



# Delta Stewardship Council

A CALIFORNIA STATE AGENCY

October 16, 2020

Mr. Zachary Simmons  
U.S. Army Corps of Engineers  
Sacramento Regulatory Division  
1325 J Street, Room 1350  
Sacramento, CA 95814-2922

Sent via email: Zachary.M.Simmons@usace.army.mil

**RE: Comments on Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Delta Conveyance Project, Sacramento, San Joaquin, Contra Costa, and Alameda Counties, CA**

Dear Zachary Simmons:

Thank you for the opportunity to review and comment on the Notice of Intent (NOI) to Prepare an Environmental Impact Statement (EIS) for construction of the Proposed Delta Conveyance Project (Delta Conveyance Project or project). The NOI states that the EIS will analyze construction of the project, as proposed by the project proponent or applicant, the California Department of Water Resources (DWR). Project construction would include new conveyance facilities in the Sacramento-San Joaquin Delta, including intake facilities on the Sacramento River, tunnel reaches and tunnel shafts, and a southern Forebay that would connect to existing State Water Project infrastructure. Because the proposed action would alter Federal levees and cross under a federal navigation project, permission from the U.S. Army Corps of Engineers (USACE) is required under Section 14 of the Rivers and Harbors Act (RHA) (33 U.S.C. 408) (Section 408). In addition, the proposed work in navigable waters and discharge of dredge or fill material into waters of the U.S. requires authorization from USACE under Section 10 of the RHA (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344).

The Delta Stewardship Council (Council) previously commented on DWR's Notice of Preparation (NOP) of an Environmental Impact Report (EIR) for the project. The Council's April 17, 2020 comment letter on DWR's NOP is provided as Attachment 1 to this letter.<sup>1</sup> We are providing comments to USACE to highlight areas of interest to the Council. These

---

<sup>1</sup> The Council's comment letter on the Delta Conveyance Project NOP is also available online at <https://deltacouncil.ca.gov/pdf/council-meeting/outgoing-correspondence/2020-04-17-conveyance-notice-of-preparation-comment-letter.pdf>.

**CHAIR**

Susan Tatayon

**MEMBERS**

Frank C. Damrell, Jr.  
Michael Gatto  
Maria Mehranian  
Oscar Villegas  
Daniel Zingale

**EXECUTIVE OFFICER**

Jessica R. Pearson

980 Ninth Street,  
Suite 1500  
Sacramento, CA  
95814

916.445.5511

**DELTACOUNCIL.CA.GOV**

Mr. Zachary Simmons

Comments on Notice of Preparation to Prepare an Environmental Impact Report for the Proposed Delta Conveyance Project

October 16, 2020

Page 2

comments are provided primarily to identify areas of clarification and to encourage close coordination between USACE and DWR so that the USACE's EIS and DWR's EIR appropriately, consistently, and fully assess potential impacts.

The Council is an independent state agency established by the Sacramento-San Joaquin Delta Reform Act of 2009, codified in Division 35 of the California Water Code, sections 85000-85350 (Delta Reform Act). The Delta Reform Act charges the Council with furthering California's coequal goals of providing a more reliable water supply and protecting, restoring and enhancing the Sacramento-San Joaquin River Delta (Delta) ecosystem. (Wat. Code, § 85054.) The Delta Reform Act further states that the coequal goals are to 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. The Council is charged with furthering California's coequal goals for the Delta through the adoption and implementation of the Delta Plan. (Wat. Code, § 85300.)

Pursuant to the Delta Reform Act, the Council has adopted the Delta Plan, a comprehensive long-term management plan for the Delta and Suisun Marsh that furthers the coequal goals. The Delta Plan contains regulatory policies, which are set forth in California Code of Regulations, Title 23, sections 5001-5015. A state or local agency that proposes to undertake a covered action is required to prepare a written Certification of Consistency with detailed findings as to whether the covered action is consistent with the Delta Plan and submit that certification to the Council prior to implementation of the project. (Wat. Code, § 85225.) As described in the Council's April 17, 2020 NOP comment letter to DWR (see Attachment 1), the proposed project appears to be a covered action and the Council urges close coordination between USACE and DWR.

### **Comments Regarding EIS Scope and Crosscutting Topic Areas**

The Council provides the following comments related to the EIS scope, potential relationships to DWR's EIR, and topic areas that may require special attention or clarification.

#### **Scope of Analysis**

According to the NOI, the EIS will analyze the environmental effects of construction on the aquatic environment and all other impacts that fall within the USACE jurisdiction.

Potentially significant issues to be analyzed in depth include impacts to waters of the United States (including wetlands), the federal flood control project, and air quality. Other impacts include biological resources, special status species, hydrology and water quality, land use, navigation, water supply, aesthetics, recreation, and socioeconomic effects. The NOI notes that:

Mr. Zachary Simmons

Comments on Notice of Preparation to Prepare an Environmental Impact Report for the Proposed Delta Conveyance Project

October 16, 2020

Page 3

*"USACE's jurisdiction is limited to construction activities resulting in the discharge of dredge or fill material within waters of the U.S., work or structures within navigable waters, and modifications to the federal levees and navigation projects. The scope of the USACE NEPA review for operations of the new facilities is limited to potential effects to navigation and long-term operations and maintenance of the modifications to federal levees. The scope does not extend to the potential downstream effects from the diversion of water through new intakes or to the overall State Water Project (SWP) and water deliveries."<sup>2</sup>*

USACE notes that the project elements anticipated to require a permit from USACE include:

Intakes:

- a. Intake structures and facilities
- b. Setback levees
- c. Two tunnel shafts
- d. Temporary construction areas

Tunnel:

- a. 13 Crossings of navigable waters
- b. Eight tunnel shafts
- c. Access roads and improvements
- d. Staging areas
- e. Tunnel material storage areas
- f. Barge landing(s)

Southern Forebay:

- a. A new southern forebay at Byron Tract
- b. Three tunnel shafts
- c. One crossing of a navigable water
- d. Pumping plant
- e. Outlet and control structure
- f. Tunnel material storage area
- g. Temporary construction areas

