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WSIP and BIB funding for CA storage projects

January 28, 2021

There is one statutory deadline that would (or in most cases might have prevented) the California Water Commission from providing funding for storage projects under their Proposition 1, California Water Bond WSIP. There were two statutory deadlines that could have prevented the Secretary of the Interior from tapping U.S. taxpayer funding under the WIIN. These deadlines have been bypassed for a number of California and other-state projects under Title IX of the Infrastructure Investment and Jobs Act. We start with the California taxpayer funding deadline.

Part One, California Water Commission — Before non-early (non-study/non-permitting) funding¹ can be released for projects that applied for Commission funding and were ranked in the then one-time 2018 allocation decision,² the Commission made a

¹ At this writing, seven of the “Water Supply Investment Program” (WSIP) projects are receiving early funding. The Temperance Flat dam, alone among the initial WSIP projects with funding allocations, did not receive early funding. Funding awards were up to 5% of the WSIP project funding allocations.

² Eight projects were ranked, and three projects were deemed ineligible in what became the first round of financing allocations. The ranked eligible projects were the following: Pacheco Dam, Los Vaqueros Reservoir expansion, Temperance Flat and Sites dams, Kern Fan Groundwater Storage, Chino Basin Conjunctive Use, Willow Springs Water Bank, and South Sacramento County Ag Program (the latter now “Harvest Water”). On October 30, 2020, the Temperance Flat Reservoir Authority authorized its staff to withdraw its application for project funding:
https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/2020/11_November/November2020_Item_9_Attach_2_TFRAResolution.pdf?la=en&hash=383CB3E7D7D919B2ED628A1A0B6E7E504C739A4F
<https://www.friendsoftheriver.org/wp-content/uploads/2020/12/2020-12-21-TFD-returns-171-million-Fresno-Bee.pdf>. Funding allocations for other projects are not permitted under current regulations. However, the Commission, in response to a staff proposal, directed a staff survey for other projects that might seek funding allocations in a potential second round of applications that could be made by changes in regulations. These potential second-round projects are called “screening” projects.
https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/2020/12_December/December2020_Item_8_AddFunding_Final.pdf?la=en&hash=F75D6A35941D9F023D10CD840AF5BFB530221B05. As discussed later in this memo, on December 16, 2021, the Commission provided the necessary determinations for two of these screening projects, (1) the Regional Surface Water Supply Project (Regional Project), submitted by the Stanislaus Regional Water Authority (SRWA), from the Tuolumne River and (2) the Del Puerto

number of findings discussed in §6013 of the Commission's "Water Supply Investment Program" (WSIP) regulations.³ Some of these findings had a hard January 1, 2022, statutory deadline created in the Proposition 1 bond language — Cal. Water Code §79757(a)⁴, but the effective deadline was December 16, 2021, the last California Water Commission meeting of 2021.

The specific WSIP regulatory deadline language tracks the §79757(a) bond language closely. Here's the regulatory language from §6013(f):

- (2) After January 1, 2022, a project will not be eligible for funding if the following conditions are not met:
- (A) All feasibility studies are complete and draft environmental documentation is available for public review;
 - (B) The Commission makes a finding that the project is feasible, and will advance the long-term objectives of restoring ecological health and improving water management for beneficial uses of the Delta;
 - (C) The Director of the Department receives commitments from not less than 75 percent of the non-public benefit cost shares of the project;

As can be seen from the following graphic retrieved from the Commission's website on December 16, 2021, most funding decisions, described as the final award hearing (as

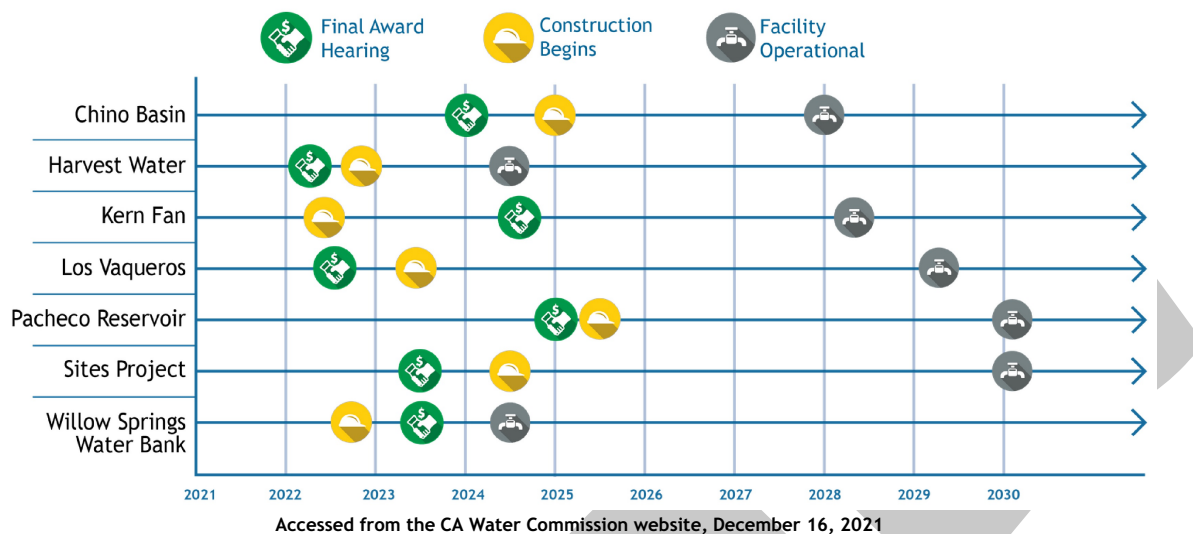
Canyon Dam. These determinations were made without the necessary information required by WSIP regulations. The Commission expects to change regulations to permit a second round of allocations in 2022 for these two projects.

³ <https://www.friendsoftheriver.org/wp-content/uploads/2020/06/WSIP-RegulationsSubmitted.pdf>

⁴ Cal. Water Code §79757

- (a). A project is not eligible for funding under this chapter unless, by January 1, 2022, all of the following conditions are met:
- (1) All feasibility studies are complete and draft environmental documentation is available for public review.
 - (2) The commission makes a finding that the project is feasible, and will advance the long-term objectives of restoring ecological health and improving water management for beneficial uses of the Delta.
 - (3) The director receives commitments for not less than 75 percent of the nonpublic benefit cost share of the project.
- (b) If compliance with subdivision (a) is delayed by litigation or failure to promulgate regulations, the date in subdivision (a) shall be extended by the commission for a time period that is equal to the time period of the delay, and funding under this chapter that has been dedicated to the project shall be encumbered until the time at which the litigation is completed or the regulations have been promulgated.

distinct from funding allocations and §79757(a) determinations) are anticipated to come well after the January 1, 2022, deadline for §79757(a) determinations.



However, no project (with the now irrelevant exception of projects delayed by litigation) that did not make the Commission §6013(f) deadlines for feasibility studies, available draft environmental documentation, feasibility and performance findings, and private benefits funding commitments could be funded later. All the seven remaining WSIP projects⁵ plus two others, the Del Puerto Canyon dam and the “Regional Surface Water Supply Project,” a Tuolumne River diversion-to-storage project, received the required determinations, although in some cases improperly.

Some of these preconditions to meet the January 1, 2022, deadline might have been easier to meet than others, although all proved easy to meet because of the lax interpretations of their regulatory and statutory duties by the California Water Commission commissioners.

(1a) Draft feasibility reports were required to apply for WSIP funding allocations. In slight contrast, under condition §6013(f)(2)(A), *final* feasibility reports from the applicant

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https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/Press/WSIP_Eligibility_PressRelease_102721.pdf.

https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/Press/WSIP_Eligibility_PressRelease_111821.pdf.

https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/Press/WSIP_Eligibility_PressRelease_121521.pdf.

were required to meet the 2022 deadline. Presumably, final feasibility reports should have met regulatory standards in the Commission's WSIP Technical Reference,⁶ but in the end the two screening projects (and arguably some others) were not held to the regulatory and statutory standard that *all* feasibility reports be completed and to the WSIP regulatory standards by the Commission. These Commission departures from their regulatory duties were made without comment except that they wanted to protect the screening projects WSIP eligibility. In effect, the Pandemic request of nearly all of the Project applicants (that the Commission consider earlier stage or incomplete feasibility reports⁷ for projects undergoing major redesign as "final" or defer any requirement for completion of feasibility reports⁸) was honored by Commission actions rather than formal regulatory or policy changes.

