

Title 23 of the California Code of Regulations, Division 2, Chapter 1

Division 2, Chapter 1, Article 1 (General Provisions), Add Section 306

§ 306. Information Request

(a) 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, upon reasonable notice, to the designated offices of the department any information, including results from required investigations, relating to the dam or suspected dam, including those relating to its ownership, control, operations, management, maintenance, construction, and compliance with provisions of Division 3, Part 1 of the Water Code and implementing regulations.

(b) A “suspected dam” means a structure that, based on available information, may meet the definition of a dam in Water Code section 6002. A “suspected dam owner” means a person that, based on available information, may meet the definition of an owner, as defined in Water Code section 6005, of a dam or of a suspected dam.

(c) Dam owners and suspected dam owners required to furnish information pursuant to this section shall pay any costs related to providing the information required under subsection (a).

Authority: Section 6078, Water Code.

Reference: Sections 6100, 6101, and 6120, Water Code.

Add Article 7 Administrative Enforcement

§ 337. Purpose and Authority.

The department is responsible for implementing California’s Dam Safety Program pursuant to the California Water Code, Division 3, Part 1. In the event of a violation of Water Code, Division 3, Part 1, regulations adopted pursuant thereto, or any department approvals, orders, or requirements issued under Water Code Division 3, Part 1, the department may initiate proceedings to obtain compliance. With respect to enforcement actions to ensure compliance with Water Code, Division 3, Part 1, Chapter 4, Article 6, the department will coordinate with Cal OES. The regulations in this article specify the process for administrative enforcement actions that the Department may take to ensure compliance with Water Code Division 3, Part 1 and implementing regulations. ~~The regulations also provide a hearing process for revocations of certificates of approval.~~ The process established in this article does not limit the Department’s ability to issue directives or orders for dam safety remedial actions or emergency work or to pursue judicial remedies.

Authority: Section 6078, Water Code.

Reference: Sections 6075, 6077, 6079, 6100, 6160, 6161, ~~6357.4~~, 6429, 6431, and 6432, Water Code.

§ 337.2 Definitions.

Unless the context clearly indicates otherwise, as used in this article and Article 7.1, the terms below shall have the meanings noted:

(a) "ALJ" means Administrative Law Judge.

(b) "Cal OES" means the California Governor's Office of Emergency Services.

~~"Certificate of approval" means a certificate issued under Water Code, Division 3, Part 1, Chapter 7, Article 1.5.~~

(c) "Dam owner" has the same meaning as "Owner" provided in section 6005 of the Water Code.

(d) "Dam Safety Program" means the Department's program to regulate and supervise the safety of dams under the California Water Code, Division 3, Part 1 and implementing regulations.

(e) "Dam Safety Program requirements" means any requirement 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.

(f) "Department" means the California Department of Water Resources.

(g) "DSOD" means the Department's Division of Safety of Dams.

(h) "EAP" means an emergency action plan as described in section 8589.5 of the Government Code and includes updates to an EAP as required by Water Code section 6161.

(i) "Inundation map" means an inundation map as described in Water Code section 6161 and in the California Code of Regulations, Title 23, Division 2, Chapter 1, Article 6, section 335.2 (a)(17) and updates to an inundation map as required by Water Code section 6161 and California Code of Regulations, Title 23, Division 2, Chapter 1, Article 6, section 335.16.

(j) "OAH" means the Office of Administrative Hearings.

(k) "Parties" means the dam owner that is the subject of the action, DSOD and Cal OES, with respect to actions to ensure compliance with Water Code, Division 3, Part 1, Chapter 4, Article 6.

(l) "Period of Violation" is the number of calendar days, as determined by the department, that the Dam Owner is in violation of Water Code, Division 3, Part 1, regulations adopted pursuant thereto, or any department approvals, orders, or requirements issued under Water Code, Division 3, Part 1.

(m) "Presiding officer" means an impartial person designated by the department to conduct the hearing under this article, including an administrative law judge assigned by the OAH of the Department of General Services.

~~“OAH” means the Office of Administrative Hearings.~~

(n) “Reservoir restrictions” 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.

(o) “Staff costs” means department staff costs, including labor costs and travel expenses, related to the investigation and enforcement of Dam Safety Program violations, and it includes costs incurred beginning with the preparation of a Notice of Violation until the time that a hearing is requested pursuant to section 337.12, subsection (a).

Authority: Section 6078, Water Code.

Reference: Sections 6005, 6160, 6161, 6357, and 6429, Water Code.

§ 337.4 Notice of Violation.

If DSOD determines that a dam owner has violated the Water Code, Division 3, Part 1; regulations adopted pursuant thereto; or any approval, order, or requirement issued under Water Code, Division 3, Part 1 or the regulations adopted pursuant thereto, then DSOD may issue a Notice of Violation to the dam owner. The Notice of Violation shall describe the activity or failure to act that constitutes a violation and actions that the dam owner is required to undertake to remedy the violation, provide the dam owner with the opportunity to submit information to DSOD concerning the violation, and ~~The Notice of Violation shall provide notice that failure to take the required action(s) within the specified time period may subject the dam owner to administrative civil penalties, reservoir restrictions, property liens, revocation of a certificate of approval and, with respect to actions to ensure compliance with Water Code, Division 3, Part 1, Chapter 4, Article 6, reimbursement of the costs to prepare an EAP and inundation maps~~ result in the issuance of an administrative complaint as described in section 337.8. The Notice of Violation shall include an estimated cost to prepare an EAP and inundation map(s) where the dam owner has failed to submit them.

