



ACTION ITEM

Council Consideration and Possible Adoption of 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, staff will recommend that the Council approve Resolution 2023-01 to adopt 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), as revised after the November 17, 2022 public hearing and receipt of public comments ("Revised Proposed DLIS Rulemaking").

Resolution 2023-01 would also authorize the submission of the rulemaking documents to the Department of Finance and the Office of Administrative Law for review and approval pursuant to the Administrative Procedure Act (APA).

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)), and that the Council 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). 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 by the Council Concerning Proposed Amendments 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 might have on the proposed DLIS regulations.

In 2020 and 2021, Council staff updated the data that informs the DLIS risk analysis with new topographic information and water surface elevations. Council staff also worked to address concerns raised by stakeholders and consulted with the Department of Water Resources (DWR) and the Central Valley Flood Protection Board (Flood Board) to address comments from the two 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 decisionmakers 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 (revised after the November 17, 2022, public hearing) is provided under Tab F of Attachment A to the Resolution.

At its August 2021 public meeting, the Council certified a CEQA 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. The initial Notice of Proposed Rulemaking was issued on August 26, 2022.

On November 17, 2022, the Council held a public hearing at its regularly scheduled public meeting to receive additional public comments on the Proposed DLIS Rulemaking. 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 Reasons (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.

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. The Council identified the State's interests in the Delta to include:

- People
- Property
- Habitat
- Water Supply

The Council also identified special considerations for additional evaluation, including all of the following:

- Hydraulic connection between adjacent islands.
- Ecosystem restoration opportunities.
- Delta as a place.
- Suisun Marsh levees.
- socially vulnerable communities that are disproportionately at risk from climate change.

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 revised proposed amendments to Section 5001 and Section 5012, as modified after the November 17, 2022 public hearing, are provided in Tab F of Attachment A, to Resolution 2023-01 (Attachment 1 to this staff report) and on the Council's website¹. The proposed regulatory changes made in response to public comments after the November 17, 2022, public hearing are shown in double strikeout (e.g. ~~double strikethrough~~) for deletions and double underline (e.g. double underline) for additions. These changes, summarized below, were available for public comment from December 15, 2022, to January 9, 2023:

1. The definition of **"Levee improvement"** was amended to clarify what activities are included in levee improvements that would be prioritized within the Delta Levees Investment Strategy. The Council received several comments about the need to restore levees to their previous condition after settlement or deterioration; the Council does not consider this activity to be an improvement.

2. Section 5012 was modified to add a due date of no later than March 1 each calendar year for DWR to submit the annual levee investment report to the Council. The addition was made in response to a comment. The Council believes it would add clarity to the reporting process and predictability for interested parties.

3. Missing footnotes were also added for the Economic and Fiscal Analysis. Proposed Amendment to Section 5012 (RR P1)

The proposed amendment to Section 5012 makes funding operations and maintenance throughout the Delta a priority. For discretionary investments in levee improvements, the proposed amendment identifies specific islands or tracts that are located in the Delta 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.

¹ <https://deltacouncil.ca.gov/pdf/dlis/2022-12-14-proposed-modifications-to-amendment-to-existing-regulation.pdf>

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, at least 45 days prior to the oral presentation before the Council, and no later than March 1 of each calendar year, 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 Revised Proposed DLIS Rulemaking includes a new appendix to the Delta Plan (Appendix P), included in Tab F of Attachment A to Resolution 2023-1 (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 Revised Proposed DLIS Rulemaking.

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) (Tab C of Attachment A (rulemaking file) to Resolution 2023-01) and Attachment 1 to the ISOR (the Economic and Fiscal Impact Assessment) of Proposed Amendments to Prioritization of State Investments in Delta Levees and Risk Reduction, which is Tab J of

Attachment A to Resolution 2023-01), 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 (Tab C of Attachment A to Resolution 2023-01) and the Economic and Fiscal Impact Assessment of Proposed Amendments to Prioritization of State Investments in Delta Levees and Risk Reduction (Tab J of Attachment A to Resolution 2023-1), . 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.²

² 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.

[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).³ The written public comment period began on August 26, 2022. The initial deadline was 11:59p.m. on November 16, 2022,. A duly noticed public hearing was held on November 17, 2022. At the public hearing, the Council extended the written public comment period through November 21, 2022. After the close of the public comment period, In response to public comments received, changes were made to Section 5001, subd. (w) "Levee improvement" and Section 5012, subd. (c)(1), which were available for further public comment from December 15, 2022, to January 9, 2023.

