



ACTION ITEM

Public Hearing on Proposed Rulemaking for Section 5001 (Definitions) and Section 5012 (Delta Levees Investment Strategy) (Delta Plan Policy RR P1) of Title 23 of the California Code of Regulations (Government Code §11346.8)

Summary

At today's meeting the Council will conduct a public hearing on the proposed regulatory amendments for Section 5001 (Definitions) and Section 5012 (Prioritization of State Investments in Delta Levees and Risk Reduction (Delta Plan Policy RR P1)) of Title 23 of the California Code of Regulations Office of Administrative Law File No. Z2022-0816-07) for the implementation of the Delta Levees Investment Strategy (DLIS). The purpose of this hearing is to obtain public comment on the proposed rulemaking. The Council will not respond to comments at this hearing and will not engage in discussion about these proposed regulations, other than to provide clarification, if needed.

Staff will seek Council direction regarding next steps in the rulemaking process pursuant to the Administrative Procedure Act (APA), which may include taking under submission all written and oral comments received during the public comment period and at the hearing and preparing responses to all comments and the Final Statement of Reasons (FSOR). If the Council directs staff to prepare the FSOR, it will be made publicly available upon completion and will be posted on the Council's DLIS website (<https://deltacouncil.ca.gov/dlis/>). If the Council directs staff to prepare the FSOR, it will be made publicly available upon completion and will be posted on the Council's DLIS website (<https://deltacouncil.ca.gov/dlis/>).

Requested Action

Following the completion of the public hearing, staff recommends that the Council adopt Resolution 2022-08 (Resolution) (Staff Report Attachment 1 to this staff report), which would authorize and direct the Executive Officer, or designee(s), to:

- (1) prepare written responses to the public comments received by the Council on the Proposed DLIS Rulemaking; and
- (2) prepare other pertinent documents, including a Final Statement of Reasons (FSOR); and
- (3) incorporate changes to the Proposed DLIS Rulemaking identified by the Council at the November 17, 2022, public hearing and that Council staff recommend or may be in response to public comments received on the Proposed DLIS Rulemaking; and
- (4) make such non-substantive changes to the Proposed DLIS Rulemaking as are necessary to effect the intent of this Resolution; and
- (5) return to the Council at a future meeting to present the Proposed DLIS Rulemaking, including any such changes, and the related pertinent documents, including the FSOR, to the Council for consideration and possible adoption.

Background

Delta and Suisun Marsh Levees

The Sacramento-San Joaquin Delta (Delta) is home to more than 500,000 people and is comprised of approximately 1,300 square miles of low-lying, flood-prone lands bound by 1,100 miles of levees.

The Suisun Marsh, located immediately downstream from the Delta and north of Grizzly Bay, includes about 230 miles of levees that reduce flood risk and help manage flows for wetlands. About 80 miles of these levees protect Delta water quality and terrestrial and aquatic habitat of statewide importance.

Levees in the Delta and Suisun Marsh reduce flood risk to people, property, water supply, the Delta ecosystem, and infrastructure of statewide importance. However,

levee failure can cause catastrophic flooding, and can potentially cause injury or loss of life, disrupt water supplies, and possibly damage property, infrastructure, and environmental resources of importance to the entire State.

[Delta Reform Act Requirements and Authority](#)

Pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009 (“Delta Reform Act”), set forth in Water Code sections 85000 et seq., the Council has developed an enforceable, comprehensive, long-term management plan for the Delta (Water Code section 85300). The Delta Reform Act charges the Council with furthering the coequal goals for the Delta of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place (Water Code section 85054). To implement the Delta Plan and achieve the coequal goals, the subgoals inherent in the coequal goals, and the policy objectives of the Delta Reform Act, the Delta Plan contains regulatory policies, codified in California Code of Regulations, Title 23, Sections 5001 through 5016.

The Delta Reform Act also requires that the Delta Plan attempt to reduce risks to people, property, and State interests in the Delta by promoting effective emergency preparedness, appropriate land uses, and strategic levee investments (Water Code section 85305(a)), as well as recommend priorities for State investment in levee operation, maintenance, and improvements in the Delta, including both project levees (which are a part of the State Plan of Flood Control), and nonproject levees (which are not a part of the State Plan of Flood Control) (Water Code section 85306).

In addition to the substantive requirements of the Delta Reform Act to attempt to reduce risk (Water Code section 85305(a)) and recommend priorities for Delta levee investments (Water Code section 85306), the Delta Reform Act authorizes the Council to adopt regulations or guidelines as needed to carry out its powers and duties (Water Code section 85210(i)) and “to request reports from state, federal, and local governmental agencies on issues related to the implementation of the Delta Plan” (Water Code section 85210(h)).

