

STATE OF CALIFORNIA
DEPARTMENT OF FISH AND WILDLIFE
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-publication of Notice Statement)

Add Section 748.5
Title 14, California Code of Regulations
Re: Procedures for Imposing Civil Penalties and Conducting Hearings

I. Date of Initial Statement of Reasons: November 3, 2015

II. Dates and Locations of Scheduled Hearings

Public Hearing

Date: December 28, 2015

Time: 1:00 pm – 2:30 pm

Location: Resources Auditorium

Resources Building

1416 9th Street

Sacramento, CA 95814

III. Description of Regulatory Action

(a) Introduction

The California Department of Fish and Wildlife (Department) proposes to adopt through regular rulemaking the existing regulatory procedures for imposing civil penalties and conducting administrative hearings pursuant to Fish and Game Code sections 12025, subdivision (e), and 12025.1, subdivision (d). (Cal. Code Regs., tit. 14, § 748.5.) The Department adopted the existing regulatory procedures found in Title 14, section 748.5, California Code of Regulations (CCR) through an emergency rulemaking action approved by the Office of Administrative Law on July 10, 2015. (Cal. Reg. Notice Register 2015, No. 30-Z; OAL File No. 2015-0703-01 E.) The existing emergency regulations will expire on January 6, 2016. The Department is initiating this regular rulemaking action in order to make permanent its regulations to afford procedural and substantive due process rights to any person or entity on which a civil penalty may be imposed pursuant to Fish and Game Code sections 12025, subdivision (e), and 12025.1, subdivision (d).

(b) Background

In 2014, the California Legislature enacted and the Governor signed Senate Bill (SB) 861, which amended Fish and Game Code section 12025 (Chapter 35, Statutes 2014, effective June 20, 2014) to deter environmental impacts in connection with the production or cultivation of a

controlled substance. The 2014 amendments added Section 12025, subdivision (e), which grants the Department authority to administratively impose a civil penalty on a person found to have violated any sections of the Fish and Game Code specified in Section 12025 in connection with the production or cultivation of a controlled substance, directs the Department to conduct administrative hearings, and provides that the Department may adopt regulations to implement subdivision (e). The primary purpose of this statute is to address the environmental impacts caused by the cultivation of marijuana, defined as a controlled substance under Health and Safety Code section 11054.

The proliferation of marijuana cultivation is wreaking havoc on the state's sensitive ecosystems and sucking drought-stricken streams dry. Marijuana plants use six to eight gallons of water per plant, per day and cultivation sites can contaminate streams. The impacts from marijuana cultivation include fragmentation and loss of habitats caused by illegal land clearing and logging, death of terrestrial wildlife by rodenticide ingestion, contamination of streams from delivery of sediment, pesticides, fertilizers, and petroleum products, erosion of stream habitats and burying of streams, and surface water diversions resulting in reduced flows and completely dewatered streams at a time of severe drought. As the trustee agency for the state's fish and wildlife resources, the Department seeks to address environmental impacts from marijuana cultivation sites.

The environmental impacts documented by Department law enforcement officers and environmental scientists and other researchers demonstrate that marijuana cultivation is having adverse effects on some threatened and endangered species and species of special concern in the state. A recent study (Thomson et al. 2013) revealed that 85 percent of dead fishers found in California's Sierra National Forest had been exposed to poisons typically used to kill wood rats in illegal marijuana cultivation fields. More recently, an analysis (Bauer et al. 2015) conducted by environmental scientists from the Department revealed that during drought conditions water demand for marijuana cultivation exceeded the stream flow in three of four watersheds studied by the Department. The study results are consistent with the events that occurred in the summer of 2014 and again in July 2015 when water diversions for marijuana cultivation caused large segments of the studied streams to run dry. Bauer et al. concluded that diminished stream flow caused by marijuana cultivation is likely to have lethal to sub-lethal effects on anadromous fish, such as state- and federally-listed salmon and steelhead.

In response to California's extreme drought conditions, the Department has taken immediate actions to protect fish and wildlife and their habitats from the impacts of marijuana cultivation that worsen the effects of the drought. For instance, in 2014, the Department's law enforcement officers assisted with the eradication of 609,480 plants from illegal 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. To restore streams within these sites, the Department also removed 137 dams illegally installed to facilitate unlawful water diversions.

