

Feb 2023

Delta Levees Investment Strategy

Council Consideration of Proposed Regulation



**Delta
Stewardship
Council**

A CALIFORNIA STATE AGENCY

Agenda

1. Introduction
2. The Delta Levees Investment Strategy
3. Proposed Regulatory Amendments
4. Rulemaking Process and Responses to Comments
5. Staff Recommendation

INTRODUCTION

Summary of Requested Action

- The purpose of today's meeting is for the Council to consider adopting proposed regulatory amendments for Section 5001 and Section 5012 of Title 23 of the California Code of Regulations to implement the Delta Levees Investment Strategy (DLIS), as modified after the November 17, 2022, public hearing.
- Staff will ask the Council to approve Resolution 2023-01, by which the Council would **adopt the proposed regulatory amendments** and **authorize staff to finalize and submit rulemaking documents** to the Department of Finance and Office of Administrative Law, including making any non-substantive changes to the rulemaking file and providing information as needed or requested by these agencies to complete the rulemaking process.



THE DELTA LEVEES INVESTMENT STRATEGY

DLIS Amendment Timeline



PROPOSED REGULATORY AMENDMENTS

What Would DLIS Do?

The proposed DLIS regulations would set priorities for levee improvement, operation and maintenance funding and establish requirements for DWR to report to the Council and the public regarding where and why Delta levee investments are made.

- increases transparency, and
- informs decision-makers about how strategic investments in Delta levees can reduce risk to State interests over time.



How Would DLIS Work?

2013 Interim Priorities

- Priorities cover Delta flood risk management, including levee operations, maintenance, and improvements
- All tiers equally important
- Investments balanced over time

Proposed Updates

- Risk-based tiers for levee improvements
- O&M a priority throughout the system
- Annual DWR report to Council
 - O&M throughout the system
 - Improvements by risk tier