Prior Actions Concerning Proposed Amendment to Sections 5001 and 5012

In 2013, pursuant to Water Code section 85306, the Council adopted Risk Reduction Policy RR P1 (23 CCR section 5012) which provides interim priorities to guide discretionary investments in Delta levees. Policy RR P1 sets forth interim priorities for State funding and investments in levee operation, maintenance, and improvements. Key priorities for interim funding included emergency preparedness, response and recovery, localized flood protection, protection of the levee network, and ecosystem conservation. The priorities were meant to guide budget and funding allocations. The policy states that the goals are all important, and their achievement is expected to be balanced over time.

In 2014, Council staff began developing an update to the interim policy. In this effort, the Council has engaged stakeholders to identify state interests, develop a methodology to assess risks to those interests, and develop levee investment priorities based on those risks. In 2018, the Council adopted amendments to the Delta Plan (Delta Plan Amendments), which included a Delta Levees Investment Strategy (DLIS) and initiated a rulemaking process to amend RR P1. The Council also certified a Program Environmental Impact Report for the Delta Plan Amendments (2018 PEIR) pursuant to the California Environmental Quality Act (CEQA). However, in 2019 before the Council completed the rulemaking process to amend RR P1, new information was published by the Department of Water Resources (DWR) that had the potential to change the DLIS prioritization. In March 2020, the Council withdrew RR P1 from the rulemaking process to evaluate this new information and any implications it may have on the proposed DLIS regulations.

Since March 2020, Council staff has updated the data that informs the DLIS risk analysis with new topographic information and water surface elevations. Council staff has also worked to address concerns raised and has consulted with the Department of Water Resources (DWR) and the Central Valley Flood Protection Board (Flood Board) to address comments among the three agencies on modified preliminary regulatory language and developed an update to the Delta levee prioritization based on best available information.

The proposed regulations establish reporting requirements for DWR to inform the Council and the public about where and why Delta levee investments are made. The proposed regulations are designed to increase transparency and inform decision-makers about how strategic investments in Delta levees can reduce risk to State interests over time. This information is intended to inform future risk reduction investment decisions. An underlined and ~~strike through~~ version of the proposed draft regulatory language is provided as Attachment A to the Resolution.

At its August 2021 public meeting, the Council certified an Addendum to the 2018 PEIR (PEIR Addendum), approved updates to Delta Plan Policy RR P1 for proposed rulemaking and directed Council staff to commence this rulemaking process pursuant to the APA.

DLIS Development Process

In 2014, the Council began formulating a comprehensive analysis of State interests and risks in the Delta. The analysis began with the development of the document, *State Investment in Delta Levees: Key Issues*, which summarizes relevant statutes and key issues to consider in developing updated priorities for State investment in Delta levees. Following a Council workshop with nationally recognized flood management experts, Council staff drafted the *Delta Flood Management Investment Principles*. These documents informed the Council's draft methodology that would be the foundation of the DLIS. An independent scientific panel reviewed the documents in the summer of 2015. In addition to the independent peer review, the Council conducted an extensive public engagement process, hosting over 70 workshops and public meetings with Delta residents, reclamation district engineers, water supply and ecosystem interests, and other Delta stakeholders.

Building on the results of previous Delta levee planning efforts, Council staff collected and used existing data and information from numerous sources to evaluate risks to State interests in the Delta. State interests in the Delta are defined by:

- (1) Risk to public safety, property, and infrastructure
- (2) Water supply reliability
- (3) The Delta ecosystem
- (4) The unique attributes of the Delta as an evolving place

Using a risk analysis methodology, DLIS establishes a three-tiered priority list of islands and tracts – **Very-High Priority, High Priority, and Other Priority** – for State investments in levee improvements for Delta islands. The priorities generally address the relationship between the flood risk of each island or tract, and the number of State interests that an island's or tract's assets encompass.

The updated risk analysis shows that improvements in levees can, and do, change DLIS priorities for Delta islands and tracts, moving islands and tracts up and down the priority tiers (i.e., Very-High Priority, High Priority, Other Priority). DLIS was designed to be responsive to new data. Improvements to Delta levees will continue to occur and will necessitate updates to DLIS regulations in the future.

[Proposed Regulatory Amendment to Sections 5001 \(Definitions\) and 5012 \(RR P1\)](#)

The proposed amendments to Section 5001 and Section 5012 are provided as Attachment A to the Resolution (Attachment 1). The proposed regulatory changes are shown in underline.