These project elements are distributed across the Delta. The size, extent, and nature of the proposed infrastructure mean that there is potential for secondary and cumulative impacts beyond those associated with a single location or smaller project. According to the Map of Waters of the U.S. (verified by USACE on June 18, 2020), the EIS will include a study area

---

<sup>2</sup> Source:

[https://www.spk.usace.army.mil/Portals/12/siteimages/001\\_2020.08.20\\_Notice%20of%20Intent.pdf?ver=2020-08-21-152944-083](https://www.spk.usace.army.mil/Portals/12/siteimages/001_2020.08.20_Notice%20of%20Intent.pdf?ver=2020-08-21-152944-083)

Mr. Zachary Simmons

Comments on Notice of Preparation to Prepare an Environmental Impact Report for the Proposed Delta Conveyance Project

October 16, 2020

Page 4

of 135,639 acres, in which there are approximately 5,683 acres of wetlands and 10,132 acres of other waters. This includes broad areas along the project tunnel alternative routes. However, it does not include all of the Sacramento River below the proposed intake locations, other lands and waterways outside of an identified tunnel route, or lands or waters associated with the Bethany Alternative that DWR is currently analyzing within the EIR.

### **Project Operations**

As described in the NOI, the Council understands that future operations of the proposed diversions for the Central Valley Project (CVP) are outside of the USACE control and responsibility. However, operations are relevant to compliance with several laws, including the Endangered Species Act (Section 7 consultation), National Historic Preservation Action (Section 106 consultation), and the Clean Water Act (Section 401 certification, under the jurisdiction of the State Water Resources Control Board).

The EIS should clearly describe how operations, project features, and potential impacts of Federal government activities associated with the Delta Conveyance Project beyond USACE jurisdiction are analyzed. If such analyses will be conducted by DWR and/or by another Federal entity, we request that USACE coordinate with such entities. For example, according to the NOI, the USACE has invited the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), and the U.S. Environmental Protection Agency to participate as cooperating agencies in the preparation of the EIS. If analyses will be conducted by DWR or another Federal entity such as USFWS and NMFS, we request that USACE coordinate closely to ensure that potential impacts are addressed in either the EIS or the EIR and, if not covered in the EIS, clearly identify that such impacts will be addressed elsewhere.

### **Secondary and Cumulative Impacts**

The Delta Reform Act charges the Council with furthering California's coequal goals for the Delta. (Wat. Code, § 85054.) The coequal goals address both water supply and ecosystem restoration, as well as the unique values of the Delta as an evolving place. While we recognize the limits of USACE's jurisdiction, impacts within this jurisdiction could impact statewide water supply reliability, ecosystem restoration, and communities and existing and planned uses within the Delta. As such, the EIS should consider – either directly, or through incorporation of work conducted by others – impacts to the coequal goals that go beyond direct construction impacts occurring within USACE's jurisdiction.

Given the broad scope of the proposed project, the EIS should analyze secondary and cumulative impacts, including topics relevant to Delta Plan regulatory policies that may arise from avoidance, minimization, and mitigation measures. A range of potential cumulative impacts were identified in the Council's comments on DWR's NOP, including

Mr. Zachary Simmons

Comments on Notice of Preparation to Prepare an Environmental Impact Report for the Proposed Delta Conveyance Project

October 16, 2020

Page 5

cumulative impacts to water quality, agricultural productivity, and water-based recreation, among others.

The Delta Conveyance Design and Construction Authority's (DCDCA) Stakeholder Engagement Committee (SEC) process has developed additional information regarding the proposed project elements, size, and location, than was available at the time the Council prepared its comments on DWR's NOP. This information indicates the potential for secondary effects from proposed avoidance and minimization measures. For example, in order to minimize truck trips and consequent air quality impacts, the DCDCA has proposed to increase the size of the proposed sedimentation basins at the intake locations. Increasing the size of the basins may cause secondary impacts by converting additional agricultural land. Similarly, to minimize noise impacts from pile driving, the DCDCA has proposed a new configuration for in-river intake structures that enables vibratory installation methods. However, the new configuration, materials, and construction timing associated with this effort may cause secondary impacts to aquatic species. These and other potential secondary effects associated with avoidance, minimization, and mitigation measures should be analyzed in the EIS.

### **Climate Change**

Climate change is projected to dramatically impact the Delta and the State of California in the coming years and decades (<https://www.climateassessment.ca.gov/>). The Council is encouraged that the USACE has a climate change program (<https://www.usace.army.mil/corpsclimate/>). Climate change should be considered as part of all relevant impact areas considered in the EIS, including, but not limited to flood protection and biological resources. Furthermore, climate change assumptions, underlying scientific data, and analysis methods should be based on best available science (described further below, under Delta Plan Policy G P1(b)(3)). To aid stakeholders in understanding the potential impacts of climate change, we also request that climate change assumptions and analyses be aligned with the analyses to be conducted by the project lead, DWR, in their EIR.

### **Relationship and Timing of EIS and EIR**

It is our understanding that the USACE EIS and the DWR EIR will be conducted in separate, but parallel processes, resulting in separate documents, both expected to be finalized in 2022. The Council encourages close coordination between USACE and DWR so that the USACE's EIS and DWR's EIR appropriately, consistently, and fully assess potential impacts. To the degree possible, it will be helpful to align baselines and assumptions used between the documents, to ensure that the respective scopes do not create gaps in potential impact areas or inconsistencies, and to release the documents on a similar schedule so that they can be reviewed concurrently. If the documents are not released on a similar schedule, we

Mr. Zachary Simmons

Comments on Notice of Preparation to Prepare an Environmental Impact Report for the Proposed Delta Conveyance Project

October 16, 2020

Page 6

also request an extended period of review for the final EIS before USACE's record of decision is issued in order to allow for full review of both the USACE EIS and the DWR EIR.

