



California Water Commission  
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Sent via email to [WSIPComments@cwcc.ca.gov](mailto:WSIPComments@cwcc.ca.gov).

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

Dear Chairman Byrne and Members of the Commission:

Friends of the River (FOR) joined with Defenders of Wildlife et al. in submitting comments on the August 29, 2016, revised proposed regulations for the Commission's Water Storage Investment Program (WSIP or Program) quantification regulations. We urge the Commission and Commission counsel to consider them carefully and accept our recommendations.

Here, Friends of the River et al. offer some supplemental comments, largely as a followup to FOR's comment letter on the previous proposed regulations. The subject areas of the supplemental letter include the following:

- Request for clearer language on the definition of CALFED projects.
- Request for the wild and scenic river eligibility determination regulations to offer more clarity and consistency with Proposition 1.
- Support for Defenders of Wildlife et al. request to develop the concept of minimum reasonable value to avoid impermissibly allowing applicants to overestimate the economic value of public benefits.

**CALFED definition:**

The California Water Commission's January 29, 2016, proposed WSIP Quantification Regulations did not include the Shasta Dam raise within the definition of CALFED storage projects (§6000(a)(12)) for Commission purposes.<sup>1</sup>

"CALFED surface storage projects" means Los Vaqueros Reservoir Expansion, In-Delta Storage Project, Sites Reservoir, and Temperance Flat Reservoir.

As the Commission, staff, and stakeholders have discussed many times, the Shasta Dam raise CALFED investigation alternative is illegal under the California Wild & Scenic Rivers Act and, as such, ineligible for Chapter Eight funding, a fact made even more clear by Chapter 4, §79711(e) and Chapter 8, §79751(a) of the Water Bond itself. Our comments complimented these earlier proposed regulations for their clarity in excluding the Shasta Dam raise from its regulatory definition of the CALFED storage projects for the WSIP purposes. Unfortunately, the revised regulations, §6001(a)(10), although in one aspect more informative, could be read by some to be less clear.

"CALFED surface storage projects" means projects meeting the requirements of Water Code section 79751(a). For the purposes of this program, this includes Los Vaqueros Reservoir Expansion, In-Delta Storage Project, Sites Reservoir, and Temperance Flat Reservoir.

Some readers who fail to look up the referenced code section might interpret the word "includes" as "includes, but not limited to." This reading is not supported, however, by the referenced Water Code section, §79751(a), created by Proposition 1, which reads,

§79751. Projects for which the public benefits are eligible for funding under this chapter consist of only the following: (a) Surface storage projects

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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 that might advance under the beneficiaries-pay principle.

The financing strategy for individual storage projects will vary due to the design and planned operations of each project. Final cost allocations, however, will be made based on the principle of "beneficiaries pay." *p. 47 CALFED ROD.*

The projects listed in the revised proposed WSIP regulations are among the projects in the Commission's proposed CALFED definition — a definition created for its WSIP purposes, not CALFED purposes. It should be noted, however, that it is not clear that even with Commission funding, these potential storage projects can be financed by the beneficiaries.

identified in the CALFED Bay-Delta Program Record of Decision, dated August 28, 2000, except for projects prohibited by Chapter 1.4 (commencing with Section 5093.50) of Division 5 of the Public Resources Code.

The Public Resources Code reference is to the California Wild & Scenic Rivers Act, which would prevent the enlargement of Shasta Reservoir and thus the Shasta Dam raise.<sup>2</sup> We, thus, understand the revised proposed regulatory definition language to mean that since the Shasta Dam raise is excluded from the Program and is also excluded by statutory definition from the definition of the CALFED surface storage projects, it is also intended to be excluded in the regulatory description for clarity purposes.<sup>3</sup> However, on first reading by some, this revised proposed regulation is less clear than the previous draft.

Requested Action: We, therefore, request that the Commission replace “includes” with “means” to meet the clarity standard of the Administrative Procedures Act (APA).<sup>4</sup>

Relevance: In the previous proposed regulations, this definition was relevant because CALFED projects were defined in then §6001(b)(2)(A) as eligible projects, and joint powers authorities associated with CALFED projects were defined as eligible applicants for Chapter Eight funding in then §6001(b)(1)(G).

The revised proposed regulations delete the explicit description of the eligibility criteria from the proposed regulations. In addition, the WISP Draft Technical Reference Document does not reference specific CALFED storage projects in the context of their eligibility. Thus, at first glance, these definitions might have appeared to have lost their regulatory relevance. However, §6003(a)(1)(E) of the revised proposed regulations instead requires the applicant to describe a project’s or an applicant’s eligibility according to the statutory criteria. Commission staff is required by §6006(c)(1)(A)(1) of

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<sup>2</sup> For map and USBR Shasta Lake Water Resources Investigation narrative references, see endnote 40 in the “Shasta Dam raise fact sheet 5-26-2016” or later available on the Friends of the River website.

