

TITLE 14. DEPARTMENT OF CONSERVATION

Notice Published August 16, 2013

NOTICE OF PROPOSED RULEMAKING

The California Department of Conservation (Department) proposes to adopt the proposed regulations described below after considering all comments, objections, and recommendations regarding the proposed action. With this rulemaking the Department will re-number Title 14, Chapter 6, sections 3000 through 3015 to: Title 14, Chapter 6, Article 1, sections 3100 through 3115, and add these proposed regulations as Title 14, Chapter 6, Article 2, sections 3100 through 3118.

PUBLIC HEARING

At this time, no public hearing has been scheduled concerning the proposed regulation. Any interested person or the person's representative may request a public hearing; he or she must do so no later than September 15, 2013, by contacting the Contact Person set forth below.

WRITTEN COMMENT PERIOD

Any person, or his or her authorized representative, may submit written statements, arguments, or comments related to the proposed regulatory action to the Department. Comments may be submitted by mail to the contact person noted below, or may be submitted by facsimile (FAX) to (916) 327-3430 or by email to solar.ag.comments@conservation.ca.gov. The written comment period closes at 5:00 p.m. on September 30, 2013. The Department will consider only comments received at the Department's offices by that time. Submit comments to:

John Lowrie
Department of Conservation
801 K Street, MS 18-01
Sacramento, CA 95814

Authority and Reference

Government Code sections 51191, 51191.3, and 51191.8 authorize the Department to adopt these regulations. The proposed regulations implement, interpret, and make specific Government Code sections 51190, 51191, 51191.3, 51191.5, and 51192.1.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

As our State, nation, and the world have developed, so has the need for energy to operate our homes, businesses, and industries. Much of the energy used is electrical energy, and, historically, much or most of that electricity has been produced by burning fossil fuels. It is now widely accepted that the burning of fossil fuels results in the production of carbon dioxide and other “greenhouse gasses.” As a result of the many catastrophic projections of the future, if greenhouse gasses continue to accumulate in the atmosphere, the state has adopted a number of goals and strategies to encourage the production of electricity from renewable resources and thereby reduce the production of greenhouse gasses. One of those strategies is to encourage the use of photovoltaic energy to produce electricity.

In order to meet its renewable energy goals, it has been estimated that photovoltaic panels will need to be installed on 100,000 or more acres of land, and possibly ranging up to 1 million acres to meet the 2050 greenhouse gas reduction targets. Unfortunately, many of the same attributes that make land useful as farmland, such as an abundance of sun and flat, wide open spaces, make the land attractive to developers of photovoltaic facilities.

SB 618 (Wolk, Chapter 596, Statutes of 2011) encourages the development of photovoltaic facilities on marginal and impaired farmland by creating solar-use easements. These easements balance the benefits arising from the development of photovoltaic electricity generation facilities, which are renewable resources, and the value of prime farmland. The Legislature found that “encouraging utility scale photovoltaic energy facilities on marginally productive or physically impaired land by providing expedited termination of Williamson Act contracts, without penalty, will protect the many statewide benefits of the program while providing significant economic incentives for new solar power development.” In addition to enacting SB 618 and creating solar-use easements, the Legislature also empowered the Department to adopt regulations to implement the provisions of the bill.

This rulemaking action clarifies, interprets, implements, and makes specific the procedural and substantive requirements that a landowner, applicant, or project proponent must satisfy in order to place land under a solar-use easement. These regulations will also clarify, interpret, implement, and make specific the roles of cities, counties, and the Department in processing proposals and applications for solar-use easements.

The Regulations

Government Code (GC) 51191 requires the Department, in consultation with the Department of Food and Agriculture, to determine whether a parcel or parcels are eligible for a solar-use easement. GC 51191(c) requires the Department, also in consultation with the Department of Food and Agriculture, to review the landowner's or applicant's (landowner, applicant) proposed management plan for the solar-use easement parcel(s). GC 51191(e) authorizes the Department to establish a fee to be paid by the landowner to recover the Department's estimated costs to conduct the consultations.

Proposed regulation section 3100 would specify a one-time fee of \$7,100 to be charged by the Department to conduct the consultation provided by GC 51191. Section 3100 would allow the landowner or applicant to pay that fee in two components; one component would be for the determination of eligibility of the parcel(s) for placement into a solar-use easement, and the other component would cover the estimated cost to the Department for its review and consultation upon the landowner, applicant's proposed management plan for the solar-use easement land. If the Department determines that the parcel(s) are not eligible for placement under a solar-use easement, the landowner or applicant may rescind their application and need not pay the second component.

