

PROPOSED TEXT OF EMERGENCY REGULATION

Section 748.5, Title 14, CCR, is added to read as follows:

§ 748.5 Procedures for Imposing Civil Penalties and Conducting Hearings

This section implements the department's authority to administratively impose civil penalties pursuant to sections 12025(e) and 12025.1(d) of the Fish and Game Code.

(a) Definitions.

- (1) "Party" includes any person or entity named in a complaint or the department official who issued the complaint (collectively, "Parties"), but does not include the presiding officer.
- (2) "Presiding officer" means a person designated by the director to conduct the hearings under this section, including an administrative law judge assigned by the Office of Administrative Hearings.
- (3) "Respondent" means any person or entity named in a complaint that is subject to a civil penalty imposed pursuant Section 12025 or 12025.1 of the Fish and Game Code.

(b) Burden of Proof.

The burden of proof to prove a violation for which a civil penalty may be imposed pursuant to Section 12025 or 12025.1 of the Fish and Game Code shall be a preponderance of the evidence.

(c) Complaint.

- (1) The department may issue a complaint to any person or entity on which a civil penalty may be imposed pursuant to Section 12025(e) or 12025.1(d) of the Fish and Game Code.
- (2) The complaint shall:
 - (A) allege the act or failure to act that constitutes a violation;
 - (B) include any facts related to natural resources impacts;
 - (C) provide the provision of law authorizing the civil penalty to be imposed;
 - (D) state the amount of the proposed civil penalty; and
 - (E) inform each respondent that the failure to request a hearing within 20 days after the date of service of the complaint constitutes a waiver of the right to a hearing.
- (3) The complaint and an order setting the amount of the civil penalty to be imposed shall be served by personal service or certified mail on each respondent named in the complaint.
- (4) At any time before the matter is submitted for decision in a hearing, an amended complaint or order may be issued to a respondent. All parties shall be served with the amended complaint or order. If the amended complaint or order alleges a new violation or presents additional penalties, the presiding officer shall afford the affected respondent a reasonable opportunity to prepare his or her defense.

(d) Assessment of Civil Penalty.

In determining the amount of the proposed civil penalty, the department shall take into consideration all relevant circumstances to the extent they are known to the department, including the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, any prior history of violation, any corrective action taken by the respondent, and the respondent's assets and other financial resources.

(e) Request for Hearing.

- (1) A respondent may request a hearing no later than 20 days after the date of receipt of the department's complaint.
- (2) The request for hearing shall be in writing signed by or on behalf of the respondent and shall state the respondent's or his or her legal counsel's mailing address, telephone number, and email address.
- (3) The request for hearing shall contain a brief statement of the material facts the respondent claims support his or her contention that no civil penalty should be imposed or that a civil penalty of a lesser amount is warranted.

(f) Presiding Officer.

- (1) In the case where a respondent 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 and shall issue the final decision and order for the department. The director may designate administrative law judges who work for the Office of Administrative Hearings to serve as presiding officers under this section.
- (2) The director may designate other persons to serve as presiding officers under this section, but the presiding officer shall not be the same department official who issued the complaint and shall not have served as an investigator, prosecutor, or advocate in any stage of the hearing or its prehearing stage.
- (3) The designation of the presiding officer shall be made in full consideration of the requirements of due process and fundamental fairness to the parties. Any party may challenge the designation of the presiding officer pursuant to subsections (i)(2) and (i)(3).

(g) Waiver of Hearing.

- (1) A respondent waives the right to a hearing if the respondent does not request a hearing within 20 days of receipt of the complaint. If a respondent waives the right to a hearing, the order served with the complaint shall become final.
- (2) In the case where a respondent requests a hearing, a respondent's failure to appear at the time and place of the hearing constitutes a waiver of the request for hearing, in which case the order served with the complaint shall become final.

(h) Settlement.

- (1) The parties may reach a settlement at any time before the order served with the complaint becomes final.

