

State of California
Department of Water Resources
California Code of Regulations, Title 23. Waters
Division 2. Department of Water Resources
Chapter 1. Dams and Reservoirs
Article 1. General Provisions, Section 306
Article 7. Administrative Enforcement
Article 7.1 Method of Calculating Administrative Civil Penalties

Final Statement of Reasons

1. Introduction

The proposed regulation was noticed on May 21, 2021, for a 55-day public comment period, with a public hearing to receive comments on July 12, 2021. The Department of Water Resources (Department), Division of Safety of Dams (DSOD) received 4 comment letters/emails during this period, with a total of 17 comments, and received 11 comments at the hearing. Because of comments received and further review of the regulations' text, DSOD made changes to the proposed regulations and published them for an additional 19-day comment period from August 19, 2021, through September 7, 2021. The modifications were sufficiently related to the text of the regulations noticed on May 21, 2021. DSOD received 1 comment letter/email during the 19-day comment period, with a total of 4 comments and no changes were made to the regulations following the 19-day comment period. Upon further review of the regulations, DSOD decided to make changes to the proposed regulations and published the revised text for an additional 16-day comment period from June 20, 2022 through July 6, 2022. The modifications were sufficiently related to the text of the regulations noticed on May 21, 2021. DSOD received 1 comment letter/email after the 16-day comment period ended, with a total of 1 comment, and no changes were made to the regulations following the 16-day comment period.

The California Water Commission (Commission) unanimously approved the regulations at their July 20, 2022 meeting (Resolution Number 2022-22).

2. Update of Initial Statement of Reason

After careful consideration of the comments received and further review of the proposed regulations' text, modifications to the text of the regulations that were published on May 21, 2021, were proposed on August 19, 2021 and June 20, 2022. The following summarizes revisions made to specific sections and subsections; it does not include all modifications to correct typographical or grammatical errors, or all non-substantive revisions made to improve clarity.

Proposed Modifications to the Regulations Noticed on August 19, 2021

CCR Title 23., Division 2, Article 1. Section 306. Information Requests

Subsection (a). This subsection was modified to clarify that dam owners may be required to submit information related to compliance with Water Code Division 3, Part 1 and regulations that implement Water Code Division 3, Part 1.

CCR Title 23., Division 2, Article 7. Administrative Enforcement

Section 337. Purpose and Authority.

This section was revised to clarify that Article 7 does not limit the Department's ability to pursue judicial (or court) actions in an effort to obtain compliance with Water Code, Division 3, Part 1, implementing regulations, or any Department approvals, orders or requirements issued under Water Code Division 3, Part 1 or implementing regulations.

This section was also revised to remove the revocation of a certificate of approval as one of the remedies that may be sought for violations of Water Code Division 3, Part 1, implementing regulations and orders and directives issued thereunder. Some violations may implicate the revocation of a certificate of approval and pursuing revocation may motivate dam owners to correct violations in a timely manner. However, historically, revocation has been reserved for those cases where dam safety deficiencies pose a significant danger to public safety and property and revocations have not been used to address deficiencies that pose low or moderate risk. As such, the Department has decided not to include revocation of the certificate of approval at this time, and to, instead, include the types of relief that the Department would use for a wide variety of dam safety violations. Conforming changes were made to the following sections in Article 7 to remove references to the revocation of certificate: sections 337.2, 337.8, 337.12, 337.14, and 337.28.

Section 337.2. Definitions

Numbering was added so that specific definitions within the section can be easily referenced.

Definition of Certificate of Approval was removed. See explanation under section 337, above.

The definition of "Dam owner" was revised to refer to "Owner" in Water Code section 6005, since that is the terminology used in the statute.

A definition for "Dam Safety Program requirements" was added and means any requirements imposed by Water Code, Division 3, Part, 1 and regulations adopted pursuant thereto; or any approval, order, or requirement issued under Water Code, Division 3, Part 1, or the regulations adopted pursuant thereto. This definition was added to clarify the breadth and authority for requirements issued under the Dam Safety Program.

The definition of "EAP" was revised to expressly include updates to EAPs that are required by Water Code section 6161. The development of initial EAPs and periodic updates are required by Water Code section 6161 and failure to comply with requirements to prepare updates to EAPs as well as the initial EAP may result in administrative enforcement under Article 7. This definition carries over to other references to EAP throughout the regulations. For example, section 337.6 authorizes the Department to prepare an EAP, including inundation maps, and recover costs from the dam owner where the dam

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owner fails to prepare an EAP as ordered by the Department. In this example, the revised definition of EAP clarifies that the Department take the same actions with respect to updates to EAPs, which are also required by Water Code section 6161 like the preparation of the initial EAP, including inundation maps.

The definition of "Inundation map" was revised to add a reference to Water Code section 6161, which requires inundation maps.

The definition of "OAH" was moved so that the definitions appear in alphabetical order.

The definition of "Staff costs" was added for clarity. In the text initially noticed on May 21, 2021, there were multiple instances in Article 7 that referred to and authorized recovery of staff costs to bring the enforcement action. The Department provided more specificity to the meaning of staff costs and added a definition to Section 337.4 that is now used throughout Article 7. The new definition of "staff costs" specifies the costs that may be recoverable are Department staff costs related to the investigation and enforcement of a Dam Safety Program violation beginning with the preparation of a Notice of Violation and ending when a hearing is requested or scheduled by the Department. Attorneys from the Department's Office of the General Counsel will be assisting DSOD enforcement staff with investigating and bringing administrative enforcement cases, and so it is appropriate to refer to Department staff with respect to these investigation and enforcement activities. Even though investigatory activities may commence before the development of the Notice of Violation, with respect to the recovery of staff costs under Article 7, only the Department's staff costs incurred from the preparation of the Notice of Violation to the date a hearing is requested will be subject to cost recovery.

Section 337.4. Notice of Violation

This section was revised to expressly require that the Notice of Violation provide the dam owner with the opportunity to submit information to DSOD about the Dam Safety Program violation. This information could include but not be limited to, reasons why the dam owner believes that the dam owner is not in violation of Dam Safety Program requirements. This section was also clarified to indicate that if required actions are not made within the specified time period, then an Administrative Complaint may be issued. It is the Administrative Complaint that may seek administrative penalties, reservoir restrictions and other administrative remedies listed in section 337.8 if the dam owner fails to comply with Dam Safety Program requirements, and so the revisions to this section (337.4) clarify this process.

Section 337.6. Department preparation of Emergency Action Plan; Reimbursement by Dam Owner.