The Department has continued to devote significant resources to inspect marijuana cultivation sites that can be causing environmental damage. Between January and September 2015, the Department's law enforcement officers have eradicated over 1,275,975 marijuana plants, which used approximately 7,655,850 gallons of water per day. During this time, the Department's law enforcement officers also removed 62,225 pounds of trash, 203,160 feet of poly pipe, 9,380 pounds of fertilizers, and 211 containers of pesticides and hazardous materials. The Department has also continued to help restore streams within marijuana cultivation sites. In 2015, it has removed 63 unlawfully constructed or maintained dams used to divert and irrigate water for marijuana cultivation sites.

In early 2015, as part of a series of legislative measures to address the fourth year of extreme drought conditions, the Legislature enacted Assembly Bill 92, which added Fish and Game Code section 12025.1 (Chapter 2, Statutes 2015, effective March 27, 2015) to address unlawful construction or maintenance of devices that impede fish passage and threaten the survival of anadromous fish. Recently adopted Section 12025.1, subdivision (d), grants the Department authority to administratively impose a civil penalty on a person found to have violated Section 5901 of the Fish and Game Code. 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. Similar to Section 12025, this newly adopted statute also directs the Department to impose civil penalties and conduct administrative hearings. Section 12025.1, subdivision (d), requires the Department to follow the procedures described in Section 12025, subdivision (e), and directed the Department to adopt emergency regulations to implement the statute.

On July 10, 2015, pursuant to the directive in Fish and Game Code Section 12025.1, subdivision (d), the Department promulgated emergency regulations to implement Section 12025, subdivision (e), and Section 12025.1, subdivision (d) ("Civil Penalty Statutes"). The emergency regulations are found in Title 14, section 748.5, CCR, and include procedures for imposing civil penalties and conducting administrative hearings. The Department adopted the emergency regulations to more quickly address environmental violations deemed to have worsened the adverse consequences of the fourth consecutive year of severe drought conditions in the state. The purpose of the procedures in Title 14, section 748.5, CCR is to provide any person upon whom a civil penalty may be imposed a regulatory process that ensures that their due process rights are protected through the establishment of clear, detailed, and consistent hearing procedures.

(c) Problem the Regulatory Action Intends to Address

Current law authorizes the Department to impose a civil penalty on any person upon whom a complaint may be served for violating any of the provisions of the Fish and Game Code specified in Sections 12025 and 12025.1. Current law also requires that the Department conduct an administrative hearing when a person upon whom a complaint is issued requests a hearing. On July 10, 2015, the Department adopted emergency regulations found in Title 14, section 748.5, CCR to establish regulatory procedures to impose penalties and conduct administrative hearings pursuant to the Civil Penalty Statutes. The existing emergency regulations will expire on January 6, 2016. The Department is initiating this regular rulemaking action in order to make the emergency regulations found in Title 14, section 748.5, CCR permanent.

In 2015 to date, Department has inspected over 182 properties and documented 436 violations of the Fish and Game Code in connection with marijuana cultivation. The Department has served Notices of Violations to over 50 individuals or entities responsible for these violations. Under the Civil Penalty Statutes, the Department may exercise its authority to impose civil penalties for these violations and any future violations, and must be prepared to conduct administrative hearings if a hearing is requested. The Civil Penalty Statutes 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 to 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 gather information and evidence, and issue a decision are not specified in the Civil Penalty Statutes.

As noted above, the existing emergency regulations in Title 14, section 748.5, CCR will expire on January 6, 2016. Without a permanent regulatory framework, hearing procedures will be unclear to the regulated community. The purpose of this regular rulemaking action is to continue to provide clear, detailed, and consistent rules to efficiently resolve contested cases and afford procedural and substantive due process rights to any person on whom a civil penalty may be imposed pursuant to the Civil Penalty Statutes. These regulations are necessary to continue to implement, interpret, and make specific the Civil Penalty Statutes.

(d) Benefits from the Regulatory Action

In general, this regular rulemaking action will help the Department implement a permanent process to impose a civil penalty on a person responsible for environmental damage connected with marijuana cultivation or unlawful construction or maintenance of a device that impedes fish passage. The proposed permanent regulations will help assure members of the regulated community that administrative hearings initiated pursuant to the Civil Penalty Statutes will be conducted in a manner that will afford suspected violators (hereinafter “respondents”)

procedural and substantive due process rights. The proposed regulations will provide a more efficient mechanism for the timely resolution of violations under the Civil Penalty Statutes.

