



CALIFORNIA CENTRAL VALLEY
FLOOD CONTROL
ASSOCIATION

<i>Executive Director</i>	MELINDA TERRY
<i>President</i>	MIKE HARDESTY
<i>Vice President</i>	LEWIS BAIR
<i>Treasurer</i>	PETE GHELFI

August 19, 2019

Delta Stewardship Council
980-9th Street, Suite 1500
Sacramento, CA 95814

DELIVERED VIA EMAIL: oal_amendRRP1@deltacouncil.ca.gov;
Erin.mullin@deltacouncil.ca.gov; Anthony.navasero@deltacouncil.ca.gov

SUBJECT: Comments on DLIS Rulemaking

Dear Council Members:

The CA Central Valley Flood Control Association (CCVFCA/Association) submits these comments on the proposed rulemaking for Title 23 Section 5001 (Definitions) and Section 5012 (Delta Levee Investment Strategy-Delta Plan RR P1) currently scheduled for the August 22, 2019 hearing (Item #11). As you know, CCVFCA's members are local agencies (Reclamation Districts/RDs) that perform the daily routine operation and maintenance (O&M) of levees and drainage ditches and canals.

EXISTING DELTA OBJECTIVES

The Delta is one of the most fertile agricultural areas in the United States, supporting a variety of crops and a wine appellation region, contains California's most important high-quality natural gas producing areas, world-class recreational opportunities, important shipping and highway routes, water supply conveyance corridor, and habitat for hundreds of species.

The coequal goals and other objectives in the 2009 Delta Reform Act are merely the latest of numerous Delta directives and declarations adopted into law over the years by the State Legislature that recognize the statewide importance of protecting the unique values of the Delta from flood damage:

WC §12981(a) - Declares the Delta's many invaluable and unique resources are of major statewide significance.

PRC §29701 – Declares the Sacramento-San Joaquin Delta as a natural resource of statewide, national, and international significance, containing irreplaceable resources, and it is the policy of the State to recognize, preserve, and protect those resources of the Delta for the use and enjoyment of current and future generations.

PRC §29712 – Declares the Sacramento and Stockton shipping ports as economic and water dependent resources of statewide significance.

PRC §29703 – Declares the Delta as an agricultural region of great value to the state and nation; and the continued retention and dedication of that land in agricultural production contributes to the preservation and enhancement of open space and habitat values.

PRC §29712 – Declares the Delta’s waterways, marinas, and recreational boating are of statewide and local significance; and a source of economic benefit to the region.

PRC §29702(a) – State goals for the Delta include achieving coequal goals of providing a more reliable water supply and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals must be achieved in a manner that protects and enhances the unique cultural, recreational, natural resources, and agricultural values of the Delta as an evolving place.

Many of these long-standing statutes include specific legislative directive in regards to maintaining the Delta’s levee system in Delta planning and implementation:

PRC §29704 – Declares that the public safety risks and costs of public emergency responses to floods to be of critical statewide significance in the Delta and that the improvement and ongoing maintenance of the levee system is a matter of continuing urgency to protect farmlands, population centers, the state’s water quality, and significant natural resource and habitat areas.

WC §12981(b) - Declares that the Delta’s uniqueness is particularly characterized by its hundreds of miles of meandering waterways and numerous adjacent islands; and that the key to preserving the Delta’s physical characteristics is the system of levees.

WC §12981(b) - Declares that the physical characteristics of the Delta’s system of levees should be preserved in their present form in order to preserve the Delta invaluable resources, which includes highly productive agriculture, recreational assets, fisheries, and wildlife environment.

WC §12981(c) – Declares that funds necessary to maintain and improve the Delta’s levees to protect the Delta physical characteristics should be used to fund levee work that would promote agricultural and habitat uses in the Delta consistent with the purpose of preserving the Delta’s invaluable resources.

WC §12982 – Declares that while most of the Delta’s are privately owned and maintained, there are added levee maintenance costs associated with varied multiple uses that benefit other interests and the public at large.

