



June 26, 2015

FINDING OF EMERGENCY

(Gov. Code, § 11346.1, subd. (b); Cal. Code Regs., tit. 1, § 50)

Pursuant to Government Code section 11346.1, subdivision (b), and California Code of Regulations, Title 1, section 50, a state agency may adopt emergency regulations if the agency makes a finding that the adoption of a regulation is necessary to address a situation calling for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. The Department of Fish and Wildlife (Department) finds that emergency adoption of the regulation proposed herein affording procedural and substantive due process rights for any person who is subject to a civil penalty imposed by the Department to address impacts to fish and wildlife and the habitat upon which they depend are necessary for immediate preservation of the public peace, health, safety, or general welfare.

Specific Facts Demonstrating the Existence of an Emergency and Need for Immediate Action

The Drought's Historic Low Stream Flows are Impeding Passage of Anadromous Fish

On January 17, 2014, Governor Edmund G. Brown, Jr. proclaimed a State of Emergency to exist in California due to severe drought conditions. As part of the proclamation, the Governor ordered the Department to evaluate and manage the changing impacts of drought on threatened and endangered species and species of special concern. On April 25, 2014, the Governor issued an Executive Order (EO) stating, among other things, "*California water supplies continue to be severely depleted despite a limited amount of rain and snowfall since January, with very limited snowpack in the Sierra Nevada mountains, decreased water levels in California's reservoirs, and reduced flows in the state's rivers.*" The Governor's proclamation and EO remain in full effect.

In response to Governor Brown's order, the Department initiated statewide monitoring of rivers and streams that are subjected to historically low flow conditions. The Department has determined that these low stream flows are impeding the passage of anadromous fish, such as salmon and steelhead. Low stream flows have concentrated juvenile and adult anadromous fish into shrinking pools, increasing their vulnerability to mortality from physiological stress, predation, and angling. As a result of these conditions, the Department has deployed staff to rescue threatened and endangered species, including species of salmon and steelhead, on many rivers and streams across the state.

Extreme drought conditions continue to persist in California due to lack of rain and snowfall over three straight years. As California experiences a fourth consecutive extremely dry year and water availability is even more drastically limited, the Department must take immediate

actions to preserve and protect the state's fish and wildlife resources during the ongoing drought.

Unlawful Marijuana Farms are Draining Drought-Stricken Streams and Degrading Fish Habitats

Unlawful water diversions by marijuana cultivators have severely limited the amount of water available for the public and wildlife. Marijuana plants use six to eight gallons of water per plant, per day and fertilizers and pesticides used in marijuana cultivation sites contaminate streams. The Department is significantly involved in operations to rid the state of illegal marijuana grows. In 2014, the Department's law enforcement officers assisted with the eradication of 609,480 plants from unlawful marijuana cultivation sites on private and public lands. These plants used approximately 4,593,600 gallons of water per day. The Department also participated in reclamation efforts that included the removal of 340,603 pounds of trash, 566,510 feet (111 miles) of poly pipe, 45,590 pounds of fertilizers, and 70 gallons of assorted hazardous chemicals from marijuana cultivation sites. Finally, to restore streams within these sites, the Department removed 137 dams that were illegally installed to facilitate unlawful water extractions.

With this as a backdrop, and following Governor Brown's State of Emergency proclamation, the California Legislature enacted and the Governor signed Senate Bill 861, which amended Fish and Game Code section 12025 (Chapter 35, Statutes 2014, effective June 20, 2014) to deter environmental damage associated with the cultivation of marijuana. The 2014 amendments added Section 12025, subdivision (e), which authorizes the Department to administratively impose a civil penalty on a person found to have violated Fish and Game Code sections 1602 (illegal water diversion), 5650 (pollution), or 5652 (waste disposal) in connection with the production or cultivation of marijuana; directs the Department to conduct hearings pursuant to the procedures described therein; and provides that the Department may adopt regulations to implement subdivision (e).

Unlawful water diversions for growing marijuana have an enormous adverse effect on threatened and endangered species and species of special concern in the state. A study (Bauer et al.) conducted by Department staff and published on March 18, 2015, showed that during drought conditions water demand for marijuana cultivation exceeded the stream flow in three of four study watersheds. Bauer et al. concluded that diminished stream flow from this water-intensive activity is likely to have lethal to sub-lethal effects on state- and federally-listed salmon and steelhead. These study results are consistent with the events that occurred in the summer of 2014 when water diversions for marijuana cultivation, in combination with severe drought, caused large segments of the study streams to run dry.

