
SENATE COMMITTEE ON NATURAL RESOURCES AND WATER

Senator Henry Stern, Chair
2019 - 2020 Regular

Bill No: AB 3005
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Fiscal: Yes

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

Due to the COVID-19 Pandemic and the unprecedented nature of the 2020 Legislative Session, all Senate Policy Committees are working under a compressed timeline. This timeline does not allow this bill to be referred and heard by more than one committee as a typical timeline would allow. In order to fully vet the contents of this measure for the benefit of Senators and the public, this analysis includes information from the Senate Governance and Finance Committee & the Senate Judiciary Committee.

BACKGROUND

The Leroy Anderson Dam is located in Santa Clara County near Morgan Hill. Owned and operated by the Santa Clara Valley Water District (SCVWD, aka Valley Water), it is a 235' tall earthfill dam that impounds up to 91,300 acre-feet of water. The Department of Water Resources (DWR) rates its downstream hazard as Extremely High. Under that hazard rating, the potential downstream impacts to life and property would be expected to cause loss of at least one human life and one of the following:

- result in an inundation area with a population of 1,000 or more; or,
- result in the inundation of facilities or infrastructure, the inundation of which poses a significant threat to public safety.

As shown on the flood inundation map (right), if the dam was completely full and then failed, water would flood north west through the City of San Jose on its way to San Francisco Bay, and south east through Gilroy and then down the Pajaro River past Watsonville on its way to Monterey Bay.



In January 2009, SCVWD released a preliminary seismic study that suggested a small chance that a 6.6 magnitude quake centered directly at Anderson Reservoir, or a 7.2 quake centered one mile away, could cause the reservoir's 240-foot-high

earthen dam to fail. In response, SCVWD lowered the water level to 74 percent of capacity and announced further analysis of the situation, which could possibly result in retrofitting the dam if necessary.

In December 2016, SCVWD reported that additional geotechnical analysis indicated considerably more work would need to be performed on the dam, essentially, removing the dam completely and rebuilding it. The existing dam had been built on alluvial deposits, which could liquefy during an earthquake. Accordingly, the estimated cost rose to US\$400 million and the start of work was rescheduled to 2020, with completion planned for 2023–2024.

However, the Federal Energy Regulatory Commission (FERC) dismissed SCVWD's plans as insufficient to address the risk of catastrophic failure. In a letter dated February 24, 2020, FERC ordered the reservoir immediately be maintained at an elevation that provides approximately 32,000 acre-feet of storage. Moreover, that beginning October 1, SCVWD would be required to begin draining Anderson Lake as quickly and safely as it can to "dead pool" (that level in in a reservoir that cannot be drained by gravity through a dam's outlet works).

The letter concluded, "Combined, the above dam safety directives and initiation of efforts to design and construct the proposed low-level outlet works will provide increased interim protection for residents and property downstream while still providing time to secure alternative water supplies and minimize environmental effects. In the meantime, you should continue to work with all haste to design and secure the necessary permits and complete the design for the larger Anderson Dam Seismic Retrofit Project."

Existing Law:

- 1) Prohibits any activity in a river, stream, or lake, which may alter a streambed.
 - a) The California Department of Fish and Wildlife (CDFW) may to enter into a Lake and Streambed Alteration Agreements, which permit activities that alter a streambed *IF* reasonable measures to protect fish and wildlife resources are included.
 - b) An entity is required to notify the CDFW prior to commencing any activity that may substantially alter a stream bed.
- 2) Designates the State Water Resources Control Board (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 state board will not reduce water quality below applicable standards.
- 3) Requires, under the California Environmental Quality Act (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.

- 4) Authorizes certain local entities to select a bidder for a contract on the basis of “best value;” a procurement process whereby the selected bidder may be selected on the basis of objective criteria for evaluating the qualifications of bidders with the resulting selection representing the best combination of price and qualifications.
- 5) Governs various types of contract procedures applicable to the SCVWD, and prescribes competitive bidding procedures for any improvement or unit of work over \$50,000.