WC §12983 – Declares that there is an urgent need for a higher degree of levee maintenance and rehabilitation generally throughout the Delta and that the State has an interest in providing financial and technical assistance. The purpose of the state’s approval of plans and inspection of works set forth in the Delta Subventions program is

to provide fiscal oversight of expenditures, ensure levees are effectively maintained and rehabilitated in order to reduce the probability of failure and State's liability exposure.

WC §12986(c) – Delta Subvention reimbursements shall reflect the priorities of, and be consistent with, the Delta Plan.

WC §12987 – Local agencies maintaining project or non-project levees are eligible for Delta Subventions reimbursement, including plans for the routine maintenance of levees.

WC 12987(f) – CVFPB must apportion reimbursement funds among those levee segments that are most critical and beneficial in terms of flood control, water quality, recreation, navigation, habitat improvements, and fish and wildlife.

WC §12225 – Establishes DWR Bulletin 192 as the plan for improving Sacramento-San Joaquin Delta levees, to guide the formulation of projects to preserve the integrity of the Delta levee system.

DELTA FLOOD PROTECTION

There are approximately 600 miles of non-project levees and 380 miles of project levees¹ under the jurisdiction and responsibility of the Central Valley Flood Protection Board (CVFPB). The Delta's comprehensive interconnected system of levees is absolutely critical to public health and safety, including the protection of the region's transportation, agrarian economy, communities, and water conveyance.² Levees provide this protection at all times, during two daily high tides and seasonal high-flow events.

The State's interest in funding Delta levee maintenance has been well-documented in statutes over the last 50 years. In the Delta Levee Maintenance Subventions Program Water Code §12981(c) the Legislature declares that funds necessary to maintain and improve Delta levees should be used to fund levee work that would promote agricultural and habitat uses and §12983 declares the State has an interest in providing financial assistance for Delta levee maintenance *and* rehabilitation and further declares that subvention funds must be expended to ensure that Delta levees are effectively rehabilitated and maintained. To further protect public interests, the Legislature subsequently created the Delta Special Projects grant program with the primary purpose of protecting discrete public benefits defined as: urbanized areas, water quality, navigation, recreation, highways and roads, utility lines and conduits, and habitat.³

Renewed commitment of the state in levee investments typically followed severe flooding which required federal assistance to repair damaged levees. Following the 1969 levee breaks flooding Sherman and Mildred Islands, the Legislature funded a plan to evaluate the feasibility of providing flood control, recreation, wildlife habitat, and environmental enhancement.

¹ Delta levee mile data from Table 1 and 2 in the Delta Protection Commission's Economic Sustainability Plan, pages 61 and 62, adopted in 2012.

² DWR *A Framework for Department of Water Resources Integrated Flood Management Investments in the Delta and Suisun Marsh* (September 24, 2013)

³ Water Code §12311.

The need for the improved levee protection of the Delta was reinforced on a sunny summer day in 1972 when a San Joaquin River levee broke, flooding Brannan and Andrus Islands, and the town of Isleton. This caused the shutdown of export water supplies for six months and the eventual release of 500,000 acre-feet of reservoir water to flush salinity out before pumping at the SWP and CVP water projects could resume.

When technical studies for Bulletin 192-82 were being finalized by the Department of Water Resources (DWR) and the U.S. Army Corps of Engineers (USACE) in August 1982, the levee protecting McDonald island collapsed, forcing farm workers to take refuge on rooftops and the evacuation of 100 people. As final edits were being completed, on November 30, 1982, the levee on Venice Island failed, flooding 3,200 acres of farmland. FEMA threatened to deny future levee repair funding unless levee maintenance efforts were improved when several Delta levees over-topped and breached during storm events in 1986.