The Department finds that an emergency exists due to both California's entry into a fourth consecutive year of severe drought conditions and the upcoming marijuana cultivation season (June to October), each of which will have a devastating effect on dwindling populations of

state- and federally-listed salmon and steelhead. Emergency adoption of the regulation proposed herein to implement Section 12025, subdivision (e), is necessary to enable the Department to timely enforce against violations of the Fish and Game Code connected with marijuana cultivation and afford procedural and substantive due process rights to any person who is subject to civil penalties imposed administratively by the Department for environmental damage connected with marijuana cultivation.

Unlawful Construction or Maintenance of Devices that Impede Fish Passage Threaten the Survival of Anadromous Fish Under Drought Conditions.

As part of a series of legislative measures to address the fourth year of extreme drought conditions, on March 27, 2015, the California Legislature adopted Fish and Game Code section 12025.1 (Chapter 2, Statutes 2015, effective March 27, 2015) to impose an additional civil penalty of not more than \$8,000 on a person found to have violated Fish and Game Code section 5901. Section 5901 prohibits the construction or maintenance, in certain fish and game districts, of any device or contrivance that prevents, impedes, or tends to prevent or impede, the passing of fish up and down a stream. When coupled with drought-related environmental stressors, such as severely reduced stream flows, high water temperature, and poor water quality, devices that impede fish passage up and down a stream exacerbate the low survival rate of imperiled anadromous fish species.

Newly adopted section 12025.1, subdivision (d), authorizes the Department to administratively impose a civil penalty on a person found to have violated Section 5901 according to the procedures described in Section 12025, subdivision (e). Section 12025.1, subdivision (d), directs the Department to adopt emergency regulations to implement the statute. Specifically, Section 12025.1, subdivision (d)(2), states that “adoption of these regulations shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare.”

The Department finds that an emergency exists because unlawful devices that impede fish passage significantly affect the survival of anadromous fish species subject to severe drought conditions. Emergency adoption of the regulation proposed herein to implement Section 12025.1, subdivision (d), is necessary to enable the Department to timely enforce against the unlawful construction or maintenance of devices that impede fish passage and afford procedural and substantive due process rights to any person subject to civil penalties imposed administratively by the Department for violations of Fish and Game Code section 5901.

Need for the Proposed Regulation to Effectuate the Statute Being Implemented

In September 2014, following Governor Brown’s State of Emergency proclamation and the appropriation of resources under the Budget Act of 2014, the Department formed a Watershed Enforcement Team (WET) to implement a priority-driven approach to address environmental

damage caused by marijuana cultivation on private lands, which is impacting streams and habitats severely afflicted by the ongoing drought. To date, WET has inspected over 71 properties, issued over 30 notices of violations, and is investigating approximately 10 cases for administrative civil liability. As noted previously, Sections 12025, subdivision (e), and 12025.1, subdivision (d), authorize the Department to administratively impose civil penalties and conduct administrative hearings to address specific violations connected with the production or cultivation of marijuana. Section 12025.1, subdivision (d), also authorizes the Department to administratively impose civil penalties for violations of Section 5901 not connected with marijuana cultivation. Currently, the Department does not have regulations that implement Section 12025, subdivision (e), or Section 12025.1, subdivision (d).

Sections 12025, subdivision (e), and 12025.1, subdivision (d), authorize penalties up to a specific maximum amount per each violation, but do not provide the factors the Department may take into consideration when assessing the amount of the civil penalty. In addition, other key details, including, but not limited to, the procedures parties must follow to request a hearing, waive the right to a hearing, issue a notice of hearing, designate a hearing officer, request continuance of hearing, reach a settlement, conduct discovery and other fact gathering procedures, and issue a decision are not specified in these statutes. Without a regulatory framework, hearing procedures would be unclear to the public. The proposed regulation is necessary to implement, interpret, and make specific Sections 12025, subdivision (e), and 12025.1, subdivision (d). The adoption of an emergency regulation to specify the process for imposing civil penalties and conducting administrative hearings will maximize transparency, ensure consistency, and provide more efficient mechanisms for resolving contested cases, as well as more quickly address the associated impacts on public health and safety, the environment, and natural resources.

Facts Explaining Failure To Address the Situation Through Nonemergency Rulemaking

As noted above, the 2014 amendments to Section 12025 of the Fish and Game Code were made effective on June 20, 2014. Although Section 12025, subdivision (e), was made effective over a year ago, the Department has not initiated a regular rulemaking action. The following facts explain why the Department has not addressed the situation described herein through nonemergency rulemaking.

