



Santa Clara Valley Water District

File No.: 20-0544

Agenda Date: 6/23/2020

Item No.: *2.7.

BOARD AGENDA MEMORANDUM

SUBJECT:

Public Hearing on the Engineer's Report and the CEQA Emergency Exemption Determination for the Anderson Dam Federal Energy Regulatory Commission Order Compliance Project; Resolution Approving the Engineer's Report; and Project Approval for the Anderson Dam Federal Energy Regulatory Commission Order Compliance Project, Project No. 91864005 (Morgan Hill) (District 1).

RECOMMENDATION:

- A. Conduct Public Hearing on the Engineer's Report and the CEQA Emergency Exemption Determination for the Anderson Dam Federal Energy Regulatory Commission Order Compliance Project (FOCP);
- B. Close the Public Hearing;
- C. Approve the CEQA emergency exemption determination for the FOCP;
- D. Adopt the Resolution APPROVING THE ENGINEER'S REPORT FOR THE FOCP; and
- E. Approve the Project.

SUMMARY:

The Anderson Dam FOCP is being proposed to comply with an Order from the Federal Energy Regulatory Commission (FERC), which requires Santa Clara Valley Water District's (Valley Water) immediate implementation of interim risk reduction measures to protect the public from risk of dam failure due to seismic activity. The proposed FOCP would ensure compliance with the FERC Order by (a) allowing Valley Water to safely, reliably, and expeditiously drawdown Anderson Reservoir (Reservoir) level and maintain the Reservoir level at a required lower elevation; (b) minimizing risks associated with exceeding the restricted Reservoir level and an undersized outlet structure by constructing a new, low-level outlet; (c) prioritizing the interim downstream protection of residents and property; and (d) minimizing the public health and safety and environmental impacts of Reservoir drawdown.

I. Background

Anderson Dam was built in 1950 three miles east of U.S. 101 in the City of Morgan Hill. The dam is an earthen dam that is 235-feet high and sits along the Coyote Creek Fault as well as is parallel to the Calaveras Fault. Anderson Dam forms Anderson Reservoir, which holds approximately 90,000 acre-feet of water when full and is the largest of Valley Water's 10 reservoirs. In 2012, following a

seismic stability analysis, Valley Water began plans to retrofit and strengthen Anderson Dam to meet current regulatory safety standards to withstand a large earthquake. This effort is known as the Anderson Dam Seismic Retrofit Project (ADSRP), an effort to ensure public safety and secure a reliable water supply.

Anderson Dam is under the jurisdiction of FERC and California Department of Water Resources, Division of Safety of Dams (DSOD) and must meet their dam safety design standards. FERC has jurisdiction over Anderson Dam safety measures and operations due to licensing a small hydroelectric facility on this Reservoir.

On February 20, 2020, under Part 12 of the Federal Power Act, FERC ordered Valley Water to implement interim risk reduction measures associated with ADSRP immediately, due to the limited existing outlet capacity at Anderson Dam and the presence of densely populated areas downstream of the dam. Specifically, FERC ordered Valley Water to: maintain the reservoir no higher than elevation 565 feet immediately; start lowering the Reservoir to an elevation of 488 feet beginning no later than October 1, 2020; take all appropriate measures to maintain and quickly lower the Reservoir to deadpool in the event of significant inflow once the 488 feet elevation is reached; assess and address the issue of potential rim instability during drawdown; and expedite design, construction, and operation of a new, low-level outlet in advance of the ADSRP. FERC stated in its Order that Valley Water should implement the dam safety directives, including design and construction of the proposed low-level outlet, while securing alternative water supplies and working with FERC staff, and federal, state and local resource agencies to minimize environmental effects.