The proposed regulations provide a number of specific benefits, including transparency and promotion of fairness. The administrative process is set forth in great detail, ensuring that respondents understand their rights and have an opportunity to present evidence in their defense. For instance, the proposed regulations provide respondents with early access to the evidence in the case and with several discovery mechanisms (i.e., subpoenas, affidavits, depositions) to prepare for the hearing. Furthermore, the proposed regulations set forth the burden of proof to prove a violation and provide the factors the Department may take into consideration when assessing the amount of the civil penalty. The proposed regulations also clearly define who may be designated as a presiding officer to conduct the hearing, establish strict ex parte communication rules, and specify that the presiding officer shall issue the final decision of the Department. The Civil Penalty Statutes are silent on all of these important issues. Together these regulations make the process for issuing penalties under the Civil Penalties Statutes transparent and fair.

In addition to the benefits described above, the proposed regulations provide more efficient procedures to timely address environmental damage through the administrative hearing process rather than through the more costly civil litigation process. Further, the Department's enforcement efforts to resolve environmental violations will no longer be wholly reliant on county district attorneys, many whom of have limited resources to prioritize and prosecute Fish and Game Code violations. Finally, through the implementation of the proposed administrative process, the Department anticipates significant benefits to the environment through improved protection of stream flows, water quality, and stream habitat during the current severe drought and into the future. The proposed regulation will therefore provide direct benefits to ecosystems impacted by the cultivation of marijuana. The Department also anticipates benefits to the environment through the prevention of unlawful fish passage barriers that threaten the long-term survival of anadromous fish populations.

(e) Statement of the Specific Purpose of Each Adoption and the Rationale for Determining that Each Adoption is Reasonably Necessary

The Department has adopted emergency regulations found in Title 14, section 748.5, CCR to establish regulatory procedures to impose penalties and conduct administrative hearings pursuant to the Civil Penalty Statutes. The existing emergency regulations will expire on January 6, 2016. The Department is initiating this regular rulemaking action in order to make permanent the emergency regulations found in Title 14, section 748.5, CCR.

The hearing procedures under the Administrative Procedure Act (APA) (Government Code, Title 2, Division 3, Part 1, Chapter 4.5, sections 11400 to 11475.70) provide some guidelines ("default provisions") for conducting administrative hearings such as those authorized by the Civil

Penalty Statutes. The proposed regulations are necessary to provide additional specificity not found in the Civil Penalty Statutes or the default provisions under the APA. The sections below set forth a discussion of the specific purpose for each regulatory provision adopted in Title 14, section 748.5, CCR and why each regulatory provision adopted is reasonably necessary to carry out the purpose and address the problem for which it is proposed.

Subsection (a)

Purpose: The purpose of subsection (a) is to provide definitions of key terms used throughout the proposed regulation.

Necessity: 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 regulations for those impacted by them by making terms specific.

Subsection (b)

Purpose: The purpose of subsection (b) is to specify that the burden of proof to prove a violation shall be a preponderance of the evidence.

Necessity: The Civil Penalty Statutes are silent concerning the burden of proof to prove a violation. This subsection is necessary to notify the regulated community of the burden of proof in the hearing process and to avoid inconsistent application of the burden of proof.

Subsection (c), subparts (1) through (4)

Purpose: The purpose of subsection (c) is to provide clear procedures for how the Department will issue a complaint and order to a respondent.

Necessity: Subparts (1) through (3) are necessary to organize and clarify each requirement the Department must meet in order 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) is necessary to specify that the Department can amend a complaint or order before a case is submitted for a decision only if all parties are served with the amended complaint or order. This subpart is also necessary to specify that if an amended complaint or order alleges a new violation or presents additional penalties, the presiding officer must provide affected respondents a reasonable opportunity to present a defense. This subpart is beneficial to respondents because it informs them that they have the right to request additional time to prepare a defense to allegations of a new violation or additional penalties included in an amended complaint or order.

Subsection (d)

Purpose: The purpose of subsection (d) is to provide clarity on how to calculate a civil penalty, as well as to inform the regulated community of the circumstances which the Department will consider when calculating the civil penalty amount.

Necessity: 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 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)

Purpose: The purpose of subsection (e), subparts (1) through (3), is to specify what information a respondent must include in a request for a hearing, including personal contact information.