As an initial matter, when Section 12025, subdivision (e), was made effective, the Department did not have the resources or a program to immediately initiate a regular rulemaking action to implement this section of the Code. In September 2014, following the appropriation of resources under the Budget Act of 2014, the Department created WET to inspect marijuana cultivation sites that could be causing environmental damage, and in January 2015 WET began to implement a program to issue notices of violations and investigate cases for administrative civil liability. As such, the Department recently obtained the resources and created a program to enable it to initiate administrative civil liability actions under this section of the Code.

In addition to the lack of resources and program to initiate administrative civil liability actions, the Department lacked the data and empirical study it has today. A recently completed study, (Bauer et al.), published in March 2015, found that water demand for marijuana cultivation could use more than 100 percent of stream flow during the dry summer season in three of four study watersheds and concluded that this water-intensive activity is likely to have lethal to sub-lethal effects on state- and federally-listed salmon and steelhead. The recently published study shows that the Department must take immediate actions to address environmental damage caused by marijuana cultivation, which is significantly depleting water resources during the ongoing drought in the state.

There is insufficient time to adopt nonemergency regulations to implement Sections 12025, subdivision (e), and 12025.1, subdivision (d), to address the environmental damage that would worsen the adverse consequences of the fourth consecutive year of severe drought in the state. The most recent electronic readings record the snowpack's statewide water content at 0 (zero) percent of the April 1 average, the lowest in California's recorded history. Because extreme drought conditions persist in California, on April 1, 2015, Governor Brown issued EO B-29-15, which states, among other things, that "*new expedited actions are needed to reduce the harmful impacts from water shortages and other impacts of the drought.*" As the summer and marijuana cultivation season (June to October) is now upon us, emergency regulations are thus necessary to impose a civil penalty on any person found to be causing environmental damage associated with marijuana cultivation and to deter unlawful activities, which are worsening the already severe drought.

As discussed above, a regulation setting forth the procedures for imposing civil penalties and conducting hearings is necessary to timely address the environmental damage caused by unlawful marijuana cultivation as well as unlawful construction or maintenance of devices that impede fish passage. These unlawful activities further aggravate the impacts of the severe drought on anadromous fish and the habitats upon which they depend. Recognizing that fact, the Legislature enacted Section 12025.1, subdivision (d), directing the Department to promulgate emergency regulations. The proposed emergency regulation is necessary to timely resolve administrative civil liability actions and afford procedural and substantive due process rights to any person subject to civil penalties imposed administratively by the Department.

Technical, Theoretical, and/or Empirical Studies, Reports, or Documents Relied Upon

The Department relied on the following studies and documents in proposing this emergency rulemaking action:

Bauer S, Olson J, Cockrill A, van Hattem M, Miller L, et al., (2015) *Impacts of Surface Water Diversions for Marijuana Cultivation on Aquatic Habitat in Four Northwestern California Watersheds*. PLoS ONE 10(3):e0120016. doi:10.1371/journal.pone.0120016.

California Department of Fish and Wildlife, Stream Dewatering Reported and Resources of Concern Impacted (2013). Complaints received by one staff in Region 1. Unpublished data.

California Department of Water Resources, *Sierra Nevada Snowpack Is Virtually Gone; Water Content Now Is Only 5 Percent of Historic Average, Lowest Since 1950*, California Cooperative Snow Surveys Website (April 1, 2015),
<http://www.water.ca.gov/news/newsreleases/2015/040115snowsurvey.pdf>.

California Department of Water Resources, California Data Exchange Center,
<http://cdec.water.ca.gov/cgi-progs/reports/EXECSUM> (last visited June 17, 2015).

California Governor Brown State of Emergency Declaration (January 17, 2014),
<http://gov.ca.gov/news.php?id=18368>.

California Governor Brown Executive Order for State Drought Actions (April 25, 2014),
<http://gov.ca.gov/news.php?id=18496>.

California Governor Brown Executive Order for State Drought Actions (April 1, 2015),
http://gov.ca.gov/docs/4.1.15_Executive_Order.pdf.

Morongo Band of Mission Indians v. State Water Resources Control Board, 45 Cal. 4th 731 (2009).

PBS Newshour, *Are marijuana growers sucking California dry?* (June 9, 2015),
<http://www.pbs.org/newshour/bb/marijuana-growers-sucking-california-dry/>.

State Water Resources Control Board, *Marijuana Cultivation on the North Coast Threatens Water Quality and Wildlife* (2013),
http://www.waterboards.ca.gov/northcoast/publications_and_forms/available_documents/pdf/2013/130611_MarijuanFactSheet.pdf (last visited May 15, 2015).