(1b) Regarding the second part of condition §6013(f)(2)(A) (draft environmental documents available for public review), under condition §6013(f)(2)(A) these documents were also required (although the Commission, in practice, did not honor this requirement) to apply for WSIP funding allocations.⁹ In the end, the Commission

⁶ WSIP Regulations §6003(a)(1)(O): "Documentation that demonstrates the project's engineering, environmental, economic, and financial feasibility as specified in the Water Storage Investment Program Technical Reference Document (Technical Reference) ..., incorporated herein by reference, including draft feasibility studies (if available);"

The Technical Reference Document takes a little more than a page in Section 3.4, pp. 3.3 & 3.4, to define feasibility. Feasibility materials must include project objectives, description, costs, benefits, and cost allocation in addition to describing technical, environmental, economic, and financial feasibility determinations and a constructability finding.

<https://www.friendsoftheriver.org/wp-content/uploads/2020/06/WSIP-TechnicalReference.pdf>

⁷ Six of the eight successful applicants for funding allocations requested emergency program changes in a letter to the Commission on May 11, 2020. Changes to feasibility report requirements was one of their suggestions: "[c]onsider interpreting the requirements for feasibility and local cost-share commitments in a way that accommodates COVID impacts." This request was not put up for a Commission vote by staff. Staff and the applicants apparently considered these matters to be part of Commission judgement on the §6013(f)(B) findings and thus not require regulatory or statutory changes. <https://www.friendsoftheriver.org/wp-content/uploads/2020/07/Letter-to-CWC-requesting-changes-to-project-deadlines.pdf>

⁸ The Sites and Pacheco dam projects are undergoing redesign. Temperance Flat dam, before its deferral, was trying to assign new beneficiaries and establish financial partners. It is uncertain whether these potential arrangements might have reduced or eliminated the public benefits that were the basis of its \$171 million allocation.

⁹ Under WSIP Regulations §6003(a)(1)(S), the "[m]ost recent version of publicly-available environmental documentation for the project" is a requirement to apply for a funding allocation. The Commission permitted publically available "administrative" pre-drafts of draft EIRs to suffice for this regulatory requirement for an allocation.

determined that all the WSIP and WSIP-screening surface-storage projects with draft EIRs, Revised draft EIRs, or undertaking supplemental environmental impact reports and sought to meet the §6013(f) January 1, 2022, Commission determinations deadline met this requirement.

(2a) The first part of condition (B) required a Commission determination of feasibility (rather than merely feasibility studies by the applicant). This could have been a small or big hurdle depending on the rigor of the Commission review, including their willingness to consider legal or practical feasibility, such as ability to meet Commission deadlines. This turned out to be a barely discernable hurdle. In addition, when confronted with the question of legal feasibility of putting a reservoir in a California State Park, the applicant claimed that this was legal and the Commission unanimously issued the feasibility determination without discussion.

(2b) Depending on how much the project has evolved since the supplicant applied for a funding allocation, the second part of condition (B), a Commission determination that the project “advances the long-term objectives of restoring ecological health and improving water management for beneficial uses of the Delta,” proved to be an insignificant hurdle. By regulation, projects that failed to do this were supposed to be eliminated at an early stage in the application process (§6006(c)(2)(F)), and the Commission did not appear to reassess this at its November and December 2021 meetings. Interestingly, projects that have been redesigned or not finished their design process may have chosen to or could no longer commit to accomplish the same public benefits for which they received WSIP funding allocations.¹⁰ Commission staff recognized this could happen when, at the December 2020 Commission meeting, they did not propose to recommend an “inflation adder” to the Sites Reservoir project since it was in the process of a minor downsizing which could reduce the public benefits of the project.

All of the WSIP projects received this “advancing the long term objectives ...” determination, either on the basis of the previous determination or at the November

¹⁰ Press accounts in 2018 reported that the San Joaquin Valley Water Infrastructure Authority might redesign the proposed Temperance Flat dam project without the public benefits allocated to them by the Commission.

<https://www.friendsoftheriver.org/wp-content/uploads/2018/07/Dam-backers-may-turn-down-funding-GV-Wire-7-25-2018.pdf>

<https://www.friendsoftheriver.org/wp-content/uploads/2018/07/Dam-backers-may-turn-down-funding-GV-Wire-7-25-2018.pdf>. In later developments, the successor authority, the Temperance Flat Reservoir Authority withdrew their application for funding at the November 2020 Commission meeting.

and December 2021 Commission meetings. The WSIP screening projects received this determination, largely on speculation, at the December 2021 meeting.¹¹

(3) Condition (C) was straightforward: the Department of Water Resources had to have received commitments for 75% of presumably the financing costs of the allocations of the projects not being financed by the Commission, the so-called “private benefits.” Demonstrating these commitments should have been a challenge for some projects that have not finished their design process and thus making financing arrangements premature — or requiring leaps of faith by financiers. Perhaps as a result, most of the supplicants asked for a loosening of the standards for demonstrating this commitment.¹² In the end, the Department received information purporting to establish the required commitments and seemed to be willing to charitably accept the demonstrations on faith.

(4) The Bond Act (Water Code §79757) provided for two exceptions to the January 1, 2022, deadline that would otherwise make a project ineligible for Commission funding:

(b) If compliance with subdivision (a) is delayed by litigation or failure to promulgate regulations, the date in subdivision (a) shall be extended by the commission for a time period that is equal to the time period of the delay, and funding under this chapter that has been dedicated to the project shall be encumbered until the time at which the litigation is completed or the regulations have been promulgated.

The Commission did not fail to promulgate regulations. None of the seven remaining projects with Commission funding allocations and one screening project, the “Regional Surface Water Supply Project” have litigation pending against them. One screening project, the Del Puerto Canyon dam, has CEQA litigation pending against it; however,

¹¹ Friends of the River *et al.* prepared a written letter explaining to the Commission why three projects would or may not meet the feasibility or “advances the long term... or improving water management...” standards. Friends of the River also made oral presentations. https://www.friendsoftheriver.org/wp-content/uploads/2021/12/FOR-Coalition-CWC-Letter-12-13-21_FinalDraft.pdf

¹² “Incorporate COVID related impacts into pre-established deadlines – such impacts were not expected when dates were determined. Day for day extensions are typical contract remedies for *Force-Majeure* conditions. The Governor has significant powers under the emergency declaration which should be further explored. As an alternative to deadline changes, consider interpreting the requirements for feasibility and local cost-share commitments in a way that accommodates COVID impacts.” (May 11, 2020 letter to Commission – emphasis added) <https://www.friendsoftheriver.org/wp-content/uploads/2020/07/Letter-to-CWC-requesting-changes-to-project-deadlines.pdf>

in spite of the inability of staff to support the feasibility determinations, the Commission voted to provide the required determinations by the January 1, 2022, deadline. Thus Water Code provision §79757(b) is moot, i.e., no longer relevant.

Potential second round of funding allocations – On February 10, 2021, the Water Commission announced the following funding reallocations that might limit availability of Commission funding for the two screening projects and/or augmenting Sites Reservoir’s additional funding to the remaining unallocated WSIP funds (currently estimated to be \$64 million):

In October 2020, the Temperance Flat Reservoir Authority (TFRA) formally withdrew from the WSIP, stating that the timing of WSIP statutory program requirements no longer aligned with the status of the Temperance Flat Reservoir project and the WSIP funding source would not be usable by the project. At the January 20, 2021, Commission meeting, the Commission voted to redirect a portion of the TFRA MCED amount to bring the Kern Fan and Willow Springs MCEDs up to their eligible amount. The Kern Fan Groundwater Storage Project was eligible for \$85,660,000 and received an initial MCED of \$67,537,315. Willow Springs was eligible for \$123,290,000 and received an initial MCED of \$95,405,999.

The Commission also voted to adjust the MCEDs of all existing projects to account for inflation at approximately 2.5 percent (inflation of approximately 10 percent has occurred compared to the cost estimates contained in the applications).