PROPOSED LAW

This bill would:

- 1) Define the Anderson Dam project as:
 - a) 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.
 - b) The project includes any avoidance, minimization, or mitigation measures, including the Coyote Creek related Phase 1 measures of the Fish and Aquatic Habitat Collaborative Effort determined to be appropriate by the district, in consultation with state and federal agencies designated as “responsible agencies” and “trustee agencies” under CEQA.
- 2) Require CDFW to issue a lake and streambed alteration agreement, which includes reasonable measures necessary to protect the affected resource, for the Anderson Dam project within 180 days of receiving completed notification.
 - a) Provided SCVWD:
 - i) Submits a complete notification for the project.
 - ii) Completes and certifies the adequacy of environmental documentation required by CEQA for the activity in the notification.
 - b) The 180-day time period would not apply if CDFW and SCVWD mutually agree to an extension.
- 3) Require the SWRCB to issue project certification within 180 days after SCVWD 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 CEQA.
- 4) Specify 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.

- 5) Authorize a state agency, board, commission, or department with the authority to issue permits that would authorize the project or project-related work to do the following:
- a) Enter into an agreement with SCVWD to recover costs for actions authorized by this section that are above the usual level of service provided by the state agency to expedite the review of environmental documents prepared under CEQA or permit processing and approval for the Anderson Dam project.
- The goal is to comply with statutes regarding dams and dam safety, and complete permit review and approval in an expeditious manner.
- b) Hire or compensate staff or contract for services needed to achieve those goals.
 - c) Work collaboratively with local, state, and federal agencies on an integrated regulatory approach.

This provision does not limit or expand the authority or discretion of a state agency with regards to processing a permit application, the issuance of a permit, or any conditions that may be required in conjunction with the issuance of a permit.

- 6) Authorize SCVWD to award contracts on a best value basis for any work of construction to retrofit, repair, or replace the Leroy Anderson Dam and Reservoir.
- a) SCVWD would be required, if the 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.
 - b) A best value contractor would be prohibited 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.
- 7) Make legislative findings and declarations regarding:
- a) The necessity of a special statute for the Santa Clara Valley Water District.
 - b) The importance of this bill.

ARGUMENTS IN SUPPORT

According to the Author, “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 [SCVWD], 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.”

“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 provides expedited judicial review of challenges to environmental documents issued in compliance with the California Environmental Quality Act (CEQA). Lastly, this bill 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.”

“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 while creating 5,400 well-paying jobs for the region.”

ARGUMENTS IN OPPOSITION

- 1) CalTrout writes, “It is not our intent to undermine the importance of protecting public safety and property first and foremost. However, we believe that using legislation to expedite the established agency permitting and approval processes in this specific case would set a dangerous precedent for all future dam retrofit projects in California – including the Calero and Lexington reservoirs on the Guadalupe River and Stevens Creek Reservoirs that are under the jurisdiction of the Santa Clara Valley Water District. Legislation designed to change how environmental permitting and compliance is done specifically for this project is simply unnecessary. This is evidenced by the Calaveras Dam on neighboring Alameda Creek which was completely retrofitted by the San Francisco Public Utility Commission just last year without special legislation to bypass the state’s regulatory process timeline or ultimate decision-making power.”

“For nearly 20 years, the Fisheries and Aquatic Habitat Collaborative Effort (FAHCE) Settlement Agreement parties, including CalTrout, Trout Unlimited, Guadalupe-Coyote Resource Conservation District, Pacific Coast Federation of Fishermen’s Associations, Northern California Council of Fly Fishers International, and the natural resources agencies (California Department of Fish and Wildlife, and NOAA Fisheries), have advocated for adequate streamflow for steelhead and habitat improvements for other wildlife in Coyote Creek in collaboration with the Santa Clara Valley Water District. Unfortunately, Valley Water has not adhered to the recommendations of the Settlement parties and has failed to meet its obligations under the Settlement terms. This has prevented implementation of streamflow adjustments and habitat restoration measures agreed to by the FAHCE Initialing Parties as needed to protect steelhead and other aquatic life. Based on this poor track record of collaboration and lack of good-faith effort by the Valley Water to restore streamflows and habitat for public trust resources and beneficial uses in the Coyote Creek Watershed, we strongly disagree that the provisions of this bill as proposed by Valley Water are needed or would be adequately protective of listed fish and wildlife species, especially federally threatened Central California Coast steelhead.”