The Nature Conservancy, California Drought Dashboard,
<http://www.casalmon.org/disappearing-rivers> (last visited June 18, 2015).

United States Drought Monitor, U.S. Drought Monitor California (June 9, 2015),
<http://droughtmonitor.unl.edu/Home/StateDroughtMonitor.aspx?CA> (last visited June 17, 2015).

United States Geological Survey, Streamstats Web Application,
<http://water.usgs.gov/osw/streamstats/index.html> (last visited June 17, 2015).

United States Geological Survey, USGS Current Conditions for California (Mendocino County),
<http://tinyurl.com/pgqoxw3> (last visited June 17, 2015).

AUTHORITY AND REFERENCE

(Gov. Code, § 11346.5, subd. (a)(2))

Fish and Game Code section 12025.1, subdivision (d)(2), provides authority for the emergency regulation. The Department proposes this emergency rulemaking action pursuant to the authority vested by Fish and Game Code section 702 and to implement, interpret, or make specific Fish and Game Code sections 12025, subdivision (e), and 12025.1, subdivision (d).

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

(Gov. Code, § 11346.5, subd. (a)(3))

Existing Laws and Regulations Directly Related to the Proposed Regulation

The proposed regulation provides procedures to afford greater procedural and substantive due process rights to any person subject to a penalty imposed pursuant to Fish and Game Code sections 12025, subdivision (e), or 12025.1, subdivision (d). These procedures are more protective than the rights granted in Section 12025, subdivision (e), and the requirements set forth in Chapter 4.5, Article 6 of the APA.

Current law (Fish and Game Code section 12025) provides that a person who violates sections 1602, 5650, or 5652 of the Fish and Game Code in connection with the production or cultivation of a controlled substance is subject to a civil penalty not to exceed the amount set forth in Section 12025, subdivisions (a) or (b), for each violation.

Section 1602 provides, among other things, that an entity may not substantially divert or obstruct the natural flow of any river, stream, or lake, unless it notifies the Department in the manner prescribed by the Department; Section 5650 provides that it is unlawful to deposit into waters of the state any substance or material deleterious to fish, plant life, mammals, or bird life; and Section 5652 provides that it is unlawful to deposit trash into waters of the state.

Fish and Game Code section 12025, subdivision (e), added in June 2014, provides that the Department may administratively impose a civil penalty authorized pursuant to Section 12025. Section 12025, subdivision (e)(1) through (e)(4), outlines some procedures for imposing civil penalties and for conducting hearings, if a hearing is requested by a person subject to a penalty imposed pursuant to this section. Section 12025, subdivision (e) does not provide factors the Department may consider to assess the amount of a civil penalty and does not include or provide specificity on important procedures for, among other things, requesting a hearing, waiving the right to a hearing, issuing a notice of hearing, designating a hearing officer, requesting a continuance of hearing, settlement, conducting discovery, conducting the hearing, and issuing the final decision.

Currently, the Department does not have regulations that implement Section 12025, subdivision (e). Section 12025, subdivision (e)(5), provides that the Department may adopt regulations to implement subdivision (e). The proposed regulation provides additional requirements to interpret and make specific Fish and Game Code sections 12025, subdivision (e).

Current law (Fish and Game Code section 12025.1), enacted in March 2015, provides that a person who violates Section 5901 is subject to a civil penalty of not more than \$8,000 for each violation. Section 5901 provides that it is unlawful to construct or maintain, in certain fish and game districts, any device or contrivance that prevents, impedes, or tends to prevent or impede, the passing of fish up and down a stream.

Section 12025.1, subdivision (d), provides that the Department may administratively impose a civil penalty authorized pursuant to Section 12025.1, subdivision (a), according to the procedures described in Section 12025, subdivision (e)(1) through (e)(4). As noted above, Section 12025, subdivision (e)(1) through (e)(4), outlines some procedures for imposing civil penalties and for conducting hearings.

Currently, the Department has no regulations that implement Section 12025.1, subdivision (d). Section 12025, subdivision (d)(2), provides that the Department shall adopt emergency regulations to implement subdivision (d). The proposed regulation provides procedures not found or made specific in Fish and Game Code sections 12025, subdivision (e), and 12025.1, subdivision (d).

