



**ACTION ITEM**

**Delta Levees Investment Strategy Regulation Update**

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**Summary:** At today's meeting, Council staff will discuss new information that could impact the estimation of risks to State interests in the Delta. Staff is requesting that the Council take action and adopt a resolution to withdraw the current regulatory adoption process for Delta Plan Policy RR P1; and direct staff to evaluate if this new information could change the prioritization of Delta levees and tracts in the Delta Levees Investment Strategy (DLIS).

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**Requested Action**

Staff recommends that the Council adopt Resolution 2020-01 (Attachment 1) which would:

- 1) Determine that the proposed actions are exempt from environmental review pursuant to California Environmental Quality Act (CEQA) Guidelines sections 15061(b)(3) and 15262;
- 2) Amend Chapter 7 of the Delta Plan to delete text describing DLIS and proposed Policy RR P1 and restore text describing these items previously adopted in 2013 but removed from the Delta Plan in 2018;
- 3) Authorize the Executive Officer to prepare and submit to the Office of Administrative Law (OAL) a Notice of Decision Not to Proceed on Proposed Rulemaking for Section 5001 (Definitions) and Section 5012 (Delta Levees Investment Strategy) of Title 23 of the California Code of Regulations (Government Code section 11347); and
- 4) Direct Council staff to evaluate the new information and report to the Council at a future date for further direction and action.

**Background**

The Council initiated formal rulemaking under the California Administrative Procedure Act (APA) by filing a Notice of Proposed Adoption, published in the California Regulatory Notice Register on July 5, 2019 to amend California Code of Regulations, title 23, section 5012 for Policy RR P1. The APA requires rulemakings to be completed within one year of issuing the notice (Gov. Code, § 11346.4). The California Department of Water Resources recently published new Light Detection and Ranging (or LiDAR) elevation imaging of the Delta and Suisun Marsh. This information provides updated information about the height of levees and island floors and needs further evaluation to inform whether the priorities identified in Delta Plan Policy RR P1 (2018), and the proposed regulation, require modification because of changed levee or island conditions. Because this evaluation is needed, the Council will not be able to complete the rulemaking within one year of filing the Notice of Proposed Adoption. Therefore, staff recommends that the Council issue a Notice of Decision Not to Proceed pursuant to Government Code section 11347; and amend Delta Plan, Chapter 7, to delete portions

of Chapter 7 describing priorities for state investment in levees and Delta Plan Policy RR P1, as amended in 2018, restoring the version of Delta Plan Policy RR P1 adopted in 2013. Council staff will evaluate the new information and report to the Council for further direction and action.

### ***Delta and Suisun Marsh Levees***

The Sacramento-San Joaquin Delta (Delta) is home to about 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 includes about 230 miles of levees. 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 cause injury or loss of life, disrupt water supplies, and damage property, infrastructure, and environmental resources. Since 1975, the State has invested approximately \$700 million dollars toward maintaining and improving nonproject levees, which are largely managed by local reclamation districts. The State does not currently have a comprehensive method to prioritize its levee investments in the Delta and Suisun Marsh.

### ***Delta Reform Act Requirements and Authority***

The Delta Reform Act requires the Council in the Delta Plan to recommend priorities for State investment in levee operation, maintenance, and improvements in the Delta, including both project levees for which the State has accepted maintenance and operations responsibility from the federal government (which are part of the State Plan of Flood Control), and nonproject levees (which are not a part of the State Plan of Flood Control) (Wat. Code, § 85306). The Delta Reform Act also requires that the Delta Plan be “based on the best available scientific information” (Water Code section 85308).

To guide discretionary State investments in Delta flood risk management pursuant to the Delta Reform Act, the Council adopted Policy RR P1 (Section 5012), *Prioritization of State Investments in Delta Levees and Risk Reduction*, as part of the 2013 Delta Plan. This set forth interim priorities for State levee investments. Key priorities for interim funding include emergency preparedness, response, and recovery, as well as Delta levees funding.