Authority: Section 6078, Water Code

Reference: Sections 6075, 6077, ~~6357-4~~, 6428, 6429, 6431, and 6432, Water Code.

§ 337.6 Department ~~e~~Preparation of an Emergency Action Plan; Reimbursement by Dam Owner.

If a dam owner fails to comply with ~~a Notice of Violation issued by DSOD that requires the dam owner~~ 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 may prepare an EAP, including inundation maps. The department may use contractors, including other agencies, to prepare all or portions of the EAP, including inundation maps, and in accordance with Water Code, Division 3, Part 1, Chapter 8, section 6431, the department costs and expenses shall be recoverable by the state, including the department, from the dam owner.

Authority: Section 6078, Water Code.
Reference: Section 6431, Water Code.

§ 337.8 Administrative Complaint.

(a) If DSOD determines that a dam owner has failed to correct the violations of Dam Safety Program requirements ~~comply with a~~ described in the Notice of Violation, DSOD may issue an administrative complaint to the dam owner. The administrative complaint may seek administrative civil penalties, reservoir restrictions, property liens, fees, penalties and interest imposed by statute, ~~revocation of a certificate of approval,~~ and any other ~~appropriate~~ actions that DSOD deems necessary to ensure compliance with Water Code, Division 3, Part 1 and implementing regulations. The administrative complaint may also seek recovery of ~~all~~ staff costs ~~incurred by DSOD to bring the enforcement action~~ and, with respect to violations of Water Code, Division 3, Part 1, Chapter 4, Article 6, recovery of ~~Department~~ costs to prepare an EAP, including inundation maps. ~~If the administrative complaint seeks recovery of DSOD costs to bring the enforcement action, the costs shall be limited to those incurred by DSOD up until the time that a request for hearing is requested.~~

(b) The administrative complaint shall:

(1) Allege the activity or failure to act that constitutes a violation of Water Code, Division 3, Part 1; regulations adopted pursuant thereto; or any approval, order, or requirement issued under Water Code, Division 3, Part 1 or regulations adopted pursuant thereto.

(2) Include the provision of law authorizing the administrative civil penalty ~~imposed,~~ reservoir restrictions, property liens, ~~revocation of a certificate of approval,~~ reimbursement of ~~Department~~ costs to prepare EAPs and inundation maps, reimbursement of staff costs, fees, ~~statutory~~ penalties and interest imposed by statute, or other ~~conditions or requirements authorized under~~ actions proposed to ensure compliance with Water Code, Division 3, Part 1 and implementing regulations.

(3) State the amount of any administrative civil penalty proposed, reservoir restrictions or property liens proposed, costs for which DSOD is seeking to recover, fees, ~~and interest~~ and penalties, and interest imposed by statute, as applicable, ~~revocation of a certificate of approval,~~ and any other actions ~~DSOD~~ proposed to ensure compliance with Water Code, Division 3, Part 1 and implementing regulations.

(4) State that the dam owner's failure to request a hearing ~~within twenty (20) calendar days after the date of service of the complaint~~ in accordance with section 337.12, subsection (a) constitutes a waiver of the right to a hearing. ~~Notwithstanding the preceding sentence, if the administrative complaint seeks revocation of the certificate of approval, the department will schedule a hearing absent a timely request and will provide notice to the dam owner and interested parties at least twenty (20) thirty (30) calendar days before the hearing. A hearing initiated by the department under this subsection will be limited to the proposed revocation of the certificate of approval, the right to a hearing on other matters and relief sought in the administrative civil complaint is waived.~~

(c) DSOD may, within its discretion, issue an administrative complaint without first issuing a Notice of Violation in cases where DSOD determines that issuance of a Notice of Violation would result in an unreasonable delay.

Authority: Section 6078, Water Code.

Reference: Sections 6075, 6077, 6357.1, ~~6357.4~~, 6428, 6429, 6431, and 6432, Water Code.

§ 337.10 Assessment of Administrative Civil Penalty.

(a) In determining the amount of the proposed and assessed administrative civil penalty authorized by Water Code section 6432, the department shall take into consideration the following, to the extent they are known to the department: the actual or potential harm to public safety, including human life and property; the extent of deviation from applicable dam safety requirements; the amount of time over which the violation occurs; any prior history of violations; any corrective action taken and cooperation by the dam owner; the dam owner's culpability and ability to pay the penalty; any impacts to disadvantaged communities; and the prophylactic effect that the imposition of the penalty would have on both the dam owner and the regulated community as a whole.

(b) Except as provided in subsection (c) of this section, administrative civil penalties imposed pursuant to this Article shall be assessed following the procedures set forth in Article 7.1. The penalty imposed for any violation in accordance with this article shall not exceed the maximum penalty specified in statute, which is currently expressed as a daily maximum per violation.

(c) ~~Administrative civil p~~Penalties set by statute will not be assessed by the procedures set forth in Article 7.1.

Authority: Section 6078, Water Code.

Reference: Section 6432, Water Code.