Project	2.5% Inflation Adjustment
Chino Basin Conjunctive Use Program	\$5,172,500
Harvest Water Program	\$7,012,500
Kern Fan Groundwater Storage Project	\$2,141,500
Los Vaqueros Reservoir Expansion Project	\$11,475,000
Pacheco Reservoir Expansion Project	\$12,113,750
Sites Project	\$20,409,442
Willow Springs Water Bank and Conjunctive Use Project	\$3,082,250
Inflation Adjustment Total	\$61,406,942

“This decision will help all of the water storage projects move forward as they work to complete their eligibility requirements,” said Commission Chair Teresa Alvarado. “All of the projects face challenges during this economic downturn, and seeing the projects succeed is important to the Commission and vital to the future of the state’s water supply.”

With approximately \$64 million in available funding remaining, a screening process has begun that will allow the Commission to receive conceptual submittals before the statutory deadline of January 1, 2022. In order to meet the WSIP's January 1, 2022, requirements, it is recommended and encouraged that project proponents submit screening proposals to Commission staff no later than October 22, 2021. The Commission could then decide to perform any needed rulemaking prior to opening a second solicitation.¹³

Emergency WSIP regulatory relief request – As discussed earlier, ranked WSIP applicants requested program alternations under what they believe staff or the Commission can accomplish under regulations and statute – or under *Force-Majeure* or Governor's emergency powers doctrines.¹⁴ Environmental groups were not in support.¹⁵ In response, (1) staff outlined some of the program tweaks they intend to make that don't require new regulations or law and (2) they did get approval at the July 15, 2020, Commission meeting to seek emergency regulations from the California Office of Administrative Law (OAL) to have a second round of "early" funding applications and approval process.¹⁶ These second-round emergency early-funding regulations were finalized. All the remaining WSIP projects received early funding, four as the result of the emergency regulatory changes.

The Commission voted at its December 2021 meeting to make the determinations for the two screening projects, thus maintaining their eligibility for the \$64 million in unallocated WSIP (and any other funds that become available if one or more WSIP projects drop out or reduce the project public benefits they can perform). The screening projects would have to go through whatever formal processes provided for in Commission regulation in a second round of funding. The Sites Reservoir project might also be eligible in a second round of funding on the basis of its eligibility not being fully

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https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/Press/MCEDInflationIncreasePressRelease_021021.pdf

¹⁴

<https://www.friendsoftheriver.org/wp-content/uploads/2020/07/Letter-to-CWC-requesting-changes-to-project-deadlines.pdf>

¹⁵

https://www.friendsoftheriver.org/wp-content/uploads/2020/07/NGO-Letter-to-Commission-re-WSIP-Modifications_7.13.2020.pdf

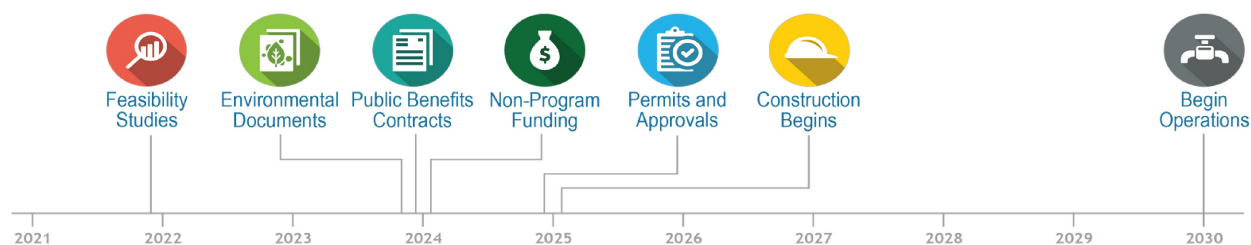
¹⁶ "Staff will present options to the Commission to address possible program changes suggested in a May 11 letter submitted by six of the WSIP owners due to the economic downturn caused by COVID-19. The Commission will decide on which course of action to take regarding potential program changes requested by applicants." (July 15, 2020, Commission agenda)

https://www.friendsoftheriver.org/wp-content/uploads/2020/07/July2020_Agenda_Final.pdf

funded (or perhaps new benefits it might claim in a second round of funding allocations). Thus there are as many as three projects likely to be fighting for these Commission WSIP funds. Less likely, other WSIP projects might seek additional allocations if they feel they can demonstrate additional public benefits that might make them eligible in a second round of funding allocations.

WSIP Dam project timelines: For a little more detail on how the individual projects are faring, here's the contemporary timelines for the dam projects from the Commission's website:

Projected Timeline



Pacheco Timeline

Accessed from CA Water Commission website, December 16, 2021

Pacheco dam — One of these projects, the Santa Clara Valley Water District's ("the District," SCVWD, or "Valley Water") proposed new Pacheco Dam is encountering considerable cost overruns, with the estimated cost of the project growing from the \$969 million at the time of the 2018 Water Commission allocation, to a revised estimate of \$1.3 billion to \$2.5 billion because of seismic issues at the then proposed site.¹⁷ The proposed dam was then moved upstream with an estimated cost of \$2.161 billion in the November 2021 draft EIR. The DWR Division of Safety of Dams, however, is proposing an earthfill dam estimated to cost \$2.304 billion. The District proposed to DWR that it would meet the §79757(a)(2)(C) 75% non-WSIP funding commitment itself, presumably from its ratepayers.

Valley Water is now calling the project the Pacheco Reservoir Expansion Project (PREP). The District's preferred draft EIR alternative would unlawfully encroach into Henry Coe State Park, and Valley Water maintains that such new use of the Park is lawful

¹⁷ <https://www.friendsoftheriver.org/wp-content/uploads/2021/01/PBRtable051018.pdf>
<https://www.friendsoftheriver.org/wp-content/uploads/2021/01/2020-1-6-Price-tag-nearly-doubles-for-Pacheco-Dam-Merc-News.pdf>

under the CA Public Resources Code. Here was a 2020 assessment from the District about project alternatives:

Alternatives (lowest to highest cost at 5% design)

Preliminary Alternative #	Facilities Variations			Notes
	Dam Site Location	Expanded Reservoir Size	Dam Type	
5	Upstream	96,000 AF	Earthfill	<ul style="list-style-type: none"> Narrower and smaller dam Spillway and inlet/outlet works are separate from dam Provides 31% less reservoir capacity
4	Upstream	140,000 AF	Hardfill	<ul style="list-style-type: none"> Narrower dam (less embankment volume) Spillway and inlet/outlet works are integrated into dam Potentially shorter construction duration Technical/permitting challenges Encroaches into Henry Coe Park at full pool
2	Downstream	140,000 AF	Hardfill	<ul style="list-style-type: none"> Spillway and inlet/outlet works are integrated into dam Potentially shorter construction duration Technical/permitting challenges
3	Upstream	140,000 AF	Earthfill	<ul style="list-style-type: none"> Narrower dam (less embankment volume) Spillway and inlet/outlet works are separate from dam Encroaches into Henry Coe Park at full pool
1	Downstream	140,000 AF	Earthfill	<ul style="list-style-type: none"> Similar to WSIP application Spillway and inlet/outlet works are separate from dam

Santa Clara Water District "Valley Water" 2020

PREP Milestones for WSIP Funding

(WSIP Rank No. 1: \$497 million)

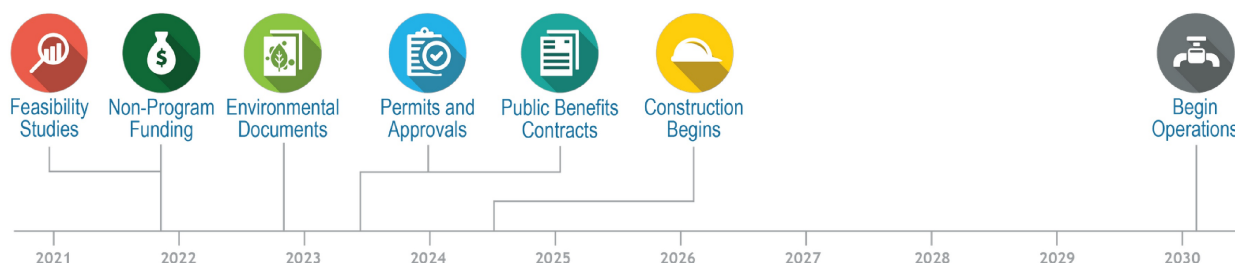
Milestone	Anticipated Completion	Notes
Updated Feasibility Documentation	October 2021	Includes project updates and refinements since the WSIP application feasibility study
75% of non-public cost share	October 2021	SCVWD Board Resolution to be enacted
Environmental Documentation (draft)	November 2021	Draft EIR underway set for public comment through beginning of 2022
CWC Feasibility Determination	December 2021	Prior to January 1, 2022 deadline for funding eligibility
Environmental Documentation (final)	November 2023	Complete document with SCVWD Board certification
Contracts for administration of public benefits	December 2023	CDFW for ecosystem DWR for emergency supply
Contracts for non-public cost share	September 2024	Agreements with potential partners for operations and funding
All required permits, agreements, approvals, and certifications	December 2024	Coincides with design completion and preparation of construction bid package