Operations



Maintenance



Improvements



2013 DLIS Priorities

Operations



Maintenance



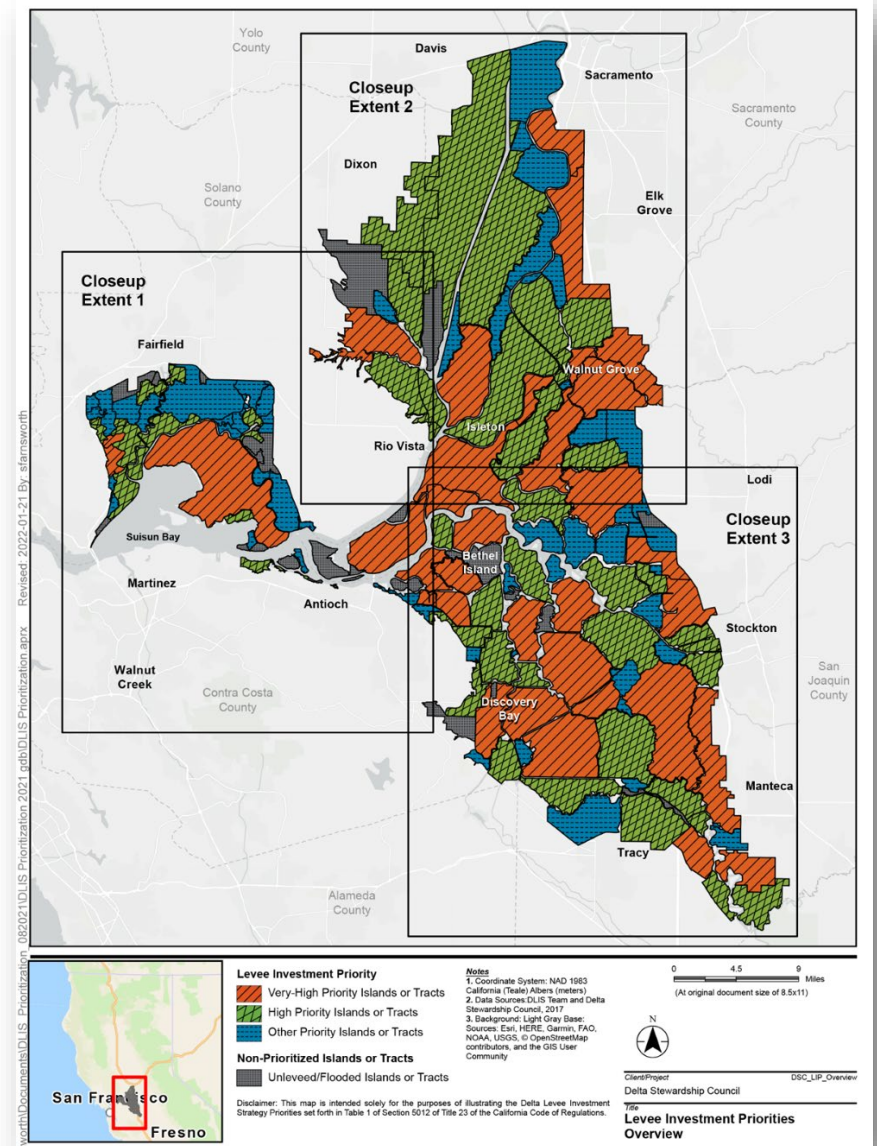
Improvements



2022 DLIS Priorities

DLIS Priorities for Delta Islands and Tracts

- Very-High Priority, High Priority, Other Priority tiers
- Priority tiers apply only to levee *improvements*
 - *Maintenance* and *operations* are system-wide priorities
- Updated risk analysis shows that improvements in levees can, and do, change DLIS priorities for Delta islands and tracts
- Delta levee improvements will continue to occur and will necessitate future DLIS updates

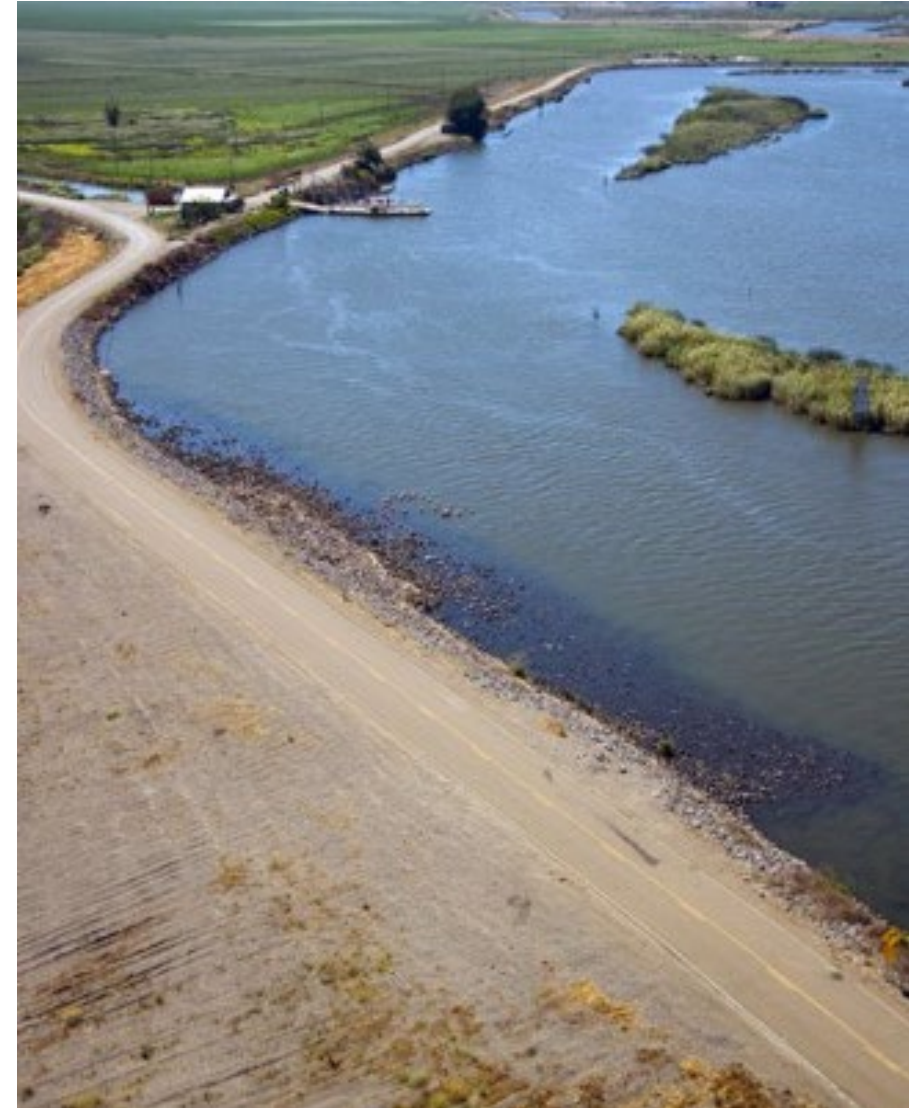


Proposed Regulatory Amendment to Section 5012 (RR P1)