Section 3101 will adopt definitions for "solar-use easement project," "project," "solar-use easement landowner," "solar-use easement land," "solar-use easement statutes," "operator," and "applicant" which are terms utilized repeatedly in the regulations.

Section 3102 states, in one place, the information that must be included in all applications for solar-use easements. This section makes clear that the written narrative required by new GC 51191(b)(1) and section 3103 of this Article, is a required component of all applications. Subdivisions (1.) through (6.) list information that identifies and describes the nature of the project. This regulation also clarifies that the information listed in sections 3104 through 3107 will only be required to the extent that the information is applicable to the application.

Section 3103 prescribes the information that will be required for the written narrative referenced in GC 51191(b)(1) and require the narrative to be a component of all applications.

Section 3104 clarifies the requirements for a soil test report. This regulation will also clarify that a soil test report is only required when eligibility is based upon reduced productivity of the proposed solar-use easement's soil.

Section 3105 describes the information that will be required in a water availability analysis. This regulation will also clarify that this analysis is only required if eligibility is premised upon an insufficiency of water that would be needed for continued agricultural production.

Section 3106 describes the information required for a water quality analysis. This section will clarify that it is only applicable if an applicant landowner asserts that the quality of the water available to the proposed solar-use easement land significantly reduces agricultural productivity.

Section 3107 will describe the information necessary to determine whether the crops and yield on the site demonstrate impairment of the soil. This regulation will require landowners who are basing eligibility upon reduced crop yield to disclose the crop and yield history on the solar-use easement site.

Once the requirements of section 3102 through 3107 have been satisfied, to the extent applicable, the Department can make a determination whether the site is eligible for a solar-use easement.

Section 3108 establishes the requirements for a soil management plan and a site restoration plan. Section 3108(a) requires that the soil management plan include the soil management practices to be utilized while the solar-use project is occurring on the easement land. The practices to be included are construction, grading, soil removal techniques, irrigation, and erosion protection. The plan must also disclose the effect of soil removal activities upon the easement's soil. Section 3108(b) describes the information that will be required for the site restoration plan, which the solar-use easement statutes require as part of a management plan. Section 3108(c) will require a landowner who proposes to change their project in such a way as the management plan will no longer be adequate to restore the easement land, to submit a proposed amended plan to the city or county and the Department. Section 3108(d) will require the landowner to amend their management or restoration plan when the city or county or the Department determine that a management or restoration plan is not adequate to ensure restoration of the easement land.

Section 3109 re-states provisions in the solar-use easement statutes that allow the Department, cities and counties to place restrictions, conditions, and covenants on

solar-use easements that are in addition to the restrictions, conditions, and covenants specifically denominated in the statutes.

Section 3110 provides cities and counties with authority to inspect the uses on solar-use easement lands. Inspection authority is necessary to ensure compliance with the easement requirements and enable the city or county to take any necessary enforcement actions.

Sections 3111 through 3116 establish the requirements for posting financial securities, as authorized and required by GC 51191.3(b)(3) and (c), to ensure restoration of the easement site to the same general condition as existed prior to the easement.

Section 3111 prescribes the methods for determining the proper amount of restoration security to be provided by the landowner or operator.

Section 3111(a) clarifies and implements GC 51191.3(b)(3) of the solar-use easement statutes in that it states that cities and counties may, but do not need to, require restoration securities for solar-use easements that are perpetual.

Section 3111(b) will re-state the statutory requirement that a landowner must post financial securities to ensure restoration of land that will be entered into easements that are not perpetual in that the easement will expire after some period or will only continue until such time as the easement is not renewed. This regulation will clarify that the security be in effect from the date of the establishment of the easement until restoration is complete. Subsections (c) through (f) will require that the security be in an amount adequate to ensure restoration, be made payable to the city or county, and be submitted for review and approval by the city or county in consultation with the Department prior to commencement of any operations on the easement land. Subsection (g) will require the landowner to review the security at least every five years, or as often as the city or county determines is necessary to keep the security current.

Section 3112 will describe the amount and type of financial instruments that satisfy the requirements for restoration securities. Section 3112(a) will indicate that cities and counties have discretion to determine what constitutes adequate restoration security for perpetual easements. Section 3112(b) describes the types of securities that can satisfy the requirements for term easements and self-renewing easements. Section 3112(c) will require that the security be in an amount sufficient to cover restoration of the easement land. Section 3112(d) will clarify that restoration security constitutes an obligation by the landowner to the city or county.

Section 3113 will require that cities and counties proposing to enter into a term easement or a self-renewing easement submit a copy of a proposed restoration security instrument to the Department along with the calculation of restoration security amount.