Santa Clara Water District (Valley Water) August 2021

The Water Commission unanimously made the necessary determinations for the proposed (November 2021) PREP on December 15, 2021, in spite of the location of the proposed project in Henry Coe State Park. Here’s a URL from Valley Water’s puff piece on the project:

https://www.friendsoftheriver.org/wp-content/uploads/2021/10/August2021_Item_9_Attach_1_PowerPoint.pdf

Projected Timeline



Sites Timeline

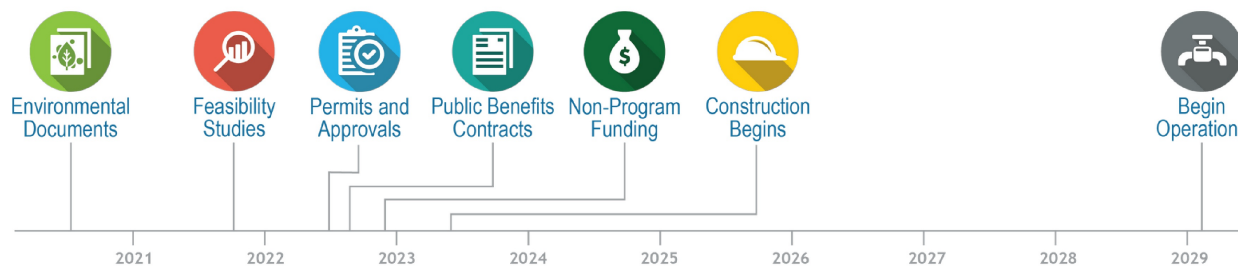
Accessed from CA Water Commission website, December 16, 2021

Sites Dam: A badly out-of-date fact sheet is available. Comments on the draft Revised EIR will be available after January 28, 2022.

<https://www.friendsoftheriver.org/our-work/sacramento-threat-sites/>

The Water Commission unanimously made the necessary determinations for the revised (November 2021) project at its December 2021 meeting.¹⁸

Projected Timeline



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https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/Press/WSIP_Eligibility_PressRelease_121521.pdf

Los Vaqueros

Accessed at CA Water Commission website December 16, 2021

Los Vaqueros: The Water Commission unanimously determined that this project met its January 1, 2022 required findings on October 20, 2021.¹⁹

<https://www.cwater.com/CivicAlerts.aspx?AID=839>

For more information from the project sponsors, review Contra Costa Water District's website. <https://www.cwater.com/706/Los-Vaqueros-Studies>

Del Puerto Canyon dam

Del Puerto Canyon Dam: (No Commission timeline available) This project was a screening project and failed to provide the required information for staff to make any recommendations to the Commission of the §79575 determinations. The Commission, however, charitably accommodated the applicant, the Del Puerto Water District and the San Joaquin River Exchange Contractors Authority, and made the required determinations. The vote was 5 to 3, Chair Alvarado and Commissioners Steiner and Arthur voting in the minority.

Non-dam WSIP deadlines: Here's just brief graphic summaries:

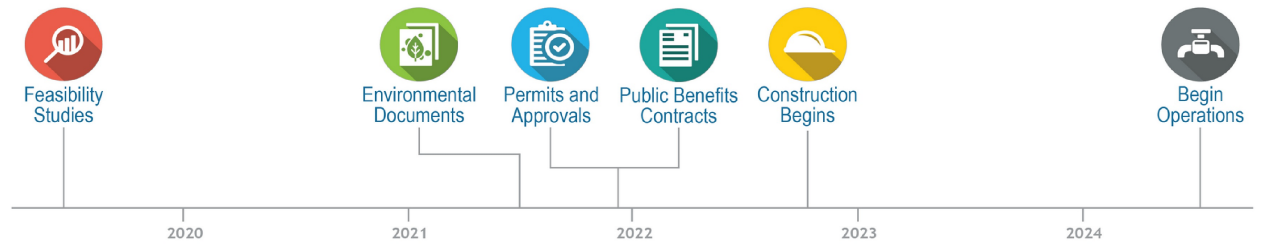


Chino Basin

California Water Commission website accessed October 21, 2021

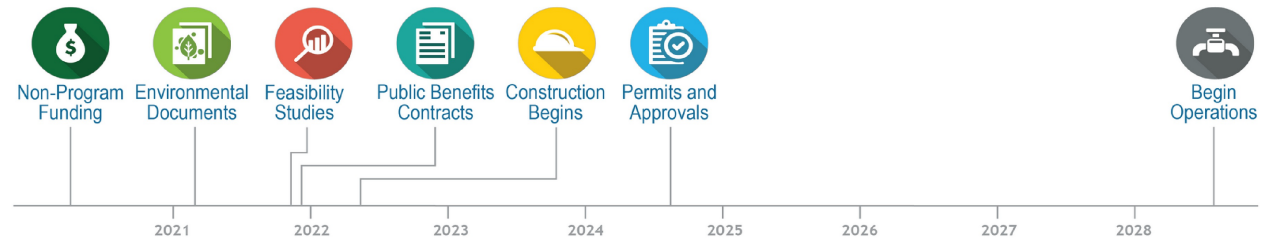
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https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/Press/WSIP_Eligibility_PressRelease_102721.pdf.



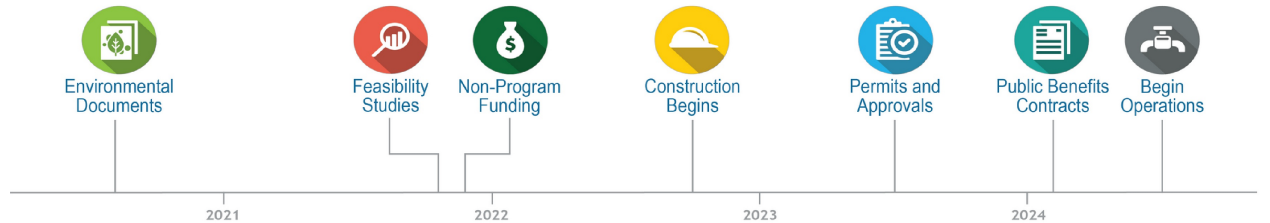
Harvest Water

California Water Commission website accessed October 21, 2021



Kern Fan

California Water Commission website accessed October 21, 2021



Willow Springs

California Water Commission website accessed October 21, 2021

The Water Commission unanimously made all the required determinations for these non-WSIP projects (loosely characterized as groundwater projects) at its November and December 2021 meetings.

Discussion:

Early funding. The Commission made changes to its early funding (funding for permitting and environmental reviews) decisions. Requests for “early” funding were initially to be made in the application process, three projects received early funding at the July 24, 2018, Commission meeting,²⁰ and any failure to award early funding in the Commission’s July 2018 meetings would be final. However, at the July 15, 2020,

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https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/Press/MCEDPressRelease_072418.pdf.

Commission meeting, the Commission at the request of six of the eight WSIP applicants voted to seek approval for emergency regulations to allow a second round of early funding applications for the projects that had not received early funding previously. These emergency regulations were approved and would continue to be limited to 5% of the Water Supply Investment Program (WSIP) maximum conditional eligibility allocations.

The non-dam WSIP projects with funding allocations all applied for and received early funding under the emergency regulations. All of the original WSIP dam projects with funding allocations (except the Temperance Flat Dam) previously sought and received early funding allocations. I have not reviewed the emergency regulations to discover if the screening projects will be able to receive early funding once they receive the allocations but presume they will be eligible.

January 1, 2022 Determinations Summary: The Commission determined that all the remaining seven WSIP projects and the two screening projects meet Cal. Water Code §79757 statutory conditions by January 1, 2022, the deadline. That continues the eligibility of these projects for funding for as long as there are unspent WSIP funds. Because of the Bond Act 2022 deadline, no other projects can be considered for WSIP subsidies.