### **Comments Regarding Delta Plan Policies and Potential Consistency Certification**

As noted above, we have attached and provided a link to previous comments submitted on DWR's NOP. These comments focused on the Council's regulatory policies and covered actions process (<https://coveredactions.deltacouncil.ca.gov/>). While the covered actions process does not apply to USACE, the content of the EIS is relevant to the Delta Plan and its regulatory policies due to the wide range of potential anticipated impacts in the Delta, and given the potential for DWR to submit a certification of consistency that relies, in part, on the EIS and its administrative record. In addition to considering comments the Council offered on DWR's NOP, we also recommend that USACE consider the subset of Delta Plan policies that may be especially relevant to preparation of the EIS offered below.

### **General Policy 1: Detailed Findings to Establish Consistency with the Delta Plan**

Delta Plan Policy **G P1** (Cal. Code Regs., tit. 23, § 5002) specifies what must be addressed in a Certification of Consistency by a state or local public agency proposing a project that is a covered action. The following is a subset of policy requirements which a project shall fulfill to be considered as consistent with the Delta Plan:

#### **Best Available Science**

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 Delta Plan defines best available science as "the best scientific information and data for informing management and policy decisions." (Cal. Code Regs., tit. 23, § 5001 (f).) Best available science is also required to be consistent with the guidelines and criteria in Appendix 1A of the Delta Plan (<https://deltacouncil.ca.gov/pdf/delta-plan/2015-appendix-1a.pdf>).

Establishing a scientifically-robust understanding of baseline and future conditions with climate change is critical to understanding the proposed project, alternatives, and potential impacts. As relevant to USACE jurisdiction, best available science should be considered for potential impact areas, including but not limited to aquatic resources. For example, the EIS should document use of best available science to support climate change projections, hydrologic and life-cycle model selection and assumptions, timesteps, and cascading model interactions and uncertainty.

#### **Mitigation Measures**

Delta Plan Policy **G P1(b)(2)** (Cal. Code Regs., tit. 23, § 5002(b)(2)) requires covered actions not exempt from the California Environmental Quality Act (CEQA) must

Mr. Zachary Simmons

Comments on Notice of Preparation to Prepare an Environmental Impact Report for the Proposed Delta Conveyance Project

October 16, 2020

Page 7

include all applicable feasible mitigation measures adopted and incorporated into the Delta Plan as amended April 26, 2018 (unless the measures are within the exclusive jurisdiction of an agency other than the agency that files the Certification of Consistency), or substitute mitigation measures that the agency finds are equally or more effective. These mitigation measures are identified in Delta Plan Appendix O and are available at: <https://deltacouncil.ca.gov/pdf/delta-plan/2018-appendix-o-mitigation-monitoring-and-reporting-program.pdf>.

Given the scope of the project it is likely that several mitigation measures will apply. USACE should review Appendix O and, in coordination with DWR and any Federal partners, ensure inclusion all applicable feasible mitigation measures adopted and incorporated into the Delta Plan or substitute mitigation measures that USACE finds are equally or more effective.

### **Ecosystem Restoration Policy 1: Delta Flow Objectives**

Delta Plan Policy **ER P1** (Cal. Code Regs., tit. 23, § 5005) requires that the State Water Resources Control Board's Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan. The EIS should analyze and document how the project may impact or alter Delta flows that are subject to meeting the Bay Delta Water Quality Control Plan flow objectives.

The U.S. Bureau of Reclamation has coordinated exports from the Delta with DWR through a joint agreement. The EIS should include operating assumptions for such future exports that are aligned with DWR analyses in their EIR. Furthermore, we request that the EIS consider the potential impacts of a range of possible flows, and potential cumulative impacts to the Delta, as well as downstream areas within USACE, National Marine Fisheries Service, and U.S. Fish and Wildlife Service jurisdiction in Suisun Marsh, and the greater estuary and coastal areas.

### **Delta as Place Policy 2: Respect Local Land Use when Siting Water or Flood Facilities or Restoring Habitats**

Delta Plan Policy **DP P2** (Cal. Code Regs., tit. 23, § 5011) reflects one of the Delta Plan's charges to protect the Delta as an evolving place by siting water management facilities, ecosystem restoration, and flood management infrastructure to avoid or reduce conflicts with existing or planned future land uses when feasible, considering comments from local agencies and the Delta Protection Commission. As described in the NOI, the project includes substantial new infrastructure that would be sited within the Delta. The construction of such infrastructure could extend over multiple years, and have secondary and cumulative effects on areas outside of direct USACE jurisdiction. The USACE should describe or include the necessary information for the project lead, DWR, to assess potential impacts to areas such as land use, noise, economics, aesthetics, recreation and tourism, community, culture, and quality of life. In addition, as referenced above, operations may be

Mr. Zachary Simmons

Comments on Notice of Preparation to Prepare an Environmental Impact Report for the Proposed Delta Conveyance Project

October 16, 2020

Page 8

relevant due to secondary impacts to water quality or other factors that affect multiple impact areas.

### **Closing Comments**

As the USACE proceeds with the EIS for the project, the Council invites USACE and DWR to engage Council staff in early consultation (prior to DWR's submittal of a Certification of Consistency) to discuss project features and mitigation measures that would promote consistency with the Delta Plan.

Council staff are available to discuss issues outlined in this letter as USACE proceeds in the next stages of its project and approval processes. Please contact Daniel Constable at (916) 282-8433 or [daniel.constable@deltacouncil.ca.gov](mailto:daniel.constable@deltacouncil.ca.gov) with any questions.

