

State of California
California Water Commission

California Code of Regulations, Title 23. Waters
Division 7. California Water Commission
Chapter 2. Procedure for Water Infrastructure
Improvements for the Nation Act Determination

Initial Statement of Reasons

Background and Authority

In 2016, Congress passed the Water Infrastructure Improvements for the Nation Act (S. 612) (WIIN Act) to address, support, and improve the infrastructure related to many aspects of water throughout the United States. Section 4007 of the WIIN Act allows the United States Bureau of Reclamation to participate in state-led water storage projects in limited circumstances:

- (1) on the request of a state governor, participate in state-led water storage projects in an amount up to 25% of the total project cost; and
- (2) provide financial assistance to carry out projects within any "Reclamation State" (in general, a western state in which Reclamation operates a water development project).

WIIN Act Section 4007(f) requires storage projects seeking funding from the federal government pursuant to the WIIN Act to first obtain a determination from the California Water Commission (Commission) that the project is consistent with the California Water Quality, Supply and Infrastructure Improvement Act (Proposition 1).

The Commission previously evaluated and made the required WIIN Act findings for eight projects (WSIP Projects) that applied for funding pursuant to California Water Code section 79750 *et seq.* These regulations do not apply to WSIP Projects, because the Commission already determined the WSIP Projects are consistent with Proposition 1.

Problem Statement

Congress adopted the WIIN Act to address the nation's needs for water infrastructure improvements. While typically the federal government's adoption of law does not necessitate state action, in this instance, to obtain WIIN Act funding, proponents of water storage are required to obtain the determination outlined above. The California Water Commission has an obligation to provide a public forum for these projects and to make a determination on these projects. However, the California Water Commission does not have any regulations or processes to address the duties delegated to it by Congress in the WIIN Act.

The California Legislature adopted, and voters approved, Proposition 1 to finance a water quality, supply, and infrastructure program to address the various challenges and needs facing California's water resources, and made the following findings, codified in California Water Code section 79701, including:

- Government has a responsibility to safeguard clean and safe water for homes, businesses, and farms and this responsibility is critical to protecting the quality of life for all Californians;
- Every Californian should have access to clean, safe, and reliable drinking water;
- Droughts continue to plague California;
- California's water infrastructure is aging and deteriorating;
- Funding is necessary to implement the California Water Action Plan objectives of more reliable water supplies, restoration of important species and habitat, and a more resilient and sustainably managed water infrastructure;
- Developing and guarding our water resources is critical for California to maintain vibrant communities, globally competitive agriculture, and healthy ecosystems.
- Water conservation and recycling are "commonsense methods to make more efficient use of existing water supplies";
- Sustainable water management in California depends upon reducing and reversing overdraft and water quality impairment of groundwater basins. Investments to expand groundwater storage and reduce and reverse overdraft and water quality impairment of groundwater basins provide extraordinary public benefit and are in the public interest; and
- Protecting lakes, rivers, and streams, cleaning up polluted groundwater supplies, and preserving water sources that supply the entire state are crucial to providing a reliable supply of water and protecting the State's natural resources.

(California Water Code section 79701.)

Water storage plays a key role in California, where the quantity, timing, and location of water demand frequently do not match the natural water supply availability. Water storage is fundamental to managing variability in water supply for human and environmental purposes and is a critical tool for providing water management flexibility in California. New surface water or groundwater storage capacity can provide improvements to the operations of the state water system and a robust set of benefits, including water supply reliability for municipal and industrial uses, agriculture, and ecosystem purposes. Increased surface storage can also provide water to improve flow

regimes and lower water temperatures to increase fish survival in rivers and the Sacramento-San Joaquin Delta (Delta), as defined in Water Code section 85058. Increased surface storage also provides flood storage space, water quality improvements, hydropower generation, and recreation opportunities. Increased groundwater storage can provide groundwater recharge, reduce overdraft, and minimize or stabilize land subsidence. It may also capture flood flows and improve water quality. When conjunctively managed (i.e., managed in a planned and coordinated manner), surface and groundwater storage projects can provide synergistic benefits for all or many of these desired outcomes.

Improving water supply reliability depends on the ability to capture and store water during peak flows and wet years. Water storage serves as a “water savings account” that allows water to be captured and stored until needed and can allow for more efficient water use when integrated with other water management tools, such as conservation and recycling. For example, water conserved through water use efficiency practices, such as reduced irrigation losses, could be stored in water storage facilities and “saved” for use at another time or for another purpose.

In addition, Proposition 1 affirms the role of water storage as part of a comprehensive approach to address California’s water resources challenges. Major state and federal planning efforts suggest that water storage is an integral part of the State’s comprehensive set of water solutions, including surface storage. Additional funding from the WIIN Act will help ensure robust development of additional storage projects.

Purpose of Regulation

The purpose of the proposed regulation is to implement a process for storage projects to obtain the determination necessary to apply for federal funding from the WIIN Act. The Commission’s activities need to be open and fair to each project proponent seeking WIIN Act funding, and each project proponent needs to undertake the same efforts to obtain the Commission’s determination. The only way to ensure the process to obtain a Commission determination is fair and equitable to each proponent is to adopt a procedure for the processing of requests to the Commission.