- (2) Upon submission of a signed settlement agreement, the department or the presiding officer, if a hearing is requested, shall issue an order including the terms of the settlement, without conducting a hearing. Notwithstanding any other provision of law, no evidence of an offer of compromise or settlement made in settlement negotiations is admissible in a hearing, whether as affirmative evidence, by way of impeachment, or for any other purpose, and no evidence of conduct or statements made in settlement negotiations is admissible to prove liability for any loss or damage except to the extent provided in Section 1152 of the Evidence Code.
- (3) A settlement may include any terms voluntarily agreed to by the parties. A settlement order is fully enforceable by the parties.

(i) Hearing Procedures.

In the case where the proposed penalty set forth in the complaint is less than \$25,000, the hearing procedures shall be consistent with the requirements described in Section 11425.10 of the Government Code. For cases in which the proposed penalty set forth in the complaint is \$25,000 or greater, the requirements in subsections (i)(1) to (i)(12) apply to the procedures by which the department conducts a hearing. Parties may waive or modify any provision of subsection (i) upon agreement of all parties to the waiver or modification and approval of the presiding officer.

(1) Notice of Hearing.

- (A) In the case where a respondent requests a hearing, the department shall determine the time and location of the hearing with due consideration for the convenience of the parties and the ends of justice.
- (B) The department shall serve a notice of hearing to all parties at least 10 days prior to the hearing. The notice of hearing may be served by personal notice, certified mail, or by email if the respondent agrees to service of the notice by email.
- (C) The notice of hearing shall include a copy of the complaint and proposed order or amended complaint and proposed order.
- (D) The notice shall be substantially in the following form but may include other information:

You are hereby notified that a hearing will be held before a presiding officer at [here insert place of hearing] on the _____ day _____ 20 _____, at the hour of _____, upon the charges made in the complaint served upon you. If you object to the place of hearing, you must notify the presiding officer within 10 days after this notice is served on you. Failure to notify the presiding officer within 10 days will deprive you of a change in the place of the hearing. You have the right to be represented by an attorney at your own expense. You are entitled to represent yourself without legal counsel. You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to [insert the name and address of the presiding officer].

The hearing will be conducted in the English language. If you do not proficiently speak or understand the English language and would like to request language assistance, you must notify the department no later than 10 days after the notice of hearing is served on you. The presiding officer may order you to pay the costs of an interpreter.

Any questions you may have regarding this hearing should be addressed to the department of Fish and Wildlife, Office of General Counsel, at 1416 Ninth Street, Sacramento, CA 95814. You may also contact [insert name], [insert title] at [insert telephone] or [insert email address].

- (F) The notice shall advise each respondent that failure to appear at the time and place of the hearing shall result in the order becoming final.
- (G) The notice shall include a copy of this section.
- (H) The notice shall contain a statement that any continuance of the scheduled hearing date may be obtained only through compliance with subsection (i)(4).

(2) Peremptory Challenge.

- (A) Each party is entitled to one peremptory challenge of a presiding officer.
- (B) The peremptory challenge may be in writing or on the record and should be made in substantially the following form:

I am party to [insert name of case] and I am exercising my right to a peremptory challenge regarding presiding officer [insert name], pursuant to Section 748.5(j), Title 14, California Code of Regulations and Section 11425.40(d) of the Government Code.
- (C) The peremptory challenge of the presiding officer shall be served on all parties if made in writing and shall be made no later than two (2) business days before the hearing. In no event will a peremptory challenge be allowed after the hearing has begun.

(3) Disqualification.

Any party may request the disqualification of a presiding officer by filing an affidavit prior to the taking of evidence at a hearing on the grounds that a fair and impartial hearing cannot be accorded. The affidavit shall state with particularity the facts that support the party's request. The issue shall be determined by the presiding officer who shall either grant or deny the request.

(4) Continuance of Hearing.

- (A) The presiding officer may, for good cause on his or her own motion or upon the request of any party, continue the hearing to another time.
- (B) The request for a continuance shall be made in writing and shall include the case name and the date, time, and place of the scheduled hearing.
- (C) The presiding officer must receive the request no less than (2) two business days prior to the scheduled date of the hearing. The requesting party shall also send the request to the other parties. The other parties may each provide a response to the request within a time limit set by the presiding officer.