Sincerely,



Jeff Henderson, AICP  
Deputy Executive Officer  
Delta Stewardship Council

Attachment 1: April 17, 2020 Delta Stewardship Council letter to California Department of Water Resources re: Notice of Preparation of an Environmental Impact Report for the Delta Conveyance Project

CC: Marcus Yee, Department of Water Resources  
([Marcus.Yee@water.ca.gov](mailto:Marcus.Yee@water.ca.gov))  
Carrie Buckman, Department of Water Resources  
([Carolyn.Buckman@water.ca.gov](mailto:Carolyn.Buckman@water.ca.gov))  
Katherine Marquez, Department of Water Resources  
([Katherine.Marquez@water.ca.gov](mailto:Katherine.Marquez@water.ca.gov))  
Kathryn Mallon, Delta Conveyance Design and Construction Authority  
([kathrynmallon@dcdca.org](mailto:kathrynmallon@dcdca.org))  
Erik Vink, Delta Protection Commission ([Erik.Vink@delta.ca.gov](mailto:Erik.Vink@delta.ca.gov))  
Campbell Ingram, Sacramento-San Joaquin Delta Conservancy  
([Campbell.Ingram@deltaconservancy.ca.gov](mailto:Campbell.Ingram@deltaconservancy.ca.gov))  
Diane Riddle, State Water Resources Control Board  
([Diane.Riddle@waterboards.ca.gov](mailto:Diane.Riddle@waterboards.ca.gov))  
Jessica Fain, Bay Conservation and Development Commission  
([Jessica.Fain@bcdca.gov](mailto:Jessica.Fain@bcdca.gov))





**DELTA STEWARDSHIP COUNCIL**  
*A California State Agency*

980 NINTH STREET, SUITE 1500  
SACRAMENTO, CALIFORNIA 95814  
HTTP://DELTACOUNCIL.CA.GOV  
(916) 445-5511

April 17, 2020

Renee Rodriguez  
California Department of Water Resources  
P.O. Box 942836,  
Sacramento, CA 94236  
Sent via email: [DeltaConveyanceScoping@water.ca.gov](mailto:DeltaConveyanceScoping@water.ca.gov)

**Chair**  
Susan Tatayon

**Members**  
Frank C. Damrell, Jr.  
Randy Fiorini  
Michael Gatto  
Maria Mehranian  
Oscar Villegas  
Daniel Zingale

**Executive Officer**  
Jessica R. Pearson

**RE: Comments on Notice of Preparation of an Environmental Impact Report for the Delta Conveyance Project**

Dear Ms. Rodriguez:

Thank you for the opportunity to review and comment on the Notice of Preparation (NOP) of an Environmental Impact Report (EIR) for the Department of Water Resources (DWR) Delta Conveyance Project (Project). The Delta Stewardship Council (Council) recognizes the stated purpose of the Project is to develop new diversion and conveyance facilities in the Sacramento-San Joaquin Delta (Delta) in order to ensure a reliable water supply south of the Delta. (NOP, p. 2) Stated project objectives include, but are not limited to, addressing anticipated rising sea levels and other reasonably foreseeable consequences of climate change and extreme weather events, minimizing potential for health and safety impacts from reduced quantity and quality of water deliveries south of the Delta resulting from a major earthquake, protecting the ability of the State Water Project (SWP) (and potentially the Central Valley Project (CVP)) to deliver water under varying hydrologic and regulatory conditions, and providing operational flexibility to improve aquatic conditions in the Delta and better manage impacts of further regulatory conditions on SWP (and potentially CVP) operations. (NOP, p. 2).

The Council is an independent state agency established by the Sacramento-San Joaquin Delta Reform Act of 2009, codified in Division 35 of the California Water Code, sections 85000-85350 (Delta Reform Act). The Delta Reform Act charges the Council with furthering California's coequal goals of achieving a more reliable water supply and restoring the Delta ecosystem, to 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. (Wat. Code, § 85054.)

---

*"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."*

Pursuant to the Delta Reform Act, the Council has adopted the Delta Plan, a legally enforceable management framework for the Delta and Suisun Marsh for achieving the coequal goals. The Delta Reform Act grants the Council specific regulatory and appellate authority over certain actions that take place in whole or in part in the Delta and Suisun Marsh, referred to as “covered actions.” (Wat. Code, §§ 85022(a) and 85057.5.) The Council exercises that authority through its regulatory policies (set forth in Title 23 of the California Code of Regulations, Sections 5002 through 5015) and recommendations incorporated into the Delta Plan. State and local agencies are required to demonstrate consistency with the Delta Plan when carrying out, approving, or funding a covered action. (Wat. Code, §§ 85057.5 and 85225.)

### **Covered Action Determination and Certification of Consistency with the Delta Plan**

Water Code section 85057.5(a) provides a multi-part test to define what activities would be considered covered actions. Based on the Project location and scope described in the NOP, the Project appears to meet the definition of a covered action because it:

1. Will occur in whole or in part within the boundaries of the Legal Delta (Wat. Code, §12220) or Suisun Marsh (Pub. Res. Code, §29101). The new Project alignments (i.e., central tunnel corridor and eastern tunnel corridor shown on NOP Figure 1, p. 4) and facilities (i.e., intakes, tunnel reaches and shafts, forebays, pumping plant, and South Delta conveyance facilities described on NOP p. 3) would be located in the Legal Delta.
2. Will be carried out, approved, or funded by the State or a local public agency. DWR, a State agency, would carry out and approve the Project.
3. Will have a significant impact on the achievement of both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta. The Project would construct and operate new conveyance facilities in the Delta, including a single-tunnel facility designed to increase reliability of water supply, and would add to existing SWP infrastructure. The Project proposes to size new north Delta facilities to convey up to 7,500 cfs of water from the Sacramento River to SWP facilities in the south Delta to increase reliability of water supply under varying earthquake, climate change, and regulatory conditions. It would also include mitigation and operational characteristics that would contribute to ecosystem restoration. Therefore, the Project would have a significant impact on achievement of both coequal goals.
4. Is covered by one or more of the regulatory policies contained in the Delta Plan (Cal. Code Regs., tit. 23, §§ 5003-5015). Delta Plan regulatory policies that may apply to the Project are discussed below.

In addition, DWR previously submitted a Certification of Consistency with the Delta Plan to the Council for the proposed California WaterFix project (which was subsequently withdrawn). Although the NOP describes a new project, the Project scope and facilities described in the NOP are similar to California WaterFix and will likely implicate a similar range of Delta Plan policies.

### **Comments Regarding Delta Plan Policies and Potential Consistency Certification**

The following information is offered to assist DWR in preparing environmental documents to support a certification of consistency. It describes regulatory Delta Plan policies that may apply to the Project based on the available information in the NOP. The information below may also assist DWR in describing the relationship between the Project and the Delta Plan in the EIR.

