

STATE OF CALIFORNIA
CALIFORNIA NATURAL RESOURCES AGENCY
CALIFORNIA DEPARTMENT OF WATER RESOURCES

NOTICE OF ADOPTION OF REGULATIONS FOR ENFORCEMENT OF ACCESS TO THE
RIGHT-OF-WAY ALONG THE STATE WATER RESOURCES DEVELOPMENT SYSTEM

ADOPTION OF REGULATIONS FOR ISSUANCE OF ENCROACHMENT PERMIT AND
ENFORCEMENT OF ACCESS TO THE RIGHT-OF-WAY ALONG THE STATE WATER
RESOURCES DEVELOPMENT SYSTEM

California Department of Water Resources

OCTOBER 15, 2013

The California Department of Water Resources (“Department”) proposes to adopt new regulations establishing rules and procedures for obtaining an Encroachment Permit and removal of unauthorized encroachments along the State Water Resources Development System, otherwise known as the State Water Project (“SWP”). Authority for the regulations is found in S.B. 543 (Stats. 2005, c. 263; Margett) that established Water Code sections 12899, *et seq.* The regulations, adopted pursuant to the authority of Water Code section 12899.9, will implement, interpret, or make specific Water Code sections 12899 through 12899.11, and create standards for obtaining an Encroachment Permit. Section 12899.5 authorized the Department to remove encroachments and the regulations implement that authority. The regulations will establish a new Chapter 6, “Encroachments”, within Title 23, Division 2 of the California Code of Regulations. The regulations will add Sections 600 through 630 within Chapter 6.

The Department has prepared this Notice of Proposed Action as specified by Government Code section 11346.5. The Department has also published the proposed language of the regulations (also referred to as the 45–day language Express Terms), the Initial Statement of Reasons in support of the proposed regulations, and an Economic and Fiscal Impact Statement for the proposed regulations. These documents are discussed below.

Public Hearing

Department staff will hold a public hearing on the following date and time to receive public comments on the proposed regulations:

December 9, 2013
Beginning 9:00 a.m. – 1:00 p.m.
Bonderson Building
901 P Street
First Floor, Hearing Room 102-B
Sacramento, California
(Wheelchair accessible)

PLEASE TAKE NOTICE that the public hearing will begin at 9:00 a.m. and will continue until the earlier of 1:00 p.m. or until there are no people who wish to comment on the regulations.

At this hearing, any person may present oral and written comments on the proposed regulations. Persons may submit written comments as specified below. If possible, please submit written comments to be considered at the hearing by December 4, 2013. The Department will appreciate receiving written comments at the earliest possible date. Audio for the December 9, 2013, hearing will be available by telephone.

If you have a disability and require assistance to participate in either the workshop/hearing, please contact Leroy Ellinghouse at (916) 653-7168 at least five days in advance of the workshop/hearing.

Oral and Written Comments and Comment Period

The 45-day public comment period for the proposed regulations is October 25, 2013, through and including December 9, 2013. The proposed regulations, initial statement of reasons and related documents are accessible to the public and can be located at <http://www.water.ca.gov/regulations>.

Any interested person may submit oral and written comments on the proposed regulations. To provide time to properly evaluate written comments, it is requested that written comments be submitted no later than December 9, 2013. However, both oral and written comments will be accepted at the December 9, 2013, public hearing.