- (D) 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 upon a showing of additional good cause.
- (E) When a continuance is ordered, the presiding officer shall give written notice of the time and place of the continued hearing.
- (F) Failure to appear as scheduled or to comply with the provisions of subsection (5) shall be deemed a withdrawal of the request for a hearing, in which case the order served with the complaint shall become final.

(5) Discovery.

- (A) The provisions in this subsection (i)(5) provide the exclusive right to and method of discovery as to any proceeding governed by this section.
- (B) A party, upon written request made to another party, prior to the hearing and within 30 days after service of the department's complaint or within 15 days after the service of an amended complaint or order, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:
 1. A statement of a person, other than the party named in the complaint or in any additional pleading, when it is claimed that the act or omission of the party as to this person is the basis for the administrative proceeding;
 2. A statement pertaining to the subject matter of the proceeding made by any party to another party or person;
 3. Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in 1 or 2 above;
 4. Any writing or thing which is relevant and which would be admissible in evidence;
 5. Reports made by or on behalf of the department or other party pertaining to the subject matter of the proceeding, to the extent that these reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in 1 to 5, inclusive, or summary thereof.

For the purpose of this subsection, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, or oral statements by the person, and written reports or summaries of these oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure or otherwise made confidential or protected by law.

(6) Subpoenas.

- (A) The presiding officer may issue subpoenas and subpoenas duces tecum at the request of any party for attendance at the hearing and for production of documents, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure.
- (B) The process followed pursuant to subsection (6)(A) extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure.
- (C) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with Section 1561 of the Evidence Code.
- (D) Failure to comply with a subpoena issued and acknowledged pursuant to this subsection may be punished as contempt and the subpoena may so state.
- (E) A person served with a subpoena or a subpoena duces tecum may object to its terms by a motion for a protective order, including a motion to quash. The presiding officer shall resolve the objection and may issue an order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy.
- (F) A witness appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive for the appearance the same mileage and fees allowed by law to a witness in a civil case, to be paid by the party at whose request the witness is subpoenaed. This subsection does not apply to an officer or employee of the state or a political subdivision of the state.

(7) Affidavits.

- (A) At any time 10 or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which the party proposes to introduce in evidence, together with a notice as provided in subsection (7)(B). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, the party's right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.
- (B) The notice referred to in subsection (7)(A) shall be substantially in the following form:

The accompanying affidavit of [insert name of affiant] will be introduced as evidence at the hearing in [insert title of proceeding]. [Insert name of affiant] will not be called to testify orally and you will not be entitled to question him or her unless you notify [insert name of proponent or his attorney] at [insert address] that you wish to cross-examine him or her. To be effective your request must be mailed or delivered

to [insert name of proponent or his attorney] on or before [insert a date seven days after the date of mailing or delivering the affidavit to the opposing party].

(8) Depositions.

- (A) On verified petition of any party, the presiding officer, or if a presiding officer has not been appointed, the department may order that the testimony of any material witness residing within or without the state be taken by deposition in the manner prescribed by law for depositions in civil actions under Title 4 (commencing with section 2016.010) of Part 4 of the Code of Civil Procedure.
- (B) The petition shall set forth the name of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of the testimony; a showing that the witness will be unable or cannot be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose.
- (C) The petitioner shall serve a copy of the petition on the other parties at least 10 days before the hearing. Transcript of the deposition may be introduced in evidence.
- (D) Where the witness resides outside the state and where the presiding officer or the department has ordered the taking of the testimony by deposition, the department shall obtain an order of court to that effect by filing a petition therefor in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189 of the Government Code.

(9) Conduct of Hearing.

- (A) The proceedings at the hearing shall be recorded electronically unless otherwise agreed by the parties.
- (B) The presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits. The presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party objects.

(10) Evidence.

- (A) Oral evidence shall be taken only on oath or affirmation.
- (B) Each party may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter, impeach any witness regardless of which party first called him or her to testify, and rebut evidence against him or her. If the person upon whom the complaint was served does not testify in his or her own behalf he or she may be called and examined as if under cross-examination.
- (C) The presiding officer may examine any party or witness.
- (D) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely upon in the conduct of serious affairs. However, the presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by

the probability that its admission will cause undue consumption of time. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded.