Section 3114 will establish requirements that must be met in order for a restoration security amount to be reduced or the security released. Section 3114(a) will allow cities and counties to determine when and under what conditions restoration security can be reduced or released for perpetual easements. Section 3114(b) will require the submission of information regarding the status of the easement to the Department before the security can be reduced or released. Section 3114(c) will allow the Department to review and comment upon proposals to reduce or release restoration security.

Section 3115 will require submission by the landowner to the Department of any proposal to amend a management plan or restoration plan, and require the payment of a fee to cover the Department's estimated cost to review the proposed amendment. The fee shall be not more than the Department's actual cost to review the amendment, but not exceed the \$2,200 fee for review of an initial management plan.

Section 3116 will provide explicit grounds for forfeiture of restoration security. This regulation will explicitly allow cities and counties to require a landowner to forfeit their restoration security under certain conditions.

Sections 3117 will provide criteria to determine whether a landowner applicant is financially capable of completing restoration.

Section 3118 will ensure that landowners be provided a public hearing before their restoration security is forfeited. It will allow the city or county to determine the hearing process when they conduct the hearing. When the Department conducts the hearing, this regulation will prescribe use of the Informal Hearing process established in the State's Administrative Procedures Act.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATION

The regulation will benefit the welfare of the people of this State by encouraging the development of utility-scale photovoltaic facilities of farmland that is either marginally productive or physically impaired instead of on prime farmland or farmland that provides the people of this state, this nation, and the world with a steady supply of high-quality, low-cost fresh foods.

CONSISTENCY WITH FEDERAL STATUTE AND REGULATION

There are no federal regulations addressing or regulating the development of photovoltaic solar electricity generation facilities on farmland. Therefore, the proposed regulation would not conflict or duplicate federal law, or otherwise be inconsistent or incompatible with existing federal regulations.

CONSISTENCY WITH EXISTING STATE REGULATIONS

The authority to establish solar-use easements was enacted by the statutes included within SB 618. There are no other state statutes or regulations that regard creation of solar-use easements. Therefore, this regulation would not be inconsistent or incompatible with existing state regulations.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Department has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: The statute implemented by the proposed regulation allows the Department to recover its estimated cost to conduct the consultation mandated by GC 51191. Therefore, the regulation will save the Department the costs that it would otherwise incur to carry out the consultations mandated to it by GC 51191.

The Department of Food and Agriculture is likely to incur some costs in its consultation with the Department regarding eligibility of parcel(s) for solar-use easements and on proposed management plans. However, the consultation to be provided by the Department of Food and Agriculture is required by GC 51191, not these regulations. Therefore, these regulations will not impose costs or result in savings to any other state agency.

Costs to any local agency or school district that must be reimbursed in accordance with GC 17500 through 17630: None.

Other non-discretionary cost or savings imposed on local agencies: Costs will only be incurred by those cities and counties that elect to establish solar-use easements; therefore, these regulations will not impose any costs or savings on any local agency that does not agree to take on the costs. To the degree that cities and counties incur

costs, the costs will likely be incurred to collect and review information regarding proposed and ongoing solar-use easements, and to police the easements.

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

COST IMPACTS ON A REPRESENTATIVE PRIVATE PERSON OR BUSINESS:

The Department anticipates that these regulations will result in one-time costs to a representative private person or business that are not likely to significantly exceed \$10,000. The costs include \$7,100 for the initial eligibility determination and review of the management and restoration plan. There may be additional costs, likely to be in the range of \$3,000, for acquisition and submission of information to support the application for a solar-use easement.

The additional \$3,000 in costs is based upon, and consistent with, the Department's estimation that the cost for the soil survey will be \$2,425. Instead of a soil survey, a landowner might incur costs to acquire and submit other of the requisite application information. However, the Department anticipates that that information will typically already be in possession of a landowner and, therefore, the landowner will incur no cost to collect and submit the information. If there is a cost to acquire and submit the information, the Department anticipates that the cost would likely be no more than the cost of a soil survey. Consequently, the total cost to a representative private person or business would not likely be much more than a one-time cost of \$10,000.

Significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states: The Department has determined that a private person or business that chooses to enter into a solar-use easement would incur one-time costs not likely to significantly exceed \$10,000 in compliance with the proposed action. The Department has initially determined that this cost would be borne by owners of agricultural land that seek to develop solar electricity generation facilities on their land, or developers of solar electricity generation facilities.

The Department has made an initial determination that the adoption of this regulation will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with business in other states. In making this determination, the Department has relied on the fact that the one-time costs imposed by this regulation would be *de minimis* in relation to the multimillion dollar cost to develop a utility scale photovoltaic electricity generation facility on land to be covered by a solar-use easement.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT/ANALYSIS

Since the adverse economic impact on business is not likely to exceed \$10,000, and the total cost to develop the utility-scale solar facilities will run from \$2 million to upwards of \$2 billion, the Department anticipates that these regulations are: (1) not likely to eliminate any jobs associated with development of solar photovoltaic facilities in this state; and, (2) not likely to eliminate any existing businesses.

