

MEETING DATE: July 9, 2015

TITLE: Authorization to submit a Letter of Intent to U.S. Army Corps of Engineers for Painter Creek Section 206 Funding

RESOLUTION NUMBER: 15-061

PREPARED BY: Tiffany Schaufler

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REVIEWED BY: Administrator Counsel Program Director: James Wisker
 Board Committee Engineer Other

WORKSHOP ACTION:

<input type="checkbox"/> Advance to Board mtg. Consent Agenda.	<input type="checkbox"/> Advance to Board meeting for discussion prior to action.
<input type="checkbox"/> Refer to a future workshop (date):_____	<input type="checkbox"/> Refer to taskforce or committee (date):_____
<input type="checkbox"/> Return to staff for additional work.	<input type="checkbox"/> No further action requested.
<input checked="" type="checkbox"/> Other (specify): FINAL ACTION July 9, 2015	

PURPOSE or ACTION REQUESTED:

Authorization to submit a letter of intent to the U.S. Army Corps of Engineers for Painter Creek Section 206 funding.

PROJECT/PROGRAM LOCATION:

Painter Creek Subwatershed

PROJECT TIMELINE:

July 2015: Submit Letter of Intent to USACE

December 2015: Negotiate Project Partnership Agreement with USACE

PAST BOARD ACTIONS:

- February 19, 2009, RES 09-024: Resolution of Support for USACE Painter Creek Feasibility Study
- May 20, 2010: Discussed whether the District should work with the USACE to develop a collaborative project in the Painter Creek subwatershed.
- August 19, 2010: Discussed the real estate plan for the USACE Painter Creek partnership. At that time the real estate plan required the District to acquire land through fee title which was found infeasible for the District and resulted in the Board passing a resolution to communicate to the USACE that the District did not wish to proceed with a partnership on the project.

SUMMARY:

The Painter Creek Subwatershed is a developing area in the western portion of MCWD. Painter Creek, also known as County Ditch 10, drains from the headwaters at Lake Katrina (Baker Park Reserve) to Jennings Bay on Lake Minnetonka. Jennings Bay is currently on the State Impaired Waters List and has historically had water quality issues. In 2004, MCWD undertook a Painter Creek Feasibility Study to assess the methods available to restore water quality to Jennings Bay and its tributary area, with primary emphasis on the Painter Creek Subwatershed.

In anticipation of significant capital investment with the Painter Creek Subwatershed, MCWD reviewed the Painter Creek Feasibility Study (2004) with the U.S. Army Corps of Engineers (USACE) to evaluate federal interest in the Painter Creek Subwatershed improvement projects. Since 2005, the USACE has worked to evaluate the Painter Creek project area through site investigation, remote sensing and various modeling exercises. The USACE produced their own Draft Painter Creek Feasibility Study which was presented to the Board of Managers on February 19, 2009. The USACE Feasibility Study and project falls under Section 206 of the Water Resources Development Act of 1996 which is primarily focused on ecosystem restoration.

The USACE completed their Painter Creek Feasibility Study in March 2010 and subsequently it was discussed with the Board of Managers at the May 20, 2010 Board Meeting. At the May 20, 2010 Board Meeting, the Board directed District counsel to develop additional details on a potential partnership with the USACE to implement projects in the Painter Creek Subwatershed. Discussion was continued at the August 19, 2010 Board Meeting, where staff outlined the real estate plan required for the USACE Painter Creek partnership. At that time the real estate plan required the District to acquire land through fee title which was found infeasible for the District. Following this discussion, the Board of Managers passed a resolution to communicate to the USACE that the District did not wish to proceed with a partnership on the project.

In recent years, the Board has identified the need to diversify its funding sources in order to fund larger projects. Following these discussions, staff reinitiated contact with the USACE to explore ways to access Section 206 funding while managing risk to the District. Additionally, since the August 19, 2010 Board Meeting, the USACE has removed language from the Painter Creek Feasibility Study requiring that all acquisitions must be in fee title and rather can be acquired through easement. Recently at the April 16, 2015 Planning and Policy Committee (PPC), staff summarized recent planning efforts within the Painter Creek subwatershed, specifically in proximity to South Katrina Marsh and Painter Marsh. Both the South Katrina Marsh and Painter Marsh project areas represent areas of potential work pursuant to the USACE Painter Creek Feasibility Study. Staff then introduced a preliminary risk assessment should the District wish to revisit a potential partnership with the USACE to access ~\$2.3 million in Section 206 funding for wetland restoration with the Painter Creek corridor. The Planning and Policy Committee discussed its interest in more carefully reexamining the potential to partner with the USACE and strategies to minimize the risk to the District through the USACE project partnership agreement.