The Department will appreciate receiving written comments at the earliest possible date. E-mail is preferred. To e-mail comments on behalf of an organization, send a scanned copy of the comments on the organization's letterhead, signed by an authorized representative. Written comments must be signed or verified and must include the name of the commentator along with the commentator's address and telephone number. E-mail comments as attachments in either Microsoft Word format (.doc) or Adobe Acrobat portable document format (.pdf) to: epregs@water.ca.gov. All written comments sent by e-mail must indicate **Encroachment Permit Regulations** in the subject line or they may not be appropriately routed to the reviewers. Written comments may also be mailed to:

California Department of Water Resources
Encroachment Permit Regulations
Encroachment Unit
1416 Ninth Street, Room 649
Sacramento, CA 95814

Authority and Reference

The Department of Water Resources proposes to adopt the proposed regulations under the authority of Water Code section 12899.9. The proposed regulations will implement,

interpret, and make specific Water Code sections 12899 through 12899.11, allowing the Department to control access and activities along the SWP right-of-way.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

A. SUMMARY OF EXISTING LAWS AND OBJECTIVE AND BENEFITS OF REGULATIONS

There is no current law, other than Water Code section 12899, *et seq.*, that specifically allows the Department to control the uses and activities within the SWP right-of-way. Although the statute provides an outline of the Department's authority and process for handling encroachments and encroachment permits, it does not set forth specifics as to the requirements that must be met to obtain an Encroachment Permit. The proposed regulations establish rules and procedures for members of the general public and public agencies to apply for and obtain an Encroachment Permit to conduct various activities within the statutory right-of-way along the State Water Project aqueduct, pipelines and related facilities. In addition, Section 12899.5 authorizes the Department to remove encroachments under specified conditions if the department determines that the encroachment will interfere with the department's rights with regard to access, inspection, repair, or the operation and maintenance of the SWP facilities. The regulations clarify, explain and implement that process.

B. OBJECTIVE

The proposed regulations will add a new Chapter 6, "Encroachments", to Title 23, Division 2 of the California Code of Regulations. The regulations will add Sections 600 through 630, setting forth the requirements for obtaining an Encroachment Permit pursuant to the authority conferred by Water Code Section 12899.9. The regulations outline the application requirements, DWR review process, associated costs to the applicant, and will implement the enforcement provisions of Water Code section 12899, so that DWR can limit unauthorized encroachments and control access to the right-of-way. The Department has the authority under Water Code section 11451 to "have full charge and control of the construction, operation, and maintenance" of the SWP. Generally, the right-of-way extends about 300 feet along the aqueduct and 60-100 feet along the pipelines. Encroachments into this restricted space must be strictly controlled so that the integrity of these critical facilities can be maintained.

Since the SWP was initially constructed more than 50 years ago, land use adjacent to the aqueduct, pipelines and related facilities has changed significantly along with the population of the state. Farming has increased in areas where the SWP delivers water. Cities and subdivisions have edged closer and closer to the SWP aqueduct and pipeline alignments. While this evolution was anticipated from the beginning, encroaching development has created many problems for DWR. The Department's access to the facilities has been gradually limited by new towns and subdivisions. Farmland and orchards have expanded to the limits of the SWP right-of-way. Increasing development of adjacent properties has created a need for protection of this critical facility from

unauthorized encroachments and increased the necessity for the Department to control access so that it can conduct its operations and maintenance functions without interference.

In 2005, in enacting Senate Bill 543, the Legislature recognized the State Water Resources Development System as serving a “critical public infrastructure function by providing water to California’s residents, businesses, farms, environment, and other users.” The Legislature formally conferred upon the Department of Water Resources the legal authority to control encroachments in the right-of-way and provided DWR the authority to remove unauthorized encroachments. Water Code section 12899 was enacted for this purpose. These proposed regulations seek to implement that authority.

C. ANTICIPATED BENEFITS

The regulations will provide the public with details of the requirements that must be met in order to obtain an Encroachment Permit, so that any person seeking access to the right-of-way will be able to determine what is required. Certain types of encroachments will necessarily interfere with the Department’s ability to maintain and operate the facilities, so the regulations provide limitations on what activities or uses will be permitted. Uses of the right-of-way such as grading, trenching, digging, or water diversions can adversely impact the structural integrity of the aqueduct or pipelines, so the regulations control these types of activities. Finally, the regulations address unauthorized encroachments and inform the general public on the Department’s process to seek removal of an unauthorized encroachment.