Current law (Government Code, Title 2, Division 3, Part 1, Chapter 4.5, sections 11400 to 11475.70) provides procedures for conducting administrative hearings pursuant to the Administrative Procedure Act (APA). Government Code section 11410.20 provides that procedures under Chapter 4.5 apply to all agencies of the state unless otherwise expressly provided by statute. Article 6 (beginning with section 11425.10) provides all the requirements for conducting administrative hearings. The proposed regulation complies with all the requirements in Article 6. The proposed regulation is also consistent with the requirements in Article 7 (ex parte Communications), Article 8 (Language Assistance), and Article 11 (Subpoenas). The remainder of Chapter 4.5 provides guidance for conducting informal hearings. The proposed regulation provides additional specificity not found in the default provision of Chapter 4.5 of the APA, including guidelines for imposing penalties.

Current law (Government Code, Title 2, Division 3, Part 1, Chapter 5, sections 11500 to 11529) provides formal hearings procedures under the APA. Although the Department is not required by statute to conduct the formal hearings in Chapter 5, the proposed regulation includes many requirements set forth in Chapter 5, including section 11507 (amendment of pleading), section 11507.6 (discovery), section 11509 (notice of hearing), section 11511 (deposition), section

11513 (oral evidence, witness examination, rules of evidence, hearsay rules, and privilege rules), and section 11514 (affidavit).

The Proposed Regulation Does Not Differ or Conflict with Federal Law

The proposed regulation sets forth procedures for imposing civil penalties and conducting hearings pursuant to sections 12025, subdivision (e) and 12025.1, subdivision (d), of the Fish and Game Code. The proposed regulation does not differ substantially or conflict with an existing comparable federal regulation or statute.

The Proposed Regulation is Not Inconsistent or Incompatible with Existing State Regulations

The Department conducted an evaluation of existing regulations adopted for the purposes of imposing civil penalties and conducting administrative hearings pursuant to the Fish and Game Code and other California statutes. The proposed regulation is the only regulation that implements procedures to administratively impose civil penalties and conduct hearings under Fish and Game Code sections 12025, subdivision (e) and 12025.1, subdivision (d). Therefore, this regulation is neither inconsistent nor incompatible with existing state regulations.

Benefits of the Proposed Regulation

The proposed regulation would implement procedures for imposing civil penalties and conducting hearings pursuant to Fish and Game Code sections 12025, subdivision (e), and 12025.1, subdivision (e) (hereinafter "Civil Penalty Statutes"). The primary objective of the proposed regulation is to address and deter environmental damage that is worsening the adverse consequences of the ongoing severe drought in the state. The proposed regulation would provide a more efficient mechanism for the timely resolution of disputed cases while assuring members of the regulated community that hearings will be conducted in a manner that will afford suspected violators (hereinafter "Respondents") procedural and substantive due process rights.

Overall, the benefits and fiscal impact of addressing potential violations through the Department's authority to administratively impose civil penalties and conduct hearings are significant. First, the Department's enforcement is no longer wholly reliant on county district attorneys, many whom of have limited resources or expertise to prioritize and prosecute Fish and Game Code violations. Second, administrative hearings provide more efficient procedures for resolving contested cases and reduce the need for costly civil litigation.

The proposed regulation provides a number of important benefits, including transparency and promotion of fairness. The proposed regulation would provide Respondents with an opportunity to review the evidence and prepare for the hearing. The regulations set forth the hearing process in great detail, ensuring that Respondents understand their rights and have an opportunity to present evidence in their defense.

In addition to the administrative and due process benefits described above, the Department anticipates significant, non-monetary benefits to the environment through improved protection and enforcement of water quality and stream flows during the current drought emergency and into the future. The proposed regulation will therefore provide direct benefits to the long term survival of anadromous fish populations that depend on these aquatic systems.

A summary of the objectives and specific benefits of each subsection of the proposed regulation, California Code of Regulations, Title 14, section 748.5, is set forth below.

Subsection (a) provides definitions of key terms used throughout the proposed regulation. This subsection is necessary because terms that are not already defined in the Fish and Game Code could be subject to multiple interpretations. This subsection improves clarity and overall understanding of the regulation by Respondents.

Subsection (b) specifies that the burden of proof to prove a violation shall be a preponderance of the evidence. The Civil Penalty Statutes are silent concerning the burden of proof. Section (b) is necessary to clarify that the Department must meet a specific burden of proof before it can impose a civil penalty pursuant to the Civil Penalty Statutes.