The 2013 Delta Plan also described a framework for the development of DLIS to 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

### ***DLIS Development Process***

The Council formulated DLIS between 2014 and 2016. This work included partnering with the Department of Water Resources (DWR) and the Central Valley Flood Protection Board (CVFPB), advice from Council members, extensive technical analysis, independent peer review of the proposed methodology, and numerous discussions at

Council meetings. The Council also deployed 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.

As part of the DLIS process, Council staff, supported by a consultant, developed the DLIS-Decision Support Tool (DST), a computerized tool designed to explore flood risks to state interests on Delta islands protected by levees. The DLIS-DST was used to create risk maps that helped inform Council decision-making for the update to Policy RR P1 described below.

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 risk analysis, economics, engineering, and decision-making techniques to identify funding priorities and assemble a comprehensive investment strategy for Delta levees, the Council developed the DLIS. The 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 each island's or tract's assets encompass.

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

In 2018, the Council adopted revisions to Chapter 7 of the Delta Plan including the DLIS. 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."

### ***Ongoing Rulemaking Process***

Pursuant to the Council's direction, Council staff initiated the rulemaking process and published a Notice of Proposed Rulemaking to amend California Code of Regulations, Title 23, Sections 5001 and 5012 in the California Regulatory Notice Register on July 5, 2019; issued an Initial Statement of Reasons for the proposed rulemaking; and initiated a 45-day comment period that closed on August 19, 2019. The Council held a noticed public hearing on the proposed rulemaking on August 22, 2019. At that time, the Council directed staff to meet with stakeholders and adopted Resolution 2019-02, which further directed staff to address public comments received during the comment period and at the hearing, and to return to the Council for final action at a later date. Council staff have reviewed the public comments received. While these comments will not be considered as part of the official future rulemaking, they will be considered in the development of the future rulemaking.

The California Administrative Procedure Act requires rulemakings to be completed within one year of issuing the notice (Gov. Code, § 11346.4).

### ***New Information***

The risk maps produced by the DLIS-DST are based on Delta levee and island floor elevation data from 2007, which was the best available information at the time. The California Department of Water Resources recently published new elevation imaging of the Delta and Suisun Marsh for 2017, which provides updated information about the height of the levees and floors of islands and tracts. The DLIS methodology uses the levee geometry to estimate the levee's fragility. The height of levees and island floors have a direct correlation to how risk is estimated for each island and tract (e.g., a higher levee has a lower risk of overtopping).

The 2017 LiDAR imaging presents new information that could impact the estimation of risks to State interests in the Delta. The DLIS-DST uses levee fragility curves to estimate the chance and consequence of flooding to each island and tract. The DLIS methodology outlines a procedure to develop these curves using information specific to each island and tract, including the elevation of levees and the floor of the island or tract. Levee improvement projects and ongoing land subsidence have the potential to significantly impact these conditions, changing each island's and tract's fragility curve and estimated risk. While these items would be accounted for in updated elevation information afforded by the 2017 LiDAR imaging, the magnitude of resulting changes cannot be estimated without developing new fragility curves running the DLIS-DST with the new information and evaluating the results. This process may result in changes to the risk maps produced by the tool. Depending on the significance of the changes, the Council may want to assign different priorities (Very-High, High, Other) to each Delta island or tract as part of Policy RR P1. This process will take time and cannot be accomplished before the deadline for the current rulemaking process.

### ***Next Steps***

To accommodate the work that needs to be accomplished and ensure adequate stakeholder and public participation, staff recommends withdrawing the current rulemaking proposal by filing a Notice of Decision Not to Proceed, completing the evaluation described above, facilitating a stakeholder participation process, and reinitiating the rulemaking at a later date.