Following the April 16, 2015 PPC meeting, staff committed to meeting with legal counsel to discuss the risk. District staff, Smith Partners staff and USACE staff had a joint meeting on June 9, 2015 to examine the risks and risk mitigation strategies associated with a USACE project partnership agreement. District staff and District counsel facilitated a discussion with the Planning and Policy Committee at their June 25, 2015 meeting to discuss whether the risk was manageable to partner with the USACE to access Section 206 funding within the Painter Creek Subwatershed. The Committee determined that the risks were generally manageable and passed a resolution recommending to the Board of Managers that a letter of intent be submitted to the USACE for the Painter Creek Feasibility Study.

ATTACHMENTS:

- Risk Management Framework: Painter Creek Partnership with USACE

RESOLUTION

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TITLE: Authorization to submit a Letter of Intent to U.S. Army Corps of Engineers for Painter Creek Section 206 Funding

WHEREAS, the Minnehaha Creek Watershed District has identified the Painter Creek subwatershed as a priority area for Capital Improvements in its 2007 Comprehensive Water Resources Management Plan; and

WHEREAS, the U.S. Army Corps of Engineers (USACE) completed a DRAFT Feasibility Study for the Painter Creek project area and reviewed the DRAFT Feasibility Study findings with the MCWD Board of Managers at their February 19, 2009 Board Meeting; and

WHEREAS, at the February 19, 2009 Board Meeting the Board passed Resolution 09-024 to provide a Resolution of Support for the USACE Painter Creek Feasibility Study; and

WHEREAS, in March 2010 the USACE finalized the Painter Creek Feasibility Study; and

WHEREAS, at the May 20, 2010 Board Meeting the Board discussed whether the District should work with the USACE to develop a collaborative project in the Painter Creek subwatershed; and

WHEREAS, at the August 19, 2010 Board Meeting the Board passed a Resolution to communicate to the USACE that the District did not wish to proceed with a partnership on the Painter Creek project, due in part to the real estate plan requirement to obtain all project lands in fee; and

WHEREAS, since the August 19, 2010 Board Meeting the USACE has communicated that project lands may be acquired through easement rather than in fee; and

WHEREAS, in recent years the Board of Managers has identified the need to diversify its funding sources in order to fund larger capital projects; and

WHEREAS, in June 2015 District staff, legal counsel, and USACE staff jointly examined the risk and risk mitigation strategies associated with executing a USACE project partnership agreement; and

WHEREAS, at the June 25, 2015 Policy and Planning Committee staff and legal counsel facilitated a discussion on the risk and risk mitigation strategies associated with executing a project partnership agreement with the USACE to access Section 206 funding within the Painter Creek subwatershed; and

WHEREAS, at the June 25, 2015 Policy and Planning Committee it was moved by Manager Miller, seconded by Manager Shekleton and passed 3-0 that the Committee recommend issuing a letter of intent to the USACE at the July 9, 2015 Board of Managers Workshop.

NOW, THEREFORE, BE IT RESOLVED that the Minnehaha Creek Watershed District Board of Managers hereby authorizes the Board President, on advice of counsel, to submit a non-binding letter of intent to the USACE for Painter Creek Section 206 funding.

Resolution Number 15-061 was moved by Manager _____, seconded by Manager _____.
Motion to adopt the resolution ___ ayes, ___ nays, ___ abstentions. Date: _____.