§ 337.11 Reservoir Restrictions

(a) In determining the extent of the reservoir restrictions to be imposed pursuant to this article, the department shall consider the level of reservoir restrictions that will, as determined by the department, provide reasonable incentive for the dam owner to comply with the Dam Safety Program requirement or requirements that form the basis or bases of the reservoir restrictions, based upon particular facts and circumstances surrounding the dam, the reservoir, and the dam owner.

(b) Administrative complaints issued by DSOD that propose reservoir restrictions and decisions issued by the department that impose reservoir restrictions shall include findings that identify relevant facts and circumstances and analyze the criteria in subsection (a).

§ 337.12 Request for Hearing; Waiver.

(a) If the dam owner chooses to contest an administrative complaint, the dam owner must submit a written request for a hearing to the department within ~~twenty (20)~~ thirty (30) calendar days of the date that DSOD served the administrative complaint. The request must include a

statement of defense, which shall include at a minimum: a summary of any legal and factual basis(es) or bases for challenging the administrative complaint, including the underlying factual allegations and violations, and, as applicable, the amount of any administrative civil penalty, costs, and fees, penalties and interest imposed by statute, reservoir restrictions, revocation of a certificate of approval, the costs imposed on the dam owner, and any other relief sought in the administrative complaint.

(b) If the dam owner fails to submit a written request for a hearing as prescribed in subsection (a), any right to a hearing will be deemed waived and the department will be authorized to issue a final administrative order decision that orders the imposes imposition of the administrative civil penalties, reservoir restrictions, property liens, recovery of costs to prepare an EAP, including inundation maps, staff costs, fees, statutory penalties and interest imposed by statute, and other actions proposed in the administrative complaint to ensure compliance with Water Code Division 3, Part 1. The deadline to submit the request may be extended for good cause upon a written request from the dam owner or on the department's own motion, and any extensions granted by the department must be in writing.

(c) Notwithstanding subsections (a) and (b), if the administrative complaint seeks revocation of the certificate of approval, the department will schedule a hearing absent a timely request and will provide notice to the dam owner and interested parties at least twenty (20) calendar days before the hearing. If a dam owner chooses to contest the revocation, it must provide a statement of defense, as described in subsection (a), at least ten (10) calendar days before the hearing. A hearing initiated by the department under this subsection will be limited to the proposed revocation of the certificate of approval, and the right to a hearing on other matters and relief sought in the administrative civil complaint is waived.

Authority: Section 6078, Water Code.

Reference: Sections 6357.4, 6428, 6429, 6431, and 6432, Water Code.

§ 337.14 Presiding Officer; Hearing Procedure.

(a) In the case where the dam owner requests a hearing or the department schedules a hearing because revocation of a certificate of approval is being sought, the department shall schedule the hearing before a presiding officer who shall exercise all powers relating to the conduct of the hearing.

(b) The department may designate an ALJ from the Office of Administrative Hearings (OAH) to serve as a presiding officer under this section. Or, the department may designate an impartial person within the department to serve as a presiding officer under this section, but the presiding officer, and any advisors to the presiding officer, shall not be the same department person who issued the Notice of Violation or administrative complaint and shall not have served as an investigator, prosecutor, or advocate in any stage of the enforcement proceeding.

(c) In the cases where the department designates an ALJ from the OAH to serve as the presiding officer, the hearing shall be conducted and the decision shall be issued in accordance with Chapter 4.5 (commencing with Section 11400) and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. Any proposed and final

decisions issued after a hearing authorized by this subsection may include any of the orders authorized by section 337.28, subsections (a)(1) – (a)(4)(7).

(d) In cases where the department designates a person other than an ALJ from the OAH, the requirements in sections 337.16 through 337.28 apply to the procedures by which the department conducts a hearing, except that the presiding officer may waive or modify the requirements for good cause.

(e) The designation of the presiding officer and any waiver or modifications of hearing procedures or requirements authorized under subsection (d) shall be made in full consideration of the requirements of due process and fundamental fairness to the parties.

Authority: Section 6078, Water Code.

Reference: Sections ~~6357.4~~, 6428, 6429, 6431, and 6432, Water Code.

§ 337.16 Notice of Hearing (Non-OAH Cases).

(a) In cases where a department official serves as the presiding officer, the department shall schedule a hearing and provide notice to the dam owner as set forth in this section. Hearings will be conducted in Sacramento, unless the dam owner provides the presiding officer good cause, in writing, to schedule the hearing at an alternate location in California or to schedule a virtual hearing. The presiding officer may decide, for good cause, to schedule the hearing at a location other than Sacramento or to conduct a virtual hearing.

(b) The department shall serve a notice of hearing to the dam owner at least thirty (30) calendar days prior to the hearing, except as provided in subsections ~~(c) and (d)~~.

(c) If the department determines that the provision of a 30-day notice poses an unreasonable risk to public safety or welfare, the department may provide a shorter notice period, but in all cases the original notice of a hearing must be provided a minimum of ten (10) calendar days prior to the hearing.

~~(d) The department shall serve a notice of hearing at least twenty (20) calendar days prior to the hearing, if the sole purpose of the hearing is to seek the revocation of the certificate of approval.~~

~~(e)~~(d) The notice of hearing shall include the following:

(1) The date, time, and place at which the hearing will be held.

(2) A statement that the hearing will be governed by this article.