Necessity: 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 and states that the request must contain a brief statement of the material facts a 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. This subsection is necessary because the Civil Penalty Statutes do not specify that the request must be done in writing and must be signed by respondent or by someone on behalf of the respondent. The Civil Penalty Statutes also do not specify that the request for a hearing must include respondent's contact information. Subsection (e), subpart (2), specifies that a request for a hearing must be in writing and signed by or on behalf of respondent and must include respondent's or his or her legal counsel's mailing address, telephone, and email address. Subsection (e), subparts (1) through (3), benefit respondents by increasing clarity on what must be included in a request for a hearing and also facilitate the Department's ability to more quickly contact a respondent or his or her representative to discuss matters related to scheduling the hearing.

Subsection (f), subparts (1) through (3)

Purpose: The purpose of subsection (f), subparts (1) through (3), is to specify who may conduct a hearing when a respondent requests a hearing.

Necessity: If a hearing is requested, the Civil Penalty Statutes provide that it shall be scheduled before the director or his or her designee, which shall not be the chief deputy or the assistant

chief issuing the complaint and order. Subsection (f), subpart (1) specifies the role of the presiding officer and states 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), subparts (1) and (2) are 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. The APA and due process principles require that the hearing officer be separated from the investigative process. Subsection (f), subparts (1) and (2) are also necessary to assure the regulated community 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)

Purpose: The purpose of subsection (g), subparts (1) and (2), is to specify when a respondent has waived the right to a hearing.

Necessity: 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), subpart (2) specifies that respondent's failure to appear at the time and place of the requested hearing also constitutes a waiver of the request for a hearing, in which case the order served shall become final. Subsection (f), subpart (1) and (2) are 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)

Purpose: The purpose of subsection (h), subparts (1) through (3), is to encourage the resolution of contested cases by settlement. The purpose of the revision to subsection (h) is to delete reference to Section 1152 of the Evidence Code from subpart (2).

Necessity: The Civil Penalty Statutes are silent concerning the resolution of contested cases through settlement. Subsection (h), subpart (1) specifies that a settlement may be reached at any time before an order becomes final. Subsection (h), subpart (2) provides that the Department or the presiding officer, if a hearing was requested, must include the terms of the settlement in the final order. Subparts (1) and (2) are necessary to encourage the resolution of

contested cases prior to or after a hearing is requested, but before an order becomes final. Subpart (2) also specifies that no evidence of an offer of compromise is admissible in a hearing and that no evidence of statements made during settlement negotiation is admissible to prove liability or lack thereof. Subpart (2) is necessary to facilitate candid discussions and exchange information between parties in settlement negotiations. The revision to subpart (2) is necessary to delete Section 1152 of the Evidence Code because Section 1152 is not relevant to any of the violations or claims that may be asserted under the Civil Penalty Statutes. Subsection (h), subpart (3) specifies that a settlement may include any terms voluntarily agreed to by the parties and that a settlement order is fully enforceable by the parties. Subpart (3) is necessary to encourage the parties to attempt to resolve contested cases by settlement and to promote the efficient resolution of contested cases.

Subsection (i)

Purpose: The purpose of subsection (i) is to specify the hearing procedures.

Necessity:

Subsection (i) specifies that the procedures in Subsection (i), subparts (1) through (12), apply when the Department conducts a hearing to resolve cases where the proposed penalty set forth in the complaint is \$25,000 or greater. The Civil Penalty Statutes authorize maximum penalties ranging from \$8,000 to \$40,000 per each violation, depending on the type of violation. If a person is found to have violated any of the specified sections in the Civil Penalty Statutes on land he or she owns, leases or otherwise uses or occupies with the consent of the landowner, the Department may impose up to the maximum prescribed penalty each day the violation continues to occur or until the violation is remedied.

Between January and September 2015, the Department inspected 182 properties and documented 436 violations of the Fish and Game Code in connection with marijuana cultivation. The Department has served Notices of Violation on over 50 individuals or entities responsible for these violations. Based on a review of the Notices of Violation that have been served on responsible parties, the Department estimates that 90% of these notices involve violations where the Department may impose a penalty of more than \$75,000. Consequently, pursuant to the Civil Penalty Statutes, the Department may impose penalty amounts greater than \$25,000 on the majority of persons responsible for the violations found at the inspected properties. Given that the amount of the penalties involved in these cases are large, the Department believes that respondents should be able to rely on more detailed hearing procedures to help them understand the hearing process and adequately prepare to present their position that no civil penalty should be imposed or that a lesser amount is warranted. Subsection (i) is necessary to 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 default provisions of Chapter 4.5, Article 6 of the APA.