Funding Decisions: Actual funding decisions that result in cash delivered to the applicants are still subject to the conditions set forth in the Commission's regulations, particularly §6013,²¹ but these decisions are not time bound. Actual Commission funding or allocations could be reduced, depending on whether contractual performance is not expected to live up to public benefits depicted at the time of the maximum allocation awards. In addition, with the withdrawal of the Temperance Flat dam allocation or failure of other applicants to use their allocations, we may see competition among projects to increase their allocations. However, increases in allocations would have to be justified by additional public benefits, something that may be difficult to demonstrate.²² The Commission changed its regulations to allow a second round of applicants to seek Commission WSIP funding. Two projects, called "screening" projects, joined the pool of aspiring WSIP applicants.

²¹ §6014 establishes the continued role of state agencies in managing the public benefits.

²²

More state taxpayer subsidies contemplated or on the way:

Water Resilience Portfolio: Action 19.4 of the Governor's Water Resilience Portfolio calls for the California Water Commission to develop recommendations for state taxpayer funding of new or rehabilitated conveyance infrastructure that is not currently an obligation of state taxpayers.²³ The Commission released a draft White Paper on this subject in May of 2021. It suggests that the legislature or the voters hand it state taxpayer funds to award to aspiring canal-infrastructure supplicants.²⁴ It may, of course, also choose to recommend bond funding or general fund funding to expand its Proposition 1 storage funding mission as well.

2021 California Budget: The Governor's May 2021 Budget Revision included \$200 million for taxpayer-funded repairs to the California Aqueduct and the federal San Luis, Delta-Mendota, and Friant-Kern Canal reconstructions. It was passed by the legislature. There was no demonstration that these large and wealthy canal users could not have financed these projects themselves. Much of the need for the canal reconstruction was caused by widespread groundwater mining by local and regional farmers resulting in land subsidence.²⁵ According to the Legislative Analyst's Office (LAO), the current combined cost of these projects are \$2.4 billion.

Future ballot-box state taxpayer storage funding: It should also be noted that the proposed "Water Infrastructure Funding Act of 2022," ballot initiative²⁶ is designed to avoid any of the deadlines, cost-sharing, and restrictions on the "private benefit" funding found in the WSIP. It is circulating for signature collection. The circulators will have to collect 1.56 million signatures in a six-month (180-day) period ending in April 22. If successful, the initiative would appear on the November 2022 ballot.

²³

https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/Final_California-Water-Resilience-Portfolio-2020_ADA3_v2_ay11-opt.pdf.

²⁴

https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/Press/DraftWhitePaperPressRelease_051221.pdf.

https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/2021/05_May/May2021_Item_9_Attach_1_WhitePaperPrelimDraft_Final.pdf.

²⁵ <https://sjvsun.com/ag/hurtado-pulls-bill-to-repair-sinking-canal-after-legislators-yank-funding/>

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<https://morewaternow.com/wp-content/uploads/Final-Amended-Version-Water-Infrastructure-Funding-Act-of-2022.pdf>

If passed, it would set aside 2% of the state general fund (\$2.5 billion to \$4 billion per year according to the LAO) for water projects until state water supply availability is increased by 5 million acre-feet annually (annual state water use is currently approximately 42 million acre-feet). Like the WSIP funding, it would be continuously appropriated to the California Water Commission, but this California taxpayer funding stream could go on for decades since the ballot measure imposes no efficiency requirement on Commission funding awards. The highest priority for funding would begin with the WSIP projects, including the original WSIP projects — a list that would include the proposed Temperance Flat dam.²⁷

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Part Two, Secretary of the Interior under the WIIN and BIB (IIJA) —

Under the existing provisions of the Water Infrastructure Development Act of 2106 (WIIN),²⁸ the California Central Valley Project (CVP) operational changes and storage provisions expire on December 16, 2021 — except for storage projects under construction. Projects must also have a Secretarial feasibility determination before January 1, 2021. However, these deadlines have been made somewhat irrelevant under the 2021 Bipartisan Infrastructure Bill (BIB).

WIIN Construction Start Deadline: The relevant statutory language is easily summarized: §4013. Duration – Subtitle J, California, expires five years from the date of enactment with the exception of §4007 storage projects already under construction.²⁹ The WIIN expired on December 16, 2021. The WIIN was not extended by this Congress, but that task was partially accomplished by the 2021 BIB. A more complete reauthorization of the WIIN may be on the agenda of the next session of this Congress or the next Congress, especially when and if Rep. McCarthy is House Speaker in next Congress.

The BIB: Title IX³⁰ (Western Water Infrastructure) of the 2021 bipartisan infrastructure bill (The Infrastructure Investment and Jobs Act, HR 3684,) created a WIIN-like storage subsidy program authorizing \$1.150 billion for water storage, groundwater storage, and conveyance projects and \$3.2 billion for rehabilitation of projects identified on Reclamation's Asset Management Report. HR 3684 (the "IIJA" or less formally called the Bipartisan Infrastructure Bill, "the BIB") also allows Corona Virus Relief Funds to be diverted to paying the non-federal cost-sharing requirement (presumably for feasibility and construction work) for authorized Reclamation projects. The funds could also be used for other non-federal funding requirements for authorized Reclamation projects.³¹

²⁸ <https://www.friendsoftheriver.org/wp-content/uploads/2020/12/PLAW-114publ322.pdf>.

²⁹ WIIN §4013. DURATION. This subtitle shall expire on the date that is 5 years after the date of its enactment, with the exception of—

(1) section 4004, which shall expire 10 years after the date of its enactment; and

(2) projects under construction in sections 4007, 4009(a), and 4009(c).

§4009 deals with desalination and other similar projects not covered in this memo.

³⁰ <https://www.friendsoftheriver.org/wp-content/uploads/2022/01/2021-BIB-IIJA-Title-IX.pdf>

³¹ BIB §40909.

<https://www.friendsoftheriver.org/wp-content/uploads/2021/12/Title-IX-Western-Water-Infrastructure-2021-Water-Infrastructure-Investment-Jobs-Act.rtf>

Authorization of BIB Title IX appropriations expires at the end of the 2026 federal fiscal year (§40901).³²

WIIN Subtitle J summary: established authority and conditions for participation in federal storage projects, grant funding for non-federal “state-led” storage projects, Secretarial storage project assistance funding, Secretarial discretion to allow use of federal reservoirs by non-federal parties, authority to form partnerships with joint powers authorities to advance CALFED dams (Temperance Flat, Sites, Los Vaqueros, and the Shasta Dam raise), and authorization for the “Water Storage Account” slush fund to be created by funds from advanced payments of CVP capital debt to be used by the Secretary to establish and spend from the storage account.³³

While some provisions of Subtitle J are specific to California, the §4007 storage program applied broadly within the Reclamation states.

It is not clear if any California traditional storage projects — federal or non-federal — received WIIN construction funding from either the Secretary or the Congress. At this writing, I presently don’t have the complete information³⁴ to determine if that changed in FY 2020/2021.³⁵ The Friant-Kern Canal reconstruction and the 130,000 acre-foot San Luis Reservoir expansion are likely possibilities. These two projects are likely to have received direct federal appropriations, whether inside or outside the WIIN. Federal expenditures may also be eligible for BIB funding if they can meet the BIB §40902(a)(2) subsection (A) construction authorization and subsection (B) prior WIIN-construction funding.³⁶ Also, under BIB §40909, the required non-federal expenditures for these

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<https://www.friendsoftheriver.org/wp-content/uploads/2022/01/2021-BIB-IIJA-Title-IX-sec-40901.pdf>

³³ <https://www.friendsoftheriver.org/wp-content/uploads/2020/12/FOR-WIIN-CA-storage-provisions-memo-12-23-2020.pdf>

³⁴ The enacted FY 2020/21 omnibus bill has to be read in the context of unspent prior years’ appropriations, a 2020 House explanatory statement, and two 2020 letters from the Administration to the Congress (only one of which I have here — the letter to Rep. Kaptur that can be accessed in subsequent footnotes).

