



Action Item: Potential Modifications to Water Storage Investment Program

Background

Through the Water Storage Investment Program (WSIP), the California Water Commission will invest nearly \$2.6 billion in the public benefits of water storage projects, consistent with the requirements of Proposition 1 (the Water Quality, Supply, and Infrastructure Improvement Act of 2014), Chapter 8. In July 2018, the Commission determined the Maximum Conditional Eligibility (MCED) amounts for eight projects that will create more than four million acre-feet of storage capacity. Since then, applicants have been working to complete the Proposition 1 requirements, which include obtaining permits and environmental documents, contracts for the administration of public benefits, and contracts for non-Proposition 1 funding before returning to the Commission for a final award hearing.

At the July 2018 meeting, the Commission awarded early funding, (a portion of the MCED), to three projects to help pay for environmental documents and permitting: Los Vaqueros Reservoir Expansion Project, Pacheco Reservoir Expansion Project, and Sites Reservoir Project.

On May 11, 2020, the Commission received a letter, signed by six of the applicants, that suggested ways WSIP could be modified to assist applicants with economic hardships caused by COVID-19, and suggested a variety of modifications to the program. Some suggestions require changes to regulations and statute. The letter's receipt was acknowledged during the Executive Officer's report at the May 20 Commission meeting. Under this item, Commission staff will provide project updates and report on their assessment of ways the program may assist applicants during this economic downturn.

Staff Analysis

Suggestions in the letter fall into three categories: existing funding agreement flexibility, requested regulatory changes, and a requested statutory change.

Funding Agreement Flexibility

Funding agreement flexibility refers to changes staff can exercise within funding agreements. Those applicants that have existing early funding agreements can work with staff to document the need for those changes and amend agreements, as applicable, to provide flexibility during the economic downturn. Such changes do not require a Commission decision. Staff will inform the Commission of the flexibility that exists within early funding agreements and the precautions staff takes in implementing any such change.

Requested Regulatory Changes

The letter suggests the following modifications to the program that would require changes to the regulations:

- Projects that did not request early funding during the application process could be given an opportunity to request funds now.
- Increase early funding to 10 percent of MCED.
- Extend early funding reimbursable cost back to November 4, 2014, when Proposition 1 was passed.

Reopening an opportunity to make a request for early funding for those applicants that did not initially request early funding or were initially denied early funding, could provide State funding at a time when applicant revenue and priorities may result in slowing down or stalling project progress. As the pandemic continues, water agency revenue shortfall and impacts to WSIP projects remain unclear. Generally, project proponents will need to assess their finances and make adjustments to their priorities as the revenue picture comes into focus. The risk to projects that must slow down or stop because of the economic downturn are schedule impacts that could result in projects not meeting the statutory interim eligibility deadline of January 1, 2022. Water Code section 79757 states that, to remain eligible, a project must provide completed feasibility documents, have a draft of the environmental document available for public review, provide commitments for 75% of the non-public benefit cost share, and the Commission must find the project feasible by January 1, 2022. Staff recommends providing an opportunity to obtain early funding to those that do not have it so it can help projects continue to move forward in the face of potential financial impacts.

During the development of regulations, the Commission decided to cap early funding amounts at five percent of the MCED. The Commission also decided that early funding could only pay for costs incurred since the date of application, which was August 14, 2017. The Commission made these decisions to reserve the bulk of the Proposition 1, Chapter 8 funds for construction activities, as well as limit the risk of stranding funds should an early funding recipient be reimbursed under the early funding agreement but not proceed to final funding. Changing these levels would mean reversing prior Commission decisions. Projects are still early enough in the planning phase that the risk of stranding funds is likely similar to when the regulations were developed. These regulation changes would benefit those projects that have been awarded early funding, but it is not clear that these changes are useful in helping projects progress toward the January 2022 requirements or final funding requirements. Allowing early funding recipients to be reimbursed for activities back to the bond passage will pay for past work, but not advance current project schedule. Water Code section 79755(c) limits applicability of early

funding to work associated with completing environmental documents and obtaining permits. It is not clear that increasing the cap from 5% to 10% provides funding that could be spent within 79755(c) limitations. Staff's recommendation is to maintain current regulation language.

