

## **California Code of Regulations, Title 23, Division 2, Chapter 1**

### **Article 1. General Provisions**

#### **§ 306. Information Request.**

(a) The department, in carrying out the provisions of Water Code, Division 3, Part 1, may require any 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 Water Code, Division 3, Part 1 and implementing regulations.

(b) A “suspected dam” is a structure that has a reasonable likelihood of meeting the definition of a dam in Water Code section 6002. The department will make this determination based on available information, including but not limited to the following:

- (1) Aerial imagery.
- (2) In-person observations.
- (3) Plans and specifications for the structure.

Authority cited: Section 6078, Water Code.

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

### **Article 7. Administrative Enforcement**

#### **§ 337. Purpose and Authority.**

The department is responsible for implementing California’s Dam Safety Program pursuant to the Water Code, Division 3, Part 1. In the event of a violation of Water Code, Division 3, Part 1, implementing regulations, 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 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 cited: Section 6078, Water Code.

Reference: Sections 6075, 6077, 6079, 6100, 6160, 6161, 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.

(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 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 or implementing regulations, or any approval, order, or requirement issued under Water Code, Division 3, Part 1 or implementing regulations.

(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) "Interested person" means any person that has an interest in the safety of a particular dam or dam safety in general.

(j) "Inundation map" means an inundation map as described in Water Code section 6161 and California Code of Regulations, Title 23, 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, section 335.16.

(k) "OAH" means the Office of Administrative Hearings of the Department of General Services.

(l) "Parties" means the owner of the dam 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.

(m) "Period of Violation" is the number of calendar days, as determined by the department, that a dam owner is in violation of Water Code, Division 3, Part 1, implementing regulations, or any department approvals, orders, or requirements issued under Water Code, Division 3, Part 1.

(n) "Presiding officer" means an impartial person designated by the department to conduct the hearing under this article, including an Administrative Law Judge assigned by OAH.

(o) "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.

Authority cited: 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, implementing regulations, or any approval, order, or requirement issued under Water Code, Division 3, Part 1 or implementing regulations, then DSOD may issue a Notice of Violation to the dam owner. In determining whether to issue a Notice of Violation, 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 a Notice of Violation. 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 provide notice that failure to take the required action(s) within the specified time period may result in the issuance of an administrative complaint as described in section 337.8. If 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, the Notice of Violation shall include an estimated cost to prepare an EAP and inundation map(s).

Authority cited: Section 6078, Water Code.

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

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

If a dam owner fails to comply with a department order to prepare and submit an acceptable EAP in accordance with Water Code, Division 3, Part 1, Chapter 4, Article 6 and as described in the Notice of Violation, the department shall prepare an EAP, including inundation maps. The department costs and expenses shall be recoverable by the state, including the department, from the dam owner.

Authority cited: 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 as set forth in a Notice of Violation, DSOD may issue an administrative complaint to the dam owner. In determining whether to issue an administrative complaint, 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 an administrative complaint. The administrative complaint may seek administrative civil penalties, reservoir restrictions, property liens, fees, penalties and interest imposed by statute, and any other actions that DSOD deems necessary to ensure compliance with Water Code, Division 3, Part 1 and implementing regulations. The administrative complaint shall also seek recovery of department costs to prepare an EAP, including inundation maps.

(b) The administrative complaint shall:

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

(2) Include the provision of law authorizing the administrative civil penalty, reservoir restrictions, property liens, reimbursement of department costs to prepare EAPs and inundation maps, fees, penalties and interest imposed by statute, or other 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, penalties, and interest imposed by statute, as applicable, and any other actions 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 in accordance with section 337.12, subsection (a), constitutes a waiver of the right to a hearing.

(5) Inform the dam owner that any request for hearing must be submitted to the department and designate the department office where the request for hearing must be sent.

(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 cited: Section 6078, Water Code.

Reference: Sections 6075, 6077, 6357.1, 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 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; and any impacts to disadvantaged communities.