- The proposed amendment to **Section 5012** would assign a DLIS priority of Very-High Priority, High Priority, or Other Priority to each Delta island or tract
- 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 *operations, maintenance, and improvement* projects
 - For *levee improvement* projects, report must identify how spending aligns with DLIS priorities, and/or describe how variance from the priorities nevertheless protects life, property, and state interests in the Delta

Proposed Regulatory Amendment to Section 5001

- The purpose of the proposed amendment to **Section 5001** would add definitions for five new terms used in the proposed amendment to Section 5012:
 - *Levee operation and maintenance*
 - *Levee improvement*
 - *Very-High Priority islands or tracts*
 - *High Priority islands or tracts*
 - *Other Priority islands or tracts*



RULEMAKING PROCESS

Rulemaking Steps

Notice of Proposed Rulemaking

- Filed the Notice of Proposed Rulemaking, which was published in the California Regulatory Notice Register on August 26, 2022
- Filed a Notice of Extension of Written Comment Period and Rescheduled Hearing, which was published in the California Regulatory Notice Register on September 23, 2022
- The extended written public comment period ended at 11:59 pm on November 16, 2022

Rulemaking Steps

Notice of Proposed Rulemaking

- Public hearing November 17, 2022, at which the 45-day comment period was extended through November 21, 2022
- After review of public comments, Council modified to Sections 5001(w) and 5012(c)(1)
 - Modifications were announced at the December 15, 2022, Council meeting, and posted on the Council website the same day, together with an addendum to the ISOR;
 - Public comment period for the modifications from December 15, 2022, through January 9, 2023

Public Comments Received

- During the comment period from August 26, 2022, through November 21, 2022, including the public hearing, the Council received:
 - 15 written comments
 - Oral comments from 13 individuals at the November 17, 2022, public hearing
- During the second comment period on modifications from December 15, 2022, through January 9, 2023, the Council received:
 - 7 written comments
 - Oral comments from 2 individuals at the December 15, 2022, Council meeting
 - Comments received addressed proposed regulations generally, but did not directly address proposed modifications

Public Comments Received

- The comments concerned the following topics:
 - Interference with federal participation
 - Definitions and alignment of definitions with objectives and other programs
 - Requests for suspension or end of rulemaking process and additional coordination with stakeholders
 - Consistency with existing law and authority
 - DLIS methodology
 - Subventions Program impacts
 - Adequacy of economic analysis
 - Requested deadline for annual report
 - Modifications to Section 5001, Section 5012, and Economic and Fiscal Impact Assessment
 - Comments expressing support for the proposed regulations

Comments Concerning Interference with Federal Participation

- **Summary of Comments:** Proposed regulations would interfere with ability to secure federal funds after a high-water event.
 - **Summary of Response:** There are no clearly defined criteria to receive assistance from FEMA under the Stafford Act. The proposed regulation would not interfere with individuals or public agencies requesting assistance in the event of a disaster declaration.
- **Summary of Comments:** The prioritization is missing the State interest of maintaining good standing in the Army Corps of Engineers PL 84-99 program, which pays 100 percent of repair costs if a levee is damaged.
 - **Summary of Response:** Proposed regulation explicitly states that levee funding should be prioritized to ensure levees are *operated and maintained* in accordance with PL 84-99 (Section 5012(a)(1)).

Comments Concerning Definitions Section 5001

- **Summary of Comments:** Proposed definitions would impact maintaining agencies' ability to participate in existing State funding programs.
 - **Summary of Response:** The proposed prioritization is not directed at specific programs or funding sources; the proposed regulation intends to track all discretionary State levee spending in the Delta.

Comments Concerning Definitions in Section 5001 (Cont.)

- **Summary of Comments:** The definition of “levee improvement” should be changed to mean “any activity that is not ‘Levee operation, maintenance, repair, rehabilitation and replacement’, and that is intended to reduce the probability of flooding to facilitate change in land use or the addition of a feature that did not previously exist.” The definition of “levee operations and maintenance” should be changed to “‘Levee operation, maintenance, repair, rehabilitation and replacement’ which means levee work intended to preserve the Delta levee system and the Delta's physical characteristics in essentially their then present form.”
 - **Summary of Response:** The Council has worked extensively with the Flood Board to align the proposed definitions for “levee improvement, operation and maintenance” with existing federal and state laws and guidance. Rehabilitation is not included in these definitions, the Council is not proposing to add rehabilitation activities to the definition of “operation and maintenance.”