This section was clarified to track the language in Water Code section 6431 more closely and indicate that failure to comply with a Department order to prepare an EAP, including inundation map(s), as described in the Notice of Violation, may lead to the Department's preparation of the EAP and inundation map(s) and ultimate recovery of associated costs. As discussed above, the revised definition of EAP clarifies that the Department may prepare updates to EAPs and recover costs from the dam, similar to how the Department may proceed with respect to the preparation of an initial EAP, including inundation maps.

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Section 337.8 Administrative Complaint

References to revocation of certificate of approval were removed. See explanation under section 337, above.

Subsection (a). This subsection was revised to make a technical clarification that it is the failure of the dam owner to comply with Dam Safety Program requirements that are described in the Notice of Violation that may lead to the issuance of an Administrative Complaint. Throughout Article 7, there are provisions that authorize DSOD to propose and the Department to impose actions to ensure compliance with Water Code Division 3, Part 1. This subsection was revised to clarify that this includes ensuring compliance with implementing regulations and to use consistent terminology throughout the article. Finally, this subsection was modified to incorporate the definition of “staff costs” as described under the definitions section, which eliminated the need for the last sentence of this subsection.

Subsection (b)(2). This subsection was revised to delete language that has been interpreted as imposing, rather than proposing, administrative penalties in the Administrative Complaint. Revisions were also made to include staff costs and use consistent terminology with respect to fees, penalties and interest imposed by statute that may be included in an Administrative Complaint. Finally, revisions were made to use consistent terminology for other actions sought to ensure compliance with Division 3, Part 1 and implementing regulations.

Subsection (b)(3). Revisions were made to this subsection to use consistent terminology throughout the article with respect to fees, penalties and interest imposed by statute and other actions that will ensure compliance with Division 3, Part 1 and implementing regulations.

Subsection (b)(4). This subsection was revised to incorporate the hearing request requirements of section 337.12. Rather than repeat the requirements of section 337.12, the Department determined that it was more efficient to reference section 337.12. As will be discussed later, with respect to modifications to section 337.12, dam owners will have thirty (30) days, rather than twenty (20) days, to request a hearing after the Administrative Complaint is served.

Section 337.10 Assessment of Administrative Civil Penalty

Subsection (a) was modified to clarify that section 337.10 applies to administratively- imposed civil penalties authorized under Water Code section 6432. This is to distinguish these penalties from other penalties where the amounts are specified by statute (e.g., Water Code section 6428(b), which imposes a 10-percent penalty for late payment of annual fees).

Subsection (c) was revised to delete the phrase “administrative civil” before the word penalty. This modification was necessary to avoid confusion between administrative civil penalties authorized by Water Code section 6432, and penalties where the amounts are set by statute. See explanation immediately above.

Section 337.11 Reservoir Restrictions

This section was added to describe how the Department will establish appropriate punitive reservoir restrictions.

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Subsection (a). Reservoir restrictions have historically been used as a risk-reduction measure for public safety, such as when dam safety deficiencies exist. Risk reduction reservoir restrictions are either directed by DSOD or self-imposed by dam owners. Water Code section 6429, which became effective on June 27, 2017, authorizes the Department to use reservoir restrictions as a means to promote compliance with any Dam Safety Program requirements, much like the intent of an administrative penalty. In other words, reservoir restrictions may be imposed as a punitive measure. Subsection (a) was added to explain how the Department will arrive at an appropriate punitive reservoir restriction. With respect to a punitive reservoir restriction, the goal is to establish a reservoir restriction that will provide incentive to the dam owner to correct the Dam Safety Program violation(s) that are the subject of the enforcement action. At the same time, it is not the Department's intent to unreasonably disrupt the normal reservoir operations and functions. Further, every dam, reservoir, and dam owner has a unique set of circumstances, and it would be difficult if not impossible to specifically list all of the relevant factors and criteria that would generally apply when determining the appropriate extent of a punitive reservoir restriction. The Department, therefore, added this subsection to state the objective for setting a punitive reservoir restriction (e.g., provide reasonable incentive to comply with applicable Dam Safety Program requirements) and to authorize the Department to analyze facts and circumstances specific to the dam, reservoir, and dam owner when arriving at an appropriate punitive reservoir restriction.

Subsection (b) was added to specify that Administrative Complaints that propose and Department decisions that impose punitive reservoir restrictions must include findings that identify the facts and circumstances relevant to the subject enforcement case and analyze the criteria in subsection (a). Since the consideration of appropriate reservoir restrictions should be based on the facts and circumstances of the dam, reservoir, and dam owner, rather than a structured framework similar to that included in Article 7.1, it is important that the basis(es) for the level of any reservoir restriction be explained. This explanation must be included in the Administrative Complaint, so that the dam owner has a meaningful opportunity to respond, and the analysis must be included in any decision issued by the Department under this article that imposes a punitive reservoir restriction.

Section 337.12 Request for Hearing; Waiver

References to revocation of certificate of approval were removed. See explanation under section 337, above.

Subsection (a) was modified to provide a dam owner thirty (30) days, instead of twenty (20), from the date that the Administrative Complaint was served to submit a written request for a hearing. Subsection (a) was also revised to add fees, penalties and interest imposed by statute to the list of items that the dam owner may address in the statement of defense.

Subsection (b) was modified to replace the term "order" with "decision," for consistency with section 337.28, which provides for the issuance of a decision after an evidentiary hearing is conducted. Subsection (b) was also modified to specify the types of costs that the Department may recover and to use consistent terminology regarding fees, penalties, and interest.

Section 337.14 Presiding Officer; Hearing Procedure

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Subsection (c) was modified to reflect renumbering in a section 337.28.

Section 337.16 Notice of Hearing (Non-OAH cases)

Subsections (b) was revised to delete the reference to subsection (d), as subsection (d) is also deleted.

Subsection (d) was deleted to remove the reference to notices for hearings that pertain to revocations of certificates of compliance. See explanation under section 337, above.

Subsection (e) was renumbered to subsection (d).

Subsection (f) [renumbered to subsection (e)] was modified to state that if a dam owner fails to appear at the hearing, then the Department may issue a final decision as described in section 337.12, subsection (b). Rather than repeat the remedies and actions that may be included, this subsection now incorporates section 337.12(b) by reference. This subsection was also modified to clarify that failure to appear at the hearing, whether the hearing was requested under section 337.12(a) or scheduled by the Department under section 337.12(c), a final decision may be issued for a dam owner's failure to appear.