(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) Penalties set by statute will not be assessed by the procedures set forth in Article 7.1.

Authority cited: 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 regarding 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).

Authority cited: Section 6078, Water Code.

Reference: Section 6429, Water Code.

§ 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 thirty (30) calendar days of the date that DSOD served the administrative complaint. The request for hearing must be sent to the designated department office, as identified in 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 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, 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 decision that orders the imposition of the administrative civil penalties, reservoir restrictions, property liens, recovery of costs to prepare an EAP, including inundation maps, fees, 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 shall be extended for at least thirty (30) calendar days 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.

Authority cited: Section 6078, Water Code.

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

§ 337.14. Presiding Officer; Hearing Procedure.

(a) In the case where the dam owner requests a hearing, 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 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 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. In accordance with Government Code section 11445.20, subdivision (c), the department may designate these cases for an informal hearing under Article 10 of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code (commencing with Government Code section 11445.10). When determining whether to designate a case for informal hearing, the department shall consider the significance and complexity of any issues in dispute and the need to create an administrative record. 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)(6).

(d) In cases where the department designates a person other than an ALJ from 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 cited: Section 6078, Water Code.

Reference: Sections 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 subsection (c).

(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 hearing must provide a minimum of ten (10) calendar days' notice prior to the hearing.

(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 within a reasonable amount of time prior to the hearing 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 subsection (c), 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. The presiding officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the dam owner to pay for the costs of the interpreter.

(4) A copy of the administrative complaint.

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

(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 decision as described in section 337.12, subsection (b). 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 decision due to the dam owner's failure to appear at the hearing initially scheduled.

Authority cited: Section 6078, Water Code.

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

#### § 337.18. Continuance of Hearing.

(a) The presiding officer may, for good cause, on their 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, 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 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 shall 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 cited: Section 6078, Water Code.

Reference: Sections 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 (b)(1) – (b)(5), shall be included in the hearing notice issued by the department.

(1) The hearing notice shall 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 to the department and to other parties designated by the department 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 and 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) 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 relying 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 cited: Section 6078, Water Code.

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

#### § 337.22. Service.

(a) 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:

(1) 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.

(2) Electronic mail if the dam owner agrees in writing to service of the notice by electronic mail.

(3) Personal service.

(b) If, after the exercise of reasonable diligence, service cannot be achieved pursuant to subsections (a)(1) – (a)(3), then 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 given. Where the person making the service is unable to obtain the name of the person to whom the documents were given, the person making the service may substitute a physical description for the name.

Authority cited: Section 6078, Water Code.

Reference: Sections 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 settlement agreement signed by all the parties, the department or the presiding officer, if a hearing was requested, shall issue an order including the terms of the settlement agreement.

Authority cited: Section 6078, Water Code.

Reference: Sections 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 section 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.

(c) 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.

(d) 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:

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

(2) 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.

(e) A presiding officer's receipt of a communication in violation of this section may be grounds for disqualification of the presiding officer.

Authority cited: Section 6078, Water Code.

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

§ 337.28. Decision.

(a) Within one hundred-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 an 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.

(3) Order the dam owner to reimburse the department for the costs of preparing an EAP, including inundation maps.

(4) Authorize the imposition of property liens on land owned by dam owner.

(5) Order that the dam owner pay fees or penalties and interest imposed by statute.

(6) Order any other appropriate action authorized under Water Code, Division 3, Part 1 that will 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 cited: Section 6078, Water Code.

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

#### § 337.30. Payment of Penalties, Fees, Interest, and Costs.

An administrative civil penalty, fees, penalties and interest imposed by statute, and 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 monetary sums recovered shall be deposited into the Dam Safety Fund established by Water Code section 6308.

Authority cited: Section 6078, Water Code.

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

#### § 337.32. Property Liens.

(a) The department will, as necessary, levy property liens on an owner who violates any provision of 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. If the department decides to levy property liens, the department shall 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.

