

DELTA STEWARDSHIP COUNCIL

RESOLUTION

2023-01

ADOPTION OF 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 (also known as the Delta Levees Investment Strategy (DLIS))

WHEREAS, the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act), Water Code sections 85000 et seq., directs the Delta Stewardship Council (Council) to develop an enforceable, comprehensive, long-term management plan for the Sacramento-San Joaquin Delta and the Suisun Marsh (collectively, the Delta) referred to as the Delta Plan; and

WHEREAS, the Delta Reform Act requires the Delta Plan to “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” (Wat. Code § 85305(a)); and

WHEREAS, the Delta Reform Act requires the Council, “in consultation with the Central Valley Flood Protection Board,” to “recommend in the Delta Plan priorities for state investments in levee operation, maintenance, and improvements in the Delta, including both levees that are a part of the State Plan of Flood Control and nonproject levees” (Wat. Code § 85306); and

WHEREAS, the Council has the power to “adopt regulations or guidelines as needed to carry out the powers and duties identified in [the Delta Reform Act]” (Wat. Code § 85210(i)); and

WHEREAS, the Council has the power to “request reports from state, federal, and local governmental agencies on issues related to the implementation of the Delta Plan” (Wat. Code § 85210(h)); and

WHEREAS, the Delta Reform Act requires the Delta Plan be “based on the best available scientific information” (Wat. Code § 85308); and

WHEREAS, on May 16, 2013, the Council, as lead agency under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 et seq., certified the Final Delta Plan Program Environmental Impact Report (State Clearinghouse No. 2010122028) and approved the Delta Plan; and

WHEREAS, on May 17, 2013, the Council adopted regulations implementing the Delta Reform Act, including California Code of Regulations, title 23, section 5001 (Definitions) (Cal. Code Regs., tit. 23, § 5001) and California Code of Regulations, title 23, section 5012 (Prioritization of State Investments in Delta Levees and Risk Reduction) (Cal. Code Regs., tit. 23, § 5012) (Delta Plan Policy RR P1); and

WHEREAS, on April 26, 2018, at a duly noticed public meeting, the Council adopted Resolution 2018-1 adopting amendments to the Delta Plan (2018 Delta Plan Amendments); and

WHEREAS, the 2018 Delta Plan Amendments included Delta Plan Chapter 7 (Reduce Risk to People, Property, and State Interests in the Delta), as amended by the Delta Levees Investment and Risk Reduction Strategy, which describes priorities for state investments in levees, and which included a proposed revisions to Delta Plan Policy RR P1 to implement the Delta Levees Investment Strategy (DLIS) (referred to herein as "2018 DLIS"), based on then-available Light Detection and Ranging elevation imaging published by the California Department of Water Resources; and

WHEREAS, by adopting Resolution 2018-1, the Council, as lead agency under CEQA, certified the Final Delta Plan Amendments Program Environmental Impact Report (State Clearinghouse No. 2017032048) ("PEIR") for the 2018 Delta Plan Amendments, adopted Findings and a Statement of Overriding Considerations, adopted and incorporated into the 2018 Delta Plan Amendments all of the new mitigation measures identified in the PEIR and in the Findings, and adopted the Mitigation Monitoring and Reporting Program for the Delta Plan Amendments, and

WHEREAS, on June 10, 2019, the California Department of Water Resources published new Light Detection and Ranging (or LiDAR) elevation imaging of the Delta and Suisun Marsh for 2017 ("2017 LiDAR imaging"), which provided updated information about the height of levees and island floors; and

WHEREAS, the 2017 LiDAR imaging presented new information that needed to be further evaluated to inform whether the priorities identified in the 2018 DLIS

should be modified because of changed levee or island conditions; and

WHEREAS, on March 26, 2020, the Council adopted Resolution 2020-01 directing staff to evaluate the new 2017 LiDAR imaging information to determine if further modifications to Chapter 7 or the 2018 DLIS priorities were needed and to report back to the Council at a future date; and

WHEREAS, on March 26, 2020, by adopting Resolution 2020-01, the Council amended Delta Plan, Chapter 7, to, among other things, delete part of pages 26-30 and 41-45 describing priorities for state investment in levees and the 2018 DLIS; and

WHEREAS, following stakeholder input, on May 21, 2021, Council staff reported the results of the evaluation of the 2017 LiDAR imaging and presented proposed revisions to the DLIS priorities, including Modified Preliminary Draft Regulatory Language for RR P1, to the Council and committed to return to the Council at a future date for authorization to reinitiate rulemaking; and