Comments Concerning Request for Increased Coordination

- **Summary of Comments:** Requests for additional stakeholder engagement, including pausing the process, and allowing additional engagement not required by the Administrative Procedures Act. The rulemaking process should be put on hold to allow additional time for Council staff to participate in levee tours and coordinate on regulatory language and definitions.
 - **Summary of Response:** For more than six years, the Council has collaborated with State agencies, local reclamation districts, Delta landowners and businesses, and other stakeholders to develop DLIS and the proposed regulatory language. The Council hosted 70+ workshops and public meetings and DLIS has been discussed at nearly 50 Council meetings. The Council's proposed definitions for levee operations and maintenance, and levee improvement were developed to align with the California Code of Regulations, the definitions in federal regulations and the Water Code and Flood Board.

Comments Concerning Request for Increased Coordination (Cont.)

- **Summary of Comments:** Interested parties should be allowed to rebut or supplement and review other comments of interested parties in writing prior to the Council taking action on the rulemaking.
 - **Summary of Response:** The Council is responding to comments in writing, as required. Written comments are part of the rulemaking file, and responses are included in the FSOR.

Comments Concerning Council Authority

- **Summary of Comments:** The Council does not have authority to regulate in this area, only to make recommendations
 - **Summary of Response:** The Legislature intended to give the Council the power to regulate Delta levee investment priorities by giving the Council specific authority and directive pursuant to Water Code sections 85306 and 85305, in conjunction with the Legislative intent to “to establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan” (Wat. Code, § 85001(c)) and empowering the Council to “adopt regulations or guidelines as needed to carry out the powers and duties identified in the [Delta Reform Act]” (Wat. Code, § 85210(i)). The Council has the power to request reports on issues concerning the implementation of the Delta Plan pursuant to Water Code section 85210(h).

Comments Concerning Council Authority (Cont.)

- **Summary of Comments:** The Council is not in compliance with the Administrative Procedure Act standards for authority. The proposed regulation limits DWR flexibility in levee funding decisions and may redirect funds from nonproject and nonurban areas within the Delta to fund urban projects that have other sources of funding.
 - **Summary of Response:** In accordance with Legislative intent, the Council has the authority to regulate in this area pursuant to Water Code sections 85306, 85305, 85210(h), and 85210(i) (*see also* Water Code section 85001(c)). The proposed regulation does not limit DWR's flexibility in levee funding decisions but requires DWR to submit a written report to the Council annually identifying its decisions to award State funds for Delta levee operation, maintenance, repair, rehabilitation, replacement and improvement projects within the legal Delta. The proposed prioritization is based on the risk to state interests, regardless of which program funds the investments and regardless of whether a levee is a project or nonproject levee. The proposed regulation does not specify which programs DWR is to include in its reporting, but rather requires DWR to explain the variations in funding for levee improvements relative to the recommended priorities. Consequently, the Council's expectation is that DWR would report on all discretionary funding decisions

Comments Concerning Council Authority (Cont.)

- **Summary of Comments:** The phrase “fund levee operation and maintenance” is unclear regarding the actions covered under Section 5012. It is unclear whether “Levee improvement” or “Levee operation and maintenance” would cover repair and rehabilitation to maintain levees to DWR Bulletin 192-82 and federal PL 84-99 standards.
 - **Summary of Response:** The Council removed the term “increasing the height of a levee” from section 5001(w) “Levee improvement” definition to clarify that restoration activities are not included in the definition for improvement.

Comments Concerning Council Authority (Cont.)

- **Summary of Comments:** The proposed regulation is contrary to Water Code section 12981.
 - **Summary of Response:** Water Code section 12981 does not apply to the Council's power to prioritize state investments in Delta levees. The Council's authority is pursuant to the Delta Reform Act set forth in Water Code sections 85000 et seq. After enacting the Delta Reform Act, the Legislature added Water Code section 12986, subsection (c), to Part 9 of Divisions 6, which clarifies that the Legislature intended the Council's levee priorities to be followed, stating "Reimbursements [for Delta levees] made pursuant to this section shall reflect the priorities of, and be consistent with, the Delta Plan established pursuant to Chapter 1 (commencing with Section 85300) of Part 4 of Division 35."

Comments Concerning Council Authority (Cont.)