(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) Hearings described in subsection (b) shall be conducted in accordance with section 337.14.

(d) Upon recordation, the lien shall continue until it is released by the department in the applicable county.

Authority cited: Section 6078, Water Code.

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

## **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 California Code of Regulations, Title 23, Division 2, Article 7 and Water Code, Division 3, Part 1. 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 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. The calculation methodology contained in this article implements the department policy requiring that administrative civil penalties:

(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 cited: Section 6078, Water Code.

Reference: Section 6432, Water Code.

### **§ 337.52. Penalty Calculation.**

Administrative civil penalties assessed in administrative enforcement orders issued pursuant to California Code of Regulations, Title 23, Division 2, Article 7 and Water Code, Division 3, Part 1 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. All penalty calculations in this article shall be rounded to the nearest whole dollar.

Authority cited: 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 Water Code, Division 3, Part 1 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 life and property.

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

(A) The dam's downstream hazard potential as determined under California Code of Regulations, Title 23, section 335.4.

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

(C) Whether 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, implementing regulations, 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 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 that the department determines is most significant for the protection of life and property.

(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

subsections (b)(2)(B)-(C). 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 cited: 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. The daily base penalty is the daily initial penalty multiplied by the adjustment factor for the violator’s intent in Table 2.

(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 in accordance with section 337.54.

Table 2: Adjustment Factors for Violator's Intent

<u>Circumstance</u>	<u>Adjustment Factor</u>
<u>Violation was completely beyond the control of the violator</u>	<u>0.1 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 cited: 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 shall be available 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. For such violations, the department shall consider the violation that the department deems to be the greatest risk to life and property.

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

Authority cited: 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 will be made at the discretion of the department.

(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 shall be available in cases where the department makes at least one of the following findings:

(A) The violation is not causing daily detrimental impacts to public safety;

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

(C) The violation 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. In determining the Alternate Penalty Assessment, fractions of a day will be rounded down to the nearest whole number.

Table 3: Alternative Penalty Assessment

<u>Period of Violation (Calendar Days)</u>	<u>Determination of Counted Days</u>
<u>First 30 days</u>	<u>Each day counts as one (1) day, up to a maximum of 30 days</u>
<u>Next 30 days</u>	<u>Every additional five (5) days count as one (1) day, up to a maximum of six (6) days</u>
<u>All days thereafter</u>	<u>Every additional 30 days count as one (1) day, no maximum</u>

Authority cited: 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 cited: Section 6078, Water Code.

Reference: Section 6432, Water Code.

§ 337.64. Total Base Penalty Adjustments.

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

(a) Cooperation. The department shall consider the violator's cooperation, including any voluntary disclosure of violations and efforts to return to compliance. Adjustment shall be made by multiplying the total base penalty by the applicable adjustment factor 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, 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) Compliance History. The total base penalty shall be increased if the violator has demonstrated a history of noncompliance over the prior five (5) years. A maximum adjustment factor of up to 2.0 shall be applied based on compliance history. The adjustment shall be made by multiplying the total base penalty by the applicable adjustment factor. 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.

(c) Impacts to Disadvantaged Communities. The total base penalty shall 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, an “adverse financial impact” occurs when the imposition of a penalty will cause increased costs to rate payers, and 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.

(d) Ability to Pay. 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, and the final penalty shall be reduced if extending the final penalty payment over a period of time would cause, in the judgment of the department, extreme financial hardship.

“Extreme financial hardship” is the condition under which a final penalty prevents a dam owner from paying their 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. Notwithstanding the foregoing, no adjustment for ability to pay shall be made if the final penalty has been adjusted upward because of failure to cooperate, pursuant to subsection (a), or based on compliance history, pursuant to subsection (b).

Authority cited: 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.

Authority cited: Section 6078, Water Code.

Reference: Section 6432, Water Code.