WHEREAS, at the regularly scheduled Council meeting on August 26, 2021, staff presented proposed revisions to the DLIS priorities and Modified Preliminary Draft Regulatory Language for RR P1 to the Council with a recommendation to authorize initiation of rulemaking; and

WHEREAS, at the August 26, 2021, meeting, the Council adopted Resolution 2021-02 that, among other things, approved a CEQA Addendum to the 2018 Delta Plan Amendments Program Environmental Impact Report (PEIR Addendum) for the staff-recommended DLIS prioritization and approved the staff-recommended DLIS Modified Preliminary Draft Regulatory Language for purposes of rulemaking to amend Delta Plan Policy RR P1, and directed staff to initiate rulemaking to amend Delta Plan Policy RR P1, set forth in 23 CCR section 5012 (Prioritization of State Investments in Delta Levees and Risk Reduction) and the related definitions in regulation in 23 CCR section 5001 (Definitions); and

WHEREAS, 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 the 30-day statute of limitations expired without challenge; and

WHEREAS, the Council initiated formal rulemaking under the California Administrative Procedure Act by filing a Notice of Proposed Rulemaking, published in the California Regulatory Notice Register on August 26, 2022 (Office of

Administrative Law File No. Z2022-0816-07), commencing the public comment period; and

WHEREAS, on September 23, 2022, the Council published in the California Regulatory Notice Register a Notice of Extension of Written Comment Period and Rescheduled Hearing due to corrected regulatory text (Office of Administrative Law File No. Z2022-0909-01), which consisted of proposed amendments to Sections 5012 and 5001 of Title 23 of the California Code of Regulations and Appendix P, which are collectively referred to herein as the “Proposed DLIS Rulemaking,” (the Proposed DLIS Rulemaking as published on September 23, 2022, is provided under Tab B of the rulemaking file that is Attachment A to this Resolution), and which extended the public comment period through November 16, 2022; and

WHEREAS, the Council received nine written comment letters from the public via email submitted during the public comment period by the November 16, 2022, deadline, which are included and summarized in the Final Statement of Reasons (FSOR) that is provided under Tab J of the rulemaking file that is Attachment A to this Resolution; and

WHEREAS, on November 17, 2022, the Council held a duly noticed public hearing, transcribed by a certified court reporter, at its regularly scheduled public meeting to receive additional public comments on the Proposed DLIS Rulemaking (the transcript of the hearing is included under Tab E of Attachment A to this Resolution; and

WHEREAS, at the public hearing, the Council received oral comments from eleven individual commenters, which are summarized in the FSOR (Tab J of Attachment A to this Resolution) and extended the deadline to submit written comments on the Proposed DLIS Rulemaking until 5pm on November 21, 2022; and

WHEREAS, at the conclusion of the November 17, 2022, public hearing, the Council adopted Resolution 2022-08, which, among other things, directed staff to prepare written responses to the public comments received, prepare other pertinent documents, including a Final Statement of Reason (FSOR), incorporate any changes to the Proposed DLIS Rulemaking identified by the Council at the November 17, 2022 public hearing, and return to the Council at a future meeting to present the Proposed DLIS Rulemaking; and

WHEREAS, after the public hearing, the Council received six additional written

comment letters via email by the extended November 21, 2022, deadline, which are included, summarized, and responded to in the FSOR (Tab H of Attachment A to this Resolution); and

WHEREAS, in total, the Council received 15 written comment letters (copies of the written comment letters are included under Tab D, Appendix A, of Attachment A to this Resolution) as well as oral comments from 11 commenters (which are transcribed and included under Tab D as well as in the complete Public Hearing Transcript under Tab E); and

WHEREAS, on December 15, 2022, the Council issued a Notice of Modification to Text of Proposed Regulations and Addendum to Initial Statement of Reasons (ISOR) and Form 399 – Economic and Fiscal Impact Statement and held an additional 25-day public comment period from December 15, 2022, through January 9, 2023, for the public to comment to the Council in writing on the changes made to the Proposed DLIS Rulemaking after the November 17, 2022, Council meeting and the addendum to the ISOR and Form 399 (hereinafter, the Proposed DLIS Rulemaking as revised after the November 17, 2022, public meeting, including Appendix P, is referred to as the “Revised Proposed DLIS Rulemaking”, which is provided under Tab F of Attachment A to this Resolution, and incorporated as if fully set forth herein); and