In response to FERC's Order, Valley Water staff expeditiously moved to complete the design of the proposed FOCF components and initiated emergency consultation processes with the regulatory agencies including federal and state fish and wildlife agencies, as appropriate. On May 26, 2020, the Board approved for transmittal to FERC staff's recommended Preliminary Project Description for the FOCF, which includes a general description of the following FOCF elements:

1. Reservoir Drawdown to Deadpool
2. Anderson Dam Tunnel Construction
3. Anderson Dam Tunnel Operation and Maintenance
4. Avoidance and Minimization Measures
 - a. Bank and Rim Stability Improvements
 - b. Existing Intake Structure Modifications
 - c. Creek Channel and Bank Erosion Control
 - d. Imported Water Releases and Cross Valley Pipeline Extension
 - e. Coyote Percolation Dam Replacement
 - f. Coyote Creek Flood Management Measures
 - g. Additional Avoidance and Minimization Measures to Protect Water Quality and Biological Resources

Also, on May 26, 2020, staff held an environmental technical work group meeting with FERC, National Marine Fisheries Service, and California Department Fish and Wildlife Service to discuss the Reservoir drawdown operations. On May 27, 2020, staff held a design technical briefing workshop

with the Board of Consultants and FERC on the FOCP elements. A virtual public meeting was held in the evening on May 28, 2020 on the FOCP. On May 29, staff e-filed a preliminary Environmental Screening Report to provide background studies and environmental information to assist FERC with its Emergency Environmental Assessment and emergency consultations with regulatory agencies for the FOCP. On June 5, 2020, staff e-filed a draft Reservoir Drawdown and Operations Plan with Appendices, including a Fish Rescue Plan, Fish Resources Assessment, and Valley Habitat Plan assessments to apprise FERC of operational plans for the FOCP, and to provide additional background studies and information regarding the potential for impacts of the FOCP, including FOCP flow operations. Also on June 5, 2020, Valley Water shared the preliminary Project Description, Environmental Screening Report, and draft Reservoir Drawdown and Operations Plan for the FOCP with the Interagency Group consisting of state, federal and local regulatory agencies in order to provide them with Valley Water's current understanding of FOCP engineering, design, and strategies to avoid and/or lessen environmental impacts.

II. Project Description

Since the Board's approval of the Preliminary Project Description on May 26, 2020 for purpose of transmittal to FERC, staff has prepared the Engineer's Report and the draft Reservoir Drawdown and Operations Plan, and has engaged in discussions of avoidance and minimization measures with regulatory agencies, all of which have resulted in the need to update the Project Description. Changes to the Project Description document include the addition of 5 parcels that were omitted, minor modification to the fisheries avoidance and minimization measures, updated and additional details of FOCP operation, and clarification of possible demolition of some of the homes following acquisition for the Coyote Creek Flood Management Measures. The final Project Description is included as Attachment 1.

III. CEQA Exemption for Emergency Projects

CEQA provides a statutory exemption for emergency projects, which include specific actions necessary to prevent or mitigate an emergency (Public Resources Code § 21080(b)(4) and CEQA Guidelines § 15269(c)). The FOCP qualifies for this emergency exemption, for the reasons summarized below.

A. Potential Dam Failure and Catastrophic Flooding is an Emergency

CEQA defines an "emergency" as a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Emergency" includes such occurrences as fire, flood, earthquake, or other soil or geologic movements. (Public Resources Code § 21060.3, CEQA Guidelines § 15359). CEQA Guidelines §15269(c) provides that the emergency project exemption generally does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term. However, this exclusion does not apply if the anticipated period of time to conduct an environmental review of such a long-term project would create a risk to public health, safety or welfare.

Dam failure leading to catastrophic flooding would be a "sudden unexpected occurrence" were it to

occur. FERC's Part 12 Dam safety Order clearly reflects a regulatory determination that seismic risks to the integrity of the Anderson Dam constitute an emergency situation that requires immediate action by Valley Water. This determination is underscored by FERC's March 16, 2020 request for emergency consultations with the federal environmental agencies. Pursuant to CEQA Guidelines, an emergency project exemption can apply even when a recognized hazardous condition, such as an earthquake that could cause dam failure and catastrophic flooding downstream, has existed for some time, if an emergency can be anticipated and immediate action taken to prevent it. The prior anticipation of an occurrence does not prevent it from being an emergency. The risk of total dam failure and flooding is a "sudden, unexpected occurrence," involving a "clear and imminent" danger that demands "immediate action" to "prevent or mitigate" loss of, or damage to, life, health, property, or essential public services.