³⁵ The FY 2020/2021 omnibus bill provides for construction funding for the Friant-Kern Canal reconstruction, a project that the Administration treats as a WIIN storage project. <https://www.friendsoftheriver.org/wp-content/uploads/2020/06/Chairwoman-Kaptur-Letter-WIIN-Storage-06-22-20.pdf>. Other projects that receive Congressional study and preconstruction appropriations from prior fiscal years include the following: Los Vaqueros, Pacheco, Delta-Mendota Canal, Del Puerto Canyon dam, and Sacramento Regional Water Bank.

³⁶

<https://www.friendsoftheriver.org/wp-content/uploads/2022/01/2021-BIB-IIJA-Title-IX-Sec-40902.pdf>

federal projects can be paid for by Corona Virus relief funds.³⁷ It would seem that the traditional financial “skin in the game” non-federal sponsor economic tests for these federal projects could be eliminated by the BIB. This provision should be regarded as a tribute to the lobbying skills of the San Luis and Friant Unit CVP and State Water Project (SWP) contractor lobbyists and public relations staff.

It should also be noted that projects within and outside of California received and continued to receive specific federal study and/or preconstruction appropriations or Secretarial funding awards from unspecified appropriations from unallocated WIIN funding. For example, the Shasta Dam raise project received study and preconstruction and design funding appropriations³⁸ and during the last Administration it appeared to be the leading federal storage project in California poised to begin construction. Project authorization and construction funding for this project has been sought by either members of Congress or the Administration for the proposed Shasta Dam raise.³⁹ These requests were not provided for in the FY 2020–21 omnibus bill. Rather, construction was prohibited by its provisions.⁴⁰

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<https://www.friendsoftheriver.org/wp-content/uploads/2022/01/2021-BIB-IJA-Title-IX-sec-40909.pdf>

³⁸ Prior years’ appropriations have included unspecified WIIN funding for the Secretary of the Interior. §208 of the FY 2020/21 omnibus bill prevents the expenditure of pre-construction and construction funds for the Shasta Dam raise from funds appropriated in this statute.

SEC. 208. None of the funds made available by this Act may be used for pre-construction or construction activities for any project recommended after enactment of the Energy and Water Development and Related Agencies Appropriations Act, 2020 and prior to enactment of this Act by the Secretary of the Interior and transmitted to the appropriate committees of Congress pursuant to section 4007, section 4009(a), or section 4009(c) of the Water Infrastructure Improvements for the Nation Act (Public Law 114–322) if such project is not named in this Act.

It is doubtful that the Biden Administration would seek to use to use prior-year or advanced payment funds for pre-construction or construction purposes (if available) at Shasta Dam during the 117th Congress.

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<https://www.friendsoftheriver.org/wp-content/uploads/2020/06/Chairwoman-Kaptur-Letter-WIIN-Storage-06-22-20.pdf>

<https://www.friendsoftheriver.org/wp-content/uploads/2020/10/Shasta-Dam-raise-referenced-fact-sheet-October-7-2020.docx>

⁴⁰

<https://www.friendsoftheriver.org/wp-content/uploads/2020/12/BILLS-116HR133SA-RCP-116-68-Reclamation-provisions.pdf>. See section 208.

The BIB also requires that reimbursable and non-reimbursable federal funding to federal projects complies with Reclamation law. BIB §40902(b) provides for that with the following language:

(2) FEDERAL BENEFITS.— Before funding a project under this section, the Secretary shall determine that, in return for the Federal investment in the project, at least a proportionate share of the benefits are Federal benefits.

(3) REIMBURSABILITY.— The reimbursability of Federal funding of projects under this section shall be in accordance with the reclamation laws.

The federal benefits associated with these federal projects may not support 50% funding, thus limiting federal project subsidies.

Feasibility Determination Deadline: §4007(i) of the WIIN Act imposed another deadline:

(i) SUNSET.— This section shall apply only to federally owned storage projects and State-led storage projects that the Secretary of the Interior determines to be feasible before January 1, 2021.

Federal WIIN or BIB dam projects in California: Federal projects are owned by Reclamation and undertaken at the request of the state or one of its political subdivisions. Under WIIN §4007(b)(3)(A), the Secretary cannot commence construction of a WIIN §4007 storage project until the Secretary, in part, “determines that the proposed federally owned storage project is feasible in accordance with the reclamation laws.” Under §4007(i), that determination had to be made before January 1, 2021. These deadlines limit the pool of grandfathered federal WIIN projects in California, although only two federal projects under some form of consideration failed to meet the WIIN deadlines ,

Shasta Dam raise: Reclamation prepared a final feasibility report for the Shasta Dam raise project (2015) and was expected to issue a Secretarial feasibility determination before the January 1, 2021 §4007(i) deadline — although the Congressional Research Service (CRS) considers this project to have met the deadline *without*, apparently, a Secretarial

feasibility determination letter.⁴¹ The assumptions of the 2015 feasibility report for the Shasta Dam raise have been challenged.⁴²

There has not been a Record of Decision for the project from Interior. Interestingly, by early 2018, the Secretary purported to have made the WIIN “determination for commencement of construction” for the Shasta Dam raise in spite of the lack of a Secretarial feasibility determination and cost-sharing partner,⁴³ necessary preconditions for commencement of construction (see WIIN §4007(b)(3)(B)). There appear to have been some irregularities at the Department of the Interior during the prior Administration.

Under BIB §40902(a)(1)(A)(i) and §40902(a)(1)(A)(ii), §40902(1) feasibility studies are authorized for this project on the basis of prior study authorization (PL 96-375 §2). Under BIB §40902(2)(A) (Congressional authorization required) and §40902(2)(B)(i) (Congressional failure to approve Secretarial construction recommendation) and the similar §40902(2)(C)(i), construction appropriations for the Shasta Dam raise are not authorized by the BIB.

The WIIN construction start (and arguably the feasibility determination) deadline has expired, so at present a construction start for the Shasta Dam raise is not authorized under either the WIIN or BIB.⁴⁴

Temperance Flat Dam: Reclamation prepared a draft feasibility report and draft EIS for the proposed Temperance Flat dam (2014). Interior intended to complete a final feasibility report or concluding report for the Temperance Flat dam for submission to the Regional Director in FY 2020/21⁴⁵ — although that project was subsequently placed

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https://www.friendsoftheriver.org/wp-content/uploads/2021/02/crs_infocus_reclamation_section4007_28jan20217.pdf

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<https://www.friendsoftheriver.org/wp-content/uploads/2020/10/NRDC-et-al-letter-re-feasibility-study-10-5-20.pdf>

⁴³ *Report to the House and Senate Committees on Appropriations Summary Distribution of Fiscal Year 2017 Funding for Water Conservation and Delivery-Pub. L. 114-322 (Section 4007), Water and Related Resources, Bureau of Reclamation and Discussion of Criteria and Recommendations*, January 2018, p 3.

<https://www.friendsoftheriver.org/wp-content/uploads/2019/07/Adm-rprt-on-2018-CA-reservoir-enlargement-approps-request-ocr.pdf>

⁴⁴ For more information see <https://www.friendsoftheriver.org/our-work/sacramento-threat-shasta/>

⁴⁵ “The CALFED water storage program plans to complete Final Feasibility Report for the North of the Delta Offstream Storage Project and submit to the Secretary of the Interior for a Feasibility determination; complete Final Feasibility Report and/or Concluding Report for the Upper San Joaquin

in deferral status by Reclamation at the request of its non-federal co-sponsor.⁴⁶ There has not been a Secretarial feasibility determination for this project. This project did not meet either of its WIIN eligibility deadlines.

Under the BIB §40902(a)(1)(A)(i) and §40902(a)(1)(A)(ii), federal feasibility funding for the Temperance Flat Dam appears to be authorized on the basis of prior study authorizations (PL 96-375).

BIB construction funding would be contingent on either Congressional actions (authorization) (§40902(a)(2)(A) or Secretarial actions (§40902(a)(2)(C)(ii). However, the latter is foreclosed by BIB §40902(a)(2)(C)(i) (Congress not approving Secretarial funding recommendations under WIIN §4007(h)(2)).

If there was a future Congressional authorization, the share of federal funding for the cost of the project would be determined by either the Congressional authorization language (BIB §40902(b)(1)(A)). Under Reclamation's 2014 draft Feasibility Report, nearly 50% of the project costs were allocated to federal benefits (the much-disputed salmon benefits). Reclamation had been likely to propose these benefits as unreimbursable under the WIIN and, if Congressionally authorized, presumably under the BIB (i.e., on the taxpayers' dime). In addition, if Congressionally authorized, under the BIB unspent Corona Virus relief funds would also be available for the non-federal share. The combination would make the project essentially free to the non-federal sponsor.