Fast forward to 2019 and levee failures in the Delta are now a rare occurrence, with the last failure on a sunny day in June 2004 at Upper Jones Tract, and the last failures during a flood event occurring way back in 1986. Progress towards achieving the Bulletin 192-82 standard has steadily occurred since the State Legislature established the Delta Levees Maintenance Subvention Program (Subventions) in 1973, with recent acceleration in improvements after voters approved \$4 billion in flood protection bond funding after Hurricane Katrina. CCVFCA believes levee maintenance performed with funding from the Subventions program is the reason for reduced flood risk and encourages the DSC to not deviate from this path of proven long-term success. The fact that there have not been any Delta levee failures during flood events over the last three decades is evidence the state's financial investment of more than \$600 million has paid off and should be continued.

STATE PLAN OF FLOOD CONTROL RESPONSIBILITY AND LIABILITY

Authorized by Congress in 1917, the Sacramento River Flood Control Project (SRFCP) is a system of "Project levees" and flood bypasses designed and built by the U.S. Army Corp of Engineers (USACE/Corps) so the individual segments and elements will function as integrated flood control components to facilitate farming and protect people and property in the Central Valley Basin, including the Delta. The San Joaquin Flood Control Project was subsequently constructed by the USACE.

Collectively, the facilities, lands, programs, conditions, and mode of O&M for the State-federal flood protection system in the Central Valley are referred to as the State Plan of Flood Control (SPFC).⁴ There are more than 1,600 miles of State-federal Project levees in the Central Valley, of which approximately 380 miles are located in the Delta. Approximately 600 miles of additional Delta levees are classified as "non-project."

In 1953, these SPFC works were transferred to California with a memorandum of understanding (MOU) confirming the State's obligation to operate and maintain all completed works/facilities and to hold the federal government harmless. When an improvement to any feature of the SPFC system is completed, the Board accepts responsibility for the project, but transfers the daily operation and maintenance (O&M) duties to a local agency such as: reclamation and levee

⁴ Public Resources Code (PRC) Section 5096.805 (j). A complete description of these assets and resources has been compiled by DWR into the *State Plan of Flood Control Descriptive Document*.

districts or joint power authorities that also include cities and counties with flood management responsibilities such as Sacramento Area Flood Control Agency (SAFCA).

The Board authorizes use of the SPFC facilities by issuing encroachment permits only *if the project is compatible with the flood system and will not hamper the State's O&M responsibilities*. The Board's authority and jurisdiction over levees and the floodways and the levee maintenance assurances provided to the Army Corps should be a state priority in the Delta Levee Investment Strategy.

The CVFPB also reviews, approves, and enters into funding agreements with more than 60 local reclamation districts under the Delta Levee Maintenance Subventions Program to “preserve the physical characteristics of the Delta essentially in the present form.”⁵

Under the USACE's PL 84-99 Rehabilitation Inspection Program (RIP), as the non-federal sponsor, the CVFPB must pay 20% for the cost to repair a SPFC project levee damaged by a flood event, with the USACE responsible for the remaining 80%. Adoption of Sections 5001 and 5012 as currently proposed may ultimately result in loss of federal repair funding due to inadequate maintenance investments by the non-federal sponsor (state) for project levees with lower priority in DLIS. Federal funding for the repair of non-project levees under FEMA may also be reduced for lower priority islands in DLIS.

In 2007 the State Legislature passed legislation requiring DWR to develop a Central Valley Flood Protection Plan (CVFPP), to be adopted by the CVFPB, that is a comprehensive framework for system-wide flood management and flood risk reduction in the Sacramento and San Joaquin River Basins. The Board adopted the plan in 2012 and in the resolution adopting the *CVFPP 2017 Update* identified the funding and operation and maintenance of the State Plan of Flood Control (SPFC) system as the highest priority. More recently, the CVFPB adopted Resolution 2018-06 for the acceptable operation and maintenance of the SPFC system.

Deviating from existing definitions of levee maintenance that results in the state reducing investments in maintenance of SPFC levees will ultimately increase state liability and costs to pay for flood damage caused by levee failures.