B. Dam Failure is "Imminent," Requiring Immediate Action

The high probability of a significant earthquake along the Calaveras fault coupled with the magnitude of harm that would result from such an earthquake establishes that risk of failure of Anderson Dam is imminent and unacceptable. Immediate action to prevent flood damage is required because, as recognized by FERC and confirmed by Valley Water studies, the magnitude of the risk of catastrophic dam failure to downstream life and property is extreme.

C. FOCF is "Necessary" to Prevent Dam Failure and Mitigate Catastrophic Flood Risks

Each of the FOCF project components is necessary for an integrated FOCF emergency response project, both to prevent or mitigate against catastrophic dam failure, and to avoid and minimize environmental or water supply impacts of such emergency response actions. Reasons why the ten main FOCF components are necessary are described more fully in the FOCF Description.

D. Time Necessary to Conduct CEQA Review of Proposed Project Would Create Public Health and Safety Risk

FOCF components other than short-term actions related to initial drawdown and maintenance of deadpool can be considered "long-term" action undertaken for the purpose of preventing or mitigating against dam failure and catastrophic flooding. However, the anticipated period of time to conduct a CEQA review of these long-term actions would create substantial risks to public health and safety and, more crucially, would not allow Valley Water to timely comply with FERC's February 20, 2020 Order to begin drawing down to deadpool beginning October 1, 2020, and thereafter maintain the reservoir at deadpool. As a FERC licensee, Valley Water has to timely comply with FERC's Order, and this Order establishes that FERC - the nation's principal dam safety regulatory agency - views *immediate* implementation of these interim risk reduction measures as necessary for public health and safety.

Consistent with Valley Water work instructions for CEQA document guidelines, processing of an Environmental Impact Report (EIR) generally takes 12 to 36 months to complete. Due to the scope and complexity of the FOCF, a processing timeline closer to 36 months if not longer would likely be necessary, based on Valley Water's typical experience with EIRs for large or complex projects. A 36-month delay would mean that Valley Water could not approve the FOCF until June 2023. This would mean that Valley Water would not be able to comply with the FERC emergency directive for three

years and that actions would not be taken to prevent emergency conditions at Anderson Dam. Therefore, there is not adequate time to complete an EIR before Valley Water approval of the FOCP, without creating a substantial risk to public health, safety, and welfare.

E. Filing of Notice Exemption

Staff has reviewed the proposed FOCP for CEQA compliance and based on the above considerations, concluded that it qualifies for CEQA's emergency project statutory exemption. Consistent with Valley Water's CEQA procedures, a draft Notice of Exemption (NOE) (Attachment 2) is attached for Board consideration. If the Board approves the FOCP, staff will file the NOE with the County Clerk.

IV. Engineer's Report

Section 12 of the District Act requires the Board to conduct a public hearing to consider all written and oral objections to the proposed project when: 1) the project is new construction; and 2) the project is funded by a single or joint zone of benefit. As the proposed FOCP meets both conditions, staff prepared an Engineer's Report (Attachment 3) for the purpose of public disclosure. The Notice of Public Hearing for the Engineer's Report (Attachment 4) was published in accordance with the District Act; posted outside Valley Water's Offices at 5700 Almaden Expressway, San Jose, California, 95118; and on Valley Water's website at <https://www.valleywater.org/public-review-documents>. Copies of the Report have been provided to the City Clerk's offices in the cities of San Jose, Morgan Hill, and Gilroy and may be available on their respective web sites.

On June 9, 2020, the Board adopted Resolution No. 20-57 Setting Time and Place of Public Hearing on the Engineer's Report and CEQA Exemption Determination for the Anderson Dam Federal Energy Regulatory Commission Compliance Order Project. As stated in the Resolution, the Board was provided with the Engineer's Report dated "May 2020." The correct date for the Engineer's Report provided to the Board and made accessible for review to the public was "June 2020."

V. Public Comments

One comment letter on the FOCP was received on June 9, 2020 from the Sierra Club. The letter and staff's responses to the Sierra Club comments are included as Attachment 5.

VI. Prior Board Action(s)

May 26, 2020: the Board approved staff's recommended Preliminary Project Description for the FOCP.

June 9, 2020: the Board adopted Resolution No. 20-57 setting the time and date for the public hearing on the Engineer's Report to take place on June 23, 2020.