Authorization of BIB Title IX appropriations expires at the end of the 2026 federal fiscal year (§40901).

Auburn Dam: Reclamation believes that feasibility reports for the proposed Auburn dam were authorized in the American River Basin Development Act of 1949 (PL 356 §2). Under the BIB §40902(a)(1)(A)(i), federal feasibility funding for the proposed Auburn

River Storage Project and submit to the Regional Director; and Secretary Determination of Feasibility and signing of the Record of Decision for the Supplement to the Final Environmental Impact Statement for the Los Vaqueros Phase II Feasibility Investigation." *Budget Justifications and Performance Information, Fiscal Year 2021, U.S. Department of the Interior, Bureau of Reclamation, Chapter Interior Region 10 California-Great Basin FY 2021 Overview*, p. 13 (PDF 413).

<https://www.friendsoftheriver.org/wp-content/uploads/2021/02/fy2021-bor-budget-justification-TFD.pdf>

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<https://www.friendsoftheriver.org/wp-content/uploads/2020/07/Temperance-Flat-Dam-on-indefinite-hold-SJV-Water-June-30-2020.pdf>

dam appears to be authorized on the basis of prior study authorizations (PL 96-375). There are no non-federal cosponsors for a feasibility study at present.

The proposed Auburn dam was Congressionally authorized in 1965. It has not been explicitly deauthorized. Under BIB §40902(a)(2)(A) construction may be authorized, and under BIB §40909, unspent Corona Virus relief funds could be used to pay for the non-federal share of the six to eight billion dollar project. It is could also be authorized by the Secretary under BIB §40902(b)(1)(C)(i) pursuant to the feasibility study and subsequent Secretarial findings, determinations, and recommendations. Section 40902(b)(1)(C)(i) would impose a 50% federal funding limitation via Secretarial authorization, and under BIB §40909, Corona Virus relief funds would be available to the non-federal sponsor. The Secretary would have to make a number of determinations, including that there must be federal benefits (BIB §40902(b)(2)), and reimbursability would be in accordance with Reclamation law (BIB §40902(b)(3)). In providing funding, the Secretary must comply with all applicable environmental laws (BIB §40902(c)).

Unlike the proposed Feinstein WIIN extension bill (the STREAMS Act), the BIB does not redefine Federal benefits to include water supply features, which are not treated as Federal benefits under traditional Reclamation law.

Authorization of BIB Title IX appropriations expires at the end of the 2026 federal fiscal year (§40901).

Friant-Kern Canal: Contrary to WIIN authority, Reclamation is treating the Friant-Kern Canal reconstruction as a WIIN storage project, and it completed its final EIS in late 2020 and feasibility report in January 2020. It is unknown to me whether the latter project has received a formal Secretarial feasibility determination (I suspect it has), but WIIN construction funding is expected to allow construction in 2021 year and the CRS considers this project to have been found feasible for the purposes of the WIIN §4007(j) deadline.⁴⁷ It may have met the WIIN construction start deadline. (Research would be helpful to determine the WIIN status.) This project (along with funding for the California Aqueduct and the federal Delta-Mendota Canal) shared \$200 million in funding in the state budget in 2021, an unprecedented gift for a federal project from the

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<https://www.friendsoftheriver.org/wp-content/uploads/2021/01/2020-12-22-Congress-Appropriations-Bill-Porterville-Recorder.pdf>.

https://www.friendsoftheriver.org/wp-content/uploads/2021/02/crs_infocus_reclamation_section4007_28jan20217.pdf

state. There are numerous bills pending in the Congress to make even more generous awards of non-reimbursable federal taxpayer funds for conveyance “storage” projects.

The BIB probably gives this project construction authority (§40902(a)(2)(B)), and the BIB lumps conveyance projects with storage projects (§40901(1)) unlike the statutory language of the WIIN (although Interior was not complying with this part of the WIIN). The project no-doubt received federal construction appropriations this year. Presumably, Corona Virus relief funds would be available to the non-federal sponsor(s) to meet its cost-share responsibilities (§40909). The combination of federal non-reimbursable funds, state subsidies, and Corona Virus relief funds could make this project free to the project beneficiaries.

Authorization of BIB Title IX appropriations expires at the end of the 2026 federal fiscal year (§40901).

San Luis Reservoir expansion: Interior did make a WIIN Secretarial feasibility determination for the B.F. Sisk Dam (San Luis Reservoir) dam raise.⁴⁸ This may be the only California federal storage dam to receive such a Secretarial feasibility determination letter. This late-breaking WIIN project piggybacks onto a Reclamation Safety of Dams \$1.1 billion seismic retrofit on the dam. I have yet find an estimate to the WIIN portion of the project, but in May 2019, the Santa Clara Water District estimated the costs to be between \$400 and \$600 million dollars (the URL to the feasibility report in the determination is a dead link, and at this writing, only the EIS appears on Reclamation’s website).

It is unclear to the memo writer how allocations of costs to non-federal beneficiaries will be undertaken. Presumably, Corona Virus relief funds would be available to the non-federal sponsor(s) to meet their cost-share responsibilities (§40909) for the reservoir expansion and perhaps their required 15% share of the seismic retrofit. Section 40901(6) BIB authorized \$500 million for the federal dam-safety program. It is unclear to this writer whether the project is also eligible for a part of the BIB §40901 (\$3.2 billion Title IX “Aging Infrastructure” Account. Research needed.

The reservoir expansion project may have met the WIIN construction deadline and likely met the BIB §40902(a)(2)(B) WIIN prior-appropriation grandfathering clause.

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https://www.friendsoftheriver.org/wp-content/uploads/2021/01/B_F_Sisk_FFR_Transmittal_Reclamation_12302020_Grijalva.pdf

Reclamation's dam-safety program is routinely reauthorized to increase the authorized spending limit, so the BIB FY 2026 sunset clause may prove irrelevant to Reclamation's seismic retrofit. The combination of federal non-reimbursable funds and Corona Virus relief funds could make this combined project heavily subsidized to the project beneficiaries.

Authorization of BIB Title IX appropriations expires at the end of the 2026 federal fiscal year (§40901).

Non-federal projects: There are at least four non-federal potential dam projects BIB projects in California that believe they have a Congressionally authorized feasibility study or received WIIN feasibility study funding or both. The BIB, therefore, has (or with the completion of certain Secretarial actions) authorized construction funding for all of these projects, here noted in descending order of project costs: Sites, Pacheco, Los Vaqueros Reservoir expansion, and the Del Puerto Canyon dams. Here's the requirements for these projects under the BIB:

§40902(a)(1) FEASIBILITY STUDIES.—

(A) IN GENERAL.— A feasibility study shall only be eligible for funding under section 40901(1) if— (i) the feasibility study has been authorized by an Act of Congress before the date of enactment of this Act; (ii) Congress has approved funding for the feasibility study in accordance with section 4007 of the Water Infrastructure Improvements for the Nation Act (43 21 U.S.C. 390b note; Public Law 114–322) before the date of enactment of this Act;

§40902(a)(2) CONSTRUCTION.— A project shall only be eligible for construction funding under section 40901(1) if— (C)(i) Congress has authorized or approved funding for a feasibility study for the project in accordance with clause (i) or (ii) of paragraph (1)(A) (except that projects described in clauses (i) and (ii) of subparagraph (B) shall not be eligible); and (ii) on completion of the feasibility study for the project, the Secretary — (I) finds the project to be technically and financially feasible in accordance with the reclamation laws; (II) determines that sufficient non-Federal funding is available for the non-Federal cost share of the project; and (III)(aa) finds the project to be in the public interest; and (bb) recommends the project for construction.

None of the California non-federal projects have been Congressionally authorized or received federal “construction” funding,⁴⁹ nevertheless, the BIB appears to make them eligible for construction funding due, at least, to WIIN feasibility study appropriations once the described Secretarial actions are completed.

Interestingly, the BIB appears to conflate federal versus non-federal project authorization for “construction” funding in federal versus non-federal projects. The WIIN distinguished between the two types of projects. For example, in federal projects, Secretarial authorization authority was for “commencement” of construction (§4007(b)(3)). In non-federal projects, Secretarial funding authority was described as “participation” (§4007(c)).