After severe flooding in 1986, more than 3,000 plaintiffs filed a lawsuit against the State (*Paterno v. State of California*), claiming damages from a SPFC Project levee failure near Yuba City which resulted in evacuations, deaths, and hundreds of millions of dollars in property losses. In 2003, the State of California settled the case for \$467 million after the Third Appellate Court concluded in an appeal of the inverse condemnation lawsuit that the State was liable as the party responsible for the SRFCP facilities (Project Levees). One of the key factors in assessing the “reasonableness” of the risk inherent to the state's levee project included the fact that the *state benefitted as a whole from the decision not to fund the levee improvements that would have prevented the breach*, with foreseeability a supplemental issue considered. *[emphasis added]*

⁵ Water Code §12981(b).

CONCERNS WITH PROPOSED DLIS REGULATIONS

While Council staff recently met with DWR, Central Valley Flood Protection Board (CVFPB), and Delta reclamation district representatives on the proposed DLIS regulations, we believe these discussions are insufficient and additional time should be provided to address the following issues before the Council takes action to adopt Resolution 2019-2.

Proposed Regulations Exceed DSC's Statutory Authority

The authority to promote and recommend priorities for state investment in Delta levees pursuant to the Delta Reform Act does not constitute authority to regulate as proposed in Section 5001 and 5012. Final decisions on allocation of funding appropriated by the Legislature remains the responsibility of DWR and the CVFPB.

The CVFPB is responsible for approval of reimbursement for levee work performed under the Delta Levee Maintenance Subventions program and DWR is responsible for the disbursement of funding in all other levee grant programs.⁶ In the case of the Delta Plan, DWR and the CVFPB must consider recommendations on prioritization in DLIS when making levee funding decisions.

Regulations to implement DLIS should clearly describe the fact that the levee funding agencies must use the prioritization as guidance when disbursing state investments in levees, but avoid shifting final decision-making to the DSC as this exceeds the Council's statutory authority under the Delta Reform Act.

Increased State Liability for SPFC Levees

These proposed regulations are in direct conflict with the CVFPB's Resolution No. 2018-06 which defines operations, maintenance, repair, rehabilitation and replacement (OMRR&R) and identifies the CVFPB's requirement to meet their responsibility for OMRR&R for the State Plan of Flood Control (SPFC) facilities, as well as the importance of obtaining active status in the U.S. Army Corps of Engineers (USACE) PL 84-99 Rehabilitation Inspection Program (RIP).

The Economic Analysis failed to analyze the fiscal impact of not receiving federal levee repair funding under PL 84-99 or increased state costs for paying damage lawsuits when levees fail due to maintenance funding being redirected to other levees designated as higher priority under DLIS.

Table 1 and 2 Delta Levees in the DSC's Economic Sustainability Plan (pages 61 and 62) list how many miles of SPFC project levees are on each island. The Economic Analysis should have identified which islands with project levees are in the lower prioritization categories and disclosed how many miles would be at higher risk of failure if will no longer be receiving state funding under DLIS prioritization. This analysis should also quantify the increased costs the state will incur for levee repair if no longer eligible for federal funding and if has to pay liability lawsuits for flood damage from levee failures.

⁶ DWR is responsible for the disbursement of Delta Special Projects funding (Water Code §12312) and several other levee grant programs such as the Urban Flood Risk Reduction Program (UFRR), Small Communities Flood Risk Reduction Program (SCFRR), Flood System Repair Project (FSRP), and newly created Flood Maintenance Assistance Program (FMAP) specifically for SPFC project levees.

Conflicts with Existing Maintenance Definitions

The new definitions added in Section 5001 are not in alignment with levee maintenance authority and responsibilities as defined in existing statutes⁷ or CVFPB's Resolution 2018-06 and Title 23 regulations.⁸ This deviation from currently accepted definition of maintenance that includes rehabilitation work necessary to keep levees at their existing level of protection is concerning if it results in reducing the amount of funding disbursed to more than 60 RDs for levee maintenance/rehabilitation under the Subventions program.

