



Meeting: **Joint Reservoir Committee & Authority Board**
Agenda Item 3.2

October 20, 2023

Subject: **Clean Water Act (CWA) 404 and 401 Permit Applications**

Requested Action:

Receive an update on the Project's Clean Water Act 404 and 401 Permit Applications.

Detailed Description/Background:

The Reservoir Committee and Authority Board identified the 404 and 401 CWA permits as two of the key permits needed prior to entering into Benefits and Obligations contracts with the members. This staff report provides an update on these critical permitting activities in preparation for requesting approval at the November Reservoir Committee/Authority Board meeting to submit the permit applications.

The purpose of the CWA is to restore and maintain chemical, physical, and biological integrity of the Nation's 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. Section 401 of the CWA requires that any person applying for a federal permit or license, which may result in a discharge of pollutants into waters of the U.S. must obtain a state water quality certification that the activity complies with all applicable water quality standards, limitations, and restrictions. For the Project, Section 404 is administered by the U.S. Army Corps of Engineers (Corps) and Section 401 is administered by the State Water Resources Control Board (State Board).

The CWA has historically and continues to be a moving target for applicants as implementation of the CWA has been the subject of extensive litigation and policy changes. The most recent of these was the U.S. Supreme Court's May 25, 2023 decision in the case of Sackett v. EPA. The U.S. Environmental Protection Agency (EPA) and the Corps recently issued final and conforming rules that amends definition of waters of the U.S. to bring it into conformance with the ruling in Sackett. The Conforming Rule is effective in 23 states, including California.

As a result of the Sackett decision, changes to the definition of waters of the U.S. were made to reduce the extent of the federal jurisdiction. However, these

changes do not change state law and the State's jurisdiction over 'waters of the state'. For the Project, this means that many of waters that are no longer federally jurisdictional continue to be under the state's jurisdiction.

Through recent discussions with the Corps, it was recommended that the Project not refine the preliminary jurisdictional determination (PJD) and mapping submitted to the Corps in August 2022 in light of Sackett. The PJD considers and maps the potential wetlands and waters in the Project footprint. The PJD has been through extensive review with the Corps and State Board and changing it now will take months if not a year or more of work. Keeping with the existing PJD and mapping allows the Project to submit permit applications on time. Impacts (and associated mitigation) included in the 404-permit application remains conservative; however, these will be refined through continued field verification and ongoing resource agency coordination. Under the 404 permit, the Authority will only be obligated to mitigate for impacts to waters of the U.S. as defined in the Sackett decision.

Staff are finishing the final permit applications and anticipate submitting to both the Corps and State Board after the issuance of the Project's Final Environmental Impact Report/Environmental Impact Statement. Permit issuance is expected to take up to one year after submittal.

Prior Action:

February 2022: The Board authorized the submittal of draft applications to both the Corps and State Board for their review and early input.

Fiscal Impact/Funding Source:

None. The efforts to finalize the 404 and 401 permit applications are covered under the current Amendment 3 Work Plan.

Staff Contact:

Ali Forsythe

Primary Service Provider:

HDR and ICF