D. CONSISTENCY AND COMPATIBILITY WITH EXISTING STATE REGULATIONS

After conducting a review, the Department has found no current regulations that specifically control access to the SWP right-of-way. Therefore, the proposed regulations are not inconsistent or incompatible with existing state regulations.

E. AVAILABILITY OF THE INITIAL STATEMENT OF REASONS, EXPRESS TERMS, ECONOMIC AND FISCAL IMPACT STATEMENTS, AND INFORMATION UPON WHICH THE PROPOSED RULEMAKING IS BASED

The Regulations and Initial Statement of Reasons will be available to the public and will be published on the Department of Water Resources web page at www.water.ca.gov/regulations.

F. DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Department has made the following initial determinations relative to the required statutory categories:

There will be no significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in

other states. The regulations are applicable to any business that seeks access to the right-of-way regardless of its principal place of business.

The Department is not aware of any additional cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action above beyond what has been historically required by the Department for issuing an Encroachment Permit. The regulations do not mandate any activity to be conducted on the right-of-way. The decision to engage in activities on the right-of-way is discretionary by any individual, business, or public entity. In addition, there will be no non-discretionary costs or savings to local agencies, federal funding to the State or to any state agency beyond that required by law.

There will be no significant effect on housing costs.

In addition, the Department has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

G. RESULTS OF THE ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The Department has made an initial determination that the proposed formalized Encroachment Permit process, including the payment of costs incurred by the Department in reviewing and issuing the permit, will not impact a person or business beyond what is currently required as part of the negotiated permit process that has been employed by the Department over the years.

The proposed regulations will not :

1. Create or eliminate jobs within California.
2. Create new businesses or eliminate existing businesses within California.
3. Affect the expansion of businesses currently doing business within California.
4. Affect the health and welfare of California residents, worker safety, or the environment.

H. EFFECT ON SMALL BUSINESSES

It has been determined that the amendments to and adoption of the regulation sections will not affect small businesses in the ways identified in subsections (a)(1)–(4) of Section 4, Title 1, CCR. The regulations only apply to those persons or businesses that seek apply for access or specified use of the Department’s right-of-way for their own

personal or business purposes. There is no legal mandate or requirement for use of the right-of-way; so the decision to seek an Encroachment Permit is entirely discretionary.

I. CONSIDERATION OF ALTERNATIVES

The Department has been utilizing alternatives in the form of negotiated agreements, use permits, leases, or other contractual arrangements for access to and use of the right-of-way since the SWP was completed. Since each request was unique, it was difficult and time-consuming for staff within the Department to maintain consistency in the requirements for an encroachment permit or other authorized use of the right-of-way. These regulations are intended to provide consistency and certainty for those seeking access with regard to the requirements that must be met and will apply uniformly to any permit applicant.

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

J. CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

Leroy Ellinghouse
Department of Water Resources
Division of Operations and Maintenance
1416 Ninth Street, Room 649
Sacramento, CA 95814
Phone: (916) 653-7168
Email: leroy.ellinghouse@water.ca.gov

The backup person for these inquiries is:

Scott Williams
Department of Water Resources
Division of Operations and Maintenance
1416 Ninth Street, Room 649
Sacramento, CA 95814
Phone: (916) 653-5746
Email: scott.williams@water.ca.gov

K. AVAILABILITY OF CHANGED OR MODIFIED TEXT

After the close of the comment period, DWR may make the regulations permanent if it remains substantially the same as described in the Informative Digest. If DWR does make substantial changes to the regulations, the modified text will be made available for at least 15 days prior to adoption. Requests for the modified text should be addressed to the contact person named in this notice. DWR will accept written comments on any changes for 15 days after the modified text is made available.

L. AVAILABILITY OF FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons will be available on the Department website at www.water.ca.gov/regulations. You may also obtain a written copy of the Final Statement of Reasons by contacting Leroy Ellinghouse.