VII. Construction and Implementation of the FOCP

Public works project contracting is generally controlled by statutory requirements, enacted primarily

to further the strong public policy of promoting competition and preventing bias, fraud, corruption, and the misuse of public funds. Unfortunately, the bidding process is lengthy and bid awards are subject to further delays often caused by bid protests and taxpayer challenges. If a contract is awarded without a competitive process, it may be deemed void and the contractor may not be able to recover the value of goods and services provided.

Like CEQA, Public Contract Code (PCC) section 1102 provides a statutory exception to competitive bidding requirements which applies to emergency situations. If time is truly of the essence, a public entity may procure goods and services without a formal bidding process. The circumstances must present “a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.” This definition is strictly construed, considering the urgency and exigency of the situation and is not merely synonymous with expediency, convenience, or even the best interests of the public agency. Even when a public agency declares an emergency exists and bypasses a formal bidding process, a qualified contractor must still be selected to perform the necessary work.

For purposes of CEQA compliance, this memorandum provides extensive discussion regarding the emergency conditions that exist at the Anderson Dam including: dam failure leading to catastrophic flooding; the probability of a significant earthquake along the Calaveras and Coyote faults coupled with the magnitude of harm that would result from such an earthquake; and the time necessary to conduct the normal environmental review of maintaining the reservoir at deadpool and constructing the ADSRP would itself create a substantial risk to public health and safety. These same facts may support a staff recommendation for a future declaration of an emergency which meets the PCC definition and statutory interpretation, however, at this time, no such action is recommended.

Other options for expedited public works contracting also exist. Staff is currently evaluating options for selecting a qualified contractor(s) to implement the FOCP, and will schedule a future board agenda item with recommendations to approve an appropriate process; adopt plans and specifications; and award contract(s) for construction and implementation of the FOCP.

VIII. Next Steps

If the Board approves the FOCP, the future FOCP milestones are:

1. Board approval of a construction contractor selection process
2. Board adoption of plans and specifications for construction
3. Board award of construction contract(s)

In addition, staff has begun and will continue to pursue permits necessary to implement the FOCP. In coming months staff will be preparing emergency consultation packages and permit applications for submittal to regulatory agencies.

FINANCIAL IMPACT:

The FOCP is included in the Board-approved Fiscal Year 2020-24 Capital Improvement Program. The estimated total cost of the proposed FOCP is \$293 million (in 2020 dollars). There are sufficient funds in the FY21 Project No. 91864005 budget to fund the proposed FOCP. An adjustment to the total Project cost may be necessary in the future depending on how the FOCP work progresses. The proposed FOCP would be funded by the Water Enterprise Fund, with 82.3% of the costs allocated to Zone W-2 (North County) and 8% and 9.7% of the costs respectively allocated to Zone W-5 and W-7 (South County).

CEQA:

CEQA provides a statutory exemption for emergency projects, which include specific actions necessary to prevent or mitigate an emergency (Public Resources Code §21080(b)(4) and CEQA Guidelines §15269(c)). After analysis of the facts and applicable law, staff has concluded that the FOCP qualifies for this emergency exemption for the reasons explained above in Section III. CEQA Exemption for Emergency Projects.

ATTACHMENTS:

- Attachment 1: Project Description
- Attachment 2: Draft Notice of Exemption
- Attachment 3: Engineer's Report
- Attachment 4: Notice of Public Hearing
- Attachment 5: Sierra Club Letter and Response
- Attachment 6: Resolution
- Attachment 7: PowerPoint
- *Supplemental Agenda Memo
- *Supplemental Attachment 1: Revised Project Description
- *Supplemental Attachment 2: Revised Draft Notice of Exemption
- *Supplemental Attachment 3: Revised PowerPoint
- *Handout 2.7-A, K. Irvin
- *Handout 2.7-B, E. Ruder
- *Handout 2.7-C, A. Kaewphokha
- *Handout 2.7-D, C. Hakes (Responding to K. Irvin, Handout 2.7-A)
- *Handout 2.7-E, G. Pugh
- *Handout 2.7-F, J. Fioretta

UNCLASSIFIED MANAGER:

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