

Requested Action:

Review and comment on the approach for further developing the contracting strategy for terrestrial biological mitigation.

Detailed Description/Background:

As the Authority prepares for Project construction actions, staff is preparing to implement the mitigation measures in the Project's EIR/EIS and those measures expected in the Project's key permits. The Project's largest construction mitigation cost is expected to be compensatory mitigation for terrestrial biological resources. As implementing compensatory terrestrial biological mitigation can take time, staff is working to formulate the contracting strategy and get contracts and the resulting mitigation in place with sufficient time to avoid construction delays. Board feedback on proposed planning principles will ensure Staff are aligned with the Board's strategy for this element of the Project.

Planning Principle #1 – Mitigation acquisition will be sequenced and timed to avoid impacting progress of critical path construction.

The Project will need to mitigate for actual temporary and permanent construction footprint impacts. The Authority's approach is to survey lands in the Project footprint upon gaining access, refine impacts based on the survey results, and then avoid and minimize impacts to the extent possible. Compensatory mitigation would be implemented for those impacts that could not be avoided. Based on initial discussions with agencies and in reviewing other recently-issued permits, staff expects compensatory mitigation to be required in advance of the impact occurring by year along with a 10 percent stay ahead requirement. It will be imperative that acquiring mitigation not impact progress during construction.

Planning Principle #2 – The Project remains open to permit allowed approaches to providing mitigation; owner and/or third party provided.

The Authority has several key decisions to make in contracting for compensatory mitigation. These include the approach to mitigation and the contract type. The following approaches are expected to be allowed in our permits:

- Purchase of bank or in-lieu credits – This would include purchasing “credits” from an established bank. Mitigation banks can take many years to plan and approve,

so the Authority's ability to purchase credits would depend on the banking credits available in the area at the time of purchase. Purchasing credits is low risk for the Authority as the banker takes on all risk, including operations and maintenance in perpetuity. In exchange for this transfer of risk, banking credits are generally more costly per unit than other methods of mitigation. The price for purchasing credits also includes the long-term endowment and the risk associated with 100% assignment of the mitigation requirements to the third party provider.

- Permittee-responsible mitigation – The Authority would take on and be responsible for implementation and long-term success of mitigation. Permittee-responsible mitigation can allow for more flexibility on site location and site characteristics as the permittee is responsible for protecting lands and habitats in perpetuity. The Authority would be taking on the risk of the development and long-term implementation of the mitigation. The Authority would need to hold a cash reserve (possibly a substantial amount) as a long-term endowment to guarantee the mitigation in perpetuity. Permittee-responsible mitigation can be implemented on or off site and can take two general forms:
 - Authority implement – In this form, the Authority would have a central role to design, build, and operate the mitigation lands and would generally implement the mitigation through Authority staff and more limited contractors. As the Authority bears the majority of the risk in this scenario, initial costs can be low, but long-term costs can be more uncertain or high.
 - Contractor implement – In this form, the Authority would contract with a mitigation provider to design, build, and operate the mitigation lands on the Authority's behalf. Under this scenario, a number of risks can be transferred to the contractor. Costs are typically between those of Authority implementation and banking costs. Long-term costs exist but can be more certain. Various contracting methods can be used including, but not limited to, design-bid-build, design-build, design-build-operate, and progressive design-build-operate – each having various risks and costs of their own.

It is likely and possible that the Authority would implement all three Approaches depending on construction schedule needs and species.

Planning Principle #3 – The mitigation contracting strategy needs to align with the July 2022 Board adopted Contracting Strategy.

In early to mid-2022, the Authority completed an effort to develop its contracting strategy, which was reviewed and approved at the Authority's July 2022 meeting. The contracting strategy established the following five values, reflecting the high-level vision and preference for packaging work and delivery methods:

- Oversight – to remain streamlined and efficient, the Authority will engage in an oversight role during design and construction
- Construction Contracts – the number and size of construction contracts must prioritize qualified contractors and management of cost and risk

- Project Cost – cost certainty must be established as soon as possible
- Project Schedule – look for opportunities to expedite schedule to reduce Project Cost
- Project Risks – balance risks with values

Environmental mitigation was one contract identified in the nine contracts in the 2022 contracting strategy. Staff has reviewed the values in the 2022 contracting strategy and believe they are applicable to the compensatory terrestrial biological mitigation efforts. Having similar values that form the basis of issuance of all construction contracts, including the mitigation contracts, will establish a similar basis, staffing approach, and risk management approach for the Authority.

Staff is proposing to build upon the 2022 contracting strategy by further refining the compensatory terrestrial biological mitigation. To do this, staff proposes to take a similar approach to developing the 2022 contracting strategy. Staff proposes to build upon the values established in the 2022 contracting strategy, prepare a draft contracting strategy for compensatory terrestrial biological mitigation, and seek mitigation contractor and industry feedback in a workshop and subsequent one-on-one meetings. Staff would then refine the strategy and return to the Authority Board and Reservoir Committee with a final strategy. The final strategy is expected to identify approach, contract type, contract content (lumping and splitting of habitat and species), and recommended timing for contract issuance. The final strategy will provide a roadmap for the Authority to implement its compensatory terrestrial biological mitigation requirements.

Prior Authority Board Action:

September 2022: Approved a new consulting agreement/contract with HDR to provide Environmental Mitigation Planning Services.

Fiscal Impact/Funding Source:

Further developing the contracting strategy for terrestrial biological mitigation can be completed within the Amendment 3 Work Plan total budget.

Staff Contact:

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Primary Service Provider:

HDR

Attachments:

None