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RE: Comments on Draft Environmental Impact Report for the Valley Rail Sacramento Extension Project, SCH# 2019090306

Dear Kevin Sheridan:

Thank you for the opportunity to review and comment on the Draft Environmental Impact Report (EIR) for the Valley Rail Sacramento Extension Project (project). The Delta Stewardship Council (Council) recognizes the goals of the San Joaquin Regional Rail Commission (SJRRRC) to expand passenger rail service, increase frequency of service, increase rail ridership, and reduce travel time between the San Joaquin Valley and the Sacramento area, among other project objectives.

The Council submitted a comment letter on the 2019 Notice of Preparation (NOP) of a Draft EIR for the project. That letter explained the Council's regulatory authority under the Sacramento-San Joaquin Delta Reform Act of 2009 (SBX7 1); Delta Reform Act (Wat. Code, section 85000 et seq.); identified Water Code section 85225 requirements for SJRRRC to determine whether the project is a covered action and, if so, submit a certification of consistency with the Delta Plan to the Council before implementing the project; and identified Delta Plan regulatory policies potentially implicated by the project.

The covered action process and applicable Delta Plan regulatory policies are discussed in multiple resource areas within the Draft EIR, including:

- Biological Resources (Section 3.4)
- Hydrology and Water Quality (Section 3.10)
- Land Use and Planning (Section 3.11)

"Coequal goals" means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place."

This letter identifies ways for SJRRC to clarify and supplement discussions in the Draft EIR to support a future certification of consistency of the project with the Delta Plan.

Covered Action Determination and Certification of Consistency with the Delta Plan

The Council's 2019 NOP letter stated that, based on the project location and scope, the project appears to meet the definition of a covered action. The state or local agency approving, funding, or carrying out a project must make a reasonable, good faith determination, consistent with the Delta Reform Act and its regulatory policies, if that project is a covered action and, if so, submit a certification of consistency with the Delta Plan to the Council prior to implementing the project. (Cal. Wat. Code section 85225; Cal. Code Regs., tit. 23, § 5001(j)(3).)

The Draft EIR states SJRRC's intention to file a certification of consistency with the Council prior to project implementation (Draft EIR, p. 3.11-15), and summarizes preliminary consistency conclusions in Table 3.11-3. This stated intent suggests that SJRRC will determine that the project is a covered action. However, the Draft EIR is not internally consistent on this matter. We request that SJRRC ensure that the Draft EIR is internally consistent with regard to the status of the project as a covered action and stated intent to file a certification of consistency with the Council. Specifically, Section 3.4 states that, "Project activities in the Delta are not covered by any provisions in the Delta Plan" (Draft EIR, p. 3.4-127). This statement is inconsistent with other sections of the Draft EIR which identify and discuss applicable Delta Plan policies in detail and should be modified to be consistent with the discussion of the project's consistency with Delta Plan policies found in Section 3.11 (see Draft EIR, p. 3.11-15).

Comments Regarding Delta Plan Policies and Consistency Certification

The Draft EIR acknowledges the Delta Plan policies highlighted in the Council's 2019 NOP letter as well as additional Delta Plan policies that may apply to the project. The following comments discuss the adequacy of the Draft EIR relative to four of the specific Delta Plan policies identified in the 2019 NOP letter and offer suggestions on how to further support these conclusions in the Final EIR to support a future certification of consistency for the project.

Ecosystem Restoration Policy 5: Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species

As described in the Council's 2019 comment letter, Delta Plan Policy **ER P5** (Cal. Code Regs., tit. 23, § 5009) requires that covered actions fully consider and avoid or mitigate the potential for new introductions of, or improved habitat conditions for, invasive, nonnative species in a way that appropriately protects the ecosystem. This policy is referenced in Draft EIR Sections 3.4 and 3.11 (Draft EIR, pp. 3.4-8, 3.11-15). However, these references are internally inconsistent and do not sufficiently address the requirements of ER P5.

The regulatory setting in Section 3.4 lists ER P5 as an applicable regulatory policy (Draft EIR, p. 3.4-8). However, ER P5 is not mentioned in the Section 3.4 impact analysis, which focuses on other Delta Plan requirements, such as Ecosystem Restoration Policy 3 (ER P3; Cal. Code

Regs., tit. 23, § 5007), which were not identified in the regulatory setting. Impacts to the Delta Plan are analyzed as part of Impact BIO-5 (see Draft EIR, p. 3.4-125 to 3.4-127, “Phase I improvements may conflict with local policies or ordinances...”) Impact BIO-5 concludes that, “...the proposed project impacts on the Delta Plan are less than significant; no mitigation is required” (Draft EIR, p. 3.4-127). It is unclear how, if at all, this finding accounts for ER P5 requirements. The Draft EIR should analyze the impacts not on the Delta Plan, but on the resources protected by Delta Plan policies in light of Delta Plan policy requirements. SJRRC should revise the analysis within Impact BIO-5 in the Final EIR to incorporate the Delta Plan policy requirements for ER P5 discussed in the Section 3.4 regulatory setting.

