

Requested Action:

Review and comment on the continued development of components of the contracting strategy for terrestrial biological mitigation.

Detailed Description/Background:

As the Authority prepares for Project construction, staff are preparing to implement the mitigation measures in the Project's Final 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 has the potential to delay construction, staff has continued to formulate a terrestrial biological mitigation contracting strategy consistent with the Authority's adopted Construction Contracting Strategy with the goal of ensuring mitigation is in place with sufficient time to avoid construction delays. Staff are nearing completion of a draft terrestrial biological mitigation contracting strategy and are seeking Board feedback on further development and updates to components of the contracting strategy prior to consulting the contracting community and then initiating the procurement process.

As a reminder, the Board reviewed and concurred with the following planning principles in its August 2023 meeting, and staff has been using these principles to guide the development of a more specific strategy targeted on addressing terrestrial species:

- Planning Principle #1 – Mitigation acquisition will be sequenced and timed to avoid impacting progress of critical path construction.
- Planning Principle #2 – The Project remains open to permit allowed approaches to providing mitigation; owner and/or third party provided.
- Planning Principle #3 – The mitigation contracting strategy needs to align with the July 2022 Board adopted Contracting Strategy.

Following the Board's consideration of the principles, a workshop was held in Maxwell in October 2023, which was open to the entire mitigation contracting

industry to receive their feedback on the principles and discuss a general strategy for mitigating terrestrial species under the Project. After the October 2023 workshop, the team held 14 one-on-one meetings with mitigation providers in late 2023 to solicit individual feedback. Staff reviewed other similar projects being conducted in the US and several mitigation contracts issued by other agencies. In mid-2024, the Authority hired legal counsel to assist in implementation of mitigation actions, including development and execution of contracting for terrestrial biological mitigation.

At the May 2024 Reservoir Committee and Authority Board meeting, staff presented and the Board concurred with a number of components of the structure for contracting for terrestrial biological mitigation. Staff has continued to develop these components and provides the following updates:

- **Single Prime Contractor Responsible to Deliver Terrestrial Species Requirements** – At the May 2024 Board meeting, the Board concurred with staff that one contract (single prime contractor or joint venture), as a single point of responsibility to the Authority was in the Project’s best interest for a variety of reasons. At that meeting, it was identified that with one prime contractor, fit/approach, continuity of individuals, succession planning, and measured, sustained performance are critical factors. In consideration of this and other feedback on the contracting strategy, staff proposes additions/revisions to the strategy as follows:
 - The Authority intends to delegate permit mitigation responsibilities to the Contractor through the Contract and in so doing, the Contractor will be responsible and will be held accountable for ensuring the mitigation implementation is performed in the most cost and schedule efficient means possible. This includes achieving state and federal agency concurrence that maximizes the “stacking” of resources within the minimum amount of purchased acres or bank credits. The Authority’s budget for mitigation assumes maximized stacking of resources on mitigation lands. The Contractor will need to possess the capabilities to successfully navigate the mitigation approval process to meet these conditions and fulfill the permit terms.
 - The Authority also seeks a Contractor that has the capability to present and deliver a mitigation package for the Project that represents a “marquee” conservation element – meaning a Project of this scale comes along infrequently and it is the intention of the Authority that the mitigation for the Project has significance and adds value to the same level and degree that the water element of

the Project contributes to California water management. This can and must be accomplished though, at the lowest cost possible.

- **Design-Build-Operate or Design Build Mitigation Agreement; Selection Process; Guaranteed Maximum Price** – At the May 2024 Board meeting, staff proposed and the Board concurred with a qualifications based selection process. Since that time, staff has looked deeper into the question of risk allocation and is proposing to update the strategy as follows:
 - Consistent with the project delivery authorization provided by the AB 2551 legislation, the terrestrial biological mitigation contract will be a Design-Build-Operate or Design-Build Mitigation Agreement. As such, the selection process for the prime contractor will follow the processes and requirements set forth in the AB 2551 legislation, including but not limited to a two-step, request for qualifications, shortlisting and subsequent request for proposal process to the shortlisted firms. This process would generally follow the CMAR process currently underway.
 - Staff anticipates development of a total scope for the mitigation contract for the entirety of its currently anticipated mitigation needs for guaranteed maximum pricing at the RFP stage. This would differ from the CMAR process currently underway and would allow for early cost competition as part of the selection process. The GMP will be based on the total estimated units of each mitigation type.
 - Staff anticipates that the contract and GMP would be broken down into task orders for different components of the construction work and reservoir inundation. Implementing the task orders would be synchronized to stay ahead of the construction activity with the first task order covering the first two years of construction and the last task order covering mitigation for the inundation area where ground disturbing activity does not occur until closer to the end of the seven-year construction period. This approach allows for the mitigation to stay ahead of construction and for a “trueing up” of the GMP to the final actual mitigation units required. For each task order, payments would be made on a "pay for success" structure, where progress payments will be made at certain stages as specified in each task order based on success. For example, a progress payment upon acquisition of lands, a progress payment upon completion of any restoration actions (such as plantings or grading work), etc.

- **Responsibility for Satisfaction of Permit Conditions** – At the May 2024 Board meeting, staff proposed and the Board concurred with shifting the responsibility for meeting permit conditions and performance criteria for any restoration activities and providing any remedies for non-conformance set by the agencies for any restoration activities be transferred to the prime contractor. Staff are also now recommending that the strategy clarify that this includes the responsibilities for the funding of endowments, the provision of financial security in the form of bonds or letters of credits, and responsibility for achieving state and federal agency concurrence with “stacking” to minimize mitigation acres.

Based on the feedback from the Board on these updates, staff will revise the draft strategy and will make the draft strategy available for additional mitigation contractor feedback. Staff will then refine the strategy based on industry feedback. Staff anticipate that a final biological mitigation contracting strategy would come for consideration by the Reservoir Committee and Authority Board in June ~~2024~~ 2025 and an Request for Qualifications would be issued in the Aug/Sept ~~2024~~ 2025 timeframe. Staff is working to prepare a checklist of items that the Authority will complete prior to issuance of the Request for Qualifications and Request for Proposal stages.

Prior Authority Board Action:

May 17, 2024: Reviewed and commented on the draft contracting strategy for terrestrial biological mitigation.

Fiscal Impact/Funding Source:

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

Staff Contact:

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Primary Service Provider:

Cox Castle

Attachments:

None