The NOP includes a range of flow capacities and describes potential federal participation. These two topics should be further explained in the EIR project description and addressed to the degree possible throughout the EIR.

The Council notes that, on behalf of DWR, the Delta Conveyance Design and Construction Authority (DCDCA) is currently exploring alternative configurations of Project features described in the NOP as part of a public process with a Stakeholder Engagement Committee (SEC). The DCDCA also recently received and published input from an Independent Technical Panel (ITP) regarding, among other things, alternative tunnel alignments that do not correspond to those described in the NOP. Thus, additional details regarding potential Project components and alternatives not described in the NOP are publicly available and being publicly discussed. The Council looks forward to receiving and reviewing the scoping and alternatives report DWR intends to prepare following the NOP review period and reserves the right to offer additional public comments regarding applicable Delta Plan policies considering more detailed alternative alignments and configurations of Project features at that time.

### **General Issues**

As a preliminary matter, in 2018 DWR submitted a Certification of Consistency with the Delta Plan for the California WaterFix project. This certification was appealed by nine parties, who alleged that for various reasons the project was not consistent with one or more Delta Plan policies. Council staff reviewed both the certification and appeals and provided a staff draft determination for the Council's consideration in November 2018.<sup>1</sup>

The staff draft determination describes the certification and appeals and makes staff recommendations regarding whether the certification was supported by substantial evidence in the record with respect to issues raised in the appeals. The staff draft determination stated that the certification was not supported by substantial evidence in the record for multiple Delta Plan policies:

- G P1, subd. (b)(1) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(1)) (“G P1(b)(1)”): Full consistency infeasible, but on the whole the covered action is consistent with the coequal goals

---

<sup>1</sup> The staff draft determination is available upon request from [archives@deltacouncil.ca.gov](mailto:archives@deltacouncil.ca.gov).

- G P1, subd. (b)(3) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3)) (“G P1(b)(3)”): Best Available Science
- WR P1 (Cal. Code Regs., tit. 23, § 5003) (“WR P1”): Reduce Reliance on the Delta through Improved Regional Water Self Reliance
- ER P1 (Cal. Code Regs., tit. 23, § 5005) (“ER P1”): Delta Flow Objectives
- DP P2 (Cal. Code Regs., tit. 23, § 5011) (“DP P2”): Respect Local Land Use When Siting Water or Flood Facilities or Restoration Habitats

Although DWR ultimately withdrew the certification, Council staff recommended that the matter be remanded to DWR for reconsideration to address several issues outlined in the staff draft determination regarding these policies. Because the Project appears similar to California WaterFix in some areas, based on the previous record for California WaterFix, the Council recommends that DWR review the staff draft determination as it relates to the Project and engage with the Council in robust early consultation to ensure that the EIR addresses these matters in detail.

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

Delta Plan Policy **G P1** (Cal. Code Regs., tit. 23, § 5002) specifies what must be addressed in a certification of consistency for a covered action. The following is a subset of Policy G P1 requirements that a project must meet to be considered consistent with the Delta Plan:

#### **Coequal Goals**

Delta Plan Policy **G P1, subsection (b)(1)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(1)) allows for covered actions, in a certification of consistency, to include a determination that despite inconsistency with one or more other Delta Plan policies, the covered action is consistent with the Delta Plan because, on the whole, it is consistent with the coequal goals.

In the EIR, DWR should analyze and document potential impacts – whether positive or negative – on the coequal goals. It may be useful to describe the impacts of the Project on the coequal goals to the public in the EIR to establish a record for a future certification of consistency.

#### **Mitigation Measures**

Delta Plan Policy **G P1, subsection (b)(2)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(2)) requires that actions not exempt from CEQA and subject to Delta Plan regulations must include all applicable feasible mitigation measures adopted and incorporated into the Delta Plan as amended April 28, 2018, or substitute mitigation measures that are equally or more effective. Mitigation measures in the Delta Plan's Mitigation Monitoring and Reporting Program (Delta Plan MMRP) are available at:

<https://www.deltacouncil.ca.gov/pdf/delta-plan/2018-appendix-o-mitigation-monitoring-and-reporting-program.pdf>.

If the EIR identifies significant impacts that require mitigation, Council staff recommends that DWR review the Delta Plan MMRP and, when feasible, apply the mitigation measures adopted and incorporated into the Delta Plan. Given the scope of the Project, it appears likely that numerous mitigation measures would be relevant.

### **Best Available Science**

Delta Plan Policy **G P1, subsection (b)(3)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3)) states that covered actions must document use of best available science as relevant to the purpose and nature of a 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, Appendix 1A. Six criteria are included in Appendix 1A: relevance, inclusiveness, objectivity, transparency and openness, timeliness, and peer review. (Cal. Code Regs, tit. 23, § 5001, subd. (f).) This policy requires that the lead agency clearly document and communicate the processes and information used for analyzing project alternatives, impacts, and mitigation measures of proposed projects, in order to foster improved understanding and decision making.

As it develops the EIR, DWR should identify and document use of best available science when analyzing and assessing impacts, including but not limited to the following areas:

- Documentation of consideration of best available science in analyzing the selected project alternatives.
- Best available science on climate change, including sea-level rise projections appropriate to the type of project and planning horizon selected.
- Consideration of best available science related to invasive species and water quality issues such as salinity, nutrients, harmful algal blooms, and contaminants.
- If a range of uncertainty is associated with the scientific data or information used to support design decisions or environmental analysis, DWR should document or communicate the uncertainty as required by the best available science Transparency and Openness criterion.

### **Adaptive Management**

Delta Plan Policy **G P1, subsection (b)(4)** (Cal. Code Regs., § 5002, subd. (b)(4)) requires that ecosystem restoration and water management covered actions include adequate provisions, appropriate to the scope of the action, to assure continued implementation of adaptive management. This requirement is satisfied through: a) the development of an adaptive management plan that is consistent with the framework

described in Appendix 1B of the Delta Plan (<https://deltacouncil.ca.gov/pdf/delta-plan/2013-appendix-b-combined.pdf>), and b) documentation of adequate resources to implement the proposed adaptive management plan.