Subsection (i) specifies that in cases where the proposed penalty set forth in the complaint is less than \$25,000, the hearing procedures must be consistent with the requirements described in Government Code section sections 11400 to 11475.70 (Chapter 4.5, Article 6 of the APA). This provision is necessary to help streamline the process for hearing cases that involve lesser penalty amounts while at the same time ensuring that Respondents are able to avail themselves of all the rights guaranteed under Chapter 4.5, Article 6 of the APA. The revision to subsection (i) is necessary to indicate that all of the default provisions of the Chapter 4.5, Article 6 of the APA apply to cases in which the proposed penalty is less than \$25,000.

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. This provision is necessary to provide parties and the presiding officer the opportunity to reduce the complexity of the hearing and to promote efficiency and speed the resolutions of contested cases.

Subsection (i), subpart (1)

Purpose: The purpose of subsection (i), subpart (1) is to specify the procedures to schedule a hearing.

Necessity: The Civil Penalty Statutes state that, if a hearing is requested, a hearing shall be scheduled before the director or his or her designee, but does not set forth specific requirements for scheduling a hearing. Subsection (i), subpart (1)(A) states that 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. This provision is necessary to ensure that the date and place of the hearing is selected taking in consideration the circumstances of respondents who may, for example, reside far away from the Department's offices or the Office of Administrative Hearings. Subsection (i), subpart (1)(B) provides that the Department shall serve a notice of hearing at least 10 days prior to the hearing and specifies how the notice of hearing shall be served on a respondent. This provision is necessary because the Civil Penalty Statutes do not have procedures specifying how respondents must be notified of the time and place of the hearing or specify how the notice of hearing must be delivered to a respondent. Subsection (i), subparts (1)(D) sets forth a notice template that the Department may use to specify the place, date and time of the hearing, the procedure to object to the place of the hearing, the procedure to request language assistance, and to explain the right to be represented by an attorney and options to present evidence. This provision is necessary to ensure respondents understand how to object to a hearing date or place, request language assistance, learn about the hearing process, and adequately prepare to present their defense. Subsection (i), subparts (1)(C), (1)(E), (1)(F), and (1)(G) each specify additional information that must be included in the notice of hearing. These provisions are all necessary because they will provide respondents with the rules governing the conduct of the hearing. Subsection (i), subpart (1) benefits respondents and the Department because it makes the hearing process

more precise and transparent. The revisions to Subsection (i), subpart (1) are necessary to correct an error in the numbering sequence of its provisions.

Subsection (i), subpart (2)

Purpose: The purpose of subsection (i), subpart (2) is to specify a procedure to challenge the designation of a presiding officer to a hearing.

Necessity: The Civil Penalty Statutes do not provide a process in which a party may challenge the designation of a presiding officer. Subsection (i), subpart (2)(A) specifies that each party is entitled to one preemptory challenge of the presiding officer, and subparts (2)(B) and (2)(C) set forth the procedures that parties must follow to make such challenge. The provisions in subsection (i), subpart (2) are necessary to provide parties with a clear and efficient process to exercise an opportunity to request a hearing officer different from the hearing officer originally assigned to preside over a case. Subsection (i), subpart (2) is beneficial because it will help promote fairness.

Subsection (i), subpart (3)

Purpose: The purpose of subsection (i), subpart (3) is to set forth the rules for disqualifying a presiding officer.

Necessity: The Civil Penalty Statutes do not address how a hearing officer can be disqualified from presiding over a hearing. Subsection (i), subpart (3) specifies that any 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. This provision is necessary to assure respondents and the Department that they may request another presiding officer if they believe that due process and fundamental fairness standards are not met.

Subsection (i), subpart (4)

Purpose: The purpose of subsection (i), subpart (4) is to set forth the procedures for requesting to continue the date of the hearing.

Necessity: Subsection (i), subpart (4)(A) specifies that 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. This provision is necessary because the Civil Penalty Statutes do not address issues related to the continuance of a hearing. Subsection (i), subpart (4)(B), (4)(C), and (4)(D) each include steps that parties must follow to request a continuance of a hearing. These provisions provide necessary specificity on the procedures to change the date of the hearing or postpone a hearing. Subsection (i), subpart (4)(D) states that the presiding officer has the discretion to waive these procedures upon the showing of additional good cause and Subsection (i), subpart

(4)(E) specifies that the presiding officer must give written notice of the time and place of the hearing when a continuance is ordered. These provisions are necessary to provide the presiding officer flexibility to address unforeseen circumstances that require that the hearing be continued and to inform all parties when a request for a continuance is granted. Subsection (i), subpart (F) provides that failure to appear as scheduled or to comply with the procedures set forth in Subsection (1), subpart (4) will be deemed a withdrawal of the request for a hearing and the order served with the complaint will become final. This provision is necessary to ensure that respondents follow the rules governing the request for a hearing and request to continue a hearing, and to prevent undue delay of resolution of contested cases.