Section 3.11 of the Draft EIR offers a more explicit discussion of consistency with ER P5 (Draft EIR, p. 3.11-15). Table 3.11-3 states that the proposed project would be consistent with ER P5 because “The proposed project would comply with Executive Order 13112,¹ as detailed in Section 3.4” (Draft EIR, p. 3.11-15). Similar to ER P5, Executive Order 13112 is mentioned within the regulatory setting of Section 3.4, but the Draft EIR does not analyze how compliance with the Executive Order fully considers and avoids or mitigates the potential for new introductions of, or improved habitat conditions for, invasive, nonnative species in a way that appropriately protects the ecosystem, as is required by ER P5. Furthermore, compliance with Executive Order 13112 is not equivalent to consistency with ER P5; they are separate requirements with separate standards. Executive Order 13112 applies to actions of federal agencies, and by extension, to use of federal funds for transportation projects. SJRRC must also independently demonstrate consistency with ER P5.

An updated discussion of Impact BIO-5 could build on analysis and proposed mitigation already present within the Draft EIR. The environmental analysis in Section 3.4 for Impact BIO-1 describes potentially significant impacts related to the introduction and spread of invasive plants during construction (Draft EIR, p. 3.4-78, p. 3.4-84). ER P5 requires that SJRRC avoid or mitigate such potential introductions and spread. Draft EIR Mitigation Measure BIO-1.4 requires SJRRC to develop and implement a revegetation and weed control plan to control invasive/noxious weeds. (Draft EIR, p. 3.4-81) SJRRC should evaluate whether Mitigation Measure BIO-1.4 is equally or more effective than Delta Plan Mitigation Measure 4-1, as required by Delta Plan policy **G P1(b)(2)** (see Delta Plan Appendix O, available at

¹ Executive Order 13112 (1999), as amended by Executive Order 13751 (2016) sets requirements for federal agencies whose actions may affect the status of invasive species to: prevent the introduction of invasive species; detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; monitor invasive species populations accurately and reliably; provide for restoration of native species and habitat conditions in ecosystems that have been invaded; conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and promote public education on invasive species and the means to address them. Under the Executive Order, a federal agency should not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.

<https://www.deltacouncil.ca.gov/pdf/delta-plan/2018-appendix-o-mitigation-monitoring-and-reporting-program.pdf>). Among other performance standards, Delta Plan Mitigation Measure 4-1 requires that an invasive species management plan be developed and implemented to ensure that invasive plant species and populations are kept below preconstruction abundance and distribution levels. SJRRC should revise Mitigation Measure BIO-1.4 in the Final EIR, if needed, to align with requirements set forth in Delta Plan Mitigation Measure 4-1.

Finally, in addition to updating the discussion in Impact BIO-5, SJRRC should consider revising Table 3.11-3 to reference the updated Impact BIO-5 discussion described above, to explain how the project is consistent with ER P5 requirements.

Delta as Place Policy 1: Locate New Urban Development Wisely

Delta Plan Policy **DP P1** (Cal. Code Regs., tit. 23, § 5010) places certain limits on new urban development within the Delta. The Council's 2019 NOP letter stated that the Draft EIR should analyze the potential of the project to induce new residential, commercial, or industrial development that would be inconsistent with DP P1 in the Delta, particularly near planned station locations.

DP P1 is discussed in Section 3.11 (Draft EIR, p. 3.11-15). Table 3.11-3 states that the proposed project would be consistent with DP P1 because "Phase I improvements would not induce land use changes that would result in new or unplanned growth around the station sites. See Section 3.13, Population and Housing" (Draft EIR, pp. 3.11-15).

Section 3.13 acknowledges the potential for the project to induce local population growth in the immediate areas around proposed stations (Draft EIR, p. 3.13-6), but states that unplanned growth would not occur because development is limited by the existing land use designations, zoning, and infrastructure constraints (Draft EIR, p. 3.13-7). However, the proposed Lodi Station alternatives and proposed North Elk Grove Station conflict with existing land use designations and agricultural zoning (Draft EIR, p. 3.11-21). If the proposed station areas themselves conflict with existing land use designations and zoning, the protection these policies afford against development pressure around station areas represents a potential conflict with DP P1.

SJRRC should add discussion of Policy DP P1 to the regulatory settings for both Section 3.11 and Section 3.13 in the Final EIR. SJRRC should also analyze Policy DP P1 among the limitations on urban development in the vicinity of the Lodi Station and Lodi Station South Alternative within Section 3.13 in the Final EIR. As DP P1 references general plan land use designations as of the date of Delta Plan adoption (2013), SJRRC should identify any relevant discrepancies between 2013 land use designations and present-day land use designations near the Lodi station alternatives and within the Delta.