Proposed Amendment to Section 5012 (RR P1)

The proposed amendment to Section 5012 identifies specific islands or tracts that are located within the legal boundaries of the Delta and the Suisun Marsh subject to the proposed regulation and assigns a DLIS priority of Very-High Priority islands and tracts, High Priority islands or tracts, or Other Priority islands or tracts for each specific island or tract.

Under the proposed amendment, the Department of Water Resources (DWR) would fund levee projects at Very-High Priority islands or tracts before approving projects at High Priority or Other Priority islands or tracts. The proposed amendment provides that if available funds are sufficient to fully fund levee improvements at the Very-High Priority islands or tracts, then funds for improvements or rehabilitation of levees on High Priority islands or tracts may be provided, and after those projects have been fully funded, then projects at Other Priority islands or tracts may be funded.

The proposed amendment would require DWR to annually submit to the Council a written report including certain information that identifies its decisions to award State funds for Delta levee improvement projects. When DWR's contributions

toward such projects vary from the DLIS priorities, the annual report would be required to identify how the funding is inconsistent with the priorities, describe why variation from the DLIS priorities is necessary, and explain how the funding nevertheless protects lives, property, and State interests.

In addition, the proposed amendment includes a new appendix to the Delta Plan (Appendix P), included as Attachment B to the Resolution (Attachment 1)). to this Staff Report)). Council staff created Delta Plan Appendix P to provide a more detailed illustration of the name, DLIS priority designation, and physical location of each island and tract identified in the proposed regulation.

Proposed Amendment to Section 5001

The purpose of the proposed amendment to Section 5001 is to add definitions for five new terms used in the proposed amendment to Section 5012: “Levee Improvement”, “Levee operations and maintenance”, “Very-High Priority islands or tracts”, “High Priority islands or tracts”, and “Other Priority islands or tracts”.

Objectives and Benefits of the Proposed Amendment

As discussed in the Initial Statement of Reasons (ISOR) (Attachment 2) and Attachment 1 to the ISOR (Economic and Fiscal Impact Assessment of Proposed Amendments to Prioritization of State Investments in Delta Levees and Risk Reduction (EFIA)), also provided separately as Attachment 3 to this staff report, the broad objectives of the proposed regulatory amendments are to achieve the requirements of the Delta Reform Act by:

- Setting priorities for strategic Delta levee investments that maximize the protection of people, property, and State interests
- Requiring the State first to invest public resources in Delta levees with the greatest potential to protect people, property, and State interests, before investing public resources in Delta levees with lower potential to achieve these objectives; and
- Increasing public awareness of how State expenditures maximize public safety and protect State interests in the Delta.

The anticipated benefits from the proposed regulatory amendments are:

- Reduced risk of damage to property and infrastructure, including the reduced cost to repair failed levees

- Reduced annual risk of fatalities from a levee failure
- Increased workers' safety by prioritizing the islands and tracts with the largest in-Delta workforce
- Increased State water supply reliability
- Increased protection for cultural, recreational, natural resource, and agricultural qualities that distinguish the "Delta as Place"
- Improved transparency and public awareness of State levee funding decisions
- Improved transparency and public awareness of State levee funding decisions
- Protected high-value non-tidal habitat

Fiscal Information

As discussed in the ISOR and Attachment 1 to the ISOR (Economic and Fiscal Impact Assessment of Proposed Amendments to Prioritization of State Investments in Delta Levees and Risk Reduction), provided as Attachment 2to2 to this staff report, the proposed amendments would create fiscal costs to State agencies of approximately \$213,000 per year. DWR would be required to prepare and submit an annual report to the Council describing Delta levee investments and, if applicable, justify why funding decisions varied from the DLIS priorities. The Council would be required to review the annual report prepared by DWR. The additional cost of preparing an annual report, \$301,000, is generally moderate and can be completed by existing staff that are familiar with Delta levee investments and the Delta Plan. Therefore, these additional costs would likely be absorbed within existing DWR and Council budgets. The proposed amendments would not create costs to, or mandates on, any local agency or school district, or other nondiscretionary costs or savings to State or local agencies. The proposed amendment would also not create costs or savings in federal funding to the State.

CEQA Compliance

At its April 26, 2018, public meeting, the Council adopted Resolution 2018-01 certifying the 2018 PEIR that included an analysis of proposed DLIS priorities.