<sup>3</sup> The WISP Draft Technical Reference Document, incorporated by reference into the revised proposed regulations also chooses to define the CALFED surface storage projects. “Projects meeting the requirements of Water Code Section 79751(a).” Setting aside the issue of whether the WISP Draft Technical Reference Document belongs in the revised proposed regulations, the Commission should consider using our requested definition in both documents.

<sup>4</sup> “Clarity” means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them. California Government Code §11349.1(c). Since most persons (likely water resources professionals) affected by these regulations may not be familiar with the Public Resource Code and the required map references, providing an unambiguous list of projects that comply with the Water and Public Resources Codes would be make the regulations easily understood.

the revised proposed regulations to conduct a basic eligibility review using, among other criteria, an application's consistency with Proposition 1 Water Code sections 79711 79751, the sections dealing with wild & scenic rivers. §6006(c)(2)(A) of the revised proposed regulations then requires Commission staff to conduct another eligibility review of the application using the code sections above.

Water Code §79751(a) declares the CALFED projects to be eligible for chapter 8 funding (except for the prohibited project(s) discussed above). Water Code §79757, part of the applicant eligibility statutory criteria, discusses the contemplated roles of joint powers authorities for the CALFED projects. Water Code §79711(e) applies to the entire Water Bond, including chapter 8, and makes clear that the bond does not affect the state and national wild & scenic rivers acts and that no funds from any part of the bond can be used that would affect the values upon which these rivers were protected.

There have been lots of twists and turns on this regulatory definition, and even those of us who have followed the path of these regulations closely might have missed a turn or two. But, in short, the definition of the CALFED storage projects is still relevant and thus could benefit from additional regulatory clarity.

## **Wild & Scenic Rivers**

In our comments on the earlier proposed regulations, we requested that the proposed wild-and-scenic-river conflict test adopt a more complete and meaningful summary of the controlling statutory framework. Our suggestion was not incorporated into the revised proposed draft WSIP quantification regulations.

The APA "reference" standard contemplates that regulations will interpret the governing statutory framework.<sup>5</sup> We argue here that our proposed interpretation revision is more consistent with the "clarity" and "consistency"<sup>6</sup> duties of the APA (California Government Code §11349.1(c) and §11349.1(d)) than the revised proposed regulations.

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<sup>5</sup> "Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation. (California Government Code §11349.1(e))

<sup>6</sup> "Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law. (California Government Code §11349.1(d))

Revised Proposed Regulations: §6003(a)(1)(I) requires applicants to provide an

[e]xplanation that the project does not adversely affect any river afforded protection in the California Wild and Scenic Rivers Act or the Federal Wild and Scenic River Act.

§6006(c)(2)(A) requires Commission staff to conduct an eligibility review to determine the project

[d]oes 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 16 U.S.C. §1271 *et seq* or California Public Resources Code section 5093.50 *et seq.*, respectively, as required by Water code sections 79711(e) and 79751(a)

Presumably, this “does not adversely affect any river...” regulatory language is meant as a surrogate for the Water Bond §79711(e) and §79751(a) language concerning potential Commission actions affecting rivers protected by the National and California Wild & Scenic Rivers Acts. We argue that this shorthand description could benefit from some additional clarifying language.

Proposed Revised language: Friends of the River proposed and Friends of the River et al. propose here that “including its free-flowing character” be inserted between “adversely affect” and “any river” in the portions of now sections 6003 and 6006 above. Such regulatory language, consistent with the Commission’s APA duties, *interprets* the statute with more *clarity* and *consistency* than the current revised proposed regulatory language.

Background: The California Water Bond Act (Proposition 1) and Public Resources Code (PRC) California Wild & Scenic Rivers Act (CalWSRA) and National [federal] Wild & Scenic Rivers Act (WSRA) are all complex and nuanced statutes.<sup>7</sup> Their provisions may affect WSIP eligibility and are not well summarized in the proposed regulations in a way that would be “easily understood by those persons directly affected by them.” To explain, let’s start with a key provision of the bond language:

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<sup>7</sup> The latest memo Friends of the River memo on the effects and history of the California wild & scenic river system runs for sixteen pages. It is available on request from the Friends of the River office. Friends of the River’s binder copy of the “Wild & Scenic Rivers Reference Guide” from the Interagency Wild & Scenic Rivers Coordinating Council is two inches thick.

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.