Subsection (c), subparts (1) through (4), provide the procedures for issuing a complaint and order to a Respondent. Subparts (1) through (3) organize and clarify each requirement the Department must meet to issue a complaint to a Respondent. The Civil Penalty Statutes did not specify whether a complaint and order may be amended. Subsection (c), subpart (4) allows the Department to amend a complaint before a case is submitted for a decision only if all parties are served with the amended complaint and order and the presiding officer provides affected Respondents a reasonable opportunity to present a defense. This provision is necessary to inform Respondents of any changes made to the complaint or order and to provide additional time to review the evidence and prepare for the hearing.

Subsection (d) provides guidance on how to calculate a civil penalty. The Civil Penalty Statutes set forth specific maximum penalty amounts per each violation, but do not describe how the penalty will be calculated. Subsection (d) is necessary because it informs Respondents that the Department will consider all relevant circumstances to the extent they are known to the Department, including certain specific factors, when calculating the amount of the civil penalty. The Civil Penalty Statutes do not specify whether the Department will consider mitigating factors or other factors to reduce a civil penalty. Subsection (d) is beneficial because it notifies Respondents that the Department will also consider mitigating factors that may reduce a civil penalty amount.

Subsection (e), subparts (1) through (3), address a request for a hearing. The Civil Penalty Statutes provide that a Respondent may request a hearing no later than 20 days from the date of service of a complaint. Subsection (e) specifies that the request must be in writing and signed by the Respondent or his or her representative and must provide Respondent's contact

information. This subsection is necessary to provide Respondents a detailed explanation of what Respondents must include in the request for a hearing.

Subsection (f), subparts (1) through (3), address who conducts a hearing when a Respondent requests a hearing. The Civil Penalty Statutes provide that the Director or his or her designee shall control the nature and order of hearing proceedings. Subsection (f), subpart (1) specifies that the Department shall schedule the hearing before a presiding officer who shall exercise all powers relating to the conduct of the hearing and provides that the Director may designate administrative law judges who work for the Office of Administrative Hearings to serve as presiding officers. Subpart (2) provides that the Director may designate other persons to serve as presiding officers, but only if the person was not the Department official who issued the complaint in the case and did not serve as an investigator, prosecutor, or advocate in any stage of the hearing or its prehearing stage. Subsection (f) is necessary to interpret and make specific who the Director may designate as a presiding officer to conduct hearings and to more fully describe the scope the presiding officer's duties. This subsection also serves to assure Respondents that a separation of functions exists between the presiding officer who is the trier of fact and final decision maker, and the Department employees who serve as investigators or prosecutors in the case. This separation of functions is required by law. See *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal. 4th 731. Subsection (f), subpart (3) is necessary to assure Respondents that a designation of a presiding officer will be made in full consideration of the requirements of due process and fundamental fairness to the parties.

Subsection (g), subparts (1) and (2), address the waiver of the right to a hearing. The Civil Penalty Statutes provide that a party waives the right to a hearing if no hearing is requested within 20 days from the date of service, in which case the order shall become final. Subsection (f) clarifies that Respondent's failure to appear at a requested hearing also constitutes a waiver of the request for a hearing, in which case the order shall become final. This subsection is necessary to effectuate the timing provided for in the Civil Penalty Statutes, to discourage dilatory tactics, and to ensure an efficient processing of hearings and civil penalty orders.

Subsection (h), subparts (1) through (3), specify, among other things, that settlement may be reached at any time before an order becomes final. This subsection is necessary to facilitate resolution of contested cases prior to, during, and after a hearing and to promote efficiency.

Subsection (i) specifies hearings procedures. In cases in which the proposed penalty set forth in complaint is less than \$25,000, subsection (i) states that the Department shall follow procedures consistent with the requirements described in Government Code section 11425.10 (Chapter 4.5, Article 6 of the APA), which contains a Respondent's bill of rights.

Subsection (i), subparts (1) through (12), specify the procedures the Department shall follow in cases where the proposed penalty set forth in the complaint is \$25,000 or greater. These

procedures will afford procedural and substantive due process rights which are more protective than the rights granted in the Civil Penalty Statutes and the requirements set forth in Chapter 4.5, Article 6 of the APA. Subsection (i) also states that parties may waive or modify any provision of the governing regulation upon agreement of all parties to the waiver or modification and approval of the presiding officer. Allowing parties and the presiding officer to agree to reduce the complexity of the hearing will promote efficiency and speed the resolutions of contested cases.