(3) A statement that if the dam owner does not proficiently speak or understand English, the dam owner may request language assistance by contacting the department and making such request within a reasonable amount of time prior to the hearing, as described below, to allow appropriate arrangements to be made. For notices issued under subsection (b), the dam owner must make the request for assistance at least fifteen (15) calendar days before the hearing, and for notices issued under subsections

(c) and (d), the dam owner must make the request for assistance at least five (5) calendar days before the hearing. The presiding officer may direct the department or the dam owner to pay for the costs of the interpreter.

(4) A copy of the administrative complaint.

(5) A statement on whether the pre-submittal of materials will be required, as described in Section 337.20(b), and if so, a description of the pre-submittal requirements.

~~(f)~~(e) In the case where a dam owner submits a timely request for a hearing, and a hearing is scheduled, a dam owner's failure to appear at the time and place of the hearing constitutes a waiver of the request for hearing and the department will be authorized to issue a final administrative decision as described in section 337.12, subsection (b). ~~order that imposes the administrative civil penalties, costs, interest, and other actions proposed in the administrative complaint.~~ Notwithstanding the preceding sentence, if the dam owner demonstrates that failing to appear at the scheduled hearing was due to circumstances beyond the dam owner's reasonable control or otherwise demonstrates good cause for failing to appear and requests that the hearing be rescheduled, the presiding officer shall reschedule the hearing, and the department shall not issue a final ~~administrative order~~ decision due to the dam owner's failure to appear at the hearing initially scheduled.

Authority: Section 6078, Water Code.

Reference: Sections ~~6357.4~~, 6428, 6429, 6431, and 6432, Water Code.

§ 337.18 Continuance of Hearing.

(a) The presiding officer may, for good cause, on the presiding officer's own motion or upon the request of any party, continue the hearing to another date, in accordance with the following.

(1) The request for a continuance shall be made in writing and shall include the name of the dam and dam owner, and the date, time, and place of the scheduled hearing.

(2) The presiding officer must receive the request no less than seven (7) calendar days prior to the scheduled date of the hearing. The presiding officer may ask other parties for comments on the request for a continuance and provide a reasonable period of time within which to submit comments.

(3) The request shall identify any previous requests to continue the matter and shall contain a statement of all facts the party contends constitute good cause to continue the matter. The presiding officer has the discretion to waive the requirement for a written request or consider a written request submitted after the time period prescribed in subsection (a)(2) upon a showing of additional good cause.

(4) When a continuance is ordered, the presiding officer shall give written notice to all parties of the time and place of the continued hearing.

(5) If the presiding officer continues the hearing on the presiding officer's own motion or in response to a request for a continuance, the presiding officer shall provide notice to

the parties at least three (3) calendar days before the scheduled hearing, unless providing that notice is infeasible because the presiding officer waived the seven (7) calendar day time period specified in subsection (a)(2) in accordance with subsection (a)(3).

(b) A dam owner's failure to appear at the time and place of the hearing that was continued under this section constitutes a waiver of the request for hearing and the department will be authorized to issue a final administrative order that imposes the administrative civil penalties and other actions proposed in the administrative complaint decision as described in section 337.12, subsection (b). Notwithstanding the preceding sentence, if the dam owner demonstrates that failing to appear at the continued hearing was due to circumstances beyond the dam owner's reasonable control or otherwise demonstrates good cause for failing to appear, the presiding officer may reschedule the continued hearing, and the department shall not issue a final order due to the dam owner's failure to appear at the continued hearing.

Authority: Section 6078, Water Code.

Reference: ~~6357.4~~, 6428, 6429, 6431, and 6432, Water Code.

§ 337.20 Conduct of Evidentiary Hearings.

(a) Hearings shall be conducted in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unnecessary delay.

(b) Parties may be required to submit written materials before the hearing, and shall be provided with a reasonable period of time to do so. Any pre-submittal requirements, including those described in subsections (1) – (5) of this section, shall be included in the hearing notice issued by the Department.

(1) The hearing notice may require that all parties intending to present evidence at a hearing shall submit the following information to the department prior to the hearing: the name of each witness whom the party intends to call at the hearing, the subject of each witness's proposed testimony, the estimated time required by the witness to present direct testimony, and if an expert witness is called, the qualifications of each expert witness. The required information shall be submitted in accordance with the procedure specified in the hearing notice.

(2) The hearing notice may require that direct testimony be submitted in writing prior to the hearing. Copies of written testimony and exhibits shall be submitted to the Department and to other parties designated by the department in accordance with provisions of the hearing notice or other written instructions provided by the department. The hearing notice may require multiple copies of written testimony and other exhibits for use by the department.

(3) Any witness providing written testimony shall appear at the hearing and affirm that the written testimony is true and correct. Written testimony shall not be read into the record unless allowed by the presiding officer.

(4) Where any of the provisions of this section have not been complied with, the presiding officer may refuse to admit the proposed testimony or the proposed exhibit into evidence, and shall refuse to do so where there is a showing of prejudice to any party. This rule may be modified where a party demonstrates that compliance would create severe hardship.

(5) Rebuttal testimony generally will not be required to be submitted in writing, nor will rebuttal testimony and exhibits be required to be submitted prior to the start of the hearing.