Section 337.18 Continuance of Hearing

Subsection (b) was modified to state that if a dam owner fails to appear at hearing that had been continued, then the Department may issue a final decision as described in section 337.12, subsection (b). Rather than repeat the remedies and actions that may be included, this subsection now incorporates section 337.12(b) by reference. This subsection was also modified to clarify that failure to appear at the hearing, whether the hearing was requested under section 337.12(a) or scheduled by the Department under section 337.12(c), a final decision may be issued for a dam owner's failure to appear at a continued hearing.

Section 337.22 Service

In the text of the regulations that was originally noticed, service was allowed by any of the four listed methods. This section was modified to allow service by leaving the document at the residence or business of the person named only if service could not be accomplished using the other methods listed in subsections (a), (b), and (c).

Section 337.28 Decision

Subsection (a)(3) was deleted to remove revocations of certificates of approval as one of the types of actions that may be included in a decision. See explanation under section 337, above.

Subsections (a)(4)–(a)(7) were renumbered and minor text changes were made to use consistent terminology throughout the article.

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Section 337.30 Payment of Penalty, Interest or Costs

This section was modified to use terminology that is consistent throughout the article and a change was made to section title to reference all of the types of monetary sums that may be imposed under Articles 7 and 7.1 and subject to payment under this section.

Section 337.32 Property Liens

Subsection (a)(4) was modified to use the new term “staff costs.”

CCR Title 23., Division 2, Article 7.1 Method of Calculating Administrative Civil Penalties

No changes were made.

Proposed Modifications to the Regulations Noticed June 20, 2022

CCR Title 23., Division 2, Article 1. Section 306. Information Request

Subsection (a) was revised to remove “dam” from owner to more closely track the language used in Water Code section 6002. “Suspected dam owner” was also removed because the Department would first investigate to determine if a suspected dam would be subject to the regulation and supervision of the Department.

Subsection (b) was re-written to clarify the information that the Department may use in making the determination if a “suspected dam” has a reasonable likelihood of meeting the definition of a dam under Water Code section 6002. This subsection was also revised to remove language related to “suspected dam owner” because the Department will only request information from owners.

Subsection (c) was removed because the language was ambiguous and could have been interpreted to require parties responding to an information request pay for the Department’s costs related to the request. This subsection was also removed because owners are already responsible for their own costs associated with compliance with Water Code, Division 3, Part 1.

CCR Title 23., Division 2, Article 7. Administrative Enforcement

Section 337.2. Definitions

Subsection (i) was added to include the definition for “interested person,” which means any person that has an interest in the safety of a particular dam or dam safety in general. This definition was added to clarify how this term is used in Article 7.

Subsection (o) which defined “staff costs” was removed because the Department will not seek the recovery of staff costs through these enforcement actions. The costs to bring enforcement actions and the Dam Safety Program’s potential recoupment of penalties and fines collected are accounted for elsewhere in the California Code of Regulations and the Water Code. Conforming changes were made to

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the following sections in Article 7 to remove references to staff costs: Sections 337.8, 337.12, 337.28, and 337.32.

The definitions were re-lettered to account for the added and deleted definitions.

Section 337.4. Notice of Violation

This section was modified to provide clarity by including factors that DSOD will consider when exercising its prosecutorial discretion to issue a Notice of Violation. In exercising its prosecutorial discretion, DSOD will consider the nature of the violation, potential threat to life and property posed by the violation, and the number of violations that would be included in the Notice of Violation. This section was also modified to clarify when DSOD would provide dam owners with an estimated cost for the Department to prepare an EAP and inundation map(s) where the dam owner has failed to comply with a Department order to prepare and submit an acceptable EAP, in accordance with Water Code, Division 3, Part 1, Chapter 4, Article 6.

Section 337.6. Department preparation of Emergency Action Plan; Reimbursement by Dam Owner.

This section was clarified to provide when the Department will prepare an EAP, including an inundation map. The use of “may” instead of “shall” created an ambiguity. This section was also revised to remove references to the Department’s ability to use contractors to prepare EAPs, because the use of contractors is already allowed by Water Code section 6052, making it unnecessary to repeat this in the regulation.

Section 337.8 Administrative Complaint

Subsection (a) was updated to clarify when an administrative complaint may be issued to a dam owner. This change clarified that DSOD may issue an administrative complaint if the dam owner failed to correct the violations of the Dam Safety Program requirements “as set forth” in the Notice of Violation. There was a potential ambiguity as to whether the Department may issue an administrative complaint if the violations were corrected after the deadline expired as set forth in the Notice of Violation. This clarifies that the Department may issue an administrative complaint if the requirements set forth Notice of Violation are not complied with.

Subsection (a) was also modified to provide clarity by including factors that DSOD will consider when exercising its prosecutorial discretion to issue an administrative complaint. In exercising its prosecutorial discretion, DSOD will consider the nature of the violation, potential threat to life and property posed by the violation, and the number of violations that would be included in the administrative complaint. This subsection was also revised to remove references to seeking the reimbursement of staff costs, see explanation under section 337.2, and to better align with Water Code section 6431.

Subsection (b)(2) was revised to remove references to seeking the reimbursement of staff costs. See explanation under section 337.2.

Subsection (b)(5) was added to clarify that the Department will designate the Department office where the dam owner must submit a request for hearing in the administrative complaint.

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Section 337.10 Assessment of Administrative Civil Penalty

Subsection (a) was revised to more closely align with the Water Code language, such as Water Code section 6075, which refers to “life” instead of “human life.”

Section 337.12 Request for Hearing; Waiver

Subsection (a) was modified to clarify that the request for hearing must be sent to the designated Department office, as identified in the administrative complaint.

Subsection (b) was modified to remove references to “staff costs.” See explanation under section 337.2. This subsection was also modified to clarify that the deadline to submit a request for hearing will be extended at least thirty calendar days, upon a showing of good cause.

Section 337.14 Presiding Officer; Hearing Procedure

Subsection (c) was modified to clarify that the Department is authorized to use the informal hearing procedures under the Government Code section 11445.10 et seq. The informal hearing procedures are already part of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code. This clarification will make the use of informal procedures more widely available for these cases. The informal procedures will reduce the costs and complexity of these matters for the parties as opposed to those brought under the formal hearing procedures. This clarification also includes factors the Department shall consider when exercising its discretion. The Department will consider the significance and complexity of any issues in dispute and the need to create an administrative record.

Section 337.16 Notice of Hearing (Non-OAH cases)

Subsection (c) was modified to address unclear language.

Subsection (d)(3) was modified to remove a reference to subsection (d), which was inconsistent with other requirements. Subsection (d)(3) was also clarified to detail how the presiding officer determines who pays for the costs of any interpreter needed for a hearing.

Subsection (d)(5) was modified to use consistent citation format in Article 7.