During the rest of 2020, working with a consultant, Council staff proposes to develop updated fragility curves based on the updated island and tract levee elevation data using the procedure outlined in the 2016 DLIS Methodology Report. Once the updated curves are developed, Council staff will offer webinars to engage key stakeholders to discuss the revised data, step through the methodology used to develop updated curves, and provide the Reclamation Districts the opportunity to provide feedback, including at the Delta Levees Habitat Advisory Committee (DLHAC), a stakeholder group comprised of representatives from Reclamation Districts and state agencies working on levee issues in the Delta. The purpose of the meetings will be to receive and review information pertaining to potential revisions to Delta levee fragility curves. Council staff will review the feedback and proposed revisions from stakeholders and Council members before finalizing the fragility curves.

Once the fragility curves have been finalized, Council staff will update the DLIS-DST database and rerun the DST to re-calculate risk and prioritization information. The results of the new analysis will be presented to the Council for deliberation.

To ensure clarity regarding existing content of the Delta Plan and currently applicable regulations, staff also recommends rescinding portions of Chapter 7 pertaining to Policy RR P1 that were amended in 2018 and reverting back to versions describing Policy RR P1 that describe the interim levee investment priorities adopted in 2013 that are the basis for the current regulation (Cal. Code Regs., title 23, section 5012).

### **California Environmental Quality Act Compliance**

Staff has determined that the recommended actions described above would be exempt from the California Environmental Quality Act (CEQA) under the following provisions:

#### **Common Sense Exemption (14 CCR section 15161(b)(3)) (State CEQA Guidelines)**

Pursuant to the “common sense exemption” in the State CEQA Guidelines, “[a] project is exempt from CEQA...[w]here it can be seen with a certainty that there is no possibility that the activity in question may have a significant effect on the environment...That is because ‘CEQA only applies to projects, which have the potential for causing a significant effect on the environment.’” The 2013 text for policy RR P1 that will be restored to the Delta Plan is the basis for the existing regulation in the California Code Regulations, title 23, section 5012; therefore, there will be no change in the regulations applicable to the covered actions at this time and no potential for a significant effect on the environment.

#### **Statutory Exemption – Feasibility and Planning Studies (Public Resources Code section 21102; 14 CCR section 15262 (State CEQA Guidelines))**

“A project involving only feasibility or planning studies for possible future actions which the agency...has not yet approved, adopted, or funded does not require the preparation of an EIR or negative declaration but does require consideration of environmental factors.” Planning and feasibility studies for possible future actions, such as the evaluation of new elevation data to inform DLIS, are exempt from environmental review.

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

Staff recommends that the Council adopt Resolution 2020-01 (Attachment 1) which would:

- 1) Determine that the proposed actions are exempt from environmental review pursuant to California Environmental Quality Act (CEQA) Guidelines sections 15061(b)(3) and 15262;
- 2) Amend Chapter 7 of the Delta Plan to delete text describing DLIS and Policy RR P1 and restore text describing these items previously adopted in 2013 but removed from the Delta Plan in 2018;
- 3) Authorize the Executive Officer to prepare and submit to the Office of Administrative Law (OAL) a Notice of Decision Not to Proceed on Proposed Rulemaking for Section 5001 (Definitions) and Section 5012 (Delta Levees Investment Strategy) of Title 23 of the California Code of Regulations (Government Code section 11347); and

- 4) Direct Council staff to evaluate the new information to determine if further modifications to Chapter 7 are needed, and report to the Council at a future date.

**Fiscal Information**

Funds to support this work will be provided from unobligated FY 19-20 funds (\$257,700) and FY 20-21 funds (approximately \$60,300), for a total of approximately \$318,000. Agenda Item 10 for today's meeting includes a proposed amendment to Contract No. 1461 with Stantec Consulting Services, Inc. that would incorporate these funds.

**List of Attachments**

Attachment 1: Council Resolution 2020-01 and Attachments (*Attachment 2 of the Resolution attachments is available upon request by emailing [archives@deltacouncil.ca.gov](mailto:archives@deltacouncil.ca.gov)*)

**Contact**

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