Risk Reduction Policy 3: Protect Floodways

Delta Plan Policy **RR P3** (Cal. Code Regs., tit. 23, § 5014) prohibits the presence or construction of encroachments in floodways unless it can be demonstrated by appropriate analysis that the encroachment will not unduly impede the free flow of water in the floodway or jeopardize public safety. The Council's 2019 NOP letter recommended that the Draft EIR analyze how the project will not impede the free flow of water in the floodway or jeopardize public safety.

RR P3 is discussed in Section 3.10 and Section 3.11 (Draft EIR, pp. 3.10-9, 3.11-15). The regulatory setting in Section 3.10 lists RR P3 as an applicable regulatory policy (Draft EIR, p. 3.10-9). Within Section 3.10, impacts to the Delta Plan are analyzed in Impact HYD-6 (Phase I-related operation could impede or redirect flood flows...). The Draft EIR states that, "Phase I related improvements at the Thornton Siding Upgrade/Extension require Delta Plan compliance with floodway improvements and could potentially reduce the effectiveness of flood improvements planned as part of the CVFPP" (Draft EIR, p. 3.10-47).

Draft EIR Mitigation Measure HYD-6.1 would require SJRRC to prepare site-specific detailed hydrologic and hydraulic studies for improvements that are proposed within the 100- and 200-year floodplains. These studies would be used to design project facilities such that stormwater flows would not be impeded or redirected. (Draft EIR, p. 3.10-48). SJRRC should evaluate whether Mitigation Measure HYD-6.1 is equally or more effective than Delta Plan Mitigation Measures 5-1, 5-2, and 5-5, as required by Delta Plan policy **G P1(b)(2)** (see Delta Plan Appendix O, available at <https://www.deltacouncil.ca.gov/pdf/delta-plan/2018-appendix-o-mitigation-monitoring-and-reporting-program.pdf>). Delta Plan Mitigation Measure 5-1 requires identification of flood risks, and construction of drainage facilities and/or mitigation of hydraulic impacts to potential flood zones. Delta Plan Mitigation Measure 5-2 requires on-site stormwater storage at construction and project facility sites in order to prevent long-term increases in drainage runoff. Delta Plan Mitigation Measure 5-5 requires temporary drainage bypass facilities to maximize surface flows under flood conditions and re-route around/under/over project facilities. Subsequently, if needed, SJRRC should revise Mitigation Measure HYD-6.1 in the Final EIR to be equally or more effective than the requirements set forth in Delta Plan Mitigation Measures 5-1, 5-2, and/or 5-5.

General Policy 1: Detailed Finding to Establish Consistency with the Delta Plan

As discussed in the 2019 NOP letter, Delta Plan Policy **G P1** (23 CCR section 5002) specifies what must be addressed in a certification of consistency by a state or local public agency for a project that is a covered action.

- Delta Plan Policy **G P1(b)(2)** (Cal. Code Regs., tit. 23, § 5002(b)(2)) requires that actions not exempt from CEQA and subject to Delta Plan regulations must include all applicable feasible mitigation measures in the Delta Plan as amended April 26, 2018 or substitute mitigation measures that are equally or more effective. Mitigation measures in the Delta Plan's Mitigation and Monitoring Report Program (Delta Plan MMRP) are

available at: <https://www.deltacouncil.ca.gov/pdf/delta-plan/2018-appendix-o-mitigation-monitoring-and-reporting-program.pdf>. Where the Draft EIR identifies significant impacts that require mitigation (including the examples identified in this letter), SJRRC should review the Delta Plan MMRP and, when feasible, apply mitigation measures identified in the Delta Plan as amended April 26, 2018 or substitute measures that are equally or more effective.

- Delta Plan Policy **G P1(b)(3)** (Cal. Code Regs., tit. 23, § 5002(b)(3)) states that actions subject to Delta Plan regulations must document use of best available science as relevant to the purpose and nature of the project. The regulatory definition of "best available science" is provided in Appendix 1A of the Delta Plan (<https://www.deltacouncil.ca.gov/pdf/delta-plan/2015-appendix-1a.pdf>). Best available science is defined in the Delta Plan as the best scientific information and data for informing management and policy decisions. Six criteria are used to define best available science: relevance, inclusiveness, objectivity, transparency and openness, timeliness, and peer review. (Cal. Code Regs., tit. 23, § 5001(f).) In a future certification of consistency, SJRRC should be prepared to document and communicate the use of best available science as relevant to the purpose and nature of the project.

Closing Comments

The Council recognizes the effort SJRRC has undertaken to establish consistency with the Delta Plan. We acknowledge the preliminary conclusions regarding consistency with the Delta Plan, as summarized in Table 3.11-3, and invite SJRRC to engage in early consultation to discuss how additional content in the Final EIR could support a future certification of consistency for the project.

More information on covered actions, early consultation, and the certification process can be found on the Council website: <https://coveredactions.deltacouncil.ca.gov>. Council staff are available to discuss issues outlined in this letter as SRJJC proceeds in the next stages of environmental review. Please contact Avery Livengood at avery.livengood@deltacouncil.ca.gov with any questions.

Sincerely,



Jeff Henderson, AICP
Deputy Executive Officer
Delta Stewardship Council