Section 337.18 Continuance of Hearing

Subsection (b) was modified to clarify when a continued hearing will be rescheduled. The use of “may” instead of “shall” created an ambiguity.

Section 337.20 Conduct of Evidentiary Hearings

Subsection (b)(1) was modified to clarify what the hearing notice will include. The use of “may” instead of “shall” created an ambiguity. This section was also clarified to state that the submittals required under this subsection must be sent to the Department and other parties designated by the Department. This avoids a potential inconsistency with the prohibition on ex parte communications as set forth in section 337.26.

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Subsection (c) was modified to remove duplicative language. “Persons directly impacted by the action” and “interested persons” contain overlapping groups of people. The Department added a definition for “interested persons” in section 337.2, to clarify who is included. Conforming changes were made with the removal of subsection (c)(4) and the renumber of subsection (c)(5).

Subsection (f) was a correction to a typographical error.

Section 337.24 Settlement

This section was modified to clarify that all parties must sign any settlement agreement submitted to the Department or presiding officer. Before the language was potentially ambiguous as to whether all parties had to sign the document before it was submitted to the presiding officer.

Section 337.26 Ex Parte Communications

Subsection (b) was modified because it referred to “subsection” instead of “section” which could cause confusion because subsection (b) provides when a prohibited ex parte communication is permissible.

Subsection (b)(4)(C) was re-lettered as subsection (c) to clarify that the potential disqualification of the presiding officer was meant to apply to any violation of this section and not just those under subsection (b).

Section 337.28 Decision

Subsection (a)(3) was deleted to remove reimbursement of staff costs. See explanation under section 337.2. The subsections were renumbered to account for this deletion.

Section 337.32 Property Liens

Subsection (a) was modified to clarify when the Department will record a property lien. Whether it is necessary for the Department to levy a property lien will be based on whether the dam owner timely pays the applicable penalties imposed, fees, interest, and costs. This will be determined based on the specifics of each case and dam owner.

Subsection (a)(4) was deleted because the Department will not be seeking the reimbursement of staff costs. See explanation under section 337.2.

Subsection (a)(d) was modified to clarify when and in what county a lien would be released.

CCR Title 23., Division 2, Article 7.1 Method of Calculating Administrative Civil Penalties

Section 337.50 Applicability; Purpose

Subsection (b) was modified to clarify that this is a policy statement for the purpose of Article 7.1.

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Section 337.52 Penalty Calculation

This section was modified to clarify that all penalty calculations under this article shall be rounded to the nearest whole dollar.

Section 337.54 Daily Initial Penalty for Each Violation

Subsection (b)(1) was revised to more closely align with the Water Code language, such as Water Code section 6075, which refers to “life” instead of “human life.”

Subsection (b)(2)(B) was removed to because it was duplicative of language in subsection (b)(1). Subsections (b)(2)(C) and (b)(2)(D) were re-lettered to account for this deletion.

Subsection (c)(2)(B) was revised to clarify what the Department will consider for extent of a moderate deviation. The use of the word “important” was ambiguous and will vary based on the facts and circumstances of a particular case.

Subsection (c)(3) was modified to clarify how the Department will evaluate non-compliance with requirements that have more than one part. This determination will be based on the requirement that is most significant for the protection of life and property.

Section 337.56 Daily Base Penalty

Subsection (a) was modified to add clarity by including a penalty calculation.

Table 2 was modified to increase the bottom end of the first adjustment factor from 0 to 0.1. This clarifies that the daily base penalty would not be adjusted to \$0.00 by using an adjustment factor of 0.0.

Section 337.58 Multiple Violations

Subsection (b) was modified to clarify when the assessment of a single daily base penalty is available. While the assessment of a single daily base penalty will be available, whether it will be applied in a particular case is in the discretion of the Department, as set forth in subsection (a).

Subsection (b)(2) was modified to remove duplicative language and to clarify which violations the Department will consider when the violations are not independent.

Section 337.60 Multi-day Violations

Subsection (a) was modified to clarify that any reduction in the daily base penalty is in the discretion of the Department.

Subsection (a)(1) was modified to provide clarity for when the reduction in the daily base penalty is available.

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Subsection (a)(2) was modified to state that fractions of a day, under the Alternative Penalty Assessment, will be rounded down to the nearest whole number. This rounding rule provides clarity on how partial days will be addressed.

Section 337.64 Total Base Penalty Adjustments

This section was modified to clarify when the Department will adjust the total base penalty. The use of “may” instead of “shall” created an ambiguity.

Subsection (a) was modified to clarify that the Department shall consider the violator’s cooperation. The use of “may” instead of “shall” created an ambiguity. This subsection was also modified to clarify how the cooperation adjustment factor would be calculated.

Subsection (b) was removed to address potential issues with clarity, consistency, and necessity. Upon further consideration, the Department has determined that this section is unnecessary in light of the other sections in Article 7.1 that calculate the penalty amount. The subsections, and references to subsections, in this section were re-lettered to account for this deletion.

Subsection (c) was modified to clarify that the total base penalty shall be increased based on a history of non-compliance. The use of “may” instead of “shall” created an ambiguity. This subsection was also modified to add a calculation to add clarity on how this adjustment factor is applied.

Subsection (d) was modified to clarify when the total base penalty shall be adjusted downward under this subsection. The use of “may” instead of “shall” created an ambiguity. This subsection was also modified to define “adverse financial impact,” which occurs when the imposition of a penalty will cause increased costs to rate payers.

Subsection (e) was modified to clarify when the total base penalty will be adjusted downward under this subsection. The use of “may” instead of “shall” created an ambiguity. This subsection was also modified to clarify what constitutes an “extreme financial hardship” under this section, which occurs when the final penalty will prevent the dam owner from paying its ordinary and necessary personal or business expenses. The department will determine extreme financial hardship by considering information provided by the dam owner, such as the dam owner’s assets, liabilities, income, and expenses.

Section 337.68 Deviations from Standard Methodology

Section 337.68 was removed to address potential issues with clarity, consistency, and necessity. Upon further consideration, the Department has determined that this section is unnecessary in light of the other sections that calculate the penalty amount.

3. Summary and response to comments received during the initial notice period of May 21, 2021 – July 15, 2021 (55-day comment period)

1. Yaocihuatl Bourdon, SLR

Received by email on June 30, 2021

Comment 1.1

Water Code 6101: Dam owners to provide information, if requested with report on maintenance, operation, staffing and engineering and geologic investigations. What would be the criteria for request information?