Subsection (i), subpart (5)

Purpose: The purpose of subsection (i), subpart (5) is to set forth rules for conducting discovery.

Necessity: The Civil Penalty Statutes and default provisions of Chapter 4.5, Article 6 of the APA are silent on procedural issues involving the conduct of discovery. Subsection (i), subpart (5) sets forth the discovery rules which apply to certain hearings conducted pursuant to the APA, Government Code, section 11507.6. Subsection (i), subpart (5)(A) specifies that this subsection provides the exclusive right to and method of discovery. Subsection (i), subpart (5)(B) provides that upon written request submitted to the Department, within 30 days after service of the complaint or within 15 days after service of an amended complaint or order, respondents may obtain names of witnesses and may inspect or make copies of statements, relevant writings, and reports which are not protected from disclosure by law. These provisions are necessary to provide respondents with clear rules for requesting information to prepare for the hearing. Applying discovery rules that are used in hearings under the APA is beneficial because these rules provide respondents procedural rights that will more adequately help them prepare their defense to large civil penalty amounts imposed by the Department. These discovery rules will also serve to create a process that is more transparent and efficient.

Subsection (i), subpart (6)

Purpose: The purpose of subsection (i), subpart (6) is to provide rules governing the issuance of subpoenas to appear at a hearing and subpoenas duces tecum (production of documents).

Necessity: Subsection (i), subparts (6)(A) through (6)(F) conform with the rules set forth in the subpoena provisions of the APA, Government Code, sections 11450.20 through 11450.40. The Civil Penalty Statutes are silent on subpoenas. Subsection (i), subpart (6)(A) through (6)(F) are necessary to provide respondents with a process to request that a witness appear at the hearing or to request the production of documents. These provisions are also necessary to help the Department compel the presence of uncooperative parties or witnesses at the hearing. These provisions are beneficial because they will make the hearing process more efficient.

Subsection (i), subpart (7)

Purpose: The purpose of subsection (i), subpart (7) is to specify procedures for introducing an affidavit of a witness who will not be called to testify orally at a hearing.

Necessity: The procedures in subsection (i), subpart (7) are consistent with the procedures related to affidavits that apply to formal hearings conducted pursuant to the APA, Government Code, section 11514. Subsection (i), subpart (7)(A) specifies that at any time 10 days or more prior to a hearing or a continued hearing any party may mail or deliver to the opposing party a notice and a copy of the affidavit which the party proposes to introduce in evidence. Subsection (i), subpart (7)(A) also specifies that the opposing party's right to cross examine the affiant is waived if, within seven days of mail or delivery of the notice, the opposing party does not request that the affiant be made available for cross-examination. The Civil Penalty Statutes are silent on affidavits. This provision is necessary to provide parties the opportunity to introduce in evidence written testimony of a witness who may not be able to attend the hearing or provide a method of introducing testimony of witnesses who do not attend the hearing. Subsection (i), subpart (7)(B) provides that notice must be made substantially in the same form specified in this subpart. This provision is necessary to properly inform an opposing party about the request to introduce the affidavit in evidence and to ensure that the opposing party is aware of the timeframe in which he or she must make the request to cross-examine the affiant.

Subsection (i), subpart (8)

Purpose: The purpose of subsection (i), subpart (8) is to provide rules for conducting depositions.

Necessity: Subsection (i), subparts (8)(A) through (8)(D) conform with the deposition procedures that apply to certain hearings conducted pursuant to the APA, Government Code, section 11511. The Civil Penalty Statutes are silent on depositions. Subsection (i), subpart (8)(A) specifies that the presiding officer or the department, if a presiding officer has not been designated, may order the testimony of any material witness residing in or outside the state be taken by deposition in a manner prescribed by law for deposition in civil actions. Subsection (i), subparts (8)(B), (8)(C), and (8)(D) each set out specific procedures that a party must follow to petition to obtain testimony from a witness by deposition. These provisions are necessary to provide respondents the opportunity to obtain written testimony of a material witness who is unable or cannot be compelled to attend the hearing. The provisions also facilitate obtaining testimony of witnesses who reside outside of the state. The revision to subsection (i), subpart (8)(A) is necessary to correct typographical errors in this subpart.

