



**ACTION ITEM**

**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)**

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**Summary**

At today's meeting the Council will conduct a public hearing related to 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 (23 CCR section 5001 and section 5012).

**Requested Action**

Following the completion of the public hearing, staff recommends that the Council adopt Resolution 2019-2 (see **Attachment 1** to this staff report) authorizing and directing the Executive Officer, or designee(s), to prepare written responses to the public comments received by the Council on the proposed rulemaking; prepare other pertinent documents, including a Final Statement of Reasons; incorporate any changes identified by the Council at the August 22, 2019 meeting, and any other changes as necessary subsequent to that meeting; present the proposed regulations, including any such changes and the related pertinent documents, to the Council for consideration and possible adoption at a future Council meeting; and to take such actions and steps as are necessary to effect the intent of this Resolution.

**Background and Delta Reform Act Authority**

***Delta and Suisun Marsh Levees***

The Sacramento-San Joaquin Delta (Delta) is home to more than 500,000 people and comprises 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 section 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 furthers 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, inherent subgoals, and policy objectives of the Delta Reform Act, the Delta Plan contains regulatory policies, codified in California Code of Regulations, Sections 5001 through 5016.

The Delta Reform Act also 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 (Water Code section 85305(a)); and to 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**

#### ***April 2018 Council Action***

The Council adopted revisions to Chapter 7 of the Delta Plan and the Delta Levees Investment and Risk Reduction Strategy (DLIS) at its April 2018 meeting in Resolution 2018-1 (Resolution) (included as **Attachment 2** to this staff report), which also certified the Program Environmental Impact Report (PEIR) applicable to DLIS.

In the Resolution, the Council also directed the Executive Officer “to initiate rulemaking to repeal Delta Plan policy RR P1 (Cal. Code Regs., tit. 23, § 5012), to adopt Delta Plan policy RR P1 as shown in...revised Delta Plan Chapter 7..., to amend the Delta Plan Glossary (Cal. Code Regs., tit. 23, § 5001) to add the new glossary terms from new Delta Plan policy RR P1,...and to make any technical changes required by the Office of Administrative Law in order to achieve any of the forgoing.”

In the Resolution, the Council also authorized the Executive Officer to make non-substantive, technical changes and formatting edits identified subsequent to that meeting.

Pursuant to the Council’s direction, Council staff initiated the rulemaking process and published a Notice of Proposed Rulemaking to amend Sections 5001 and 5012 (RR P1) in the California Regulatory Notice Register on July 5, 2019. The notice announced a 45-day public review period on the proposed amendments from July 5, 2019, through

August 19, 2019 and that the public hearing on the proposed rulemaking would be held today, August 22, 2019.

### ***2013 Delta Plan***

In May 2013, the Council certified the Delta Plan PEIR and formally adopted the Delta Plan. The 2013 Delta Plan included Policy RR P1 (Section 5012), *Prioritization of State Investments in Delta Levees and Risk Reduction*, in order to guide discretionary State investments in Delta flood risk management prior to completing and adopting the DLIS priorities (developed pursuant to Water Code section 85306), which are included in this amendment. Policy RR P1 set 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 2013 Delta Plan described a method to prioritize State investments in operations, maintenance, and improvement projects for levees in the Delta and Suisun Marsh. The development of DLIS would need to adequately assess Delta flood risk and included recommendations to: 1) assess existing Delta levee conditions; 2) develop an economics-based risk analysis for each Delta tract and island; 3) conduct ongoing Delta flood risk analyses in an open manner for the public; and 4) develop an updated understanding of Delta hydrology. The effort pursuant to this framework resulted in the proposed amendment to Section 5001 (Definitions) and Section 5012 (RR P1) that is before the Council today.

### **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; and 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 island's or tract's assets encompass.

### **Proposed Regulatory Amendment to Sections 5001 (Definitions) and 5012 (RR P1)**

The proposed amendments to Section 5001 and Section 5012 are provided as **Attachment 3** to this staff report. The proposed regulatory changes are shown in underline and preceded by the symbol ( $\mu$ ) to indicate additions, and shown in strikeout and preceded by the symbol ( $\beta$ ) to indicate deletions relative to the existing regulations<sup>1</sup>.

#### ***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.

The proposed amendment would also direct the Department of Water Resources (DWR) to fund levee projects at Very-High Priority islands or tracts before approving projects at High Priority or Other Priority islands or tracts. It 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 specific information that identifies its decisions to award State funds for Delta levee improvements and levee rehabilitation projects. When DWR's contributions towards such projects vary from the DLIS priorities, the annual report must 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 4** to this staff report). Council staff created 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 six new terms used in the proposed amendment to Section 5012: "Levee Improvement", "Levee Maintenance", "Levee Rehabilitation", "Very-High Priority islands or tracts", "High Priority islands or tracts", and "Other Priority islands or tracts".

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<sup>1</sup> These symbols are used to ensure readability for screen reading software.