The Department has made an initial determination that the adoption of this regulation will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with business in other states. In making this determination, the Department has relied upon the assumption that the costs imposed by these regulations would be *de minimis* in relation to the multimillion dollar cost to develop a utility-scale photovoltaic electricity generation facility on land to be covered by a solar-use easement.

Since the costs to be imposed by these regulations is *de minimis* in relation to the multi-million dollar cost to develop a solar facility, this regulation would not result in the creation of new business, the elimination, or the expansion of existing businesses within this state. Similarly, since the regulations would have no significant impact upon business, it would not result in the creation or elimination of jobs in this state.

BENEFITS OF THE PROPOSED REGULATION

The regulation will benefit the welfare of the people of this State by encouraging the development of utility-scale photovoltaic facilities of farmland that is either marginally productive or physically impaired instead of on prime farmland or farmland that provides the people of this state, this nation, and the world with a steady supply of high-quality, low-cost fresh foods. In addition, imposition of the one-time fees to conduct the eligibility determination and review and comment upon the statutorily required management plan will provide the Department with funds to cover the cost of the consultation to be conducted by the Department. The provision of these funds will, therefore, not require the redirection of funds and resources from other responsibilities of the Department's Division of Land Resources Protection.

HOUSING COSTS

The proposed regulation will have no significant affect on housing costs.

BUSINESS REPORTING REQUIREMENT

These regulations will require the submission of information to cities, counties, and the Department by businesses that propose to, or do, operate photovoltaic facilities. However, the Department finds that it is necessary for the health, safety, or welfare of the people of this state that the submission of information required by these regulations applies to the affected businesses.

SMALL BUSINESS DETERMINATION

The Department has determined that the proposed regulations will affect small businesses.

CONSIDERATION OF ALTERNATIVES

In accordance with GC 11346.5, subdivision (a)(13), the Department must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the Department that would be more effective in carrying out the purpose for which the action is proposed or 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.

The Department invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period or at any hearing scheduled to take statements or arguments that are relevant to the proposed action.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

John M. Lowrie
Acting Assistant Director
Department of Conservation
Division of Land Resource Protection
801 K Street; MS 18-01
Sacramento, CA 95814
Telephone: (916) 324-9013
Fax: (916) 327-3430

The backup contact person for these inquiries is:

Meri Meraz
Williamson Act Program
Department of Conservation
Division of Land Resource Protection
801 K Street; MS 18-01
Sacramento, CA 95814
Telephone: (916) 324-0850
Fax: (916) 327-3430

Please direct requests for copies of the proposed text (the “express terms”) of these regulations, the initial statement of reasons, the modified text of these regulations, if any, or other information upon which this rulemaking is based to Meri Meraz at the above address.

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATION, AND RULEMAKING FILE

The Department will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this Notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulation, the initial statement of reasons, and a standard form 399. The rulemaking file also includes the information upon which the proposed rulemaking is based, which includes the Lawrence Berkeley National Laboratory study: Tracking the Sun IV: An Historical Summary of the Installed Cost of Photovoltaics in the

United States from 1998 to 2010, September 2011. The rulemaking file also includes Harvesting Clean Energy; How California Can Deploy Large-Scale Renewable Energy Projects on Appropriate Farmland, October, 2011. In addition, the Department conducted a study to ascertain the likely estimated cost of a soil survey; the results of that study are included in the rulemaking file. In estimating the cost to conduct the consultations mandated by GC 51191 and addressed in sections 3100 through 3108 of these proposed regulations, the Department assumed that its cost to process an application for a solar-use easement would roughly equate with the cost it incurs to process a petition to cancel a Williamson Act contract. Consequently, the Department approximated the number of staff hours necessary to process a cancellation and utilized that calculation to estimate its costs to process a proposal for a solar-use easement. The results of that study are also in the rulemaking file.

Copies of these documents may be obtained by contacting Meri Meraz at the address and phone number listed above.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After the written comment period and any hearing that may be conducted by the Department to accept comments and evidence regarding the adoption of these proposed regulations, the Department will consider all timely and relevant comments received, thereafter the Department may adopt the proposed regulations substantially as described in this notice. If the Department makes modifications that are sufficiently related to the original proposed text, it will make the modified text (with changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Meri Meraz at the address indicated above. The Department will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Meri Meraz at the above address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout can be accessed through our website at: <http://www.conservation.ca.gov/dlrp/lca/Pages/Index.aspx>.