Subsection (i), subpart (9)

Purpose: The purpose of subsection (i), subpart (9) is to set forth the manner in which hearings may be conducted.

Necessity: The Civil Penalty Statutes do not describe the manner in which hearings must be conducted. Subsection (i), subpart (9)(A) specifies that proceedings at the hearing shall be electronically recorded, unless otherwise agreed by the parties. Subsection (i), subpart (9)(B) specifies 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. These provisions are necessary to make specific how a hearing may be conducted and to provide parties the flexibility to conduct the hearings in ways that will maximize efficiency and convenience to the parties.

Subsection (i), subpart (10)

Purpose: The purpose of subsection (i), subpart (10) is to specify the process for submitting relevant information in evidence and to describe the evidentiary standard for hearings.

Necessity: The Civil Penalty Statutes provide that hearings shall be informal in nature, and need not be conducted according to the technical rules relating to evidence. Subsection (i), subparts (10)(A) through (10)(D) are necessary to provide a detailed explanation of the evidentiary process, which will help respondents understand the hearing process and adequately present their position. Subsection (i), subpart (10)(B) provides necessary specificity on the procedures to introduce relevant evidence. This provision is necessary to help the respondents understand how evidence may be presented during the hearing. Subsection (i), subpart (10)(D) explains that hearings must be conducted under a more relaxed evidentiary standard and states that the presiding officer has the discretion to exclude evidence that will cause undue consumption of time or is irrelevant or unduly repetitious. This provision is necessary to help respondents introduce evidence in their defense without having to navigate complex evidence rules used in civil cases. This provision is also necessary to keep the hearing focused on the issue in contention and to avoid an unnecessarily cumbersome administrative record.

Subsection (i), subpart (11)

Purpose: The purpose of subsection (i), subpart (11) is to specify the process for requesting language assistance.

Necessity: Subsection (i), subpart (11)(A) specifies that the hearing will be conducted in the English language, unless a respondent who does not proficiently speak or understand English requests language assistance. It also notifies respondents that the request must be made 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. The Civil Penalty Statutes do not address language assistance. This provision is necessary to provide a hearing process that is fair and transparent to respondents who need language assistance. Subsection (i), subparts (11)(B) and (11)(C) provide procedures that the presiding officer and the Department must follow to facilitate language interpreters. These provisions are necessary to help respondents obtain an interpreter. Subsection (i), subpart (11)(D) states that interpreters are subject to the same requirements of confidentiality as parties and subsection (i), subpart (11)(E) specifies that interpreters must not have any involvement in the issues of the case prior to the hearing. These provisions are necessary to protect a respondent's confidential communications and to ensure respondent's due process by prohibiting interpreters who had an involvement in the investigation of the case.

Subsection (i), subpart (12)

Purpose: The purpose of subsection (i), subpart (12) is to prohibit disobedience, refusals, or conduct that obstructs or interrupts the due course of a proceeding.

Necessity: The Civil Penalty Statutes are silent on issues related to contempt sanctions. Subsection (i), subpart (12)(A) specifies that disobedience or resistance to a lawful order, refusals to take an oath or be examined, conduct that obstructs or interrupts the due course of a proceeding, and a violation of the ex parte communication rules may subject a person to a contempt sanction. Subsection (i), subpart (12)(B) sets forth the process by which a contempt proceeding may be initiated in superior court. These provisions are necessary to conduct orderly hearings. Disruptive and disorderly conduct can jeopardize respondents' or Department staff's ability to present a case and can result in an unclear transcript.

Subsection (j)

Purpose: The purpose of subsection (j), subparts (1) through (6), is to set forth the rules governing ex parte communications.