(c) The parties to the action, persons directly impacted by the action, and other interested persons may provide oral testimony at the hearing. Oral testimony shall proceed in the following order, unless the presiding officer determines that a different order will be more efficient given the facts and circumstances of the case:

(1) DSOD.

(2) Cal OES if the action relates to compliance with Water Code Division 3, Part 1, Chapter 4, Article 6.

(3) Dam Owner.

(4) Other persons who are directly affected by action that is the subject of the hearing, as determined by the presiding officer.

(5) Other interested persons.

(d) The presiding officer may allow rebuttal testimony.

(e) Cross-examination may be allowed if deemed appropriate by the presiding officer. The presiding officer and persons advising the presiding officer may ask questions at any time and the presiding officer may close the public testimony portion of the hearing when a reasonable opportunity to present all questions and points of view has been allowed.

(f) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The presiding officer may take official notice of such facts as may be judicially noticed by the courts of this state. Unduly repetitious or irrelevant evidence shall be excluded upon order by the presiding officer.

(g) The presiding officer may establish reasonable time limits for presentations and may require individuals to consolidate their comments to avoid repetition.

Authority: Section 6078, Water Code.

Reference: Sections ~~6357.4~~, 6428, 6429, 6431, and 6432, Water Code.

§ 337.22 Service.

Whenever DSOD or the department is required to serve documents on a dam owner under the provisions of this article, the dam owner shall be served by using at least one of the following methods:

(a) Service by mail may be made by first-class mail, registered mail or certified mail through the United States Postal Service, or through a mail or parcel delivery service. Where service is made by mail, the proof of service shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.

~~(b) Service may be made by leaving the document at the residence or business of the person named to be served, or at the physical location of the dam that is the subject of the document being served, with a person not less than 18 years of age. Where service is made in this manner, the proof of service shall also state the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of the person to whom the papers were handed, the person making the service may substitute a physical description for the name.~~

(b) ~~(e)~~ Service may be made by electronic mail if the dam owner agrees in writing to service of the notice by electronic mail.

(c) ~~(d)~~ Personal service.

(d) If, after the exercise of reasonable diligence, service cannot be achieved pursuant to subsections (a), (b), and (c), then the department may serve documents in accordance with this subsection. Service may be made by leaving the document at the residence or business of the person named to be served, or at the physical location of the dam that is the subject of the document being served, with a person not less than 18 years of age. Where service is made in this manner, the proof of service shall also state the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of the person to whom the papers were handed, the person making the service may substitute a physical description for the name.

Authority: Section 6078, Water Code.

Reference: Sections ~~6357.4~~, 6428, 6429, 6431, and 6432, Water Code.

§ 337.24 Settlement.

The parties may reach a settlement at any time before an order becomes final. Upon submission of a signed settlement agreement, the ~~D~~department or the presiding officer, if a hearing was requested, shall issue an order including the terms of the settlement agreement.

Authority: Section 6078, Water Code.

Reference: ~~6357.4~~, 6428, 6429, 6431, and 6432, Water Code.

§ 337.26 Ex Parte Communications.

(a) While the proceeding is pending, there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer or persons advising the presiding officer from the parties or from any interested person outside the department, without notice and opportunity for all parties to participate in the communication. Nothing in this section precludes a communication, including a communication from an employee or representative of the Department, made on the record at the hearing. For the purpose of this section, a proceeding is pending from the issuance of the department's notice of hearing.

(b) A communication otherwise prohibited by this subsection is permissible when:

(1) The communication is required for disposition of an ex parte matter specifically authorized by statute or concerns a matter of procedure or practice, including a request for a continuance that is not in controversy; or

(2) The communication is for the purpose of assistance and advice to the presiding officer from a person, including department staff, who has not served as investigator, prosecutor, or advocate in the hearing or its prehearing stage.

(3) If, while the proceeding is pending but before serving as a presiding officer, a person receives a communication of a type that would be in violation of this section if received while serving as presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication on the record and give all parties an opportunity to address it.

(4) If the presiding officer receives a communication in violation of this section, the presiding officer shall make all of the following a part of the record in the proceeding:

(A) If the communication is written, the writing and any written response of the presiding officer to the communication.

(B) If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication. The presiding officer shall notify all parties that a communication described in this subsection has been made a part of the record. Within ten (10) calendar days after receipt of notice of the communication, a party may comment on the communication.

(C) The receipt by the presiding officer of a communication in violation of this section may be grounds for disqualification of the presiding officer pursuant to this section.

Authority: Section 6078, Water Code.

Reference: ~~6357.4~~, 6428, 6429, 6431, and 6432, Water Code.

§ 337.28 Decision.

(a) Within one hundred and eighty (180) calendar days of the conclusion of the hearing, the presiding officer shall issue a written decision based on evidence in the record. The decision shall include the presiding officer's findings of fact and conclusions, and may provide and order any of the following:

(1) With respect to administrative civil penalties, the decision may concur with the administrative civil penalty proposed in the administrative complaint, modify the amount of the administrative civil penalty, or refuse to impose any administrative civil penalty.

(2) With respect to reservoir restrictions, the decision may concur with the restriction proposed in the administrative complaint, modify the restriction proposed in the administrative complaint, or refuse to impose a reservoir restriction at all.