- **Summary of Comments:** Terms defined in the proposed regulation are inconsistent with existing procedures and programs. Specifically, “levee improvement” and “levee operations and maintenance” are not aligned with definitions in federal regulations and the Water Code
 - **Summary of Response:** Proposed definitions for “levee operations and maintenance” and “levee improvement” align with the Flood Board’s definition of maintenance activities in California Code of Regulations, definitions in federal regulations and the Water Code, and Flood Board Resolution No. 2018-06
- **Summary of Comments:** The proposed regulation would override priorities established in other laws, specifically Water Code section 12313.
 - **Summary of Response:** Existing Water Code section 12313 (statutes of 1988) addresses special flood control works in the Delta *generally*, Water Code sections 85305 and 85306 (statutes of 2009) address the prioritization of state investments in Delta levees *specifically*. DWR is required to consult with appropriate agencies in complying with Water Code section 12313, including the Council and its prioritization. The Legislature was aware of existing laws governing this area when it gave the Council the authority and mandate to regulate and prioritize state investments in both project and nonproject Delta levees.

Comments Concerning DLIS Methodology

- **Summary of Comments:** Certain specific asset classes or population centers should be ranked as a higher priority. The Delta is an interconnected system and the DLIS priorities do not reflect the interconnected nature of the Delta.
 - **Summary of Response:** The Council developed DLIS based on a comprehensive methodology that quantifies risk by considering the threats to Delta levees and the assets protected by Delta levees. The DLIS also considers multiple beneficiaries of Delta levee investments.
- **Summary of Comments:** The DLIS priorities do not differentiate between large urban population centers on the periphery of the Delta and the largely agricultural islands and tracts in the Delta Primary Zone. There are different funding programs addressing each of these needs, and they should be prioritized separately.
 - **Summary of Response:** Given increasingly limited financial resources to support levee investments at the federal, state, and local levels, DLIS priorities are intended to identify the most efficient use of those resources by identifying the most urgent risks and evaluating the benefits and trade-offs of risk reduction alternatives relative to State interests.

Comments Concerning DLIS Methodology (Cont.)

- **Summary of Comments:** The first priority should be achieving a consistent levee standard throughout the Delta, such as Bulletin 192-82, before targeting specific islands and tracts for investment.
 - **Summary of Response:** The DLIS priorities are not directed toward achieving a specific levee standard or design geometry. The priorities are based on risk to defined State interests, and DLIS directs funding to islands and tracts with the greatest existing risk. In this way, a common prioritization can be applied across programs and across urban and rural environments, regardless of funding programs. This creates a level playing field for State interests, while strategically targeting the areas with the greatest risk for State investment.

Comments Concerning Subventions Program

- **Summary of Comments:** Some commenters expressed concern that proposed regulatory definitions of “levee operations and maintenance” and “levee improvement” do not support the existing Delta Levee Subventions Program.
 - **Summary of Response:** While the Subventions Program funds a variety of Delta levee activities, its first priority is operations and maintenance. The proposed regulation identifies operations and maintenance activities as a systemwide priority. The proposed regulation would require DWR to report on discretionary operations and maintenance activities funded by the Subventions Program, but it would not impact a maintaining agency’s ability to apply for or receive funding for activities through the Subventions Program.

Comments Concerning Subventions Program

- **Summary of Comments:** Proposed definitions in Section 5001 could modify the Subventions Program as it currently exists and limit funding opportunities for all Districts to perform necessary maintenance and rehabilitation of their levee systems. The Subventions Program already has priorities and a structure to balance funding universally in the Delta.
 - **Summary of Response:** As noted by DWR during the November 17, 2022, public hearing on the proposed regulation (Comment 16.15), the definitions included in the proposed regulation are aligned with and would not change the Subventions Program or the funding guidelines adopted by the Flood Board.

Comments Concerning Economic Analysis

- **Summary of Comments:** The EFIA does not adequately address the economic impacts anticipated by commenters, including but not limited to the system-wide cost of levee failure on statewide water supply reliability.
 - **Summary of Response:** The DLIS prioritization and its economic analysis considers a range of factors including water supply, public and private property, fatalities, recreation, and ecosystem/habitat. The Delta is considered as a system in the DLIS prioritization development process, but it was not possible to monetize the associated system-wide water supply reliability benefits or costs, because it is not possible to quantify the amount of water that would be disrupted, the duration of the disruption, and the effect on different users.

Comments Concerning Economic Analysis (Cont.)

- **Summary of Comments:** The DLIS priority system imposes a rigid mandate for how levee funding is distributed and would defund certain islands.
 - **Summary of Response:** The proposed regulation does not set a rigid priority system that would defund levee investments for levee operations, maintenance, or improvements to specific islands or tracts. Rather, it sets investment priorities (an order of operations) for available improvement funding. DLIS does not affect the amount of funding available from any program. DWR may vary from the DLIS funding priorities under certain circumstances and, if so, must report each variation and justify its funding decisions considering the established DLIS priorities.

