



Meeting: **Authority Board Agenda Item 4.2**

February 23, 2022

Subject: **401 & 404 (Clean Water Act) Process Overview**

Requested Action:

Review and comment on the status of the development of the Project's Clean Water Act (CWA) Section 404 and 401 permit applications.

Detailed Description/Background:

The Board has established that "critical permits" and the water right are needed prior to initiating bank financing. The 404 and 401 are two of the critical permits. This report is intended to brief the Board on the progress being made in the application process for these permits and highlights the land access necessary to complete the final permits.

The purpose of the CWA is to restore and maintain chemical, physical, and biological integrity of the Nation's waters through prevention and elimination of pollution. To achieve that goal, the CWA utilizes a variety of pollution control measures, including the establishment of water quality standards, requirements for the pre-treatment of wastewater, and a permitting program for discharges of pollutants into protected waterbodies and waters of the United States (waters or waters of the U.S.)

Section 404 of the CWA establishes a permit program regulating the discharge of dredged or fill material into waters of the U.S., including wetlands and other special aquatic sites such as vernal pools. The program is administered by the United States Environmental Protection Agency (USEPA) and implemented by the U.S. Army Corps of Engineers (Corps). Section 404 requires a permit before dredge or fill material may be discharged into waters of the U.S. No discharge of dredged or fill material may be permitted if: (1) a practicable alternative exists that is less damaging to the aquatic environment or (2) the nation's waters would be significantly degraded.

Under Section 401 of the CWA, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the U.S. unless a Section 401 Water Quality Certification is issued, or certification is waived by the state. States and authorized tribes where the discharge would originate are generally responsible for implementing the program and issuing Water Quality Certifications under Section 401. Typically, a project receives a Water Quality Certification from the appropriate Regional Water Quality

Control Board (Regional Board). However, the State Water Resources Control Board (State Board) retains jurisdiction to issue Water Quality Certifications for projects that also require a water right permit. Thus, the Project's Water Quality Certification would be issued by the State Board with assistance from the appropriate Regional Board.

Due to the size and complexity of the Project, a Section 404 Individual Permit and 401 Water Quality Certification would be needed. Staff have largely prepared the draft permit applications and anticipate submitting draft applications to both the Corps and State Board in the March/April timeframe. Final applications would be submitted around the time of the issuance of the Project's Final Environmental Impact Report/Environmental Impact Statement. Permit issuance is expected to take about 6 to 9 months after the final applications are submitted with permits expected to be issued summer to fall 2023.

Currently the USEPA and Corps are in the process of revising the definition of waters of the U.S. and have recently closed public comment on the proposed rule change. The agencies propose to put back into place the pre-2015 definition of "waters of the U.S.", updated to reflect generally accepted science and in consideration of Supreme Court decisions over the past 35 years. The proposed rule would maintain the longstanding exclusions of the pre-2015 regulations as well as the exemptions and exclusions in the Clean Water Act on which the agricultural community has come to rely on, as well as the landscape level approach that the environmental community has emphasized. Depending on proposed revisions along with the timing of finalizing and implementation of the proposed rule, changes to the Project's application and mitigation approach may be necessary. The extent of these changes and cost implications, if any, are unknown at this time.

Property Access Needed Prior Final Mapping Waters of the U.S.

As there is currently no access to most of the lands within the Project area, the Project team prepared a preliminary delineation of waters of the U.S. and other regulated aquatic resources (i.e., wetlands) through the interpretation of high-resolution aerial imagery and other data sources. This "desktop delineation" was completed by botanists and wetland specialists experienced in interpreting aerial imagery signatures of aquatic resources. This methodology is likely to have resulted in a substantial overestimation of waters of the U.S. and regulated aquatic resources and ground-based surveys would be utilized to refine and adjust the map once access has been granted.

Prior to permit issuance, the Corps (and likely the State Board) require on-site surveys with their staff to verify the accuracy of the aerial mapping. Access to some lands will be needed for these surveys and staff anticipates working with the Corps and State Board along with the Real Estate team and the Land

Management Committee to identify the highest priority areas and gain access on the timeline needed to support the schedule.

Mitigation

In issuing a 404 and 401 permit, both the Corps and State Board require that the impacts of the project to regulated waters are avoided and minimized to the extent practical, and any remaining direct or indirect effects are fully mitigated. To meet this requirement, the Project will implement several minimization measures to avoid and reduce impacts. Compensatory mitigation to offset and fully mitigate the Project’s direct and indirect effects to waters of the U.S., including wetlands and other special aquatic sites such as vernal pools is anticipated to be necessary.

As part of the permit applications, the Authority is currently preparing a compensatory mitigation plan which describes in detail the actions the Authority would undertake to provide the required compensatory mitigation. Compensatory mitigation would primarily be accomplished by procurement of existing off-site occupied habitat acquired in-fee, acquisition of conservation easements, or by purchasing credits from a certified conservation bank or mitigation bank. Any onsite mitigation that would occur on Authority-owned lands would be done on an opportunistic basis but is anticipated to be limited due to most Project lands being used for other Project purposes.

Compensatory mitigation costs for waters of the U.S. were included in the June 2021 revised total project cost estimate. The mitigation cost estimate has not yet been revised based on the mapping as staff believes the mapping has overestimated the area of waters of the U.S. Mitigation costs will be revised as the field verification efforts and revised mapping proceed over the next 12 to 18 months.

Prior Action: None.

Fiscal Impact/Funding Source:

Efforts on the 404 and 401 permit applications were covered under the previous Amendment 2 Work Plan (Budget). The current Amendment 3 Work Plan identifies continued budget to finalize the permit applications and continue to coordinate with the Corps and State Board staff until permits are issued by each respective resource agency.

Staff Contact:

Ali Forsythe

Primary Service Provider:

ICF and HDR

Attachments: None