<sup>nd</sup> draft regulation incorporating the direct statutory language of section 79753(b), as well as the changes in sections 6003(a)(1)(AA), 6004(a)(1), and 6004(a)(1)(E) prescribing the specific technical approach for the modeling of environmental mitigation and compliance obligations “associated with the public benefits.” Farm Bureau has remaining statutory consistency concerns relating to “existing” versus “new” mitigation and compliance obligations, but believes at this time that the Commission’s regulations must be finalized without delay, even if such issues must then be dealt with subsequently, on a project-by-project basis. As noted, the importance of quantitative objectivity, reasonable certainty versus reasonable flexibility, and the need for common understanding across agencies in the area of “public benefits” are additional areas in which to focus attention and additional effort in implementation.

Our organization looks forward to continued additional opportunities for engagement on behalf of our statewide agricultural membership in the important implementation phase of the Commission’s Water Storage Investment Program.

Very truly yours,



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quantification and management of public benefits described in Section 79753 by December 15, 2016. The regulations shall include the priorities and relative environmental value of ecosystem benefits as provided by the Department of Fish and Wildlife and the priorities and relative environmental value of water quality benefits as provided by the state board.”).