

DEPARTMENT OF WATER RESOURCES

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June 20, 2022

California Code of Regulations, Title 23, Division 2
Add Section 306 to Article 1
Add Articles 7 and 7.1

Notice of Public Availability of Modified Text and
16-Day Comment Period

Deadline for Public Comment: 5:00 p.m. on Wednesday July 6, 2022

On May 21, 2021, proposed regulations were published related to California's Dam Safety Program¹, which is implemented by the Department of Water Resources (Department). Upon further review of the regulations' text, the Department is proposing additional changes to the proposed regulations that are sufficiently related to the text published in the Office of Administrative Law Notice Register on May 21, 2021. The Department is making these changes available for public comment for at least 15-days as required by Government Code section 11346.8.

The originally-proposed regulatory additions and deletions are shown in single underline and ~~single strikethrough~~ format, respectively. The first set of additions and deletions to the proposed language are shown in double underline and ~~double strikethrough~~ format, respectively. New additions and deletions to the proposed language that are made public through this notice are shown in **bold underline** and ~~**bold strikeout and underline**~~ or ~~**bold strikeout and double underline**~~ format, respectively. Only new additions and deletions are currently open for public comment.

The Administrative Procedure Act requires that the Department respond to comments received regarding all noticed changes. All written comments received by the **July 6, 2022**, deadline **pertaining to the modified text shown in bold** will be responded to in the Final Statement of Reasons. All timely comments received by the Department during the initial 55-day comment period and the first comment period will also be responded to in the Final Statement of Reasons.

Summary of Proposed Modifications

After further review of the proposed regulations' text, modifications to the text of the regulations that was published on May 21, 2021 and updated with modifications on August 19, 2021, have been proposed. 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.

CCR Title 23. 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.

¹ Dam Safety Program means the Department's program to regulate and supervise the safety of dams under Water Code Division 3, Part 1.

Subsection (b) was re-written to clarify the information that the Department may use in making the determination if a “suspected dam” has the 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. Article 7.

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 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.

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. Subsections (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.

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. Article 7.1

Section 337.50 Applicability; Purpose

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

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.

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 of the other sections that calculate the penalty amount.

Written Comment Period

The Department will address written comments on the changes identified in the noticed text that are indicated by **bolded underline** and **~~bolded strikethrough underline~~** and **~~bolded strikethrough double underline~~**. Interested members of the public may submit comments by postal mail or email and any comments must be **received by the Department on or before 5 p.m. Wednesday July 6, 2022** and must be addressed to the following:

Email:

Shawn Jones, Assistant Division Manager
Division of Safety of Dams
Shawn.Jones@water.ca.gov
(916) 565-7802

Postal Mail:

Shawn Jones, Assistant Division Manager
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Please note that under the California Public Records Act (Government Code § 6250 et seq.), written and oral comments, attachments, and associated contact information (e.g. address, phone, email, etc.) become part of the public record and can be released to the public upon request.

Comments must be directed to the Department in one of the two forms described above and **received** by the Department by **5 p.m. Wednesday July 6, 2022**. Only comments received during this comment period and that relate to the above-described changes to the text of the regulations will be responded to by the Department in the Final Statement of Reasons.

Availability of Proposed Regulations

This Notice, the modified text, the Initial Notice of Regulatory Action, Initial Statement of Reasons, the express terms of the regulation initially proposed, and all information upon which the proposed regulations are based are available on the Department's website at:

<https://water.ca.gov/Programs/All-Programs/Division-of-Safety-of-Dams/Statutes-and-Regulations>

All subsequent regulatory documents, including the final statement of reasons, when completed, will be made available on the above website.

Department Contact Persons

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Questions regarding the proposed regulatory action may be directed to:

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