Response 1.1

It is noted in section 306(a), Article 1, Chapter 1, Division 2, Title 23 of the proposed regulations that the Department, in carrying out the provisions of Division 3, Part 1 of the Water Code, may require any dam owner or suspected dam owner to furnish and transmit specific documentation or information. As such, the criteria for requesting information would be based on the Department's need in carrying out Division 3, Part 1 of the Water Code. Given the broad authority over dam safety provided in Division 3, Part 1, it would be infeasible if not impossible to identify every circumstance where the Department may need information to carry out Division 3, Part 1.

No changes were made to the text of the regulation based on this comment.

Comment 1.2

Since the water code Division 3, part 1 already has civil penalties of up \$1,000 per day per violation and guilty of misdemeanor for non-compliance permitter; why is now copy into Title 23 is already part of the Senate bill 92 and it is on the water code? Or the water code does not have the authorization to enforce the fees and legal actions.

Response 1.2

Existing statutes authorize the Department to undertake administrative enforcement actions on any dam owner that fails to comply with Dam Safety Program requirements. The statutes that authorize these administrative enforcement actions do not expressly dictate the administrative process to be used, making it necessary to establish a regulatory process that is transparent, consistent, and equitable. Further, existing statutes authorize the imposition of a civil penalty of up to \$1,000 per day for each violation, but do not establish a framework or methodology for calculating penalties up to the \$1,000 per day per violation maximum. Articles 7 and 7.1 are proposed to be added to the California Code of Regulations, Title 23, Division 2 to ensure fair, effective, consistent, and transparent enforcement, and it is necessary to provide a clear methodology for calculating administrative civil penalties.

It is important to note that the process set out in these regulations relate to administrative enforcement actions. The regulations do not affect the Department's ability to pursue court actions to obtain compliance. Nor do they impact the ability to pursue criminal actions.

No changes were made to the text of the regulation based on this comment.

2. Tim Payne, Turlock Irrigation District (TID)

Received by email on July 14, 2021 (transmitted by Herb Smart, TID)

Comment 2.1

There may be instances in the future where a dam owner is out of compliance, and there is agreeable mitigation(s) that could be put into place (e.g., reservoir level restrictions). The regulation should explicitly clarify that “in such instances where mitigation conditions are achieved to the satisfaction of DSOD, enforcement fees are waived.”

Response 2.1

It is the Department’s preference to obtain compliance without initiating formal enforcement. Agreeable mitigation measures that do not fully address the violation, would not be a basis for relief from enforcement. Dam owners are expected to implement mitigation measures on their own accord or in response to a Department order to address risks that may be caused by non-compliance with the Dam Safety Program. If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner could be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1. If an Administrative Complaint was already issued by the Department and then agreeable mitigation measure were put in place that fully resolved the violation, then this could be covered under section 337.24 which allows the parties to negotiate a settlement at any time before a decision is made final.

No changes were made to the text of the regulation based on this comment.

3. Luciana Ciocci and Dennis Cakert, National Hydropower Association (NHA)

Received by email on July 15, 2021

Comment 3.1

§ 306. Information Request – NHA believes more clarity is needed as to why an information request would be sent.

Response 3.1

It is noted in section 306(a), Article 1, Chapter 1, Division 2, Title 23 of the proposed regulations that the Department, in carrying out the provisions of Division 3, Part 1 of the Water Code, may require any dam owner or suspected dam owner to furnish and transmit specific documentation or information. As such, the criteria for requesting information would be based on the Department’s need in carrying out Division 3, Part 1 of the Water Code. Given the broad authority over dam safety provided in Division 3, Part 1, it would be infeasible if not impossible to identify every circumstance where the Department may need information to carry out Division 3, Part 1.

No changes were made to the text of the regulation based on this comment.

Comment 3.2

§ 337.4 Notice of Violation – NHA requests an owner working in good faith to respond to an information request not be subject to a Notice of Violation. Similarly, an owner working in good

faith to address a deficiency identified in a Notice of Violation should not be subject to Administrative Complaint.

Response 3.2

It is the Department's preference to obtain timely compliance with Dam Safety Program requirements without having to initiate enforcement proceedings. If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner could be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1.

No changes were made to the text of the regulation based on this comment.

Comment 3.3

§ 337.4 Notice of Violation – NHA believes DSOD can determine what “good faith” is on a case-by-case basis, but NHA requests DSOD give owners a warning prior to issuing either a Notice of Violation or Administrative Complaint. For example, owners often resubmit Emergency Action Plan's (EAPs) with the Office of Emergency Services (OES) based on feedback received from OES. Such practice improves safety and compliance, and should be determined as working in good faith.

Response 3.3

It is the Department's preference to obtain timely compliance with Dam Safety Program requirements without having to initiate enforcement proceedings. If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner could be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1. It is not the Department's intention that a Notice of Violation or Administrative Civil Complaint be the first time a dam owner learns of an obligation to comply with the Dam Safety Program. While it is not a prerequisite to enforcement, prior to the Department sending an owner a Notice of Violation, the Department in most cases will have informed the dam owner of its obligation to comply, through other interactions with the dam owners, such as dam inspections and related reports as well as other communications that are part of the Dam Safety Program.

No changes were made to the text of the regulation based on this comment.

Comment 3.4

§ 337.8 Administrative Complaint – NHA requests owners be given 60 calendar days to requests a hearing, instead of 20 calendar days. Internal processes and deliberations can take multiple weeks to reach an informed decision. Depending on when the 20 calendar days begin, it could leave an owner with half as many business days to make a determination.

Response 3.4

The Department has considered this comment and modified the regulations to provide 30 calendar days to request a hearing instead of 20 calendar days. Thirty calendar days is considered adequate

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given that dam owners would typically have been made aware of any violation of the Water Code before the issuance of a Notice of Violation, which will in most cases be issued before an Administrative Complaint. In addition, the 30-day deadline may be extended for good cause upon a written request from the dam owner. See section 337.12, subdivision (b).

The text in section 337.12 was modified to allow thirty days, and the text in section 337.8 was modified to incorporate the 30-day timeframe by reference.

Comment 3.5

§ 337.10 Assessment of Administrative Civil Penalty – NHA request impacts on electricity rates be given consideration in the determination of the ability of regulated utilities and public power to pay financial penalties.

Response 3.5

While impacts on electricity rates is not specifically addressed in the regulations, the Department may consider this when applying sections 337.64(d) which allows for the administrative civil penalty to be adjusted should it impact disadvantaged communities and 337.64(e) which allows an owner's ability to pay the administrative civil penalty to be taken into consideration.

No changes were made to the text of the regulation based on this comment.

