Date of Hearing: May 14, 2020

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE
Eduardo Garcia, Chair
AB 3005 (Robert Rivas) – As Amended May 4, 2020

SUBJECT: Leroy Anderson Dam and Reservoir: permitting, and public contracting

SUMMARY: Expedites permitting and contracting requirements in order to facilitate the replacement of the Leroy Anderson Dam and Reservoir (Anderson Dam). Specifically, **this bill**:

1. Defines the Anderson Dam project as any activity or work of construction to retrofit, repair, replace, or improve the safety of the Leroy Anderson Dam and Reservoir, owned by the Santa Clara Valley Water District (Valley Water) and located in the County of Santa Clara, including any upstream or downstream construction, improvements, changes in operational activities, and flood protection measures that may be required to implement that activity or work.

2. Specifies that the Anderson Dam project includes any avoidance, minimization, or mitigation measures, including the Coyote Creek related Phase 1 measures of the Fish and Aquatic Habitat Collaborative Effort (FAHCE) determined to be appropriate by Valley Water, in consultation with state and federal agencies, as defined.

3. Requires the Department of Fish and Wildlife (DFW), to issue a final Lake and Streambed Alteration Agreement (LSAA) to Valley Water that includes reasonable measures necessary to protect the affected resource within 180 days of receipt of a LSAA notification from Valley Water and if other specified requirements have been met.

4. Requires the State Water Resources Control Board (SWRCB) to issue project certification within 180 days after Valley Water does all of the following:

    a. Files a complete application for project certification;

    b. Files a complete application or petition for all water rights approvals necessary to implement the Anderson Dam project; and

    c. Completes and certifies the adequacy of environmental documentation for the project certification required under the California Environmental Quality Act (CEQA).

5. Specifies procedures and requirements that govern the determination of whether a project certification application is complete, and outlines a process whereby the SWRCB is to notify Valley Water of any deficiencies in submitted materials, but does not allow any extension or waiver of any of the specified time periods.

6. Allows Valley Water to appeal, in whole or in part, any project certification determination to the SWRCB, and outlines procedures and timelines for an adjudicative hearing, the appeal determination by the SWRCB, and any court challenge by Valley Water of the appeal determination.

7. Authorizes state agencies with permitting authority over the Anderson Dam project to take certain actions to expedite the permitting process for the project, including entering into an agreement with Valley Water for the recovery of certain costs.

8. Authorizes Valley Water, upon approval by its board of directors, to award contracts on a best value basis for any work for the Anderson Dam project.

9. Requires Valley Water, if its board elects to award contracts on a best value basis, to comply with specified requirements governing the documents prepared setting forth the scope and estimated price of the project and the request for qualifications.

10. Prohibits a best value contractor from being prequalified or shortlisted unless the contractor provides an enforceable commitment to the district that the contractor and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project, in accordance with certain criteria. This prohibition does not apply if Valley Water or the contractor have entered into a project labor agreement (PLA).

11. Provides that no local agency reimbursement for state mandates is required by this act.

12. Makes findings and declarations as to the necessity of the bill.

13. Declares that the bill is to take effect immediately as an urgency statute.

EXISTING LAW:

1. Prohibits an entity from diverting or obstructing the natural flow of, or substantially changing or using any material from the bed, channel, or banks of, a river, stream, or lake, or depositing or disposing of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into a river, stream, or lake, unless the DFW receives written notification regarding the activity and the DFW either determines that the activity will not substantially adversely affect an existing fish and wildlife resource or, if the DFW determines that the activity may substantially adversely affect an existing fish and wildlife resource, the DFW issues a final agreement to the entity that includes reasonable measures necessary to protect the affected resource. (Fish and Game Code § 1600 *et seq.*)

2. Requires, under CEQA, a lead agency with the principal responsibility for carrying out or approving a proposed project to prepare a negative declaration, mitigated negative declaration, or environmental impact report (EIR) for this action, unless the project is exempt from CEQA (CEQA includes various statutory exemptions, as well as categorical exemptions in the CEQA guidelines) [Public Resources Code (PRC) § 21080 *et seq.*]