Subsection (i), subpart (1) provides that the Department shall serve on Respondent a notice of hearing when a request for hearing is made. The Civil Penalty Statutes do not set forth specific requirements for the notice of hearing. Subpart (1) provides that the notice of hearing shall be served at least 10 days prior to the hearing and discusses how the notice shall be served. This section requires, among other things, that the notice of hearing include a copy of the governing regulations. Subpart (1) also includes a notice template that the Department may use to specify the place, date and time of the hearing, a procedure to object to the place of the hearing, right to be represented by an attorney, a procedure to request language assistance, and options to present evidence. This subsection is necessary to help Respondents know how to object to a hearing date or place, learn about the hearing process, and adequately prepare to present their defense.

Subsection (i), subpart (2) specifies that each party is entitled to one preemptory challenge of the presiding officer, and sets forth the procedure to make such challenge. Subsection (i), subpart (3) provides that a party may request the disqualification of a hearing officer on the grounds that a fair and impartial hearing cannot be afforded, and sets forth the procedure to make such a request. These subsections are necessary to assure Respondents that they may request another presiding officer if they believe that due process and fundamental fairness standards are not met.

Subsection (i), subpart (4) specifies the procedure that parties must follow to request a continuance of a hearing. This subsection provides that a hearing may be continued for good cause, and grants the presiding officer the discretion to waive these procedures upon the showing of additional good cause. The Civil Penalty Statutes are silent on these procedural issues. Subpart (4) is necessary to ensure that requests to continue a hearing are made for good cause and to prevent undue delay of resolution of contested cases.

Subsection (i), subpart (5) addresses the method of discovery. This subsection is consistent with the discovery procedures set forth in the APA, Government Code, section 11507.6. Subpart (5) specifies that upon written request Respondents may obtain statements, relevant writings, reports, and name of witnesses. Subpart (5) ensures that Respondents have a clear process for requesting relevant information and are able to fully prepare their defense.

Subsection (i), subpart (6) sets forth the procedures for issuing subpoenas duces tecum and subpoenas to appear. This subsection conforms to the subpoena procedures set forth in the APA, Government Code, sections 11450.20 through 11450.40. Subpart (6) provides another discovery tool that Respondents may use to prepare their defense.

Subsection (i), subpart (7) specifies the process by which a party may propose to introduce an affidavit of a witness who will not be available for cross-examination at the hearing. This subsection also specifies the required form a notice requesting to introduce such affidavit must take and the timeframe under which the opposing party may request that the affiant be made available for cross-examination. This process is consistent with the affidavit process set forth in the APA, Government Code, section 11514. Subpart (7) is beneficial because it provides parties the option to introduce written testimony of a witness who is not going to appear at the hearing.

Subsection (i), subpart (8) provides the procedures for depositions. These procedures are consistent with the deposition procedures set forth in the APA, Government Code, section 11511. This subpart is beneficial because it provides Respondents with an opportunity to seek testimony of a material witness who is unable or cannot be compelled to attend the hearing.

Subsection (i), subpart (9) provides that the hearing shall be electronically recorded, unless otherwise agreed by the parties. Subpart (9) also states that a hearing may be conducted by telephone or other electronic means if agreed by the parties and each participant has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits. This subpart is necessary to inform Respondents how hearings will be conducted.

Subsection (i), subpart (10) specifies the type of admissible evidence, the manner in which each party may present evidence, and clarify that the hearing does not need to be conducted according to technical rules relating to evidence and witnesses of a more formal proceeding. A more relaxed evidentiary process will help Respondents introduce evidence in their defense without having to navigate complex standards of admissibility used in more formal proceedings. This subpart is necessary to ensure Respondents understand how evidence may be presented during the hearing. Subpart (10) also allows the presiding officer to exclude irrelevant, repetitious, and unduly burdensome evidence. This subpart is also necessary to streamline the hearings and to avoid an unnecessarily cumbersome administrative record.

Subsection (i), subpart (11) states, among other things, that the hearing will be conducted in the English language, unless Respondents request language assistance. It requires that Respondents notify the Department no later than 10 days after notice of the hearing is served, and notifies the Respondents that the presiding officer may order them to pay the cost of the interpreter. This subpart is beneficial because it provides Respondents with an opportunity to seek language assistance if English is not their first language.

Subsection (i), subpart (12) prohibits disruptive or obstructive conduct at a hearing. Persons violating this subsection may be excluded even if they are a Respondent or witness. Subpart (12) is necessary to provide for orderly proceedings. Disruptive and disorderly conduct can jeopardize Respondents' or Department staff's ability to present a case, or can result in an unclear transcript. Similar to the APA, Government Code sections 11455.10 to 11455.30, subpart (12) sets forth the facts that may subject a person to the contempt sanction and the process by which a presiding officer may seek a contempt proceeding in superior court.