In other words, (1) the bond language statute preserves the applicability of the provisions of the California (under which the Commission has obligations) and National Wild & Scenic Rivers Acts and (2) explicitly makes bond funds unavailable to projects that could have an adverse effect on the values that prompted the afforded state and federal protections.

The revised proposed regulations appear to be attempting to conflate these two statutory responsibilities into a phrase that summarizes both. The regulations would then simply requires applications to pass a no-adverse-effect eligibility test for projects affecting these protected rivers for Commission funding. Understood in that manner, it's not a bad phrase. Unfortunately, most water-resources professionals (the individuals most likely to be affected by these regulations) do not spend time with these statutes and their guidance documents, thus this simplified regulatory shorthand for the effect of these statutes may be too unclear.

For example, the regulation's "adverse effect" test certainly seems similar to the statute's "adverse effect on river values," but are there differences? And many water-resources professionals would ask what do these values spoken of in Proposition 1 mean? What is an example of an adverse effect? The regulations are silent. We argue that including the example of having an adverse effect on the free-flowing character of the river is consistent with the state and federal statutory framework and would make the regulations reasonably clear in most situations. More complicated but rare circumstances would require access to counsel, the wild and scenic river statutes, legislative histories, case law, and guidance documents of course.

*Applicability of proposed regulations to national wild & scenic rivers and vice-versa:*

The framers of Proposition 1 extended the Commission's responsibility to avoiding actions that advance dams and reservoirs with adverse effects on national wild & scenic rivers (presumably in California). This federal statute does not impose this obligation

on the state or state agencies, so the legislature's and voter's actions here are important and precedential.

Of course, federal agencies also have statutory obligations to avoid adverse effects on national wild and scenic rivers and generally have broad authority to protect these rivers from adverse water resources projects. Their authorities, however, do not involve prevention of state agencies from allocating funds to these projects. Of course, eventually, it is unlikely that applicants seeking allocations of bond funds can receive required federal permits, permissions, or assistance to dam and impound national wild and scenic rivers (see §7 National Wild & Scenic Rivers Act). Thus this early and continuing eligibility review is in the interest of the Commission and other applicants, something obviously recognized by the framers of Proposition 1.

A federal WSRA §7(a) review begins with an inquiry into whether the project “would have a direct and adverse effect on the values for which the [wild & scenic] river was established.”<sup>8</sup> Relevant to the actual bond-language standard (and by inference the current revised proposed regulations) the interagency *Wild & Scenic Rivers Reference Guide* “Management Responsibilities”<sup>9</sup> provides some guidance on the values that prompt designation.

The Secretary of Agriculture or the Interior (or his/her designee) is responsible for making determinations under Section 7 [of the National Wild & Scenic Rivers Act].

Evaluate a water resources project based on its effects on the values for which a river is added to the National System, namely its free-flowing condition, water quality, and ORVs.

Free-flowing and Outstandingly Remarkable Values (ORVs, the federal term for the state's similar extraordinarily remarkable values term) are defined and described in the National Wild & Scenic Rivers Act and the interagency *Wild & Scenic Rivers Reference Guide*. The Guide's “Compendium of Questions and Answers Relating to Wild & Scenic Rivers”<sup>10</sup> offers guidance on the meanings of these terms (see pp. 17-18, for

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<sup>8</sup> WSRA §7 reviews for licensing actions by the Federal Energy Regulatory Commission are more rigorous.

<sup>9</sup> <https://www.rivers.gov/documents/management.pdf>, p. 19. (accessed September 30, 2016) “The Wild & Scenic River Reference Guide” is composed of numerous Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council.

<sup>10</sup> <https://www.rivers.gov/documents/q-a.pdf>. (accessed September 30, 2016)

example), although it offers guidance in other parts of this portion of the guide and other parts of the Guide as well.

In part because of the broad federal “values” Guidelines definition and the federal statutory framework, storage projects for which an application has been sought for Commission funding on national wild & scenic rivers are likely to eventually be *ineligible* under the Commission’s regulations because of failure to acquire federal permits based on the federal “adverse effect on the values” test — a potentially similar test to the Proposition 1 tests, but tests that currently lack regulatory examples or definition.

The question for the revised proposed regulations is whether such projects would fail the Commission’s revised proposed regulations adverse-effect eligibility test. Ideally, it should. Of course, a study of federal wild & scenic river guidance references would achieve that understanding. However, applicants and reviewing staff may not be familiar with the nuances of the National Wild & Scenic Rivers Act (or CalWSRA), thus our concern that the revised proposed regulations may not “be[] in harmony with...existing statutes...” at least as potentially misunderstood “by those persons directly affected them.” Including the most likely storage-project conflict, free-flowing, as an example in the regulations would aid in understanding.