Comment 3.6

NHA requests DSOD continue to coordinate closely with FERC D2SI. Where FERC and DSOD regulations differ, DSOD should consider the dual obligations of the owner when determining whether the owner is working in good faith.

Response 3.6

DSOD routinely coordinates efforts with FERC; however, dam owners under dual regulation must comply with both state and federal dam safety requirements. It is the Department's preference to obtain timely compliance with Dam Safety Program requirements without having to initiate enforcement proceedings. If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner could be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1.

No changes were made to the text of the regulation based on this comment.

4. **Komy Ghods, Riverside Conservation District**

Received by email on July 15, 2021

Comment 4.1

§ 306. Information Request – In general this appears fair and the District has always sought transparency with DWR, however there might be situations that involve a Public Records Act. This section may require more details to define the nature of information and whether or not the dam owner can or even has said info.

Response 4.1

It is noted in section 306(a), Article 1, Chapter 1, Division 2, Title 23 of the proposed regulations that the Department, in carrying out the provisions of Division 3, Part 1 of the Water Code, may require any dam owner or suspected dam owner to furnish and transmit specific documentation or information. As such, the criteria for requesting information would be based on the Department's need in carrying out Division 3, Part 1 of the Water Code. If the dam owner does not have or cannot obtain the requested information, then they would notify the Department of such. The request for information from a dam owner under section 306 is not considered a Public Records Act request, and the dam owner would be required to provide the requested materials if available. The Department understands that some information provided by the dam owner may be exempt from disclosure under the California Public Records Act. Should the Department be subject to a Public Records Act request involving materials received by the Department pursuant to section 306, the Department would not disclose materials that it determines are exempt from disclosure under the California Public Records Act or as required by a court order.

No changes were made to the text of the regulation based on this comment.

Comment 4.2

§ 337.4 Notice of Violation – It is stated that the violations will include a specified time period for the dam owner to respond/remedy. The concern would be that the specified time period is not feasible for the dam owner to either respond or act on the violation. Furthermore, it should be noted that once the dam owner responds to the violation, whether it involves action or not, that DWR shall recognize the dam owner as cooperative and not proceed with further action against the dam owner.

Response 4.2

It is the Department's preference to obtain timely compliance with Dam Safety Program requirements without having to initiate enforcement proceedings. While it is not a prerequisite to enforcement, prior to the Department sending an owner a Notice of Violation, the Department in most cases will have informed the dam owner of its obligation to comply, through other interactions with the dam owners, such as dam inspections and related reports as well as other communications that are part of the Dam Safety Program. The Department understands the time necessary to meet the requirements of the Dam Safety Program, and the facts and circumstances surrounding the requirements, will vary and could impact when a violation occurs. Once a violation occurs and if and when a Notice of Violation is issued, the dam owner will be afforded the opportunity to provide a response and remedy for the violation before an Administrative Complaint is issued. Whether enforcement is pursued after the response to the Notice of Violation, or whether an Administrative Complaint is immediately issued, will depend on the facts and circumstances of the response and any proposed remedy.

If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner could be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1.

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No changes were made to the text of the regulation based on this comment.

Comment 4.3

§ 337.6 Department preparation of an Emergency Action Plan; Reimbursement by Dam Owner – It should be clarified that as long as the dam owner is actively working with DWR on the preparation of various EAPs that a violation is not warranted. Furthermore, all of our dams have EAPs on file, but we are required to update them on a regular basis. The terms for this violation seem more appropriate for dams with no EAP on file.

Response 4.3

If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner could be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1.

Prior to the Department preparing an emergency action plan on behalf of a dam owner and then seeking reimbursement, the Department would have had to issue an order to the dam owner requiring compliance. (Wat. Code, § 6431.)

This requirement applies with equal force to updates to EAPs, which are required by Water Code section 6161. Updates, as specified in the Water Code and Department regulations, are necessary to ensure that EAPs and inundation maps reflect current condition (e.g., modification to dams and downstream development since the development of the initial EAP).

The Department revised the definition of EAP in section 337.2 to clarify that it includes updates. This clarified definition applies throughout the article.

Comment 4.4

§ 337.6 Department preparation of an Emergency Action Plan; Reimbursement by Dam Owner – In general, this section states too simply that the “dam owner to prepare and submit an acceptable EAP” and does not explain or take credit for the back and forth commenting and approval between dam owner and DWR.

Response 4.4

It is the Department’s preference to obtain timely compliance with Dam Safety Program requirements without having to initiate enforcement proceedings. If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner could be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1.

The Department understands that preparation of such documents may require multiple revisions prior to approval by the Department and Governor’s Office of Emergency Services, as appropriate. Prior to the Department preparing an emergency action plan on behalf of a dam owner and then seeking reimbursement, the Department would have had to issue an order to the dam owner requiring compliance. (Wat. Code, § 6431.)

No changes were made to the text of the regulation based on this comment.

Comment 4.5

§ 337.8 Administrative Complaint – A 20-day window to request a hearing is too short for many dam owners to processes. A longer window is warranted, minimum 30 days.

Response 4.5

The Department has considered this comment and modified the regulations to provide 30 calendar days to request a hearing instead of 20 calendar days.

Comment 4.6

§ 337.8 Administrative Complaint – Subsection (c) - Issuing an Administrative Complaint without first issuing a Notice of Violation is not working with the dam owner and providing them opportunity to correct the concern. The underlying goal should be a positive, fair, and cooperative relationship between dam owners and DWR. Circumventing any notice procedures and moving directly to penalties will undermine the intent of the overall program.

Response 4.6

It is the Department's preference to obtain timely compliance with Dam Safety Program requirements without having to initiate enforcement proceedings. The Department agrees that beginning enforcement activities under Article 7 with a Notice of Violation could allow for resolution of the violation without the necessity of issuing in an Administrative Complaint in some cases. However, this subsection is necessary, though, to address fact specific cases where there is a need to initiate the enforcement proceeding in an expeditious manner (e.g., where a dam owner's noncompliance may lead to immediate dam safety consequences).

No changes were made to the text of the regulation based on this comment.

Comment 4.7

§ 337.12 Request for Hearing; Waiver – A 20-day window to request a hearing is too short for many dam owner processes. A longer window is warranted, minimum 30 days.

Response 4.7

The Department has considered this comment and modified the regulations to provide 30 calendar days to request a hearing instead of 20 calendar days.

Comment 4.8

§ 337.22 Service – Leaving documents at the dam site with a person over the age of 18yrs should only be considered if all other options are unavailable. In other words, as long as the dam owner has a business address or email on record, leaving documents at the dam site is not acceptable.

