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Request for Approval to Revise Land Tenure and Water Rights Information Requirements for Approved 2016 Prop. 1 Projects

Staff Report

RECOMMENDATION

Staff recommends that the Board approve revisions to the land tenure and water rights information requirements for the approved 2015-2016 Prop. 1 Grant Program projects.

BACKGROUND

For the 2015-2016 grant cycle, the Delta Conservancy's Grant Guidelines and Grant Application Packet (grant materials) required that applicants for Category 2 implementation grants from the Proposition 1 Ecosystem Restoration and Water Quality Grant Program (Grant Program) submit detailed information regarding land tenure and water rights for the proposed project. Of the five conditionally approved Category 2 implementation projects, four projects are required, as a condition of approval, to submit additional information to fulfill the land tenure and water rights requirements.

Since the Board issued its project approvals in May, Conservancy staff has been working with grantees, other agencies, and the Conservancy's attorney to interpret the land tenure and water rights requirements in the grant materials. Staff has determined that the 2015-2016 grant materials do not provide sufficient guidance to applicants on these topics. Below, staff proposes to clarify and streamline the requirements for the land tenure and water rights information requirements for the approved 2015-2016 projects.

Land Tenure

The 2015-2106 grant materials include the following provision regarding land tenure:

Land Tenure Documents

In order for the Conservancy to consider projects for funding, agreements must be in place allowing the applicant to access property to construct and maintain the proposed project. If appropriate, define what, if any, agreements are in place, or plans (including a timeline) to acquire those agreements. Please be aware that a grant agreement will not be executed without proof of land tenure. (Grant Application Packet, page 14)

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The grant materials do not provide specific terms for a land tenure agreement, nor do they specify that grantees will be held to a 15-year “useful life” requirement for project maintenance, as required by the State General Obligation Bond Law.

Upon the request of our current grantees, after researching the approach taken by other State conservancies and agencies, and on the advice of our attorney, staff recommends that the Conservancy provide grantees with a land tenure template, attached here, that grantees may use or to whose terms an alternate agreement must conform. Staff further recommends that grant agreements be required as a condition of the grant agreement, and not prior to executing the grant agreement. By requiring the land tenure agreement as a condition of the grant agreement, the land tenure agreement will reference and incorporate the terms of the established grant agreement, making it a stronger contract.

Water Rights

The 2015-2106 grant materials include the following provision regarding water rights:

Water Law

Funded grants that address stream flows and water use shall comply with the California Water Code, as well as any applicable state or federal laws or regulations. Any proposal that would require a change to water rights, including, but not limited to, bypass flows, point of diversion, location of use, purpose of use, or off-stream storage shall demonstrate an understanding of the State Water Resources Control Board (SWRCB) processes, timelines, and costs necessary for project approvals by SWRCB and the ability to meet those timelines within the term of a grant. In addition, any proposal that involves modification of water rights for an adjudicated stream shall identify the required legal process for the change as well as associated legal costs. Prior to its completion, any water right acquisition must be supported by a water rights appraisal approved by the Department of General Services Real Property Services Section.

All applicants must demonstrate to the Conservancy that they have a legal right to divert water and sufficient documentation regarding actual water availability and use. For post-1914 water rights, the applicant must submit a copy of a water right permit or license on file with the SWRCB. Applicants who divert water based on a riparian or pre-1914 water right must submit written evidence of the right to divert water and the priority in the watershed of that diversion right with their proposal. All applicants must include past water diversion and use information reported to the SWRCB, required by CWC Section 5101. Such reports include Progress Reports of Permittee and Reports of Licensee for post-1914 rights, and Supplemental Statements of Water Diversion and Use for riparian and pre-1914 water rights. All water rights must be accompanied by any operational conditions, agreements or court orders associated with the right, as well as any SWRCB orders affecting the water right. (Grant Guidelines, page 9-10)

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Staff has consulted staff at the State Water Resources Control Board (Water Board), including the office of the Delta Watermaster, to better understand the materials we are requiring of grantees, including where to find these materials and how to interpret their contents. Given the limited capacity of Delta Conservancy staff and the complexity of the water rights system in California, staff, in consultation with the Delta Watermaster and on the advice of our attorney, recommends the following approach to verifying water rights for grantees:

1. By the deadline approved by the Board, grantees must submit a statement or application number¹ for the water right they propose to use, as well as a short, narrative statement demonstrating that the project's water use has been considered, is reasonable, and that there is sufficient water to implement and maintain the project without causing adverse impacts to downstream users or surrounding landowners.
2. If the applicant is not the water right holder, they will be asked to submit either:
 - a. a land tenure agreement with the landowner and water rights holder that includes a clause that specifically grants the applicant the right to use water for the purposes of implementing the proposed project (see page 3, paragraph 4 of the attached land tenure template); or
 - b. a written statement from the Reclamation District or other water rights holder that verifies that the property on which the proposed project will be implemented is within the Reclamation District and that the Reclamation District recognizes its obligation to provide water to that property for the purposes of implementing the proposed project.
3. Once the items above have been received, Conservancy staff will review the water rights narrative statement, and will provide the office of the Delta Watermaster with the statement or application numbers for all of the projects that propose to use water.
4. The Delta Watermaster will review the water rights affiliated with the proposed projects and, within 4-6 weeks, will provide an informal opinion as to whether or not these water rights appear to be subject to challenge.
5. Staff will consider the Watermaster's input and any issues flagged during internal review when removing the conditions required for approval of a grant, and may make additional requests of the grantee or may integrate special terms into the grant agreement.

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¹ Application numbers are for post-1914 appropriative water rights and start with the letter "A"; statement numbers are for other types of water rights, such as riparian and pre-1914 appropriative rights, and start with the letter "S".