These DLIS priorities were subsequently adjusted based on new information and at its August 26, 2021, public meeting, the Council adopted Resolution 2021-02 certifying the PEIR Addendum and approving the proposed DLIS priorities as amendments to Delta Plan Policy RR P1 for purposes of rulemaking pursuant to the APA.¹

Rulemaking Process under the Administrative Procedure Act

Pursuant to Council authorization (Resolution 2021-02), Council staff initiated formal rulemaking under the California Administrative Procedure Act by filing a Notice of Proposed Rulemaking, originally published in the California Regulatory Notice Register on August 26, 2022 (Office of Administrative Law File No. Z2022-0816-07). A Notice of Extension of Written Comment Period and Rescheduled Hearing was published on September 23, 2022 (Office of Administrative Law File No. Z2022-0909-01). The written public comment period began on August 26, 2022 and extends through 11:59 p.m. on November 16, 2022.

Public Comments and Responses

Written comments received during the public comment period will be provided to the Council as supplemental materials at the November 17, 2022, meeting and will be made available at or after the meeting in accordance with the Bagley Keene Public Meetings Act (Gov't Code section 11125.1) and will be posted on the Council's website. In addition, written and public comments may be offered during the public hearing. The Council will not be responding to comments during the November 17, 2022, hearing. If directed, staff will prepare written responses to all comments received in a Final Statement of Reasons to be presented to the Council at a future meeting, along with other applicable rulemaking documentation for possible

¹ The 2018 Delta Plan Amendments included "pursuant to section 85305 and 85306 of the Water Code, updated and new Delta Plan recommendations and regulations regarding strategic investment in Delta levees for risk reduction, and emergency preparedness, response and recovery, all based on best available science, including repealing interim Delta Plan policy RR P1 and adopting new Delta Plan policy RR P1, referred to as the Delta Levees Investment and Risk Reduction Strategy ("DLIS")." The DLIS priorities adopted by the Council in August 2021 for purposes of rulemaking and certified in the PEIR Addendum are the same as those in this proposed amendment. The proposed amendment is within the scope of the project analyzed in the certified PEIR Addendum and approved by the Council in Resolution 2021-02, and the PEIR Addendum adequately describes the proposed amendment for purposes of CEQA. The Council filed a Notice of Determination for the PEIR Addendum with the Governor's Office of Planning and Research State Clearinghouse on August 27, 2021 and a 30-day statute of limitations expired without challenge.

adoption of the proposed regulation and authorization to submit the final rulemaking package to OAL pursuant to the APA.

Draft Rulemaking Documents

The following draft rulemaking documents are attached for your consideration (they are Attachments A and B, respectively, to the Resolution):

Proposed Amendment to Existing Regulation (Attachment A to Resolution 2022-08)

The text of the proposed amendments to Section 5001 and Section 5012 are included as Attachment A to Resolution 2022-08, which is Attachment 1 to this staff report.

Proposed Delta Plan Appendix P (Attachment B to Resolution 2022-08)

The Proposed Delta Plan Appendix P containing detailed maps of the prioritized Delta islands and tracts is included as Attachment B to Resolution 2022-08, which is Attachment 1 to this staff report.

Initial Statement of Reasons (Attachment 2 to this staff report)

An Initial Statement of Reasons (ISOR) was provided for public review during the comment period beginning on August 26, 2022. The ISOR provides a cost analysis that briefly describes the expected benefits of the proposed rulemaking. In addition, the ISOR also includes an attached supporting document: the Draft Economic and Fiscal Impact Statement (also Attachment 3 to the staff report; see description below).

Draft Economic and Fiscal Impact Statement (STD Form 399 Economic and Fiscal Impact Statement) (Attachment 3 to this staff report)

The Draft STD 399 Form Economic and Fiscal Impact Statement is based on the information in the Draft Economic and Fiscal Impact Assessment, which was attached to the Initial Statement of Reasons submitted to OAL and made available for public review and comment on August 26, 2022. It will be included in final form at the Council's adoption meeting at a later date and is then included in the final rulemaking record submitted to the OAL.

List of Attachments

- Attachment 1: Resolution 2022-08: Public Hearing on Proposed Rulemaking for Section 5001 (Definitions) and Section 5012 (Delta Levees Investment Strategy) (Delta Plan RR P1) of Title 23 of the California Code of Regulations (Government Code §11346.8)
- Attachment 2: Initial Statement of Reasons and Economic and Fiscal Impact Assessment as Attachment 1
- Attachment 3 Economic and Fiscal Impact Statement of Proposed Amendments to Prioritization of State Investments in Delta Levees and Risk Reduction

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