Response 4.8

In response to this comment, the Department has modified § 337.22 such that this method of service would only be employed if service cannot be achieved mail, personal service, or electronic mail.

4. Summary and response to oral comments received during the Public Hearing on July 12, 2021

5. Dennis Cakert, National Hydropower Association

Comment 5.1

Is DSOD able to provide a little more clarity about when an owner who's working in good faith to fill an information request would receive a notice of violation? We believe some flexibility for owners working in good faith to fulfill information requests prior to receiving a notice of violation is a good thing and this could probably be done on a case-by-case basis, but some general clarity about when that might happen would be helpful.

Response 5.1

The Department recognizes that responding to information requests may take some time. The length of time to respond that is considered reasonable will depend on the nature of the request and circumstances of a particular case. It is the Department's preference to obtain timely compliance with Dam Safety Program requirements without having to initiate enforcement proceedings. If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner could be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1.

No changes were made to the text of the regulation based on this comment.

Comment 5.2

A 60-day window to decide whether to appeal a complaint is better than 20 days. Many owners have internal processes that can take a couple weeks to navigate.

Response 5.2

The Department has considered this comment and modified the regulations to provide 30 calendar days to request a hearing instead of 20 calendar days. Thirty calendar days is considered adequate given that dam owners would typically have been made aware of any violation of the Water Code before the issuance of a Notice of Violation and that the Notice of Violation would include a date to either become compliant or an Administrative Compliant may be issued (e.g., this should not be a surprise to the dam owner).

In addition, the 30-day deadline may be extended for good cause upon a written request from the dam owner. See section 337.12, subdivision (b).

The text in section 337.12 was modified to allow thirty days, and the text in section 337.8 was modified to incorporate the 30-day timeframe by reference.

6. Matt Brown

Comment 6.1

Many of the agencies have infrastructure that is a hundred years old and was built prior to development downstream. Will there be any grants to give assistance for compliance?

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Response 6.1

This comment falls outside the scope of the proposed regulations, but the Department notes that while Senate Bill 92 (June 2017) provided the Department with new enforcement authorities, it did not provide the funding or abilities for the Department to provide grants to assist with compliance.

No changes were made to the text of the regulation based on this comment.

Comment 6.2

if agencies are fine to meet compliance, how are they to fund massive infrastructure upgrades to meet that compliance?

Response 6.2

How a dam owner funds upgrades to meet compliance with Dam Safety Program requirements falls outside the scope of these regulations. The primary goal of the Dam Safety Program is to obtain timely compliance with dam safety requirements that ensure the protection of public safety. Sometimes, it is necessary to pursue enforcement proceedings to ensure timely compliance, and it is the Department's intent to pursue enforcement when necessary and in a manner that is reasonable to achieve compliance and protect public safety.

No changes were made to the text of the regulation based on this comment.

7. Rosalva Morales, City of San Diego

Comment 7.1

In new regulations, include clarity in types of penalties.

Response 7.1

Water Code 6432 authorizes the Department to impose civil penalties for non-compliance with Dam Safety Program violations of up to \$1,000 per day per violation. Other sections of the Water Code provide for statutorily set penalties for violations of specific requirements, e.g. Section 6428(b), which imposes a 10-percent penalty for the late payment of annual fees.

Modifications were made to several sections to of the regulations to clarify the types of penalties.

Comment 7.2

Provide flexibility for agencies that have been imposed level restrictions and have acted in good faith to implement risk reduction measures.

Response 7.2

It is the Department's preference to obtain timely compliance with Dam Safety Program requirements without having to initiate enforcement proceedings. If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner could be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1.

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The Department understands that reservoir restrictions may be imposed by the Department as a means to reduce risk when dam safety deficiencies are identified; such reservoir restrictions are intended to be temporary until such time that deficiencies are corrected and are not considered to be a substitute for permanent solution to address deficiencies and fall outside the scope of these regulations. As noted in section 337.2(n), for the purpose of these regulations, a “Reservoir restriction” means restricting the level of water storage in reservoirs as a punitive action, as authorized under Water Code section 6429, and does not include reservoir restrictions that are directed by the department or undertaken voluntarily by a dam owner primarily as a means of risk reduction.

No changes were made to the text of the regulation based on this comment.

Comment 7.3

Provide clarity on phasing in dates of new regulations.

Response 7.3

The Department expects that the regulations will become effective late 2021 or early 2022. After that, the Department intends to proceed with administrative enforcement in accordance with the process set out in these regulations.

No changes were made to the text of the regulation based on this comment.

8. Michael Chan, Owner of Williamson No. 1 Dam

Comment 8.1

I agree that grants or future grants from government and U.S. Federal Departments are vital to the senior or owners of dams built decades ago. Do we have any dam grant lobbyist?

Response 8.1

This comment falls outside the scope of the proposed regulations, but the Department notes that while Senate Bill 92 (June 2017) provided the Department with new enforcement authorities, it did not provide the funding or abilities for the Department to provide grants to assist with compliance.

No changes were made to the text of the regulation based on this comment.

Comment 8.2

We do what we can to help with the environment but we have limited resources?

Response 8.2

This comment appears to fall outside the scope of the proposed regulations as it is interpreted to be regarding an owner’s limited financial resources to comply with Dam Safety Program requirements. As stated above, while Senate Bill 92 provided the Department with new enforcement authorities, it did not provide funding for dam owners to assist with compliance with dam safety program requirements. However, if this comment relates to the ability to pay an administrative civil penalty, the Department may consider an owner’s ability to pay (§ 337.64) in determining monetary administrative penalties.

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No changes were made to the text of the regulation based on this comment.

Comment 8.3

Does PGE has a right to take water from a private lake to fight fires?

Response 8.3

This comment falls outside the scope of the proposed regulations.

No changes were made to the text of the regulation based on this comment.

Comment 8.4

Is this correct that if your capacity is 100 acre feet, the dam will be delisted from your Department?

Response 8.4

This comment falls outside the scope of the proposed regulations as it appears to be regarding a dam's jurisdictional status if it stores less than 100 acre-feet of water.

No changes were made to the text of the regulation based on this comment.

Comment 8.5

Is there a forum for dam owners to share thoughts and resources?

Response 8.5

This comment falls outside the scope of the proposed regulations, but the Department offers the following information regarding possible forums for dam owners to share thoughts and resources: the American Society of Civil Engineers, the United States Society on Dams, and the Association of State Dam Safety Officials.

No changes were made to the text of the regulation based on this comment.