- 2) The Western Electrical Contractors Association (WECA), and the Southern California chapter of Associated Builders and Contractors maintain that “While they support expediting the permitting and contracting requirements to facilitate the replacement of the Leroy Anderson Dam and Reservoir (Anderson Dam), they

oppose a provision in Assembly Bill 3005 that creates a loophole for evading mandates in existing law.”

“[Public Contract Code] §21163(d) (1) requires the use of a Skilled and Trained Workforce (STWF) on the project, but (d) (2) exempts projects covered by a project labor agreement (PLA). [They] believe that the use of an STWF, as defined in existing law, should apply to all construction of a particular type – not where it applies to some projects – but not others, simply because of the existence of a PLA.”

“All public agencies and taxpayers deserve projects built by “the most highly trained workforce available.”

“[They] are Merit Shop contractor associations. Merit Shop is a way of doing business in which companies reward employees based on performance and encourage them to reach their highest level of achievement, and in which contracts are awarded based on safety, quality, and value, regardless of labor affiliation.”

COMMENTS ON THE BILL IN PRINT

What Is The Urgency? While the dam is currently at risk of failure, FERC’s requirement that the reservoir be maintained at a lower level reduces the risk of damage from flooding significantly. Moreover, the order to quickly reduce to dead pool beginning October 1 reduces that risk even more.

It might be advantageous to authorize value contracting sooner rather than later. However, the project is currently about 75% designed, SCVWD is estimating that it will complete CEQA near the beginning of 2022, and permitting is expected to be completed some time later. Actual construction isn’t scheduled to begin until 2025, with completion estimated to be sometime in 2030 or later.

Is This Bill Necessary To Expedite 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 allowed 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.

Precedent. DWR has rated the Leroy Anderson Dam as an extremely high hazard dam with a condition rating by DWR of “fair,” (although that rating might change in the future). It is not the only dam extremely high hazard dam with a condition rating of fair in California. In addition to Anderson Dam, there are 25 other extremely high hazard dams with a condition rating by DWR of “fair,” including three other dams owned and operated by SCVWD: Almaden, Calero, and Guadalupe Dams. (There are also three extremely high hazard dams with a condition rating by DWR of “poor.”) It seems reasonable to expect that, should this bill pass, there will be additional bills introduced in the future seeking similar accommodations.

Fisheries and Aquatic Habitat Collaborative Effort Settlement Agreement (FAHCE). 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. Eight other parties joined the settlement agreement, including the CDFW, 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.

SCVWD 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.

While this bill does include in the project definition for Anderson Dam the Coyote Creek related Phase 1 measures of the FAHCE, it is silent on the Stevens Creek and Guadalupe River watersheds as well as other phases of the Coyote Creek activities.

Comments by Senate Governance and Finance Committee. "AB 3005 allows Santa Clara Valley Water District to evaluate bids on portions of the Anderson Dam project using a 'best-value' basis, incorporating technical factors, such as qualifications, in addition to price. For example, it could award a contract based on consideration of objective criteria that include features, functions, lifecycle costs, experience, and past performance."

"Historically, water projects built by local agencies have been limited to the design-bid-build delivery method. While there are benefits to this process, such as an impartial design team and builders bidding on the same design, there are also several drawbacks. Unexpected costs may arise during construction due to change orders or other unanticipated complications. Alternative delivery methods, such as best value, can be more cost effective when used to procure large, complex projects because these methods give contractors the freedom to develop clever solutions to problems and transfer the risk of overruns from the public agency to the contractor. The independent Board of Consultants, convened pursuant to the Federal Energy Regulatory

Commission, recommended using best value for Anderson Dam due to the project's complexity and seismic risk consistent with other dam projects in California and other states."