Subsection (j), subparts (1) through (6), provide the ex parte communication rules governing the Civil Penalty Statutes. This subsection prohibits communications by either Respondents or Department employees with the presiding officer without notice and opportunity to participate by the opposing side. Subsection (j) delineates when communication with a presiding officer is permissible. In the event an ex parte communication does occur, subsection (j) provides how to cure any conflict created by such ex parte communications. This subsection is necessary to ensure transparency, fairness, and a clear process to address a violation of an ex parte rule.

Subsection (k), subparts (1) through (3), set forth the process for issuing a final decision and order after the conclusion of a hearing requested by a Respondent. The Civil Penalty Statutes provide that the Director or his or her designee shall issue a final order within 45 days of the close of a hearing.

Subsection (k), subpart (1) specifies that a presiding officer shall issue a written decision based on the evidence presented at the hearing and that the decision shall include the presiding officer's finding of facts and conclusions. This provision makes it clear that the presiding officer conducts the hearing and issues the decision, which shall be based solely on the evidence presented at the hearing. Subsection (k), subpart (1) is necessary to make the preparation of the decision and the decision-making process more transparent to Respondents. This subsection is also necessary to ensure the regulation is compatible with the APA, in that Government Code section 11425.50 requires a "written decision."

Subsection (k), subpart (1) also specifies that 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 on the factors listed in subsection (d). This provision is necessary because the Civil Penalty Statutes are silent on these procedural issues.

Subsection (k), subpart (2) specifies that the presiding officer shall issue the final decision for the Department and specifies that the final decision shall include the final order setting the amount to be imposed on the Respondent. This provision is necessary to clarify that the presiding officer's decision and order is final for purposes of judicial review. Without subsection (k), subpart (2), it may be unclear whether the order is final after the presiding officer issues the decision, or whether the Director or his or her designee must first approve or adopt the decision of the presiding officer. Subsection (k), subpart (2) promotes efficiency

because it does not require that the Director review or approve a decision and order before they become final.

The Civil Penalty Statutes require that a final order be served by certified mail upon the party served with the complaint. Subsection (k), subpart (3) specifies that the final decision and order shall be served by certified mail to all parties. This provision is necessary to clarify that the final decision and order must be served upon the Department, in addition to the respondents served with the complaint, given that the presiding officer who issues the decision and order may be an administrative law judge assigned by the Office of Administrative Hearings.

Subsection (l) includes the procedure to appeal a final order imposing civil penalties. The Civil Penalty Statutes provide that a party may file a petition for a writ of mandate with the superior court within 30 days of the day of service. Subsection (l) specifies that the Department shall prepare and deliver the record of the proceeding to the Respondent within 30 days after the Respondent's request and payment of a fee specified by statute. This subsection benefits Respondents because it requires the Department to provide the record of the proceeding within a reasonable amount of time; and therefore facilitates Respondent's appeal of the Department's order to a court for review.

Subsection (m) sets forth when a Respondent must pay a civil penalty imposed pursuant to the Civil Penalty Statutes. This subsection notifies Respondents that an order imposing a civil penalty is enforceable in court pursuant to Fish and Game Code section 12014.

OTHER MATTERS PRESCRIBED BY STATUTE

(Gov. Code, § 11346.5, subd. (a)(4))

The Department's operations are primarily prescribed by the hundreds of provisions set forth in the California Fish and Game Code and Title 14, California Code of Regulations. Other bodies of law that govern the Department include, but are not limited to, the Government and Penal Codes. As to civil administrative penalty hearings generally, these regulations are also prescribed in part by the hearing provisions of the Administrative Procedure Act, Government Code section 11400 et seq.

LOCAL MANDATE DETERMINATION

(Gov. Code, § 11346.5, subd. (a)(5))

The Department has determined that adoption of California Code of Regulations, Title 14, section 748.5 does not impose a new mandate on local agencies or schools districts.

ESTIMATE OF COST OR SAVINGS

(Gov. Code, § 11346.5, subd. (a)(6))

The Department does not anticipate any added costs to the Department or other State agencies as a result of this emergency rulemaking action because most of costs for the new program created by the Civil Penalty Statutes were funded by a Budget Change Proposal (BCP) approved last year. Hearing costs that were not included in the BCP will be absorbed by the Department.

The Department estimates that the emergency rulemaking may result in savings to the Department to the extent that violators come into compliance with state laws through the civil penalty process thereby reducing enforcement time in the future, freeing up law enforcement officers to work on other violations.

This emergency rulemaking will not result in any costs or savings to local agencies and does not affect federal funding to the state.