~~(3) With respect to a certificate of approval, the decision may revoke the certificate of approval or amend the terms and conditions of the certificate of approval by revocation and issuing a new certificate of approval containing the revised terms and conditions.~~

~~(4) The decision may do any or all of the following:~~

~~(A)(3) Order the dam owner to reimburse the Department for staff costs of the Department to bring the action that were incurred by the Department up until the time a hearing was requested.~~

~~(B)(4) Order the dam owner to reimburse the Department for the costs of preparing an EAP, including inundation maps.~~

~~(C)(5) Authorize the imposition of property liens on land owned by dam owner.~~

~~(D)(6) Order that the dam owner pay fees, and penalties and interest imposed by statute.~~

~~(E)(7) Order any other appropriate action authorized under Water Code Division 3, Part 1 that will facilitate or ensure compliance with Water Code Division 3, Part 1 and implementing regulations.~~

(b) The presiding officer shall issue the final decision of the department, which shall be served on the parties.

Authority: Section 6078, Water Code.

Reference: ~~6357.4~~, 6428, 6429, 6431, and 6432, Water Code.

§ 337.30 Payment of Penalties, Fees, Interest, or Costs.

An administrative civil penalty, fees, penalties and interest, imposed by statute, ~~or and other~~ costs imposed on the dam owner under this article shall be due and payable to the department within sixty (60) calendar days after a final order has been served. All ~~penalty payments and other~~ monetary sums recovered shall be deposited into the Dam Safety Fund established by Water Code section 6308.

Authority: Section 6078, Water Code.

Reference: Sections 6308, 6428, 6431, and 6432, Water Code.

§ 337.32 Property Liens.

(a) The department may levy property liens on an owner that violates any provision of Water Code, Division 3, Part 1, regulations adopted pursuant thereto, or any department approvals, orders, or requirements issued under Water Code Division 3, Part 1 or regulations. The department may record a lien with the appropriate county recorder to recover all penalties imposed, fees, interest, and costs charged to the owner under this article, including the following:

- (1) Administrative civil penalties.
- (2) Fees, interest, and penalties, as required by statute.
- (3) Cost of preparing an EAP and inundation maps.
- (4) ~~Department Staff costs to bring the actions under this article.~~

(b) Before recording a lien, the department shall provide the dam owner notice and an opportunity for a hearing to contest the amount of the lien.

- (1) The notice shall be provided at least thirty (30) calendar days before the hearing.
- (2) The notice shall include the following information:
 - (A) Identification of the department as the entity on whose behalf the lien is to be imposed.
 - (B) The department's authority for the imposition of the lien.
 - (C) A legal description and assessor's parcel number for the real property upon which the lien is to be imposed.
 - (D) The amount of the lien.
 - (E) The name of the property owner of record.
 - (F) The time and date of a hearing before the department at which time the owner may appear to contest the amount of the lien.

(c) The notice and opportunity for a hearing required by this section may be satisfied by a hearing conducted in accordance with sections 337.14(c) or (d) or the opportunity for a hearing as provided in section 337.12.

(d) Upon recordation, the lien shall continue until it is released or otherwise discharged by the department, including by recording a notice of discharge with the county clerk upon payment of the lien.

Authority: Section 6078, Water Code.

Reference: Sections 6428, 6429, 6431, and 6432, Water Code.

Add Article 7.1 Method of Calculating Administrative Civil Penalties

§ 337.50 Applicability; Purpose.

(a) This article applies to the assessment of administrative civil penalties in administrative enforcement actions pursued or orders issued pursuant to Article 7, Division 2, Title 23, of the California Code of Regulations and Part 1, Division 3 of the Water Code. This article does not apply to administrative civil penalties that are part of the settlement of any enforcement action. In this article, references to department include DSOD and the presiding officer.

(b) The purpose of this article is to promote and facilitate the fair and consistent assessment of administrative civil penalties for violations of Part 1, Division 3 of the Water Code, regulations adopted pursuant thereto, or any department approvals, orders, or requirements issued under Water Code Division 3, Part 1 or the regulations. Assessments of administrative civil penalties should:

(1) Bear a reasonable relationship to the gravity of the violation and the harm or potential harm to public safety.

(2) Deter the specific violator from committing additional violations.

(3) Deter other dam owners within the regulated community from committing the same or similar violations.

(4) Eliminate any economic advantage obtained from non-compliance.

Authority: Section 6078, Water Code.

Reference: Section 6432, Water Code.

§ 337.52 Penalty Calculation.

Administrative civil penalties assessed in administrative enforcement orders issued pursuant to Article 7, Division 2, Title 23 of the California Code of Regulations and Part 1, Division 3 of the Water Code shall be assessed following the procedures set forth in this article. The penalty assessed for any violation in accordance with this article shall not exceed the maximum penalty authorized by statute.

Authority: Section 6078, Water Code.

Reference: Section 6432, Water Code.

§ 337.54 Daily Initial Penalty for Each Violation.

(a) The department shall determine a daily initial penalty for each violation, considering actual or potential harm and the extent of deviation from the requirements in Part 1, Division 3 of the Water Code and implementing regulations, or any approval, order or requirement issued thereunder and shall use Table 1 set forth in this section to determine the daily initial penalty for each violation.

(b) Determination of Harm of the Violation.

(1) The department shall consider actual or potential harm to public safety, including human life and property.