3. Designates the SWRCB as the state water pollution control agency for purposes of the Federal Water Pollution Control Act and authorizes the SWRCB to issue a certificate or statement under the federal act that there is reasonable assurance that an activity of a person subject to the jurisdiction of the SWRCB will not reduce water quality below applicable standards. (Water Code § 13160)

4. Governs various types of contract procedures applicable to the Santa Clara Valley Water District and prescribes competitive bidding procedures for any improvement or unit of work over $50,000. (Public Contract Code (PCC) § 21161)

5. Authorizes certain local entities to select a bidder for a contract on the basis of "best value," as defined. (For example, PCC § 20155)

6. Defines a PLA as a prehire collective bargaining agreement that establishes terms and conditions of employment for a specific construction project or projects and is an agreement described in Section 158(f) of Title 29 of the United States Code. (PCC § 2500)

FISCAL EFFECT: Unknown. This bill is keyed fiscal.

COMMENTS:

Author's Statement:

> AB 3005, The Expedited Dam Safety for Silicon Valley Act, will facilitate the speedy and expert construction of the Anderson Dam Seismic Retrofit Project that will protect lives and property from Dam failure, reduce flood risk for downstream communities, and restore Anderson Reservoir's supply of clean, safe drinking water for the region. The Leroy Anderson Dam and Reservoir, owned by the Santa Clara Valley Water District (Valley Water), has been determined by local, state, and federal officials to be at risk of an uncontrolled release of water, caused by a large earthquake, that could inundate cities and rural areas from San Francisco Bay south to Monterey Bay, including much of Silicon Valley.
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> AB 3005 will expedite the critical replacement of Anderson Dam in several ways. The bill authorizes the most efficient, safest, and best overall value selection of the construction contractor and requires a skilled and trained workforce for the project. AB 3005 requires expedited processing of state permits by the Department of Fish and Wildlife and the State Water Resources Control Board, with costs covered by Valley Water, not the state.
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> Local, state, and federal authorities all have a responsibility to ensure that Anderson Dam is made seismically safe in an efficient manner while still achieving the highest level of environmental protections. This project has stalled for too many years. AB 3005 will help ensure the State of California does its part to expedite this critical project.

Background: ***Leroy Anderson Dam and Reservoir.*** Anderson Dam is a 235 feet (72 m) high earthen dam located near Morgan Hill, California, that impounds Santa Clara County's largest surface water reservoir – Anderson Reservoir. The dam measures 1,430 feet (440 m) long by 900 feet (270 m) wide and sits along the Coyote Creek Fault on Coyote Road. The dam and reservoir are owned and operated by Valley Water, and the reservoir stores local rainwater runoff and imported water from the Central Valley Project. With a capacity of nearly 90,000 acre-feet – enough water to supply almost a million people for a year – the reservoir is a part of the region's water supply system for drinking water and a water source for groundwater recharge projects.

Seismic Concerns. Experts estimate that a magnitude 7.25 earthquake on the Calaveras Fault centered less than 2 km (1.25 miles) from the dam, or a magnitude 6.6 earthquake on the Coyote Creek Fault centered beneath the dam, could significantly damage the dam embankment and lead to dam failure and the uncontrolled release of water. A catastrophic failure of the dam would impact thousands of people and property in Santa Clara, San Benito, Monterrey, and Santa Cruz counties, with effects impacting the immediate vicinity, Silicon Valley, and the San Francisco Bay and Monterey Bay areas.

The Department of Water Resources Division of Safety of Dams rates Anderson Dam as having extremely high downstream hazard due to the seismic risk. Anderson Dam is currently operated at a restricted level due to these seismic concerns. However, because the dam outlet is too small, the seismic restriction to keep the reservoir at reduced capacity cannot always be met. During winter storms, more water can flow into the reservoir than the dam outlet can release, resulting in the filling of the reservoir above the capacity restriction. In 2017, a series of atmospheric river storms filled Anderson Reservoir and resulted in water flowing over the spillway and into the creek below. While the spillway was designed to release water during high precipitation events, flooding along Coyote Creek caused an estimated $73 million in property damage to San Jose homes and businesses and prompted 14,000 residents to evacuate.