(11) Language Assistance.

- (A) The hearing shall be conducted in the English language, except that a respondent who does not proficiently speak or understand the English language and who requests language assistance shall be provided an interpreter approved by the presiding officer conducting the proceedings. The request for an interpreter must be made no later than 10 days after the notice of hearing is served. The cost of providing the interpreter shall be paid by the respondent or shall be paid by the department if the presiding officer so directs. 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 party in need of the interpreter to pay. Such an interpreter shall be selected from the list issued by the State Personnel Board pursuant to Section 11513 of the Government Code.
- (B) In the event that interpreters on the approved list cannot be present at the hearing, or if there is no interpreter on the approved list for a particular language, the presiding officer shall have discretionary authority to provisionally qualify and utilize other interpreters.
- (C) The department shall advise each party of their right to an interpreter at the same time that each party is advised of the hearing date. Each party in need of an interpreter shall also be encouraged to give timely notice to the department and the presiding officer conducting the hearing so that appropriate arrangements can be made.
- (D) Interpreters shall be subject to the same requirements of confidentiality as parties.
- (E) The interpreter shall not have had any involvement in the issues of the case prior to the hearing.

(12) Contempt.

- (A) Any person in a hearing before the presiding officer is subject to the contempt sanction for any of the following:
 - 1. Disobedience of or resistance to a lawful order.
 - 2. Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined.
 - 3. Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the hearing or by breaching of the peace, boisterous conduct, or violent disturbance.
 - 4. Violation of the prohibition of ex parte communications under subsection (j) of this section.

5. Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer, or moving, without substantial justification, to compel discovery.
- (B) The presiding officer may certify the facts that justify the contempt sanction against a person to the Superior Court in and for the county where the proceeding is conducted for contempt proceedings pursuant Section 11455.20 of the Government Code.
- (j) Ex Parte Communications.
- (1) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of the department 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.
 - (2) A communication otherwise prohibited by subsection (j) is permissible when 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.
 - (3) A communication otherwise prohibited by subsection (j) from an employee or representative of the department to the presiding officer is permissible in any of the following circumstances:
 - (A) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the hearing or its prehearing stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record.
 - (B) The communication is for the purpose of advising the presiding officer concerning a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in subsection (j)(5).
 - (4) 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 in the manner provided in subsection (j)(5).
 - (5) 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 10 days after receipt of notice of the communication, a party may comment on the communication.

(6) 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. If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer.

(k) Decision.

(1) Within 45 days after the conclusion of the hearing, the presiding officer shall issue a written decision based on the evidence presented at the hearing. The decision shall include the presiding officer's findings of fact and conclusions. The presiding officer may concur with the civil penalty imposed by the department, or may reduce the amount of the civil penalty, or may not impose the civil penalty based upon the factors listed in subsection (d).

(2) The presiding officer shall issue the final decision of the department. The decision shall contain the final order setting the amount of the civil penalty to be imposed on the respondent.

(3) Within 45 days after the conclusion of the hearing, the presiding officer shall serve the final decision and order by personal service or certified mail to all parties, or via email to parties that agree to service by email.

(l) Appeal of Order.

(1) Within 30 days of the date of service of the final order, any party may file with the Superior Court a petition for a writ of mandate for review of the final order.

(2) A record of the proceedings shall be prepared by the department and delivered to the respondent within 30 days after the respondent's request and upon payment of the fee specified in the Section 69950 of the Government Code.

(m) Payment of Penalty.

A civil penalty imposed pursuant to this section shall be due and payable to the department within 60 days after the time to seek judicial review has expired, or where the respondent has not requested a hearing, within 20 days after the order imposing a civil penalty becomes final. Orders imposing civil penalties shall be enforced in court pursuant to Section 12014 of the Fish and Game Code.

Note: Authority cited: Sections 702 and 12025.1, Fish and Game Code.

Reference: Sections 12025 and 12025.1, Fish and Game Code