Summary of specific purpose of and rationale for adoption

This section provides a summary of the specific purpose of each proposed amendment and the rationale for staff’s determination of why the proposed adoption s are reasonably necessary to carry out the purpose of the provisions of law they are implementing and to address the problem as described above.

Section 6100. The proposed text of this section sets forth the basis of the Commission’s authority. State authority to adopt regulations does not usually derive from federal law, so it was necessary to explain the nature of the regulation in a regulation.

Section 6101. The proposed text of this section defines words, phrases, and acronyms to provide clarity to their specific use in the regulation. Many of these terms are used in other regulations or statutes and it is necessary for the Commission to use these terms consistently with other programs.

Section 6102. The proposed text indicates that, when a project proponent determines it will request funding pursuant to the WIIN Act, the first step in obtaining the Commission's determination of consistency with Proposition 1 is to request the Commission schedule a time for the consideration of the project. This request must be submitted to the Commission at least thirty (30) days in advance of a regularly scheduled Commission meeting. The meeting date must be included in the request. Proposed section 6102 also requires the project proponent to provide all materials for the Commission at least ten (10) days in advance of the meeting, and that those materials be consistent with the standards of California Government Code section 11546.7 regarding website accessibility.

Section 6103. The proposed text outlines the obligations of Commission staff upon receipt of the request required in Section 6102.

Section 6104. The proposed text explains how the project proponent will present information to the Commission, including compliance with the Bagley-Keene Open Meetings Act. The proposed text also lists the Commission's options when considering the project and when additional information may be heard.

Benefits of the Proposed Regulation

The regulation will ensure water storage project proponents seeking WIIN Act funding have access to the same information to bring their projects before the Commission for a consistency determination. The regulation will allow the Commission to treat each proponent fairly and apply the same standard to each proponent. The regulation will ensure transparency in government processes and ensure the Commission does not engage in underground rulemaking.

Documents Relied Upon

Commission staff relied upon the text of the WIIN Act, S. 612, in formulating the process for proponents. S. 612 is attached.

Description of Reasonable Alternatives

Alternative 1 - No regulations

The Commission could opt to not adopt regulations governing the procedure to obtain the determination necessary under the WIIN Act. However, this alternative would be in contravention to established statutes requiring that every "rule, regulation, order or standard of general application or the amendment, supplement, or revision of any rule,

regulation, order or standard adopted by any state agency to implement interpret or make specific the law enforced or administered by it” (Government Code section 11342.600) be adopted in an open and publicly transparent process. (Government Code section 11340.5)

Alternative 2 - Paper submission

The Commission could opt to forego the proponent personally presenting the project specifics to the Commission in a public meeting. The Commission could instead base its decision solely on paper materials submitted to staff. However, staff would be unable to answer any questions the Commission might have about the project, since staff has no authority to request additional information from the project proponent, or to review the project.

Economic Impact Assessment

In accordance with Government Code section 11346.3, staff has determined that the proposed regulatory action would not eliminate existing businesses within the State of California and would not affect the creation of new businesses or the expansion of existing businesses currently doing business in California. The proposed regulatory action would not eliminate jobs within the State of California and would not affect the creation of jobs within California.

Small businesses would not be subject to the proposed regulations because the proponents of state led water projects are specifically enumerated in the definition of “State-led storage project” in section 4007 of the WIIN Act meaning “any project in a reclamation state that (a) involves a groundwater or surface water storage facility constructed, operated, and maintained by any State, department of a State, subdivision of a State or public agency organized pursuant to State law; and (b) provides a benefit in meeting any obligation under Federal law.”. (WIIN Act section 4007(a)(2).) Additionally, the voluntary nature of applying for WIIN Act funding would not require any small business participation.

The following findings support the proposed regulations:

- The proposed regulation will not result in a significant or permanent change in the number of jobs within the state.
- No creation or elimination of businesses within the state would occur as a result of this proposed regulation.
- The proposed regulation would not affect the competitive advantages or disadvantages of businesses within the state.
- The proposed regulation would not significantly affect investment in the state.
- Incentives for innovation in business products, materials, or processes would not be affected.

The objective of the proposed regulations is to provide an open and transparent process for water storage project proponents that did not apply for State Water Storage Investment Program funds, but who seeking WIIN Act funding from the federal government to obtain a Commission determination that the project is consistent with Proposition 1. The benefit of this process will support the statutory purposes associated with the California Administrative Procedure Act and ensure that all project proponents have the same requirements to obtain the determination.

There are no significant adverse impacts directly affecting businesses. Direct costs related to the proposed regulation fall on proponents that are public agencies.

Duplication of Conflicts with Federal Regulations.

Government Code section 11346.2(b)(6) requires the Commission to describe its efforts to avoid unnecessary duplication or conflicts with federal regulations that address the same issues. No federal regulations address the same issues as the Commission's proposed regulations, so the proposed amendments do not conflict with nor duplicate any federal regulations.

Environmental Impact Assessment

The purpose of the regulations is to implement a process to make a determination finding. While the storage projects the Commission evaluates will need to comply with all environmental laws of California, the activities from these regulations are solely the evaluation of the materials presented to the Commission. These activities will not have an impact on the state's environment. Specific environmental impacts resulting from evaluated projects will be subject to permitting and will be analyzed by each project's lead agency in accordance with applicable law.