

DEPARTMENT OF WATER RESOURCES

1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791



August 19, 2021

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
19-Day Comment Period

Deadline for Public Comment: 5:00 p.m. on Tuesday September 7, 2021

On May 21, 2021, proposed regulations were published that are related to California's Dam Safety Program¹, which is implemented by the Department of Water Resources (Department). The Department is proposing changes to the proposed regulations that are sufficiently related to the text that was 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. New additions and deletions to the proposed language that are made public with this notice are shown in double underline and ~~double strikethrough~~ 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 **September 7, 2021**, deadline **that pertain to the modified text shown in double strikeout and double underline** will be responded to in the Final Statement of Reasons. Even though comments at this time are limited to the changes reflected in double strikeout and double underline, all timely comments received by the Department during the initial 55-day comment period will also be responded to in the Final Statement of Reasons.

Summary of Proposed Modifications

After careful consideration of the comments received and further review of the proposed regulation's text, modifications to the text of the regulations that was published on May 21, 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). 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.

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

CCR Title 23. Article 7.

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 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.

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 confusing 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.

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 have 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 (i.e. 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

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.

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.”

Written Comment Period

The Department will address written comments on the changes identified in the noticed text that are indicated by double underline and ~~double strikethrough~~. 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. Tuesday September 7, 2021** 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
Division of Safety of Dams
P.O. Box 942836
Sacramento, CA 94236-0001
(916) 565-7802

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. Tuesday September 7, 2021**. 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

Department Contact Persons

Questions regarding the proposed regulatory action may be directed to:

Shawn Jones, Assistant Division Manager
Division of Safety of Dams
P.O. Box 942836
Sacramento, CA 94236-0001
Shawn.Jones@water.ca.gov
(916) 565-7802

Backup Contact Person
Peter Thyberg, Senior Staff Counsel
Peter.Thyberg@water.ca.gov
(916) 820-7564