### ***Objectives and Benefits of the Proposed Amendment***

As discussed in the Initial Statement of Reasons (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 5** 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 State water supply reliability;
- Increased protection for cultural, recreational, natural resource, and agricultural qualities that distinguish the Delta; and
- Improved transparency and public awareness of State levee funding decisions.

### ***Fiscal Impacts to State and Local Agencies***

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 5** to this staff report, the proposed amendments would create fiscal costs to State agencies of approximately \$368,000 per year. DWR would be required to prepare and submit an annual report to the Council describing Delta levee investments and, if necessary, justify why funding decisions deviated from the priorities in the proposed amendment. The Council would be required to review the annual report prepared by DWR. The additional cost of preparing an annual report 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.

***Non-Substantive and Technical Changes to RR P1 since April 2018 Adoption***

Resolution 2018-1 (**Attachment 2** to this staff report), adopted by the Council at its April 26, 2018 meeting, directed the Executive Officer to incorporate the errata, any other non-substantive, technical changes identified and directed by the Council at the April meeting, and any other non-substantive, technical changes and formatting edits identified subsequent to that meeting.

The proposed amendment reflects non-substantive, technical changes made by the Executive Officer that were identified in the rulemaking process since April 26, 2018. **Attachment 6** to this staff report identifies these changes, including removing the requirement for DWR to certify its levee investment decisions subject to review by the Council on appeal, and various clarifying language additions and edits.

**CEQA Compliance**

Resolution 2018-1 also certified that the PEIR for the Delta Plan Amendments was prepared in compliance with the requirements of the California Environmental Quality Act (CEQA) (Public Resources Code section 21080.5 et seq.) and approved the Delta Plan Amendments. The 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 Levee Invest[ment] and Risk Reduction Strategy (“DLIS”).” The DLIS priorities adopted in the Delta Plan Amendments and certified in the PEIR are the same as in this proposed amendment. The proposed amendment is within the scope of the project analyzed in the certified PEIR and approved by the Council in the Resolution, and the PEIR adequately describes the proposed amendment for purposes of CEQA.

**Rulemaking Process under the Administrative Procedures Act**

Council staff initiated formal rulemaking under the California Administrative Procedure Act by filing a Notice of Proposed Rulemaking, published in the California Regulatory Notice Register on July 5, 2019, requesting comments from the public during a 45-day public review period from July 5, 2019, through August 19, 2019.

***Public Comments and Responses***

The Council anticipates receiving public comment letters from interested parties following the publication and distribution of this staff report. Such comments will be provided to the Council as supplemental materials at the August 22, 2019 meeting. In addition, public comments may be offered during the public hearing. Council staff will prepare written responses to all comments received in a Draft Final Statement of Reasons, which will be presented to the Council for consideration at a future meeting.

### ***Draft Rulemaking Documents***

The following draft rulemaking documents are attached for your consideration.

#### Proposed Amendment to Existing Regulation (Attachment 3 to this staff report)

The text of the proposed regulation is included as Attachment 3 to this report.

#### Delta Plan Appendix P (Attachment 4 to this staff report)

The new Delta Plan Appendix containing detailed maps of the prioritized Delta islands and tracts is included as Attachment 4 to this report.

#### Initial Statement of Reasons (Attachment 5 to this staff report)

An Initial Statement of Reasons was provided for public review during the comment period beginning on July 5, 2019. It includes an attached supporting document that evaluates the questions addressed in the Economic and Fiscal Impact Statement (see description below) as well as a cost analysis that briefly describes the expected benefits of the proposed rulemaking.

#### Economic and Fiscal Impact Statement (STD Form 399 Economic and Fiscal Impact Statement) (Attachment 7 to this staff report)

The Draft STD 399 Form Economic and Fiscal Impact Statement will be included in its final form in the final rulemaking record submitted to the OAL. The STD 399 is based on the information in the 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 July 5, 2019.

### **Staff Recommendation for Council Action**

Following the completion of the public hearing, staff recommends that the Council consider public comments and the proposed amendments, and adopt proposed Resolution 2019-02 (included as **Attachment 1** to this staff report), through which the Council would direct staff to make changes to the rulemaking package to respond to public comments, and adjourn consideration of the proposed amendments to a future Council meeting.

### **List of Attachments**

- Attachment 1: Resolution 2019-02: 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: Resolution 2018-1: Certification of the Delta Plan Amendments Program Environmental Impact Report; Adoption of Findings and a Statement of Overriding Considerations, Mitigation Measures, and a Mitigation Monitoring and Reporting Program; and Adoption of the Delta Plan Amendments

- Attachment 3: Proposed Amendment to Existing Regulation 23 CCR sections 5001, and 5012
- Attachment 4: Proposed Delta Plan Appendix P
- Attachment 5: Initial Statement of Reasons and Economic and Fiscal Impact Assessment
- Attachment 6: Changes to Proposed Regulation since April 2018 Adoption
- Attachment 7: Economic and Fiscal Impact Statement

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