"On the one hand, proponents argue that the Anderson Dam project is unique and therefore warrants unique authority. On the other hand, AB 3005 continues to unravel previous legislative efforts to harmonize the state's contracting authorizations that had been scattered across sections of code (SB 785, Wolk, 2014). For example, AB 2551 (Gallagher, 2016) authorized local agencies to use alternative procurement methods, including best value, for reservoirs funded by state bond funds."

Technical Amendments. There are numerous technical amendments required, mostly correcting typos.

In addition, it should be made clear that:

- Before filling an application for project certification with the SWRCB, the SCVWD should also consult with the San Francisco Bay Regional Water Quality Control Board, consistent with state regulations, and
- Appeals of SWRCB decision should be handled under existing law

(See recommended amendments)

COMMENTS ON SCVWD'S PROPOSED AMENDMENTS

SCVWD's Proposed Amendments. SCVWD is interested in amending the bill to provide for expedited administrative and judicial review of any CEQA related changes associated with the Anderson Dam Project. Key provisions of these amendments include:

- 1) The Anderson Dam Project shall not result in any net additional emissions of greenhouse gases as determined by the State Air Resources Board.
 - a) To comply, the SCVWD may directly reduce the project's emissions on site, make local direct investments in actions to reduce emissions of greenhouse gases, or purchase emissions offset credits.
 - b) To cover its costs, the State Air Resources Board may adopt a fee paid by SCVWD to cover its costs, or enter into an agreement with SCVWD to recover costs for actions authorized by this section that are above the usual level of service provided by the state agency as provided by the bill in print
- 2) The Anderson Dam Project shall also include the following amenities to improve recreational opportunities at the project site.
 - a) A net increase in parking spots at the Anderson Reservoir
 - b) A boat ramp allowing public access when the reservoir is low
- 3) State courts would be required to apply Rules 3.2220 to 3.2237 of the California Rules of Court to any proceeding challenging an environmental impact report for the Anderson Dam Project or the granting of any project approvals within 270 days of filing of the certified record of proceedings with the court.

- a) These rules govern California Environmental Quality Act proceedings under Public Resources Code Sections 21168.6, 21178-21189.3, and 21189.50-21189.57.
 - b) The Judicial Council shall amend the California Rules of Court, as necessary, to implement this requirement, by or before April 1, 2021.
- 4) Other related provisions regarding the issuing and reviewing of the environmental documents.

What About NEPA & Other Federal Permits & Approvals? This project will need to comply with both state and federal environmental requirements. This includes both complying with CEQA and state permitting requirements as well as the National Environmental Policy Act (NEPA) and federal permitting requirements. While the provisions of this bill, with these amendments, would accelerate administrative and judicial review of state environmental documents and permits, it would not do so for federal environmental documents and permits. The net result of this bill with these amendments might simply be to shift the venue for challenging this project from state to federal courts.

Comments by the Senate Judiciary Committee. “This bill provides for expedited judicial review of CEQA challenges to the Anderson Dam project and thus implicates the jurisdiction of the Senate Judiciary Committee, which has historically disfavored such provisions.”

“For a small handful of major projects—particularly, large “environmental leadership” projects and a few sports stadiums—existing law provides that, to the extent feasible, courts must resolve CEQA challenges to those projects within 270 days of the filing of the record of administrative proceedings. These provisions were the subject of protracted policy deliberations over concerns regarding the burden on courts, access to justice for other litigants, and the sufficiency of environmental review. This year, the Legislature is considering several bills that would extend such provisions to additional classes of projects.”

“The widespread application of expedited review arguably magnifies the concerns described above. Additionally, it could have diminishing returns for project applicants: at some point, if the burden is too great, courts could fail to meet the 270-day deadline or even ignore it altogether. In fact, under separation of powers principles, the Legislature cannot constitutionally mandate that courts resolve cases on any particular timeframe. (See *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 855-856 [upholding a similar 270-day expedited review provision for the Sacramento Kings arena only because it contained a “to the extent feasible” proviso].)”