5. Summary and response to comments received during the period the modified text was available to the public August 19, 2021 – September 7, 2021 (19-day comment period)

9. Luciana Ciocci and Dennis Cakert, National Hydropower Association (NHA)

Received by email on September 7, 2021

Comment 9.1

§ 306. Information Request and § 337.4 Notice of Violation - NHA commends the Department for its revision of Section 337.4, allowing an owner the opportunity to submit information to DSOD related to the violation. However, NHA reaffirms its request that an owner working in good faith to address a deficiency identified in a Notice of Violation should not be subject to an Administrative Complaint. NHA believes DSOD can determine what "good faith" is on a case-by-case basis, but NHA requests DSOD give owners a warning prior to issuing either a Notice of Violation or Administrative Complaint. For example, owners often resubmit Emergency Action Plan's (EAPs) with the Office of Emergency Services (OES) based on feedback received from OES. Such practice improves safety and compliance, and should be determined as working in good faith.

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Response 9.1

It is the Department's preference to obtain timely compliance with Dam Safety Program requirements without having to initiate enforcement proceedings. If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner could be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1.

It is not the Department's intention that a Notice of Violation be the first time a dam owner learns that that are non-compliant with the dam safety program. While it is not a prerequisite to enforcement, prior to the Department sending an owner a Notice of Violation, the Department in most cases will have informed the dam owner of its obligation to comply, through other interactions with the dam owners, such as dam inspections and related reports, EAP comments from the California Governor's Office of Emergency Services, as well as other communications that are part of the Dam Safety Program.

No changes were made to the text of the regulation based on this comment.

Comment 9.2

§ 337.10 Assessment of Administrative Civil Penalty - Once again, NHA requests impacts on electricity rates be given consideration in the determination of the ability of regulated utilities and public power to pay financial penalties.

Response 9.2

While impacts on electricity rates is not specifically addressed in the regulations, section 337.64(d) allows for the administrative civil penalty to be adjusted should it impact disadvantaged communities and 337.64(e) allows an owner's ability to pay the administrative civil penalty to be taken into consideration.

No changes were made to the text of the regulation based on this comment.

Comment 9.3

§ 337.12 Request for Hearing; Waiver - NHA commends DSOD for its modification allowing dam owners thirty (30) days, instead of twenty (20) days, from the date an Administrative Complaint is served to submit a written request for a hearing. However, NHA reaffirms its request that owners be given sixty (60) calendar days to request a hearing. Internal processes and deliberations can take multiple weeks to reach an informed decision.

Response 9.3

The Department has considered this comment previously and modified the regulations to provide 30 calendar days to request a hearing instead of 20 calendar days. Thirty calendar days is considered adequate given that dam owners would typically have been made aware of any violation of the water code before the issuance of a Notice of Violation and that the Notice of Violation would include a date to either become compliant or an Administrative Complaint would be issued. In addition, the 30-day deadline may be extended for good cause upon a written request from the dam owner. See section 337.12, subdivision (b).

No changes were made to the text of the regulation based on this comment.

Comment 9.4

In General - NHA requests DSOD continue to coordinate closely with FERC D2SI. Where FERC and DSOD regulations differ, DSOD should consider the dual obligations of the owner when determining whether the owner is working in good faith.

Response 9.4

DSOD routinely coordinates efforts with FERC; however, dam owner under dual regulation must comply with both state and federal dam safety requirements. It is the Department's preference to obtain timely compliance with Dam Safety Program requirements without having to initiate enforcement proceedings. If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner could be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1.

No changes were made to the text of the regulation based on this comment.

6. Summary and response to comments received during the period the modified text was available to the public June 20, 2022 – July 6, 2022 (16-day comment period)

10. Sean Todaro, East Bay Municipal Utility District

Received by email on July 7, 2022 (after the public comment period had closed)

Comment 10.1

The following edit is proposed in order to not unduly burden agencies that have progressed in good faith: If a dam owner has submitted a draft EAP is progressing toward completion to respond to agency comments according to a reasonable schedule proposed by the owner of the dam and approved by the department, the department shall not prepare any portion of the Emergency Action Plan. If a dam owner fails to comply with a department order to prepare and submit an acceptable EAP in accordance with Water Code, Division 3, Part 1, Chapter 4, Article 6 and as described in the Notice of Violation, the department shall prepare only those portions of the non-compliant an EAP, including inundation maps to meet the requirements of Water Code, Division 3, Part 1, Chapter 4, Article 6. The department costs and expenses shall be recoverable by the state, including the department, from the dam owner.

Response 10.2

It is the Department's preference to obtain timely compliance with Dam Safety Program requirements without having to initiate enforcement proceedings. If an enforcement action is pursued under the procedures set forth in Article 7, the underlying facts related to the violation, including good faith attempts to comply and cooperation from the dam owner will be considered, as appropriate under these regulations, including when calculating administrative civil penalties under the regulations set forth in Article 7.1.

The Department understands that preparation of such documents may require multiple revisions prior to approval by the Department and Governor's Office of Emergency Services, as appropriate.

No changes were made to the text of the regulation based on this comment.

7. Local Mandate Determination

The proposed regulations do not impose any mandate on local agencies or school districts. The Department has determined that the proposed regulations will not impose a mandate on local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of Division 4 of the Government Code. Dams may be owned by local agencies or school districts. However, the regulations apply to all dam owners, not exclusively to local agencies and school districts. The proposed regulations apply to all owners of state jurisdictional dams, which include both publicly and privately-owned dams. While the proposed regulations may impose costs on local agencies that own jurisdictional dams subject the proposed regulatory action, it will not result in a reimbursable state-mandated program.

8. Alternatives Determination

The Department considered two main alternatives during the initial development of these regulations: 1) no regulations and 2) daily penalty factors without a defined calculation methodology.

The first alternative was rejected because the Department determined that the regulations are necessary to ensure consistent and transparent procedures to dam owners on whom civil penalties and other punitive measures may be imposed. The authorizing statutes allow DWR to take enforcement actions to obtain compliance with Dam Safety Program requirements, and due process considerations dictate that dam owners have notice and an opportunity to contest noncompliance allegations.

The second alternative was rejected because the Department determined that simply listing factors that would guide the Department in setting the administrative civil penalty amount may not lead to the desired level of consistency. Instead, the Department determined that listing factors, and establishing a methodology for using the factors, demonstrates the weight that is given to different factors, and will lead to the level of transparency and consistency that the Department seeks.

The Department considered other factors in developing these regulations in such that they are consistent with the statutory authority in the Water Code. After public comment periods and careful consideration by the Department, it was determined that no other alternatives, it considered or that was otherwise identified and brought to its attention, would be more appropriate.

The Department determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.