Modification Made to Section 5001

- **Summary of Comments:** The phrase “increasing the height of a levee,” should be excluded from the proposed definition of levee improvement. Rehabilitation should be part of the definition of levee operation and maintenance because levees are known to settle, which requires raising levee crowns or repairing slopes to retain the previous level of flood protection.
 - **Summary of Response:** The Council modified the proposed definition of levee improvement (Section 5001(w)) to remove “increasing the height of a levee” as an example of a levee improvement, as follows:

“Levee improvement” means any activity that is not levee operation and maintenance, and that is intended to reduce the probability of flooding or the addition of a feature that did not previously exist. Examples of levee improvements include changing levee geometry to reach a higher level of protection, ~~increasing the height of a levee~~, providing riprap where none previously existed, and other similar activities.”

Modifications Made to Section 5012 and the Economic and Fiscal Assessment (EFIA)

- **Summary of Comments:** Request that the proposed regulation include a deadline date for DWR's annual report.
 - **Summary of Response:** The Council modified the proposed regulation (Section 5012(c)) to include a due date of no later than March 1 of each calendar year.
- **Summary of Comments:** Footnotes for the Economic and Fiscal Analysis published August 26, 2022, were missing from the document.
 - **Summary of Response:** Missing footnotes were provided in numerical order, published on the Council's website, and announced and provided at the monthly Council meeting on December 15, 2022.

Comments Expressing Support for the Proposed Regulations

- **Summary of Comments:** The Council received several comments expressing support for aspects or the whole of the regulation:
 - Agreement with the goal of prioritizing levee investments;
 - Appreciate the collaborative working relationship with Council staff and Flood Board;
 - Support for how the proposed regulation values operations and maintenance;
 - Clarification of Legislative intent and history;
 - Affirmation that it is time to make DLIS a regulation

Next Steps in the Rulemaking Process

- If Council adopts the proposed regulations, staff will finish preparing the final rulemaking packet for submittal to and approval by the Department of Finance and the Office of Administrative Law.
- Depending on the processing time at these agencies, the updated regulation would become effective July 1, 2023, or October 1, 2023

STAFF

RECOMMENDATION

Requested Action

Staff recommends that the Council adopt **Resolution 2023-01**, which would adopt the proposed amendments to Section 5001 and Section 5012, including Appendix P, of Title 23 of the California Code of Regulations, as modified after the November 17, 2022, public hearing, and authorize and direct the Executive Officer, or designee(s), to:

- (1) submit the FSOR and Form 399 to the Department of Finance (DOF); and
- (2) finalize and make such non-substantive changes to the Revised Proposed DLIS Rulemaking package and related documents as are necessary to effect the intent of this Resolution; and
- (3) Upon approval from DOF, submit the rulemaking file, including the Revised Proposed DLIS Rulemaking package to OAL for approval; and
- (4) make any non-substantive changes to the rulemaking file requested by the DOF or OAL to complete the rulemaking process.