[Public Comments and Responses](#)

A total of nine written comments were received via email by the November 16, 2022 deadline during the public comment period. An additional six public comments were received by the extended November 21, 2022 deadline. In addition, public comments were received and transcribed by a certified court reporter at the November 17, 2022 public hearing (comments received during this comment period can be found in Appendix A in Tab D of Attachment A to Resolution 2023-01).

At the November 17, 2022 hearing, the Council adopted Resolution 2022-08 directing staff to prepare, and respond to comments received in, the FSOR to be presented to the Council at a future meeting, along with other applicable rulemaking documentation for possible adoption of the proposed rulemaking .

On December 15, 2022, the Council noticed an additional public comment period for modifications made after the November 17, 2022, Council hearing, with the comment period closing on January 9, 2023. The Council received seven comment

³ The Notice of Extension filing did not affect the rulemaking record number, which remains under the original Office of Administrative Law File No. Z2022-0816-07

letters via email by the January 9, 2023, deadline (written comments received during this comment period can be found in Appendix B in Tab D of Attachment A to Resolution 2023-01). The Council also received comments from two commenters at its December 15, 2022, public meeting during public comment on the agenda item for an update on the proposed rulemaking.

Comments that were received through January 9, 2023, are summarized in, and responded to, in the FSOR, which is Tab H of Attachment A to Resolution 2023-01.

The Council received a total of 22 sets of written comments and 13 sets of oral comments. Responses to the comments address the following topics, as described in the FSOR:

- Definitions and Alignment of Definitions with Objectives and Other Programs
- Request for Suspension of Rulemaking and Increased Coordination
- Consistency with Existing Law and Authority
- DLIS Methodology
- Subventions Program Impacts
- Adequacy of Economic Analysis of the Regulation

No additional changes to the proposed regulation beyond those noticed on December 15, 2022, are proposed in response to the comments received.

Requested Action

Following Council discussion, staff recommends that the Council adopt Resolution 2023-01 (Attachment 1 to this staff report), which would adopt the Revised Proposed DLIS Rulemaking (including Appendix P) and authorize and direct 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.

The Council would also further authorize and direct the Executive Officer, or designee(s), to take such actions and steps as are necessary to effect the intent of Resolution 2023-01.

Should the Council approve the Resolution, staff anticipates that the proposed regulations would take effect on either July 1, 2023, or October 1, 2023, depending on the timing of DOF and OAL review and approval.

List of Attachments:

Attachment 1 Resolution 2023-1

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))

- *The following documents are part of Attachment A to Resolution 2023-01:*
- *Tab A. NOPA*
- Notice of Proposed Rulemaking documents published.
- *Tab B. Regulation Text Noticed*
- The text of the original proposed amendments to Section 5001 and Section 5012. The modified (current) version is under Tab F “Notice of Modifications”.
- *Tab C. Initial Statement of Reasons (ISOR)*
- Initial Statement of Reason (ISOR) with Attachment 1 Economic and Fiscal Impact Analysis
- *Tab D. Public Comments*
- Complete record of written and oral comments received. Exhibit D will be available in hard copy at the February 23, 2023, Council meeting and will be sent to the Office of Administrative Law as part of the rulemaking package pending Council adoption. An electronic copy is available upon request to amend.rrp1@deltacouncil.ca.gov
- Appendix A: 45-Day comment period August 26, 2022 - November 21, 2022
- Appendix B: 15-Day comment period December 15, 2022 – January 9, 2023
- *Tab E. Complete Public Hearing Transcript*
- The final transcript by a recorder of the November 17, 2022, public hearing. This transcript will be available in print at the February 23, 2023, Council meeting and will be sent to the Office of Administrative Law as part of the rulemaking package pending Council adoption.
- *Tab F. Notice of Modifications and Text of Modified Regulation*
- The December 15, 2022 “Notification of Modification to Text of Proposed regulations” and the modified regulatory text and Addendum posted at the same time.

- *Tab G. Updated Informative Digest*
- The updates to the regularity sections 5001 and 5012 in plain language.
- *Tab H. Final Statement of Reasons (FSOR)*
- Final Statement of Reason (FSOR) with a summary of and responses to public comments.
- *Tab I. Statement of Mailing Notices*
- Statements stating when each Notice was mailed and/or posted.
- *Tab J. Form 399 and Economic and Fiscal Impact Analysis*
- The STD Form 399 with attached Final Economic and Fiscal Impact Assessment.
- *Tab K. Documents relied upon*
- A listing of all the Documents relied upon, which will be sent to the Office of Administrative Law as part of the rulemaking package pending Council adoption. The documents are available electronically by emailing amend.rrp1@deltacouncil.ca.gov

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