SUGGESTED AMENDMENTS

On page 3, line 15, after “of” insert “the”

On page 4, line 6, delete “reduces” and insert “reduced”

On page 5, line 38, after “agreed” insert “to”

On page 6, line 12, delete “21000” and insert “21000)”

On page 6, line 13, delete “Code).” and insert “Code.

On page 6, line 40, after “with” insert “both of”

On page 7, line 14, after “to,” insert “all of”

On page 8, line 18, delete “paragraph” and insert “subparagraph”

On page 8, line 29, delete “This subdivision shall not apply if any” and insert “Paragraph (1) shall not apply if either”

On page 9, line 39, delete “goals” and insert “goal”

On page 10, beginning on line 29, delete “with the state board” and insert “in accordance with Section 3855 of Title 23 of the California Code of Regulations,

On page 10, delete lines 31 and 32, on line 33, delete “3855 of Title 23 of the California Code of Regulations.” and insert “and the San Francisco Bay Regional Water Quality Control Board.”

On page 11, beginning on line 19, delete “not complete,” and insert “complete and that were incomplete,”

On page 11, line 20, delete “they” and insert “incompleted items”

On page 11, line 31, after “are” insert “complete and”

On page 11, line 33, delete “then”

On page 12, line 33, delete “application after it is determined or deemed complete,” and insert “application,”

On page 12, line 35, delete “application.” and insert “application under subparagraph (A) of paragraph (1). A request for information under this subparagraph shall not affect the deadlines under this subdivision or subdivision (c).”

On page 12, line 37, delete “board. If the”, delete lines 38-40, on page 13, delete lines 1 through 7, and insert “board, and the state board shall act on the appeal in accordance with subdivision (c) of Section 65943 of the Government Code.”

On page 13, line 10, delete “(5)” and insert “(e)”

SUPPORT

Santa Clara Valley Water District (Sponsor)

Acterra

AFSCME Local 101

American Council of Engineering Companies of California

Association of California Water Agencies (ACWA)

Bay Area Council

California Chapters of The National Electrical Contractors Association

California Legislative Conference of The Plumbing, Heating and Piping Industry

California Municipal Utilities Association (CMUA)

California Special Districts Association

Campbell Chamber of Commerce

Cities Association of Santa Clara County

City of Gilroy

City of Milpitas

City of Morgan Hill

City of Mountain View
City of San Jose
City of Santa Clara
City of Sunnyvale
County of Santa Clara
Cupertino Chamber of Commerce
Employees Association, American Federation of State, County and Municipal
Employees 101, Council 57
Gilroy Chamber of Commerce
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
International Federation of Professional & Technical Engineers Local 21
LA Raza Roundtable De California
Midpeninsula Regional Open Space District
Milpitas Chamber of Commerce
Minority Business Consortium
Morgan Hill Chamber of Commerce
Mountain View Chamber of Commerce
Northern California Allied Trades
Professional & Technical Engineers, Local 21, IFPTE, AFL-CIO
San Francisco Public Utilities Commission
San Jose Water Company
San Jose/silicon Valley Branch of The NAACP
San Jose; City of
Santa Clara & San Benito Counties Building & Construction Trades Council
Santa Clara Valley Open Space Authority
Silicon Valley Black Chamber of Commerce
Silicon Valley Central Chamber of Commerce (Santa Clara)
Silicon Valley Leadership Group
Silicon Valley MEPS (mechanical, Electrical, Plumbing and Sprinkler Fitters)
Southern California Glass Management Association (SCGMA)
State Building & Construction Trades Council of California
Sunnyvale Silicon Valley Chamber of Commerce
United Contractors
Wall and Ceiling Alliance (WACA)
Western Wall and Ceiling Contractors Association (WWCCA)

OPPOSITION

Associated Builders and Contractors - Southern California Chapter
Associated Builders and Contractors Northern California Chapter
California Trout
Guadalupe-Coyote Resource Conservation District
San Francisco Baykeeper
Western Electrical Contractors Association

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