Thank you

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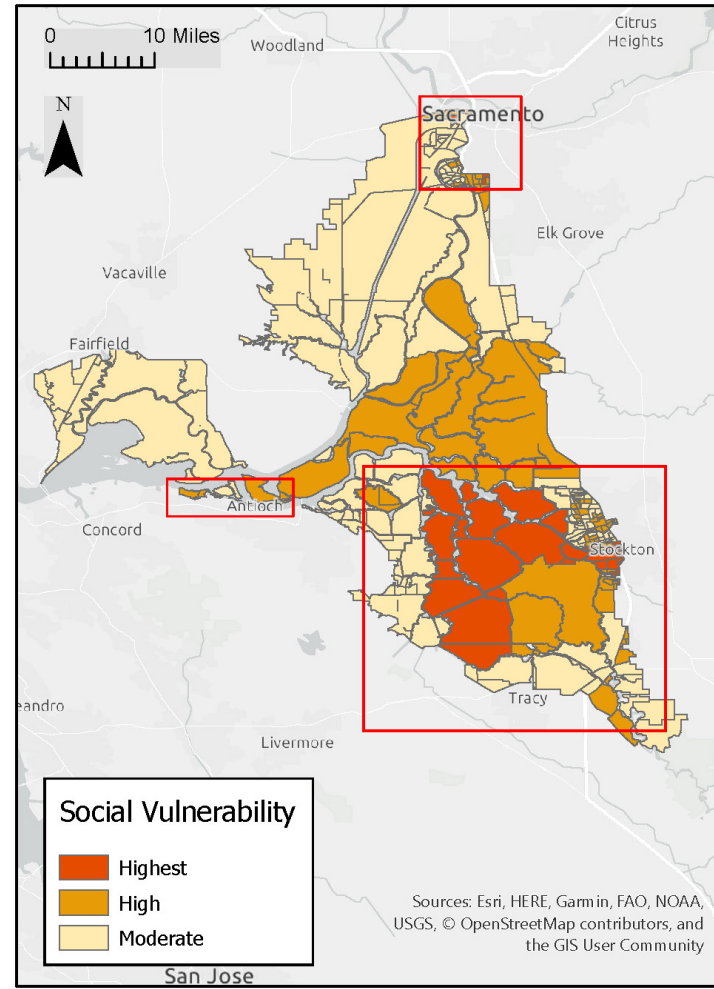
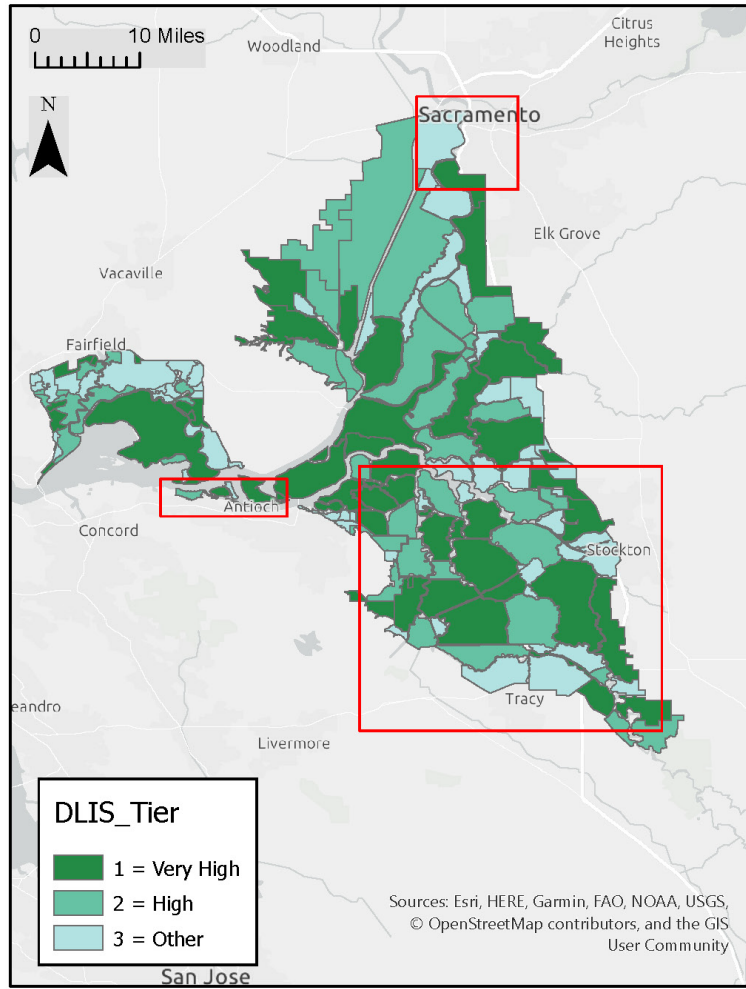
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RESERVE SLIDES FOLLOW

Social Vulnerability



Regions Containing Highest Vulnerability Areas

Staff Recommended Adjustments to DLIS 2021 Priorities

- **Dutch Slough and McCormack-Williamson Tract**
 - *Other to Very-High Priority*
 - Existing restoration plans
 - Ongoing construction
- **Pescadero District and Stewart Tract**
 - *Other to High Priority*
 - Identified in ER P3 as Priority Habitat Restoration Areas
- **Honker Bay Tract**
 - *Other to High*
 - Does not provide 50-year protection to Highway 4