(2) When considering the degree of harm, the department shall consider the following:

(A) The dam's downstream hazard potential as determined under Section 335.4, Chapter 1, Division 2 of the California Code of Regulations.

(B) In cases of actual harm to public safety, including loss of life and damage to property, the department has the discretion to base penalties on actual harm, potential harm, or a combination of both.

(C) For determining the potential for harm, the department shall consider the estimated likelihood that the violation could lead to the failure of the dam or its appurtenant structures, including violations that cause mis-operation of the dam that could pose a safety risk.

(D) Whether ~~the~~ the dam has, or does not have, an EAP approved by Cal OES.

(c) Extent of Deviation of the Violation.

(1) The department shall consider the extent of deviation from the requirements in Water Code, Division 3, Part 1, and the California Code of Regulations, Title 23, Division 2, Chapter 1, or any approval or order issued thereunder, when determining the liability factor in Table 1 set forth in this section.

(2) The categories for extent of deviation from requirements are defined as follows:

(A) Major - The act or failure to act deviates from the requirement to such an extent that the requirement is completely ignored and none of its provisions are complied with, or the function of the requirement is rendered ineffective because some of its provisions are not complied with.

(B) Moderate - The act or failure to act deviates from the requirement, but it functions to some extent although not all of its important provisions are complied with.

(C) Minimal - The act or failure to act deviates somewhat from the requirement. The requirement functions nearly as intended, but not as well as if all provisions had been met.

(3) For requirements with more than one part, the department shall consider the extent of deviation in terms of the requirement deemed most significant by the department.

(d) Calculation of the Daily Initial Penalty. The department shall calculate the daily initial penalty based on an assigned liability factor that considers the actual or potential harm and the category of the extent of deviation. For actual or potential harm, the department shall first identify the appropriate downstream hazard classification pursuant to subsection (b)(2)(A), and then make adjustments to the applicable range shown in Table 1 based on factors contained in subsection (b)(2)(B)-(D). The daily initial penalty assessment is the maximum penalty per day allowed by statute multiplied by the liability factor in Table 1.

Table 1: Determination of Liability Factor

| <u>Harm</u> | <u>Extent of Deviation</u> | | |
|-----------------------|----------------------------|-------------------|--------------------|
| | <u>Major</u> | <u>Moderate</u> | <u>Minimal</u> |
| <u>Extremely High</u> | <u>0.8 to 1.0</u> | <u>0.6 to 0.8</u> | <u>0.3 to 0.6</u> |
| <u>High</u> | <u>0.6 to 0.8</u> | <u>0.3 to 0.6</u> | <u>0.2 to 0.3</u> |
| <u>Significant</u> | <u>0.3 to 0.6</u> | <u>0.2 to 0.3</u> | <u>0.1 to 0.2</u> |
| <u>Low</u> | <u>0.2 to 0.3</u> | <u>0.1 to 0.2</u> | <u>0.05 to 0.1</u> |

Authority: Section 6078, Water Code.

Reference: Section 6432, Water Code.

§ 337.56 Daily Base Penalty.

(a) After determining the daily initial penalty, the department shall adjust the daily initial penalty based on the violator's intent in committing the violation using the adjustment factors in Table 2 to determine the daily base penalty.

(b) Adjustment of the daily initial penalty in accordance with subsection (a) may result in a daily base penalty that is higher or lower than the daily initial penalty derived from section 337.54.

Table 2: Adjustment Factors for Violator's Intent

| Circumstance | Adjustment Factor |
|---|--------------------------|
| <u>Violation was completely beyond the control of the violator</u> | <u>0.0 to 0.5</u> |
| <u>Violation occurred despite good faith efforts to comply</u> | <u>0.5 to 1.0</u> |
| <u>Violation indicated neither good faith efforts nor intentional failure to comply</u> | <u>No Adjustment</u> |
| <u>Violation was a result of intentional failure to comply</u> | <u>1.5 to 2.0</u> |

Authority: Section 6078, Water Code.

Reference: Section 6432, Water Code.

§ 337.58 Multiple Violations.

(a) At the discretion of the department, a single daily base penalty may be assessed for multiple violations. Multiple violations subject to this section are multiple instances of the same violation, where each instance is a violation in itself.

(b) The assessment of a single daily base penalty may be appropriate for multiple violations in the following cases:

(1) The violation occurs on separate occasions unless the dam owner has been notified of the violation and has had sufficient time to correct the violation.

(2) When violations are not independent or are not substantially distinguishable. For such violations, the department shall consider the violation that the department deems most significant or egregious.

(3) A single act or failure to act that violates the same requirement in different applicable approvals, certifications or authorizations.

Authority: Section 6078, Water Code.

Reference: Section 6432, Water Code.

§ 337.60. Multi-day Violations.

(a) Each day a violation continues is a separate and distinct violation. Any reduction to the daily base penalty for a continuing violation shall be determined according to this section.

(1) The daily base penalty shall be determined as provided in sections 337.56 and 337.58. A reduction to the daily base penalty for multi-day violations may be applied in cases where the department makes at least one of the following express findings that the violation:

(A) Is not causing daily detrimental impacts to public safety;

(B) Results in no economic benefit from the illegal conduct that can be measured on a daily basis; or,

(C) Occurred without the knowledge or control of the dam owner, who therefore did not take action to eliminate or mitigate the violation.