Secretary Date: _____

**DRAFT for discussion purposes only and subject to Board approval and the availability of funds.
Resolutions are not final until approved by the Board and signed by the Board Secretary.**

Risk Management Framework: Painter Creek Partnership with USACE

This document provides a framework which outlines the various stages of working with the U.S. Army Corps of Engineers (USACE), the associated risk with that work, the costs associated with the risk, and a plan to mitigate that risk. This document summarizes the following resources:

- May 12, 2010, Smith Partners Memo to MCWD Board of Managers
- April 9, 2015, meeting between District and USACE staff
- June 9, 2015, meeting between District, Smith Partner, and USACE staff

Background

Under Section 206 of the Water Resources Development Act of 1996, Public Law 104-303, as amended (33 U.S.C. 2330), the USACE, in coordination with the District, has prepared a feasibility study for ecosystem restoration projects within the Painter Creek subwatershed. Four wetlands have been selected and analyzed for potential improvements. The District would stand to gain ~\$2.3 million of USACE funding for the improvements. To move forward with the project, the USACE has asked the District to submit a letter of intent to move this project forward into the funding queue. If the project is approved the USACE and District would negotiate and execute a project partnership agreement (PPA) so that the USACE may proceed with project implementation under Section 206 authority. The PPA frames the roles and responsibilities of the USACE and the District, and is a binding agreement.

Painter Creek Section 206 Feasibility Study

The feasibility study itself has been completed but has not been approved because a letter of intent has not been submitted by the local sponsor.

Step 1:

Letter of Intent; Timeline = July 2015

In order to move this project forward and get into the funding queue, the USACE needs to have a letter of intent approved from the District. Once the District submits a letter of intent the USACE will take 30-60 days to process and review the project report. Once the project report is approved it will get sent to the Section 206 funding queue.

Risk Mitigation:

- No risk, as submitting a letter of intent does not commit the District to anything.

Financial Exposure:

- None

Step 2:

Project Partnership Agreement (PPA); Timeline = December 2015

Once the project report is approved, the USACE and District will negotiate the PPA and project management plan. The PPA frames the roles and responsibilities of the USACE and MCWD. Related project documents, including the feasibility study and project management plan (PMP), evidence the parties' intentions as to both design and process, but would not be incorporated into the PPA and would not legally bind the USACE. Though it is not favored, it is possible to revise the PPA. However, approval of a change would need to be reviewed/approved up the chain of command, depending on the nature of the proposed change, and the amount of time to do so would correspond. If the PPA is at odds with specific language in the PMP, that would be a good argument for a PPA revision (specifically, the PPA can be revised to state that easement acquisition is satisfactory).

Risk Mitigation:

- Phasing project by project—design, land rights acquisition and project construction. This can be set forth in the PMP (and presumably can be explored as revision to PPA if MCWD wishes).

Financial Exposure:

- When the PPA moves into design, the District's retroactive obligation for a feasibility study cost-share is triggered ~\$125,000

Step 3:**Design: Low Risk**

Under the PPA framework, the USACE designs the project. MCWD legal counsel's review of the PPA is that the District has no formal right to disapprove (or require changes to) the design. The District can terminate its project participation at any time. An accounting would occur and the District would be responsible for 35% of the costs incurred to the point of termination. Thus, at critical points – e.g. environmental assessment, completion of design, contractor selection, and substantial completion of project elements, the District could terminate its participation or use the ability to do so as leverage to negotiate an acceptable outcome.

Risk Mitigation:

- District inform USACE that it would like to direct the USACE during design; USACE would then need to review and approve design
 - Memorialize this through a Project Management Plan (PMP), which is tied to the PPA.
 - Design/build one wetland restoration at a time. This would allow the District to investigate the partnership while only committing financially to one project.
- District can terminate at the end of design and proceed to construct on its own with completed design if it wishes.

Financial Exposure:

- District responsible for 35% of costs incurred to that point in design
 - 5% must be cash, other 30% can be in-kind design costs (in-house design work, land rights, etc.)
 - If District walked away from final design for all projects, estimated cost would be 15% of construction costs (~\$750,000); $(\$750,000 \times 35\%) = \$262,500$
- District responsible for buy back for feasibility study costs; ~\$125,000 (*noted above in PPA section)
- Estimated total maximum financial exposure during design; $\$262,500 + \$125,000 = \$387,500$

Environmental Review: Low Risk

Environmental review would fall under the design phase of the project. Under the PPA, the USACE would perform pre-project environmental assessment utilizing the standard Phase 1, Phase 2 processes and Phase 3 if needed. The District would be responsible to address any site contamination issues that are identified. If the District can unilaterally terminate the project (see above), it would be able to evaluate any issues and decide whether and how to proceed.