Considering the water management components of the Project, an adaptive management plan will be required that addresses Project construction activities, implementation, and ongoing operations. Ecosystem restoration components of the Project would also require DWR to prepare an adaptive management plan.

### **Water Resources Policy 1: Reduce Reliance on the Delta through Improved Regional Water Self-Reliance**

Delta Plan Policy **WR P1** (Cal. Code Regs., tit. 23, § 5003) requires proposed actions that export water from, transfer water through, or use water in the Delta to contribute to reduced reliance on the Delta and improve regional self-reliance.

The Project proposes to increase water supply reliability, among other objectives, by constructing new facilities, including an isolated conveyance facility to be used in conjunction with existing through-Delta conveyance. The Council understands that as proposed, the Project would not alter existing water rights or contractual amounts.

Because the Project proposes to export water from, transfer water through, or use water in the Delta, this policy is applicable. DWR should describe in detail how all water suppliers (defined as both wholesalers and retailers)<sup>2</sup> that would receive water from the Delta as a result of the Project have adequately contributed to reduced reliance on the Delta and improved regional self-reliance consistent with the Delta Plan. DWR should provide information for each water supplier that includes: (1) identifying which water agencies have a current Urban or Agricultural Water Management Plan; (2) the identification, evaluation, and commencement of implementation activities identified in an Urban or Agricultural Water Management Plan that would reduce reliance on the Delta; and (3) the expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance.

As for any large project that would trigger this policy, DWR should ensure that the record supporting the certification of consistency for the Project specifically addresses the following items:

- Listing of all urban and agricultural water users that would receive water as a result of the Project.
- Inclusion of quantifiable data documenting reduced reliance, as described by this policy, or a discussion of why this is not feasible.

---

<sup>2</sup> Water suppliers are defined in Cal. Code Regs., tit. 23, § 5001.

- Analysis of reduced reliance under different export scenarios, considering the current range in Project capacity described in the NOP (3,000 to 7,500 cfs).

In addition, the Council notes that at this time it is not clear how the CVP may or may not be involved in the Project. To the extent feasible, the EIR should clarify involvement of the Federal Government and clearly define which water suppliers would receive water as a result of the Project. This specificity would help the Council and other stakeholders understand the full range of potential impacts of the Project.

### **Water Resources Policy 2: Transparency in Water Contracting**

Delta Plan Policy **WR P2** (Cal. Code Regs., tit. 23, § 5004) requires the contracting process for water from the SWP and/or the CVP be done in a publicly transparent manner consistent with applicable DWR and Bureau of Reclamation (Reclamation) policies. The Council notes that DWR has proposed extension of the SWP contracts as a separate project. However, the NOP states that the Delta Conveyance Project may involve modifications to one or more of the SWP water supply contracts to incorporate the Project. (NOP, p. 6).

To the extent that the Project includes the types of contract modifications described generally in the NOP, the EIR project description should clearly identify such modifications, and the EIR should assess potential environmental impacts associated with reasonably foreseeable potential contract modifications (as described in the NOP, p. 6). In a future certification of consistency, DWR should describe if and how it proposes to modify SWP water supply contracts and how such contracting was conducted in a transparent, public manner aligned with applicable DWR and Reclamation policies.

### **Ecosystem Restoration Policy 1: Delta Flow Objectives**

Delta Plan Policy **ER P1** (Cal. Code Regs., tit. 23, § 5005) requires the State Water Resources Control Board's (Water Board) *Water Quality Control Plan for the San Francisco Bay/Sacramento–San Joaquin Delta Estuary* (Bay-Delta Plan) flow objectives be used to determine consistency with the Delta Plan for a project that could significantly affect flow in the Delta. This policy applies to the Project because the Project proposes new intakes at two locations along the Sacramento River, which have potential to significantly affect flow.

The EIR should document DWR's analysis of how the Project may impact or alter Delta flows that are subject to the Bay-Delta Plan flow objectives. While these flow objectives are currently described by Decision-1641, the Water Board is undertaking updates to the Bay-Delta Plan. In addition, the ongoing voluntary agreements process could influence flow objectives on a timeline similar to the EIR. As part of a certification of consistency, the relevant flow objectives would be those in effect at the time of certification. Given this, we encourage DWR to consider updates to flow objectives during the EIR development process and analyze those as part of the document. Specifically, the following items related to Delta flow objectives may be relevant to include in the EIR:



- Documentation of ability to meet the requirements of the Bay-Delta Plan, as it exists at time of development of an EIR and at the time of a certification of consistency with the Delta Plan.
- Consideration of a range of operations and climate scenarios when conducting flow and compliance modeling.
- Documentation of model implementation and potential uncertainties.

In addition, the Council strongly encourages DWR to obtain a permit for a Change in Point of Diversion from the Water Board prior to submitting a certification of consistency for the Project to the Council. The Council acknowledges that the schedule for a certification is unknown at this point. However, DWR should include the permit in the record supporting the certification to demonstrate consistency with Delta Plan Policy ER P1.

### **Ecosystem Restoration Policy 2: Restore Habitats at Appropriate Elevations**

Delta Plan Policy **ER P2** (Cal. Code Regs., tit. 23, § 5006) requires habitat restoration to be consistent with Appendix 3 (<https://deltacouncil.ca.gov/pdf/delta-plan/2013-appendix-b-combined.pdf>), which describes the many ecosystem benefits related to restoring floodplains. The elevation map included as Figure 4-1 in Appendix 4 (<https://deltacouncil.ca.gov/pdf/delta-plan/2013-appendix-b-combined.pdf>) of the Delta Plan should be used as a guide for determining appropriate habitat restoration actions based on an area's elevation.

The NOP does not describe any habitat restoration associated with the Project, other than a general statement that other ancillary facilities may be built to support construction of conveyance facilities, including mitigation areas (NOP, p. 3). The EIR project description and/or mitigation measures should identify locations of proposed habitat restoration or mitigation sites, and the EIR should analyze the elevation proposed for each site in relation to current or long-term average water levels and best available science for projected sea level rise, documenting how the proposed restoration project is an appropriate habitat restoration action.