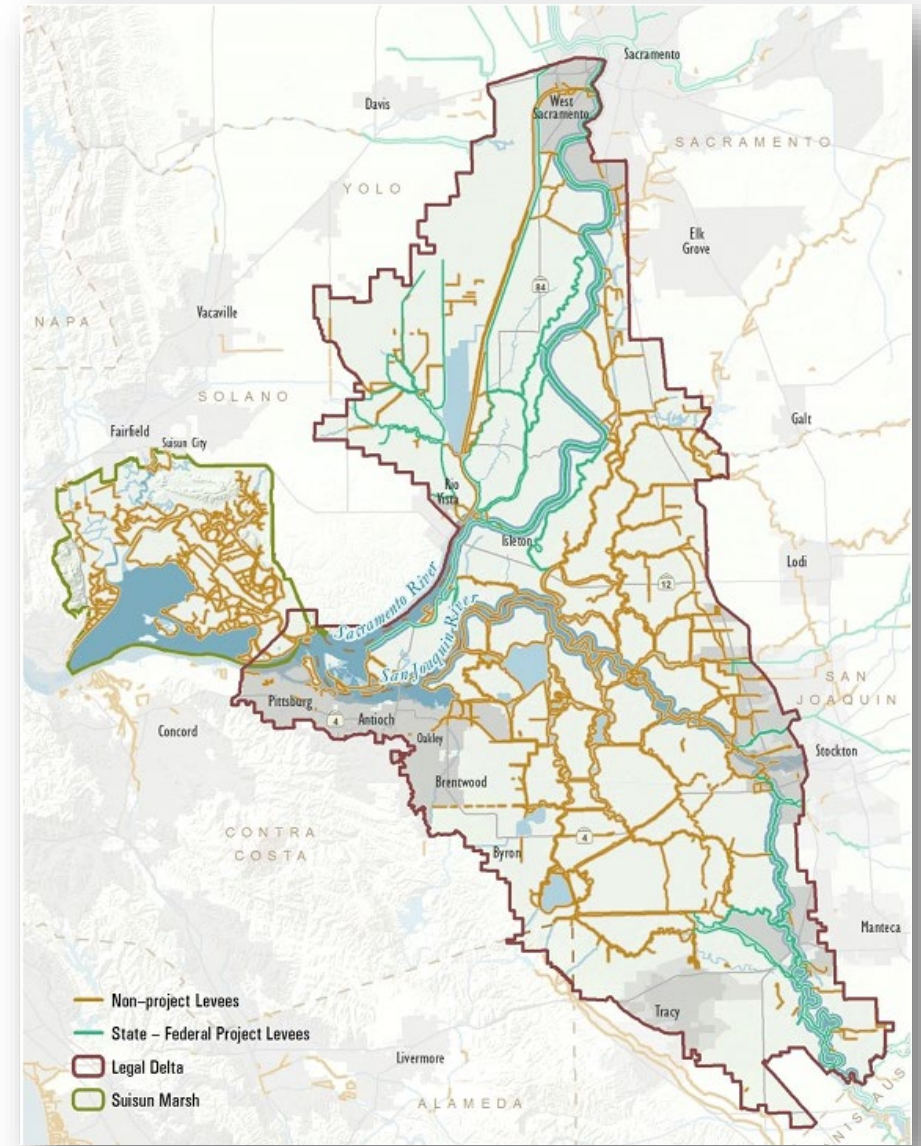
New Considerations

- *Climate Change*
 - Delta Adapts provides a better understanding of flood risk into the future
 - Adaptation Strategy will inform future DLIS updates
- Staff recommends moving Central Stockton to the **High Priority** to account for large socially vulnerable population.



Background

- Both project levees and non-project levees are located in the Delta
- Many State programs provide financial assistance to maintain and improve Delta levees
- No comprehensive strategy to prioritize levee investments



Delta Reform Act Water Code Section 85306

“The council, in consultation with the Central Valley Flood Protection Board, shall recommend in the Delta Plan priorities for state investment 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.”



Risk Reduction Policy RR P1

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

ISOR: Anticipated Benefits of the Proposed Amendments

- Setting **priorities for strategic Delta levee investments** that maximize the protection of people, property, and State interests
- Ensuring that the State **first invests 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
- Increasing public **awareness of how State expenditures maximize public safety** and protect State interests in the Delta

ISOR: Anticipated Benefits of the Proposed Amendments

- **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
- **Protected** high-value non-tidal **habitat**

ISOR: Fiscal Impacts to State and Local Agencies

- Costs to DWR to prepare and submit an annual report to the Council
- The **moderate additional annual costs** of preparing and reviewing the annual report would likely be **absorbed within existing budgets**
- No costs to, or mandates on, local agencies or school districts
- No nondiscretionary costs or savings to State or local agencies

California Environmental Quality Act

- In April **2018**, the Council adopted Resolution 2018-01 certifying the 2018 Delta Plan Amendments Program Environmental Impact Report (PEIR)
 - PEIR included an analysis of proposed DLIS priorities that were subsequently adjusted based on new information from additional data
- In August **2021**, the Council adopted Resolution 2021-02 certifying a PEIR Addendum to the 2018 Delta Plan Amendments PEIR and approving the proposed DLIS priorities as amendments to Delta Plan Policy RR P1 for purposes of rulemaking