On February 20, 2020, the Federal Energy Regulatory Commission (FERC) ordered Valley Water to begin draining the reservoir by October 1, 2020 to deadpool – the level at which water in the reservoir cannot be drained by gravity through the dam's outlet – and to construct a low level outlet tunnel as soon as possible. FERC ordered this due to new information that showed the Anderson Dam is more vulnerable in a 100-year earthquake than previously understood. In addition, there is still uncertainty about when the dam will be reconstructed.

Anderson Dam Reconstruction Plans. The Anderson Dam Seismic Retrofit Project was initiated in 2012 and is estimated to cost $576 million. The project will remove most of the existing earthen dam and replace it. The new dam will be constructed to modern seismic and dam safety standards, including increased capacities for the spillway and outlet to allow a rapid, controlled draw down in an emergency. These features are intended to increase dam safety and incidental flood protection.

Is This Bill Necessary to Implement the Project? This bill seeks to expedite permitting and contracting requirements in order to facilitate the Anderson Dam project. Other recent large dam retrofits have not sought the same expedited processes that would be required by this bill. For example, the Calaveras Dam Replacement Project, undertaken for seismic risk reasons by the San Francisco Public Utilities Commission (SFPUC), did not receive any streamlining through legislation. However, SFPUC did have an agreement with the DFW to pay for one staff position related to permitting for their Water System Improvement Program (WSIP), which includes the Calaveras Dam replacement.

Impacts to Species and Habitat. The DFW is the highest state authority on California's fish and wildlife resources and is responsible for issuing LSAAs for projects affecting lake and stream habitat and incidental take permits under the California Endangered Species Act (CESA). There is a desire by some to speed up these permit processes. The DFW maintains that LSAAs can be issued in about 90 days if the process outlined in statute (see FGC § 1602 and § 1603), is followed, although permit applicants claim that it can take a year or more to obtain a final LSAA. It is important to note that these agreements require the submission of a completed EIR.

It is likely that the DFW will determine that the Anderson Dam project significantly adversely affects existing fish and wildlife resources. The LSAAs issued by the DFW include measures that the applicant must implement in order to protect the fish and wildlife resources adversely affected by the project. This bill requires the DFW to issue a final agreement no more than 180 days from receipt of the LSAA notification. While longer than the 90 days that the DFW says is typical, this may be a short timeline for a project of this size. To this committee's knowledge, no other LSAA has been statutorily required to be completed, and as such, this component of the bill is precedent setting.

Fisheries and Aquatic Habitat Collaborative Effort Settlement Agreement. In 2003, Valley Water initialed the FAHCE settlement agreement to resolve a water rights complaint filed with the SWRCB in 1996 by the Guadalupe-Coyote Resource Conservation District (RCD). Eight other parties joined the settlement agreement, including the DFW, the U.S. Fish and Wildlife Service and National Marine Fisheries Service, and nongovernmental organizations, including Trout Unlimited, the Pacific Coast Federation of Fishermen's Associations, California Trout, the Urban Creeks Council, and the Northern California Council of Federation of Fly Fishers.

The FAHCE settlement includes provisions intended to improve aquatic spawning and rearing habitat and fish passage within the Stevens Creek, Coyote Creek and Guadalupe River watersheds. These provisions are to be achieved through modifications to reservoir operations to provide instream flows; restoration measures to improve habitat conditions and provide fish passage; and monitoring and adaptive management.

While agreed to seventeen years ago, the FAHCE is still in the planning phase. Recent data show that the number of Central California Coast steelhead, a fish species protected under the Federal Endangered Species Act, is in the single digits in Coyote Creek. The study attributes the population decline since 2014 to continued limited instream flows, high water temperatures, and fish passage restrictions.

Valley Water maintains that it has implemented numerous projects under Phase I of FAHCE while continuing the planning phase of the agreement. However, other parties to the settlement have expressed concerns that Valley Water has not adhered to the recommendations of the settlement parties and has failed to meet its obligations under the settlement terms. They believe that this has prevented implementation of streamflow adjustments and habitat restoration measures agreed to by the FAHCE parties as needed to protect steelhead and other aquatic life.