### **Ecosystem Restoration Policy 3: Protect Opportunities to Restore Habitat**

Delta Plan Policy **ER P3** (Cal. Code Regs., tit. 23, § 5007) states that within priority habitat restoration areas (PHRAs) depicted in Appendix 5 (<https://deltacouncil.ca.gov/pdf/delta-plan/2013-appendix-b-combined.pdf>), significant adverse impacts to the opportunity to restore habitat at appropriate locations must be avoided or mitigated.

Based on the NOP project description and ongoing discussions with the SEC, Project construction activities and operations could have significant adverse impacts on habitat restoration within the Cosumnes/Mokelumne Confluence PHRA. However, the locations of specific facilities that have potential to impact the Cosumnes/Mokelumne Confluence PHRA are not disclosed in the NOP. In the EIR, DWR should disclose whether ancillary facilities will be located within the PHRA and analyze the potential for construction activities and operations



of these facilities to result in significant adverse impacts to the opportunity to restore habitat in the PHRA. Proposed mitigation measures should clearly identify how such potential impacts would be avoided or mitigated.

#### **Ecosystem Restoration Policy 4: Expand Floodplains and Riparian Habitats in Levee Projects**

Delta Plan Policy **ER P4** (Cal. Code Regs., tit. 23, § 5008) requires levee projects to evaluate and, where feasible, incorporate alternatives to increase floodplains and riparian habitats. As described in ongoing discussions at the SEC, modifications of Delta levees will be required to construct two intakes and potentially for tunnel launch shafts and other ancillary facilities. Therefore, this policy applies to the Project.

ER P4 requires evaluation of setback levees in several areas of the Delta, including the Sacramento River between Freeport and Walnut Grove, Steamboat Slough, and Sutter Slough. The EIR should evaluate the potential to incorporate setback levees at locations within these areas where Delta levees would be modified to accommodate Project or ancillary features, identify alternatives that would expand floodplains and riparian habitats, and describe the feasibility of such alternatives. Council staff encourage DWR to review the January 2016 report "Improving Habitat along Delta Levees".<sup>3</sup> This report recommends habitat designs along levees that may provide greater benefits to target native species (with an emphasis on salmon and riparian birds).

In addition, the ongoing SEC meetings have informed the public about potential Project infrastructure (e.g., intakes, alignments/corridors, a southern forebay) with greater specificity than is included in the NOP. To the degree relevant, such information should be used to develop the EIR project description and should be analyzed in the EIR.

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

Delta Plan Policy **ER P5** (Cal. Code Regs., tit. 23, § 5009) requires that the potential for new introductions of or improved habitat conditions for nonnative invasive species, striped bass, or bass must be fully considered and avoided or mitigated in a manner that appropriately protects the ecosystem.

The EIR should analyze how the Project would avoid or mitigate introductions or improved habitat conditions for nonnative invasive species, striped bass, or bass. Proposed mitigation and minimization measures should be consistent with, and equally or more effective than, those identified in the Delta Plan MMRP (<https://www.deltacouncil.ca.gov/pdf/delta-plan/2018-appendix-o-mitigation-monitoring-and-reporting-program.pdf>), including Delta Plan Mitigation

---

<sup>3</sup> Available upon request by contacting [archives@deltacouncil.ca.gov](mailto:archives@deltacouncil.ca.gov)

Measure 4-1, which requires development and implementation of an invasive species management plan for any project where construction activities or operations could introduce or facilitate establishment of invasive species.

### **Delta as Place Policy 1: Locate New Urban Development Wisely**

Delta Plan Policy DP P1 (Cal. Code Regs., tit. 23, § 5010) requires that new residential, commercial and industrial development be restricted to areas described in Delta Plan appendices 6 and 7.

The NOP does not describe residential, commercial or industrial development as part of the Project, but does describe ancillary features that could be constructed. The EIR should analyze the Project's potential to create both temporary and permanent residential, commercial, and industrial development in applicable areas and describe the resulting potential impacts.

### **Delta as Place Policy 2: Respect Local Land Use when Siting Water or Flood Facilities or Restoring Habitats**

Delta Plan Policy **DP P2** (Cal. Code Regs., tit. 23, § 5011) requires the siting of project improvements/facilities to avoid or reduce conflicts with existing or planned future land uses when feasible. DP P2 may also apply if mitigation habitat is required within the Delta. Independent from state law related to local land use authority and CEQA requirements, DP P2 is a directive to state and local public agencies proposing covered actions, and it specifically requires water management facilities, ecosystem restoration projects, and flood management infrastructure to be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible, considering comments from local agencies and the Delta Protection Commission.

DP P2 considers a range of effects that extend beyond CEQA requirements. The EIR should describe the project process to avoid or reduce conflicts with existing or planned future land uses. This is a wide-ranging policy relevant to many resource areas in the Delta. Given the importance of agricultural land use, presence of Legacy towns, and the unique culture and history of the region, DWR should include in the EIR detailed analyses of potential impacts as well as documentation of how existing and planned land uses would be protected, or how potential conflicts with planned land uses would be mitigated, when feasible.

Based on the record for California WaterFix, similarity of the proposed central tunnel alignment, and ongoing discussions with the SEC, the following issues should receive particular focus in the EIR to demonstrate that DWR has avoided or reduced underlying conflicts with existing or planned Delta land uses when feasible:

- Potential conflicts with local land use plans
- Potential conflicts with existing Delta communities

- Potential conflicts with existing Delta parks and recreation uses
- Potential conflicts with existing agricultural lands
- Potential conflicts with community land uses or economic conditions in legacy Delta communities that rely on agriculture
- Potential conflicts with existing land uses due to:
  - Cultural and historical resource impacts
  - Traffic impacts
  - Noise and vibration impacts
  - Visual and aesthetic resource impacts
  - Public health and hazards impacts
  - Wastewater discharge facility impacts

In addition, as part of the previous WaterFix project, DWR committed to “the implementation of a Community Benefits Fund, or its equivalent. This fund would incorporate good neighbor policies to avoid negative impacts on agricultural lands, residents and businesses by providing a mechanism for communication with local government and community members and disburse funds to protect and enhance the Delta as an evolving place.” ([DWR Certification of Consistency for California WaterFix, DP P2, pp. 21-22](#)). The NOP does not describe a similar mechanism as part of the Project. If such a fund is proposed as part of the Project or as mitigation for potentially significant or significant impacts, it should be described in the EIR and in a future certification of consistency. DWR should describe how the fund would be managed and administered, how fund expenditures would reduce significance of Project impacts contributing to conflicts with existing land uses, and how the fund would constitute an enforceable commitment to reduce such impacts.