Risk Mitigation:

- District request Phase 2 to minimize risk found during construction
- If contamination is found, modify design to avoid area of contamination
- Insert language into PPA that addresses contamination
- Terminate contract if contamination is found that could not be dealt with in a timely/affordable method

Financial Exposure:

- District responsible to address any site contamination issue that are identified

Cultural Resource Review: Low Risk

A cultural resource review would fall under the design phase of the project Under the PPA, the USACE would manage pre-project cultural resource review under Section 106 of the National Historic Preservation Act. The District is responsible for all Phase 2 work at the direction of the State Historic Preservation Office (SHPO), following the USACE's initial Phase 1 assessment. The feasibility study notes the presence of cultural resources in the area, ranging from lithic artifacts to standing structures.

Risk Mitigation:

- If there are known sites the design process can take that into account to avoid those sites

Financial Exposure:

- USACE estimates they would be responsible for the first 50,000 of recovery costs (this is 1% of total project costs, so \$5M project would be \$50K. The larger the project the greater the Federal limit).
- Costs incurred would be project costs allocated according to cost-share terms
- District and USACE cost-share remaining costs above \$50,000

Land Acquisition: Low Risk

The "non-federal sponsor" (the District) is responsible to acquire all land rights needed for the project. The USACE already has removed language from the feasibility study stating that all acquisitions must be in fee. The draft real estate plan (a component of the feasibility study) indicates the USACE will allow some project land rights to be acquired as easements. Aside from the USACE project, the District has an interest in acquiring valuable wetland habitat areas and would benefit from acquisitions individually.

Risk Mitigation:

- USACE will ensure adequate documentation in PMP, Real Estate Plan and will create a "memorandum for record."
- Phase the remaining acquisitions over time, prioritize area where the first project will be constructed. Phasing as a key element will be set forth in the PMP—this is not technically legally binding, but a change to the PPA could be explored if MCWD wishes.
- Utilize easement acquisition versus fee title
- District has interest in acquiring land rights over wetland properties regardless of USACE PPA

Financial Exposure:

- Calculating Land, Easements, Right-Of-Ways, Relocation, and Disposal Areas (LERRD) values:
 - Purchased in past 5 years = credit for purchase price
 - Purchase >5 years ago = credit for current land price/market value
 - If land was donated there is an opportunity for valuation of the property
- To date, the District has spent ~\$1.2 million on land acquisition for properties that align with the areas needed for the USACE work

Step 4:

Construction: Moderate-High Risk

MCWD legal counsel has noted that in the PPA framework, the USACE selects the contractor, manages construction and certifies completion, therefore leaving the District with a consultative role. The District has no formal right to disapprove (or require changes to) the design, disapprove the contractor, or withhold concurrence in the certification of completion. USACE utilizes a competitive bid process and selects the low bid. The USACE would contribute ~\$2.3 million towards the project.

Risk Mitigation:

- If MCWD wishes the USACE can use a Best Value procurement process.
- Minimize risk on paper by memorializing the following in PMP (*this was not done for Minnehaha Glen project)
 - District to supply a field observer to coordinate with USACE Contracting Officer to ensure real-time involvement and site compliance daily.
 - District to work directly with Contracting Officer to modify fieldwork to achieve District objectives, i.e. placement of boulders for fish passage, etc.
- If MCWD is not satisfied with the work as completed, the USACE is committed to ensuring it is completed properly and in accordance with approved plans. USACE has access to a Section 1135 projects which provides funds to correct damage from prior federal work.

Financial Exposure:

- If District terminated project at substantial completion of project elements, the District would be responsible to cover 35% of the total costs incurred to the point of termination.

Step 5:

Maintenance of Improvements: Low Risk

Under the PPA, the USACE will prepare an operation and maintenance plan during the design phase. The District would then be obliged thereafter to “maintain, rehabilitate and replace” the improvements in accordance with the plan.

Risk Mitigation:

- District influence design so that the system functions as naturally as possible, resulting in minimal O&M requirements and investments
- District involved in developing the final O&M Plan, memorialize this in PMP
- Duration of maintenance obligation explicitly bounded
- Contingency budget to repair work after completion

Financial Exposure:

- Post construction costs to maintain project; the total estimated annual cost of operation and maintenance for the project is \$6,880