Requested Statutory Change

The letter suggests a day for day change to pre-established deadlines or interpreting requirements for feasibility and local cost share commitments in a way that accommodates COVID impacts. Staff interprets this request as possible change to the January 1, 2022, date from Water Code Section 79757. The deadline's intent is to allow sufficient time for a project to develop its feasibility documentation, and yet require a certain level of project progress to maintain program eligibility. Water Code section 79760 sets the process for changing provisions of Proposition 1, Chapter 8:

- (a) In approving the Water Quality, Supply, and Infrastructure Improvement Act of 2014, the people were informed and hereby declare that the provisions of this chapter are necessary, integral, and essential to meeting the single object of work of the Water Quality, Supply, and Infrastructure Improvement Act of 2014. As such, *any amendment of the provisions of this chapter by the Legislature without voter approval would frustrate the scheme and design that induced voter approval of this act. The people therefore find and declare that any amendment of the provisions of this chapter by the Legislature shall require an affirmative vote of two-thirds of the membership in each house of the Legislature and voter approval.*
(Emphasis added.)

It is clear from the statutory language that changing Chapter 8 language is intentionally difficult, requiring multiple parties (both houses of the Legislature and voters) to implement any change. In considering this suggestion, staff first analyzed the projects' immediate needs for the change. Staff believes that working with applicants individually on their understanding of what can be provided to meet the statutory requirements for feasibility documentation and local cost share commitments will allow applicants to meet the current statutory deadline. This cooperative effort between Commission staff and applicants will make a change to the deadline unnecessary. Staff recommends leaving the statutory deadline unchanged.

Commission Decisions

Commission decisions are needed for potential regulatory changes and the statutory change. For regulatory changes, the Commission can decide to pursue a regulatory change or decide to leave regulation language as it currently stands. Table 1 shows the requested regulatory changes and the outcome of potential Commission decisions.

Table 1. Regulatory Change Summary

Regulatory Change	Pursue Change	Do Not Pursue Change
New Early Funding Opportunity	Applicants that do not currently have early funding can apply for such funding. Results in reducing risk of slowing or stoppage of project work due to economic impacts.	No additional opportunity to access early funding. Some projects may slow or stop due to economic impacts.
Early Funding reimbursable costs extended to date of Prop 1 passage	Early Funding recipients could be reimbursed for costs incurred between November 2014 and August 2017.	Early funding recipients continue to be limited to reimbursement for costs incurred since the application date in August 2017.
Extend Early Funding cap to 10% of MCED	Early funding recipients could double the current early funding award if they can demonstrate expenditures within statutory limitations. Any new early funding awards would be subject to the new cap.	Current awards would remain the same. Any additional early funding awards would be capped at 5% of MCED.

If the Commission decides to move forward with any of the regulation changes, it must also decide on the regulatory mechanism to do so. Although COVID-19 is an established emergency, that does not necessarily mean that regulation changes made necessary because of COVID-19 meet the standard for “emergency regulations.” Impacts that jeopardize a project’s viability (e.g. no current funding) are more likely to meet the standard for an emergency regulation. Changes that result in additional funds to existing agreements, since none of the current early funding recipients are close to exceeding their contract amount, would likely not meet the standard for an emergency regulation.

An emergency regulation can be put in place within two weeks after the Commission approves the regulations, assuming the Office of Administrative Law agrees that it is an emergency. A regular rulemaking is an 8- to 10-month (minimum) process.

Staff recommends pursuing the use of emergency regulations only for providing an additional early funding opportunity as the effectiveness of that regulation change is lost in the standard regulation change timeline.

For the statutory date change, the Commission can decide to pursue a Legislative change to the January 1, 2022, date, or they can decide to leave the date as is.

If the Commission decides to implement any of these changes, it begins the change process but does not guarantee the outcome. Regulatory and statutory changes are subject to specific processes that can contain additional approval processes and necessary coordination with other State efforts. Complications may arise with these changes, and if staff is unable to implement the change the Commission may have further discussions on these topics. If the requested regulatory or statutory change is successful, additional process may be needed to fully implement the change. For example, if the Commission implements a regulatory change to provide a new opportunity for early funding, once the regulatory change is complete, applicants will still need to request the funding, supply the necessary information to the Commission, and the Commission will need to evaluate the request and make an early funding award before an applicant has access to the funds.

This is an action item.

Contact

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