The CVFPB's definition specifically includes activities that "*maintain the designated level of function.*" In contrast, the proposed DLIS regulation creates a new "Levee rehabilitation" definition that appears to say that any work to restore levee integrity and preserve existing flood risk reduction benefits is separate from maintenance.

Under DLIS, all levee maintenance activities are essentially exempted from having to compete for funding under the prioritization of islands, while funding decisions by DWR and CVFPB for all other work must consider the island prioritization in DLIS. Defining "rehabilitation" as a separate activity from "maintenance" appears to mean that all activities defined by DSC as rehabilitation will no longer be exempted as maintenance, leaving many islands with lower priority under DLIS and vulnerable to no longer receiving available funding appropriated to DWR by the Legislature. This increases the risk of levee failures, reduces the opportunity to receive federal funding for levee repairs after storm events, and increases state liability where SPFC project levees are located.

Levee rehabilitation is a vital component of maintaining the existing Delta flood protection system and should not be included with "improvement" in a state discretionary investment prioritization. Funding for levee maintenance should also include rehabilitation and should continue to be available throughout the Delta where authorized by Water Code section 12980 et seq.

Inadequate Economic Analysis

According to the Delta Protection Commission's Economic Sustainability Plan, the Delta has the largest natural gas production field and natural gas storage facility in California, produces 20% of the state's natural gas-powered electricity, and carries approximately 10% of the state's summer electricity load on major power lines crossing through the Delta. The Delta's contribution to the state's energy network is comparable to its contribution to the state's water supply. In addition, the Delta is a major transportation hub with two shipping ports and state highways traveling both north to south and east to west.

The Delta Special Projects statute⁹ acknowledges the importance of the levee grant program protecting the following discrete public benefits: public highways and roads; utility lines and conduits; urbanized areas; water quality; recreation; navigation; and habitat. Many of these facilities are located on islands that are identified in DLIS as lower priority for state funding, despite the Legislature already declaring the importance of providing funding to protect these public benefits.

⁷ Water Code §§8361, 8370, 12642, 12981(c) and 12983.

⁸ Title 23, Chapter 1, Article 2, Section 4(v).

⁹ Water Code §12311.

The Economic Analysis is inadequate in many ways. One of the primary deficiencies is that it only evaluates the re-allocation of funding for levee improvements to Very High Priority islands, but fails to evaluate the increased risks of levee failure and flood damage on lower priority islands or how new “rehabilitation” definition will further reduce the level of maintenance on these lower priority islands. There is no analysis of increased state costs related to reduced funding for SPFC project levees with lower DLIS priority or economic impacts to legacy communities located on islands designated as lower priority.

Both federal levee repair programs, FEMA for non-project levees and USACE’s PL 84-99 for SPFC project levees, require state and local agencies to perform adequate maintenance. Implementation of Sections 5001 and 5012 as currently proposed reduces the likelihood of islands with lower DLIS priority being eligible for federal aid for levee repairs after levee breach. In addition, the state will have liability for flood damages when SPFC project levees fail. If lower priority levees fail due to reduced state investments, then levee maintenance costs will increase because adjacent levees will need to be armored and possibly raised due to altered hydraulics.

Therefore, we disagree with the conclusion in the Economic and Fiscal Impact Analysis that there is only a potential for *negligible* economic impacts, because the analysis fails to disclose the increased risk of levee failures or the quantify fiscal consequences resulting from those failures (loss of federal levee repair funding for both project and non-project levees and increased liability for State for flood damages when project levees fail). These costs will be in the millions, and are therefore not negligent.

In Closing

The DSC’s rulemaking as currently proposed will only weaken the partnership with state and local agencies with flood control responsibilities and may lead to the ultimate decline of the Delta. To avoid this and to ensure consistency with existing statutes and regulations, we hope the Council agrees that extending the comment deadline and postponing action on the proposed regulations is appropriate.

If you have any questions regarding our preliminary comments, please feel free to contact me at melinda@floodassociation.net or (916) 446-0197.

Sincerely,



Melinda Terry,
Executive Director