(2) If the department makes any of the findings set forth in subsection (1) above, the department may reduce the daily base penalty to be used for each violation during the Period of Violation by using a multi-day reduction (MDR) factor.

Reduced Daily Base Penalty = Daily Base Penalty x MDR factor, rounded to the nearest dollar, where,

MDR factor = (Alternative Penalty Assessment) / (Period of Violation)

Alternative Penalty Assessment is determined using Table 3 by summing the counted days of the penalty assessment that occurred within the Period of Violation.

Table 3: Alternative Penalty Assessment

| <u>Period of Violation, calendar days</u> | <u>Determination of Counted Days</u> |
|--|---|
| <u>First 30 days</u> | <u>Count every day, up to a maximum of 30 days</u> |
| <u>Next 30 days</u> | <u>Count every additional 5 days, up to a maximum of 6 days</u> |
| <u>Every additional 30 days thereafter</u> | <u>Count every additional 30 days, no maximum</u> |

Authority: Section 6078, Water Code.

Reference: Section 6432, Water Code.

§ 337.62 Total Base Penalty.

The total base penalty is the daily base penalty for each violation as determined by this article multiplied by the Period of Violation for each violation.

Authority: Section 6078, Water Code.

Reference: Section 6432, Water Code.

§ 337.64 Total Base Penalty Adjustments.

The department may adjust the total base penalty considering each of the following adjustment factors:

(a) Cooperation: The department may consider the violator's cooperation, including any voluntary disclosure of violations and efforts to return to compliance. Adjustment shall be made using the adjustment factors in Table 4.

Table 4: Adjustment Factors for Cooperation

| <u>Degree of Cooperation</u> | <u>Circumstance</u> | <u>Adjustment Factor</u> |
|------------------------------|---|--------------------------|
| <u>Extraordinary</u> | <u>Violator voluntarily disclosed violation or exceeded the minimum requirements in returning to compliance or returned to compliance faster than requested</u> | <u>0.5 -1.0</u> |
| <u>Good Faith</u> | <u>Violator demonstrated a cooperative effort</u> | <u>No Adjustment</u> |
| <u>Recalcitrance</u> | <u>Violator failed to cooperate, delayed compliance, created unnecessary obstacles to achieving compliance, or the compliance submittal failed to meet requirements</u> | <u>1.0 – 1.5</u> |
| <u>Refusal</u> | <u>Violator intentionally failed to return to compliance</u> | <u>1.5 - 2.0</u> |

(b) Prophylactic Effect: The total base penalty may be adjusted upward or downward to ensure that the penalty is sufficient to provide a prophylactic effect on both the violator and the regulated community as a whole. This may include the consideration of any economic benefit gained or cost avoided as a result of noncompliance.

(c) Compliance History: The total base penalty may be increased if the violator has demonstrated a history of noncompliance over the past five (5) years. A maximum adjustment factor of up to 2.0 may be applied based on compliance history. When adjusting the penalty for compliance history, the department shall consider the following criteria:

(1) Previous violations with the dam in question receive more weight than previous violations at another dam owned or operated by the same dam owner.

(2) Recent violations receive more weight than older violations.

(3) The same or substantially similar previous violations receive more weight than previous unrelated violations.

(d) Impacts to Disadvantaged Communities: The total base penalty may be adjusted downward if the department is provided with documentation that demonstrates that the penalty will result in an adverse financial impact to a disadvantaged community. For purposes of this article, a “disadvantaged community” means a community with an annual median household income that is less than 80 percent of the statewide annual median household income.

(e) Ability to Pay: If the dam owner has provided the department with the financial information and supporting documentation necessary to assess the violator's ability to pay, then: (1) payment of the final penalty may be extended over a period of time if immediate, full payment would cause, in the judgment of the department, extreme financial hardship; or (2) If extending the final penalty payment over a period of time would cause, in the judgment of the department, extreme financial hardship, the final penalty may be reduced. No adjustment for ability to pay may be made if the final penalty has been adjusted upward because of failure to cooperate, pursuant to subsection (a), or because of compliance history, pursuant to subsection (c).

Authority: Section 6078, Water Code.

Reference: Section 6432, Water Code.

§ 337.66 Final Penalty.

The final penalty consists of the total base penalty, as defined in Section 337.62, with any adjustments made pursuant to the adjustment factors set forth in Section 337.64. The final penalty for each violation shall not exceed the statutory daily maximum per violation multiplied by the Period of Violation for each violation.

Authority: Section 6078, Water Code.

Reference: Section 6432, Water Code.

§ 337.68 Deviations from Standard Methodology.

This article is intended to ensure that administrative civil penalties are assessed in a fair and consistent manner, but it is recognized that every case presents unique circumstances. If the department determines that the application of the methodology described in this article will result in administrative civil penalties that are inconsistent with the purposes provided in section 337.50 (b), then the department may adjust the final penalty. The final penalty may be adjusted upward or downward, but in no event may the administrative civil penalty that is adjusted pursuant to this section exceed the statutory maximum. Any adjustment pursuant to this section must be accompanied by findings that explain the reason(s) that an adjustment is required to serve the purpose of this article as described in section 337.50(b).

Authority: Section 6078, Water Code.

Reference: Section 6432, Water Code.