WHEREAS, at its regularly scheduled public meeting on December 15, 2022, the Council provided an update on the status of the Proposed DLIS Rulemaking and received comments on the agenda item from two commenters, which are summarized and responded to in the FSOR that is Tab H of Attachment A to this Resolution; and

WHEREAS, the Council received seven comment letters on the Revised Proposed DLIS Rulemaking via email by the January 9, 2023, deadline, which are included and summarized and responded to in the FSOR that is Tab H of Attachment A to this Resolution; and

WHEREAS, in total, the Council received seven written comment letters (copies of the written comment letters are included under Tab D, Appendix B, of Attachment A to this Resolution) as well as oral comments from 2 commenters (which are summarized in Tab H of Attachment A to this Resolution) during the 25-day public comment period from December 15, 2022, through January 9, 2022 (the summary of comments and responses to comments are included in the FSOR (provided under Tab H of Attachment A to this Resolution); and

WHEREAS, at its February 23, 2022, regularly scheduled public meeting, the Council considered the Revised Proposed DLIS Rulemaking and the rulemaking file that is Attachment A to this Resolution that includes the FSOR, and received comments pursuant to the Bagley-Keene Act.

NOW, THEREFORE, BE IT RESOLVED BY THE DELTA STEWARDSHIP COUNCIL THAT:

1. The Council hereby finds the foregoing recitals to be true and correct and incorporates them herein.
2. The Council has considered the Revised Proposed DLIS Rulemaking (including Appendix P) that is provided under Tab F of Attachment A to this Resolution, the rulemaking file that is Attachment A to this Resolution, including public comments received on the Proposed DLIS Rulemaking and the Revised Proposed DLIS Rulemaking to amend Section 5001 and Section 5012 of Title 23 of the California Code of Regulations, the responses to comments set for in the Final Statement of Reasons that is Tab H in Attachment A to this Resolution, which is incorporated herein as if fully set forth, and the comments received pursuant to the Bagley-Keene Act at its February 23, 2023 regularly scheduled public meeting on the agenda item for the Revised Proposed DLIS Rulemaking.
3. The Council hereby adopts the proposed amendments to Sections 5012 and 5001 of Title 23 of the California Code of Regulations, as modified after the November 17, 2022, public hearing, and Appendix P (collectively referred to herein as the Revised Proposed DLIS Rulemaking) as provided under Tab F of Attachment A to this Resolution, incorporated herein as if fully set forth, to amend Section 5001 and Section 5012 of Title 23 of the California Code of Regulations (also known as the Delta Levees Investment Strategy or DLIS (Delta Plan policy RR P1 "Prioritization of State Investments in Delta Levees and Risk Reduction").
4. The Council authorizes the Executive Officer, or designee(s), to:
 - a. submit the FSOR (Tab H of Attachment A to this Resolution) and Form 399 (Tab J of Attachment A to this Resolution), and any other such documentation as may be necessary or requested, to the Department of Finance (DOF);
 - b. finalize and make such non-substantive changes to the Revised

Proposed DLIS Rulemaking and the rulemaking file and related documents as are necessary to effect the intent of this Resolution; and

- c. upon approval from DOF, submit the rulemaking file, including the Revised Proposed DLIS Rulemaking, and any other such documentation as may be necessary or requested, to the Office of Administrative Law (OAL) for approval and to complete the rulemaking process, to effect the intent of this Resolution; and
 - d. make any non-substantive changes to the Revised Proposed DLIS Rulemaking file as is necessary or requested by the DOF or OAL to complete the rulemaking process and effect the intent of this Resolution.
5. The Council further authorizes and directs the Executive Officer, or designee(s), to take such actions and steps as are necessary to effect the intent of this Resolution.

LIST OF ATTACHMENTS:

Attachment A: Rulemaking File for the Revised Proposed DLIS Rulemaking to amend Section 5001 and Section 5012 of Title 23 of the California Code of Regulations

CERTIFICATION

On a motion by
Councilmember _____, seconded
by Councilmember _____ and
a vote of the Council, the foregoing resolution was
passed and adopted by the Delta Stewardship
Council by the following vote at a regular meeting of
the Delta Stewardship Council on February 23, 2023.

Madueño _____

Damrell _____

Lee _____

Burgis _____

Smith _____

Zingale _____

Dated: February 23, 2023

Rebecca Barger
Clerk of the Board of the Delta Stewardship Council

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