Other Committees with Jurisdiction. *This committee was provided comments from other committees on items within the bill that involve those committees' respective jurisdictions.*

Comments from Environmental Safety and Toxic Materials Committee:

As currently drafted, the SWRCB is required to issue a Section 401 certification for the project pursuant to the federal Clean Water Act in 180 days. This does not give the SWRCB any discretion to make a decision on whether to certify the project. The author may want to consider language that requires the SWRCB to render a decision whether to certify the project within an appropriate timeframe.

Comments from Local Government Committee:

Traditionally, construction projects have been bid out and awarded based upon a lowest-cost approach. Current law generally requires Valley Water to use lowest-cost bidding procedures for any improvement or unit of work over $50,000. This bill would allow Valley Water to use best value contracting for the Anderson Dam project upon approval by its board of directors. The bill outlines a process that Valley Water must adhere to in order to use best value contracting, including issuing a request for qualifications with specified required information.

Best value contracting has generally been recognized as a viable alternative for construction projects. Best value, a competitive contracting process, allows projects to be awarded to the contractor offering the best combination of price and qualifications, instead of just the lowest bid. In addition to submitting bids for project cost, prospective contractors also submit technical

proposals. The technical proposals are evaluated based on objective criteria, and scores are compiled. The scores are then used to weigh or adjust the submitted bid price. The contract is awarded to the contractor that represents the best value to the contracting agency.

AB 2551 (Gallagher), Chapter 760, Statutes of 2016, authorized local agencies to use alternative procurement methods for reservoirs funded by Proposition 1 bond funds. These methods included design-build (including conventional, progressive, and target price methods), design-bid-build, and construction manager at-risk alternative procurement methods, in addition to any methods already authorized for irrigation districts, county water districts, and other similar water districts. AB 2551 allowed these contracts to be awarded to the lowest responsible bidder or on a best-value basis.

According to this bill's findings and declarations, "[...] the project design [for the Anderson Dam] is now 75 percent complete." In addition, "The independent Board of Consultants, convened pursuant to the Federal Energy Regulatory Commission process, has recommended the 'best value' procurement method for the Anderson Dam Seismic Retrofit Project due to its complex design, delivery, and installation. Authorizing this project for an alternative method of contract award, similar to other major surface storage projects, is in keeping with construction industry practices and is prudent for a project of this scale and importance."

According to Valley Water, "Completion of the design, obtaining all regulatory approval and acquisition of permits will be completed before construction commences, currently planned for 2021[...]We are working closely with Federal Energy Regulatory Commission and regulatory permitting agencies to begin construction of the tunnel and the low-level outlet in 2021, ***provided we receive the required permits on time and can obtain a qualified construction contractor. Construction is estimated to take approximately two to three years***[…](emphasis added). Construction on the second stage will begin after stage one is completed, and the required permits are received. Stage two construction is estimated to take seven to eight years and is dependent on the permit requirements and the field conditions."

As noted above, the Anderson Dam project was initiated in 2012 and there is still uncertainty about when the dam will be reconstructed. According to FERC, "There is no guarantee for the current scheduled dam rehabilitation. The reservoir restriction has already been in place almost 10 years and [Valley Water's] estimate is that construction could start in 2022." In addition, it appears the most pressing project is the FERC-directed reconstruction and improvement of the dam outlet structure. Given the uncertainty with which the seismic retrofit project will progress, the delays it has already experienced, and the two-stage approach Valley Water intends to take, it may be more prudent for the Legislature to grant best value authority for the seismic retrofit project as a whole at a later date when the commencement of construction is more certain, or to limit the best value contracting provisions of this bill only to the first phase of the project.

Also as noted above, the seismic retrofit project is estimated to cost $576 million. This bill allows Valley Water, upon approval of its board, to award contracts on a best value basis ***for any work for the Anderson Dam project***. This bill defines "Anderson Dam project" to mean "any activity or work of construction to retrofit, repair, replace, or improve the safety of the Leroy Anderson Dam and Reservoir,[…]including any upstream or downstream construction, improvements, changes in operational activities, and flood protection measures that may be required to implement that activity or work."