### **Risk Reduction Policy 1: Prioritization of State Investments in Delta Levees and Risk Reduction**

Delta Plan Policy **RR P1** (Cal. Code Regs., tit. 23, § 5012) calls for the prioritization of discretionary State investments in Delta flood risk management, including levee operation, maintenance and improvements. Policy RR P1 further establishes interim priorities to guide such investments.

The EIR should describe if and how DWR has incorporated the prioritization of state investments in Delta levees and risk reduction to the extent that modifications of Delta levees will be required as part of the Project.

### **Risk Reduction Policy 2: Require Flood Protection for Residential Development in Rural Areas**

Delta Plan Policy **RR P2** (Cal. Code Regs., tit. 23, § 5013) requires that “New residential development of five or more parcels shall be protected through floodproofing to a level 12 inches above the 100-year base flood elevation, plus sufficient additional elevation to protect

against a 55-inch rise in sea level at the Golden Gate, unless the development is located within:

- (1) Areas that city or county general plans, as of the date of the Delta Plan's adoption, designate for development in cities or their spheres of influence;
- (2) Areas within Contra Costa County's 2006 voter-approved urban limit line, except Bethel Island;
- (3) Areas within the Mountain House General Plan Community Boundary in San Joaquin County; or
- (4) The unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde, and Walnut Grove, as shown in [Appendix 7.](#)"

As described in the NOP, the Project does not appear to involve residential development in rural areas. If such development is proposed, the EIR should analyze and describe such development.

### **Risk Reduction Policy 3: Protect Floodways**

Delta Plan Policy **RR P3** (Cal. Code Regs., tit. 23, § 5014) restricts encroachment in floodways that are not either a designated floodway or a regulated stream. RR P3 states that "no encroachment shall be allowed or constructed in a floodway 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 EIR should describe how construction activities and operations of Project and ancillary features would not impede the free flow of water in the floodway or jeopardize public safety.

### **Risk Reduction Policy 4: Floodplain Protection**

Delta Plan Policy **RR P4** (Cal. Code Regs., tit. 23, § 5015) states that no encroachment shall be allowed or constructed in the floodplain areas specified within the regulation – including the Yolo Bypass, the Cosumnes-Mokelumne River Confluence, and the Lower San Joaquin River Floodplain Bypass area – unless it can be demonstrated by appropriate analysis that the encroachment will not have a significant adverse impact on floodplain values and functions.

The EIR should describe how construction activities and operations of Project and ancillary features would not result in encroachment on a designated floodplain.

### **CEQA Regulatory Setting**

For each resource section in which a Delta Plan policy is applicable, the EIR's description of the regulatory setting should include the Delta Reform Act, the Delta Plan and a reference to the specific applicable regulatory policy or policies. The Council encourages DWR to consider including a section in the EIR that specifically describes alignment with Delta Plan policies,

identifying where supporting information can be found throughout the document and supporting appendices.

### **Closing Comments**

As DWR proceeds with design, development, and environmental impact analysis of the Project, we invite you to continue to engage the Council in early consultation (prior to submittal of a Certification of Consistency) to discuss Project features and mitigation measures that would promote consistency with the Delta Plan. We also encourage DWR to continue to present Project updates at Council meetings.

In addition, information on the Conveyance, Storage, and Operation amendment to the Delta Plan (April 2018) can be found online at <http://deltacouncil.ca.gov/pdf/delta-plan/2018-04-26-amended-chapter-3.pdf>. This amendment updated Delta Plan Chapter 3 to include new recommendations (Recommendations WR R12a through WR R12j) supporting the concept of dual conveyance that are relevant to the Project. We encourage DWR to review these and incorporate them in the Project and its environmental analysis as appropriate.

More information on covered actions, early consultation, and the certification process can be found on the Council website at <https://coveredactions.deltacouncil.ca.gov/>. Council staff are available to discuss issues outlined in this letter as you proceed in the next stages of the Project. Please contact Daniel Constable at (916) 322-9338 ([daniel.constable@deltacouncil.ca.gov](mailto:daniel.constable@deltacouncil.ca.gov)) with any questions.

Sincerely,



Jeff Henderson, AICP  
Deputy Executive Officer  
Delta Stewardship Council

CC: Marcus Yee, Department of Water Resources ([Marcus.Yee@water.ca.gov](mailto:Marcus.Yee@water.ca.gov))  
Carrie Buckman, Department of Water Resources ([Carolyn.Buckman@water.ca.gov](mailto:Carolyn.Buckman@water.ca.gov))  
Katherine Marquez, Department of Water Resources  
([Katherine.Marquez@water.ca.gov](mailto:Katherine.Marquez@water.ca.gov))  
Kathryn Mallon, Delta Conveyance Design and Construction Authority  
([kathrynmallon@dcdca.org](mailto:kathrynmallon@dcdca.org))  
Erik Vink, Delta Protection Commission ([Erik.Vink@delta.ca.gov](mailto:Erik.Vink@delta.ca.gov))  
Campbell Ingram, Sacramento-San Joaquin Delta Conservancy  
([Campbell.Ingram@deltaconservancy.ca.gov](mailto:Campbell.Ingram@deltaconservancy.ca.gov))

Renee Rodriguez, California Department of Water Resources  
Notice of Preparation of Environmental Impact Report for the Delta Conveyance Project  
April 17, 2020  
Page 14

Diane Riddle, State Water Resources Control Board  
(Diane.Riddle@waterboards.ca.gov)  
Jessica Fain, Bay Conservation and Development Commission  
(Jessica.Fain@bcdc.ca.gov)