Federal Addendum. Also, as we noted in our previous comments, there is an additional WSRA item of potential importance outside the Commission’s explicit WSRA regulations based on Proposition 1. 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 during their land management planning under WSRA §5(d)(1). While outside of the bond’s chapter 4 language, the Commission’s review of a project’s prospects of achieving required permits should take note of this policy by these two federal land-management agencies. Thus an inquiry into the potential interim protection status by these two agencies could be valuable and should be appropriate to include in the Commission’s basic information-gathering components of the proposed regulations.

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

Although the state and federal statutory frameworks are different, they are close enough that our suggested “free-flowing” example insertion remains relevant and useful for the same APA purposes as in our federal discussion. To begin a state discussion, remember that the bond language states that the bond does not affect the California Wild & Scenic Rivers Act. So what does CalWSRA say?



The California Wild & Scenic Rivers Act: 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. (*emphasis added*)

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. (*emphasis added*)

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]. (*emphasis added*)

In other words, (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 is a specific provision of the PRC CalWSRA chapter that effectively prohibits the expansion of 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.<sup>11</sup>

*Redux — Proposed revised language:*

To repeat, the APA requirements that the statute be *consistent* with the controlling statutory framework and be *clear* to those who use the regulations argue for at least a slightly more complete description of the statutory language in the revised proposed regulations they are seeking to *interpret*. Thus our simple suggestion that add the words “, including its free-flowing character,” between “adversely affect” and “any river” in the sections of the revised proposed regulations discussed above.

Other formulations are also possible, and we would be happy to consult with Commission staff and the Commission to fashion other simple, clear, and meaningfully accurate regulatory characterizations of the Commission’s CalWSRA responsibilities.

### **Meditations on the “Minimum Reasonable Value of the Benefit”**

The September 28, 2016, letter from Defenders of Wildlife et al. discussed the concept of the minimum reasonable value of the benefit. It is worth a careful reading and hopefully reflects or will reflect the Commission’s intended regulatory philosophy.

In developing these proposed regulations over their many drafts and stakeholder meetings, economists were an important part of the team deciding how to quantify the values of the proposed public benefits of projects. Much discussion and work ensued, all prompted by the Proposition 1 language that these projects be ranked by their expected return for public investment.

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<sup>11</sup> We note that Reclamation in its letter on the revised proposed regulations suggests that the regulatory eligibility criteria be changed to an “[e]xplanation that the project does not 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 or federal Wild and Scenic Rivers Acts.” To the extent that Reclamation or the Commission adopt a narrow definition of values (particularly in the CalWSRA context), this criteria could miss the reach of the Bond Act and the preserved CalWSRA statutory framework as noted above. Also note that the neither the revised proposed regulations or the Bond Act define “values,” understandable because WSRA and CalWSRA may define (or perhaps fail to define) these differently — the former perhaps more broadly than the latter, but the latter having a statutory framework that still focuses on free-flowing. Therefore, the Commission would be ill-advised if it were to adopt Reclamation’s suggested language as the sole regulatory summary of this nuanced legal framework.

The revised proposed regulations develop this simple concept more (or sometimes misdevelop it, something Defenders et al. and the signatories of this letter are asking the Commission to fix). Setting aside the additional issue of whether the WSIP Draft Technical Reference Document belongs in the proposed regulations at this time, the Reference document develops these concepts even more.

At its simplest, the minimum reasonable value of the benefit involves two concepts: (1) that the value and thus the rankings and potential financing allocations should be determined on the basis of the minimum value of the various econometric means of calculating the benefit and (2) the recognition that the inclusion of least-cost alternatives and willingness to pay, among others, could result in some modest estimations of the public benefits.

It is worth recognizing that willingness to pay may be especially important to this valuation. If general principles of economic efficiency are meant to drive these valuations (as most good economists would assert), it may even be worth constructing a regulatory inquiry on the willingness to pay with regular funding (often from the general fund and provided in the ordinary budgeting process) allocated to the agency managing the public benefit money versus special funding with somebody else's money. The results might be expected to be different and illuminating.

We don't believe that these issues are entirely hypothetical or beyond reach. Agencies that may be applicants here routinely make decisions on how much they are willing to pay for certain public benefits (as defined in Proposition 1) such as recreation and flood control, both with and without outside subsidies. It is routine for them to develop reasonable estimates on their willingness to pay, as well as the willingness to pay by other agencies in their region, for what the bond has assigned to the public benefit category.

The Commission should be prepared to ask this question, and these regulations and any technical reference document (subsequent or otherwise) should establish some means to getting some answers and provide for meaningful incorporation of these answers in WSIP decisions.

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