While this bill generally applies similar parameters for the use of best value that exist in current law for the use of best value by other local agencies, the types and costs of the projects that this bill allows Valley Water to award using best value is comparatively broad. Best value offers awarding agencies greater flexibility than the low-bid method to select contractors that have demonstrated experience and expertise on specific types and sizes of projects. For this reason, selecting contractors for the Anderson Dam project using best value may be an appropriate and valuable option for Valley Water. On the other hand, given the breadth of work and the contract amounts involved, the Legislature may wish to consider whether it might be advisable to narrow this authority.

The best value provisions of this bill generally align with those contained in AB 2551. However, AB 2551 contained some additional provisions for best value contracts that are not included in this bill. Specifically, AB 2551 required competitive bids to be evaluated by using ***only the criteria and selection procedures specifically identified in the request for bids***. Specified minimum factors were identified, if applicable to the delivery method and weighted as deemed appropriate by the local agency. These included factors such as price; design, procurement, and construction expertise; construction approach, sequencing, and method; compliance with performance specifications; ability to meet milestone schedule dates and liquidated damages; ability to meet quality requirements; proposed risk allocation and sharing; safety record; warranty; and, specified life-cycle costs. The Legislature may wish to consider whether these provisions should also apply to this bill's best value authorization.

This bill prohibits a best value contractor from being prequalified or shortlisted unless the contractor provides an enforceable commitment to the district that the contractor and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project, in accordance with certain criteria. This prohibition does not apply if Valley Water or the contractor have entered into a PLA.

A PLA is a pre-hire agreement establishing the terms and conditions of employment for a specific construction project. A PLA is completed before any workers are hired, to establish the wage rates and benefits of all employees working on the project and to prevent strikes, lockouts, or other work stoppages for the length of the project. The terms of the agreement apply to all contractors and subcontractors, whether union or non-union, who successfully bid on the project, and supersede any existing collective bargaining agreements. These provisions are generally consistent with existing law.

Comments from Natural Resources Committee/Judiciary Committee:

Amendments were taken in this committee to strike the provisions related to CEQA and expedited judicial review. The author should continue to discuss these provisions with the Natural Resources and Judiciary Committees for potential future inclusion in the bill.

Prior and Related Legislation.

SB 128 (Beall), Chapter 501, Statutes of 2019, adds the County of Santa Clara and the County of Monterey to a pilot program that allows counties to utilize the best value method for construction projects in excess of $1 million dollars and for job order contracting.

AB 1270 (Gallagher), Chapter 3, Statues of 2018, requires the Department of Water Resources (DWR) to inspect dams, reservoirs, and appurtenant structures annually, with certain exemptions, and requires reporting and updates to dam safety regulations.

SB 92 (Committee on Budget), Chapter 26, Statutes of 2017, authorizes the DWR to impose reservoir restrictions and levy property liens on an owner of a dam who fails to comply with certain provisions relating to dam safety or any approval, order, rule, regulation, or requirement of the DWR, among other provisions.

AB 2551 (Gallagher), Chapter 760, Statutes of 2016, authorizes local agencies to use alternative procurement methods for reservoirs funded by Proposition 1 bond funds.

SB 922 (Steinberg), Chapter 431, Statutes of 2011, requires that all PLAs incorporate specified provisions, among other provisions.

Arguments in Support: Those in support argue that this bill is primarily related to public safety and helps ensure the state does its part to expeditiously eliminate the risk of a devastating loss of life, property, and thousands of job-creating Silicon Valley businesses from the potential failure of the Anderson Dam.

Arguments in Opposition: Those in opposition argue that, while the bill is well-intentioned, the timelines required by the bill may leave state agencies with inadequate time to identify necessary recommendations to sufficiently protect public trust resources, including fish and wildlife, and beneficial uses as required by existing state law.

REGISTERED SUPPORT / OPPOSITION:

Support

California Municipal Utilities Association
City of San Jose
Honorable Anna G. Eshoo, Member of Congress
Honorable Jimmy Panetta, Member of Congress
Honorable Ro Khanna, Member of Congress
Honorable Zoe Lofgren, Member of Congress
San Jose Water Company
Santa Clara Valley Water District
Silicon Valley Leadership Group
State Building and Construction Trades Council of CA
Sunnyvale Silicon Valley Chamber of Commerce

Oppose

California Trout
Guadalupe-Coyote Resource Conservation District

Analysis Prepared by: Keith Cialino / W., P., & W. / (916) 319-2096