



Meeting: **Reservoir Committee & Authority Board**
Agenda Item 2.2

June 20, 2024

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

Requested Action:

Reservoir Committee and Authority Board consider authorizing the Executive Director to resubmit the Project's Clean Water Act 404 and 401 Permit applications.

Detailed Description/Background:

In January 2024, the Board authorized submittal of the Project's Section 404 and Section 401 permit applications to the U.S. Army Corps of Engineers (USACE) and State Water Board (Water Board), respectively. However, both agencies ultimately found the applications to be insufficient and advised that the Authority resubmit when completion was achieved on, among other items, the Project's Construction Biological Opinion, National Historic Preservation Act Section 106 Programmatic Agreement, and a detailed explanation of how impacts would be mitigated in accordance with the USACE's regulations. Over the past 12 months, Authority staff have continued to closely coordinate with the USACE, Water Board, and the U.S. Environmental Protection Agency (USEPA) on a Project permitting approach that fits with the Project needs and conforms to regulations. The revised approach will provide the required information and will ensure that upon resubmittal, the permit applications is deemed complete, the permitting process would resume, and permits could be issued from the applications. Staff is seeking Board concurrence with the revised permitting approach and authorization to resubmit the applications.

The revised permitting approach considers and accounts for the complex inter-agency coordination and respective agency requirements needed for permit issuance. Under the approach, the Authority will resubmit both permit applications for the entirety of Project construction and include supplemental information specific and in greater detail for the initial construction components. For the purposes of the application, the coverage area included in the initial construction components will align with the project description in the Final EIS/EIR and other applicable permits; be located on land currently owned by the Authority or expected to be acquired prior to the start of initial construction; and be on land that has already undergone environmental surveying—or will be surveyed—before the initial construction begins.

The approach anticipates that the USACE would (1) deem the entire Project application to have been completed, (2) evaluate the application and consider signing a Record of Decision that includes a final determination of the Project's alternatives under a 404(b)(1) analysis, and provides that upon submittal of certain supplemental materials the USACE intends to issue subsequent permits for subsequent construction packages, and (3) issue a 404 permit specific to actions and effects identified for initial construction components.

The approach anticipates that the Water Board would also evaluate the application and consider issuing a 401 permit for the whole of the construction, with notices to proceed specific to each work package, along with an initial Notice to Proceed for the initial construction components.

Subsequent construction work packages would be authorized separately under 404 as required information, such as details required for a Comprehensive Mitigation Plan is submitted by the Authority and evaluated by the USACE. The Water Board would issue subsequent notices to proceed, under a more limited review of confirming the proposed work package is within the scope of the original permit application. If the work is determined to be outside of original permit application, a permit amendment would be necessary.

This approach allows the Authority to conduct the necessary surveys of land as it is acquired and prepare individual Compensatory Mitigation Plans that correspond to each construction work package that meet the USACE and USEPA's regulatory requirements. This also allows the portions of the Project construction to proceed while specific components, such as the Dunnigan Pipeline outfall structure, that may need additional USACE permitting under Section 408 undergo additional future design and permitting¹.

The initial determinations are important because they ensure that permits for subsequent work packages will be issued without the added step of completing an expansive alternatives analysis for each work package and that subsequent work authorizations/Notice to Proceed will be timely so as not to delay or disrupt construction progress or initial operations. The Authority's goal is to have the only remaining discretion after the initial determinations to be in determining whether the Authority has implemented onsite measures to avoid impacts and if proposed mitigation is adequate or not.

¹ Portions of the levees adjacent to the Colusa Basin Drain are a federally-authorized flood control project. Under the Rivers and Harbors Act, a permit is required for any activities that may alter or affect a federally-authorized flood control project. While designs continue to be under review, staff believes there is a likelihood that the Dunnigan Pipeline outfall structure will require a Section 408 permit from the USACE. However, this will depend on the 60% design configuration of the structure. The permitting approach proposed allows the remainder of the Sites Project to continue while designs and analysis are completed on the Dunnigan Pipeline outfall structure to determine, if in fact a Section 408 permit is needed for this structure.

Staff anticipate receiving the Project's Construction Biological Opinion and the execution of the National Historic Preservation Act Section 106 Programmatic Agreement to be complete by July 15, 2025. Staff are preparing revised CWA 404 and 401 permit applications with the revised approach and additional mitigation details for the initial construction components and are anticipating being ready to resubmit the CWA 404 and 401 permit applications immediately following the Section 106 Programmatic Agreement completion. Staff are coordinating with TCCA and GCID on the modified permit approach, which is not anticipated to affect their facilities or operations differently than previously described.

The 404 and 401 permits are expected to be issued in March 2026 and have been identified as a condition precedent for the California Water Commission's final Funding Award. There is some risk to meeting this end date because the Water Board statutorily has 12 months to complete the 401 Permit once the application is received. Staff are working with the State's Strike Team to ensure the Water Board does not delay completion of final State funding award.

Prior Action:

January 2024: Authorized the Executive Director to submit the Project's Clean Water Act 404 and 401 Permit applications.

Fiscal Impact/Funding Source:

None. The efforts to resubmit 404 and 401 permit applications and ongoing resource agency coordination after resubmittal are covered under the Amendment 3 Work Plan.

Staff Contact:

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Primary Service Provider:

HDR and ICF

Attachments:

None