The Secretarial funding process under the BIB for federal and non-federal projects alike have the same determinations and requirements §40902(a)(2)(C)(ii). The difference is that the federal allocations are not to exceed 25% for non-federal projects (versus not to exceed 50% or the specific Congressional authorization bill limit for federal projects). Also, Corona Virus relief funds would not be available to the non-federal sponsor(s). The BIB only makes these funds available to authorized Reclamation projects (BIB §40909).

The BIB also requires that reimbursable and non-reimbursable federal funding to non-federal projects complies with Reclamation law. BIB §40902(b) provides for that with the following language:

(2) FEDERAL BENEFITS.— Before funding a project under this section, the Secretary shall determine that, in return for the Federal investment in the project, at least a proportionate share of the benefits are Federal benefits.

(3) REIMBURSABILITY.— The reimbursability of Federal funding of projects under this section shall be in accordance with the reclamation laws.

The availability of federal benefits may limit federal project subsidies, especially for projects receiving California WSIP subsidies, which may be similar to federal benefits. Presumably, double counting would not be appropriate, and federal benefits should not be available for “benefits” that the state is paying for.

⁴⁹ We should research whether the Los Vaqueros dam raise has received federal construction funding.

The BIB Secretarial determinations are not explicitly time-limited but authorization of BIB Title IX appropriations expires at the end of the 2026 federal fiscal year (§40901).

Sites Reservoir: Reclamation prepared a final feasibility report for Sites,⁵⁰ although for a previous incarnation of the project. In that document, Reclamation said that its final feasibility report for the Sites project was for use by the Congress and the Secretary to determine the type and extent of federal interest in the project.⁵¹ The Secretarial determination letter was issued before the WIIN §4007(i) deadline.⁵² The Secretarial feasibility determination lists the types of uses for the project, including, but not distinguishing from other uses, what might be considered federal uses. The Sites Project Authority staff apparently have made their own assessment of potential funding that might be available for uses of the project, saying in late 2020 that their planning assumption is that they will receive only \$0 to \$200 million in WIIN funding for the multibillion dollar project.⁵³

Project sponsors will no doubt argue that once the required BIB Secretarial findings, determinations, and recommendations are made, the project would be eligible for construction funding under the BIB.

Pacheco dam: At this writing, Reclamation's website (last updated on November 9, 2020) reports that Reclamation published an April 2019 draft feasibility report for its San Luis Reservoir Low Point Improvement Project (SLLPIP) and began circulating a draft EIS/EIR in July 2019.⁵⁴ In its August 2019 fact sheet for the project, it projected that the final feasibility report would be issued in 2020 and the Record of Decision in 2021.⁵⁵ According to the Santa Clara Water District (Valley Water) the Pacheco dam was the

⁵⁰ <https://www.usbr.gov/mp/nodos/feasibility-report.html>

⁵¹ North-of-the-Delta Offstream Storage Investigation Feasibility Report, Executive Summary, Final Feasibility Report December 2020 – ES-1.
<https://www.usbr.gov/mp/nodos/docs/nodos-exec-summary.pdf>

⁵² The NDOS (Sites) Secretarial letter describes itself as a “Secretarial feasibility determination,” not a “concurrence” determination, a distinction relevant under the WIIN. No such distinction is made under the now more relevant BIB.
https://www.friendsoftheriver.org/wp-content/uploads/2021/01/NODOS_FR_Transmittal_Letter_12222020_Grijalva.pdf

⁵³ Personnel communication.

⁵⁴ <https://www.usbr.gov/mp/sllpp/>. <https://ceqanet.opr.ca.gov/2002082020/3>

⁵⁵ <https://www.usbr.gov/mp/sllpp/docs/sllpip-factsheet.pdf>

“preliminarily preferred option” of the SLLPIP.⁵⁶ The writer of this memo has not yet found any record of a final feasibility report being issued by Reclamation. Valley Water circulated a draft EIR in November 2021 and received a California Water Commission determination that all feasibility studies are complete at the Commission’s December 2021 meeting. The District has a well-produced brochure on the Project.⁵⁷ As discussed earlier, the District experienced a major expansion of the estimated cost of the project, but District Board of Directors are still expressing confidence in the project,⁵⁸ which now is proposed to invade Henry Coe State Park. The February 2021 CRS letter did not include this on their list of projects that have feasibility before the WIIN deadline.

If the project is finalized as the federally preferred project for the San Luis Low Point EIS, project sponsors may argue that once the required BIB Secretarial findings, determinations, and recommendations are made, the project would be eligible for construction funding under the BIB. Presumably, even if the proposed Pacheco Dam is the preferred alternative for Reclamation’s San Luis Low Point, the Pacheco Dam would be treated as a non-federal project for the purposes of the BIB.

Los Vaqueros: Reclamation announced the release of the final feasibility report for the Los Vaqueros Reservoir Expansion Project on August 13, 2020.⁵⁹ Reclamation had previously released a final EIS⁶⁰ and Contra Costa Water District an EIR⁶¹ for the project in February 2020. Contra County Water District certified its EIR in May 2020.⁶² The project received a Secretarial feasibility/concurrence determination letter from Interior in August 2020.⁶³ According to Contra Costa Water District, Reclamation intends to complete the key federal permits and approvals prior to issuing the ROD. The District is

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<https://www.valleywater.org/news-events/news-releases/valley-water-working-expand-reservoir-near-highway-152-southern-santa> (Valley Water webpage posted on December 5, 2019)

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<https://apps2.valleywater.org/publication/flipbook/Pacheco/Newsletter/2020/09.September/mobile/index.html>

⁵⁸

<https://www.friendsoftheriver.org/wp-content/uploads/2021/01/2020-1-6-Price-tag-nearly-doubles-for-Pacheco-Dam-Merc-News.pdf>

⁵⁹ <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=72063>

⁶⁰ <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=69643>

⁶¹ <https://www.cwater.com/710/Environmental-Documents>

⁶² <https://www.cwater.com/DocumentCenter/View/8479/Board-Docket-and-Staff-Report-PDF>

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<https://www.friendsoftheriver.org/wp-content/uploads/2021/01/Kaptur-LVE-2-Feasibility-Transmittal-Letter.pdf>

hopeful that Reclamation will issue a ROD before the end of 2021 or shortly thereafter.⁶⁴ Interior had told Congress that intended to make a Secretarial feasibility determination and complete Record of Decision for the Los Vaqueros Expansion Project in FY 2020/21.⁶⁵

No doubt project sponsors will argue that once the required BIB Secretarial findings, determinations, and recommendations are made, the project would be eligible for construction funding under the BIB.

Del Puerto Canyon dam: The Del Puerto Water District certified their final EIR for the proposed 82,000 acre-foot reservoir in October 2020. I am unaware of a separate Del Puerto Canyon dam feasibility report by the Del Puerto Water District, but the Del Puerto Water District reports that it received a Secretarial feasibility report for the project on December 31, 2021, just before the WIIN Act deadline. The Reclamation draft EIS for the project is expected in Spring of 2021.

No doubt project sponsors will argue that once the required BIB Secretarial findings, determinations, and recommendations are made, the project would be eligible for construction funding under the BIB.

In summary, unless a project is already under construction by December 16, 2021, the authority of the Secretary to proceed under the WIIN ended. Likewise, the Secretary could not fund a WIIN project under the authority of the WIIN unless he or she made a Secretarial feasibility determination or concurrence before January 1, 2021. However, the four proposed non-federal projects that met the January 1, 2022, California Water Commission deadlines are all eligible for future Secretarial construction authorizations under BIB procedures. The San Luis Reservoir expansion and the Friant Canal reconstruction are likely authorized by the BIB (research needed). Some research is needed to determine whether Delta-Mendota Canal construction is authorized under the BIB. Construction funding for the proposed Temperance Flat dam and the Shasta Dam raise is not authorized under the BIB. Congress could expand the BIB pool of BIB-eligible projects by future Congressional authorizations, appropriations, and legislation.

⁶⁴ Personal communication.

⁶⁵ *Budget Justifications and Performance Information, Fiscal Year 2021, U.S. Department of the Interior, Bureau of Reclamation, Chapter Interior Region 10 California-Great Basin FY 2021 Overview, p. 13 (PDF 413) Supra.*