Necessity: An ex parte communication occurs when one side of a dispute has a private communication with the person who makes a decision in the case without an opportunity for the other side to participate in the communication. Details regarding ex parte communication are not provided in the Civil Penalty Statutes. Subsection (j), subpart (1) specifies that while a proceeding is pending no communications are allowed by either respondents or Department employees to the presiding officer without notice and opportunity for all parties to participate in the communication. This provision is necessary to ensure transparency and fairness in pending proceedings. Subsection (j), subparts (2) and (3) specify when communications with a presiding officer are permissible. These provisions are necessary to inform parties that they cannot communicate with the presiding officer unless they follow the rules set forth in this subsection. Subsection (j), subparts (4) and (5) specify procedures to disclose the content of

prohibited ex parte communication and provide all parties an opportunity to comment on the communication. These provisions are necessary to cure a violation of the ex parte communication rules. Subsection (j), subpart (6) provides that the receipt of a communication in violation of this section may be grounds for disqualification of the presiding officer. This provision is necessary to ensure respondents' due process and fairness to all parties.

Subsection (k)

Purpose: The purpose of subsection (k), subparts (1) through (3), is to specify the process for issuing a decision following a hearing.

Necessity: 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 is necessary to make explicit what is implicit in the Civil Penalty Statutes, which is that a decision shall be based solely on the evidence presented at the hearing. This provision 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 (1) is beneficial because it makes the preparation of the decision and the decision-making process more transparent to respondents and to the public in general.

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 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 it becomes 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)

Purpose: The purpose of subsection (l), subparts (1) and (2), is to provide the process to appeal an order imposing civil penalties.

Necessity: 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), subpart (2) 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 provision is necessary to facilitate respondent's appeal of the Department's order to a court for review. It benefits respondents because it requires the Department to provide the record of the proceeding within a reasonable amount of time.

Subsection (m)

Purpose: The purpose of subsection (m) is to specify the process for payment of penalties.

Necessity: The Civil Penalty Statutes provide that a civil penalty is due and payable to the Department within 60 days after the time to seek judicial review has expired or where respondent has not requested a hearing, within 20 days after the order imposing the civil penalty becomes final. Subsection (m) notifies respondents that an order imposing a civil penalty is enforceable in court pursuant to Fish and Game Code section 12014. This provision is necessary to ensure that respondents meet the statutory deadlines to pay the civil penalty imposed after an order becomes final and to discourage dilatory tactics.

(f) Authority and Reference Sections from Fish and Game Code for Regulation

Authority: Sections 702, 12025, and 12025.1, Fish and Game Code.

Reference: Sections 12025 and 12025.1, Fish and Game Code.

(g) Specific Technology or Equipment Required by Regulatory Adoption

None

(h) Identification of Reports or Documents Supporting the Adoption of Regulation:

1. 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.
2. California Governor Brown Executive Order for State Drought Actions (April 1, 2015),

http://gov.ca.gov/docs/4.1.15_Executive_Order.pdf.

3. Carah J, Howard J, Thompson S, et al., *High Times for Conservation: Adding the Environment to the Debate on Marijuana Liberalization*. BioScience 2015: biv083v1-biv083.
4. *Morongo Band of Mission Indians v. State Water Resources Control Board*, 45 Cal. 4th 731 (2009).
5. PBS Newshour, *Are marijuana growers sucking California dry?* (June 9, 2015), <http://www.pbs.org/newshour/bb/marijuana-growers-sucking-california-dry/>.
6. 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 September 22, 2015).
7. The Nature Conservancy, California Drought Dashboard, <http://www.casalmon.org/disappearing-rivers> (last visited September 22, 2015).
8. Thompson C, Sweitzer R, Gabriel M, Purcell K, Barrett R, Poppenga R. Impacts of rodenticide and insecticide toxicants from marijuana cultivation sites on fisher survival rates in the Sierra National Forest, California. *Conserv Lett*. 2013. Available: <http://onlinelibrary.wiley.com/doi/10.1111/conl.12038/abstract>.
9. United States Drought Monitor, U.S. Drought Monitor California <http://droughtmonitor.unl.edu/Home/StateDroughtMonitor.aspx?CA> (last visited September 22, 2015).

(i) Public Discussions of Proposed Regulations Prior to Notice Publication:

The Department scheduled no public meetings or hearings prior to the public notice. The 45-day public comment period provided by the APA as part of the regular noticed rulemaking action provides adequate time for public review of the proposed adoption of existing Title 14, section 748.5, CCR.

IV. Description of Reasonable Alternatives to Regulatory Action

(a) Alternatives to Regulation Change

The intent of the proposed adoption of existing emergency regulations in Title 14, section 748.5, CCR is to establish permanent regulatory procedures to impose civil penalties and conduct hearings pursuant to the Civil Penalty Statutes. In the course of reviewing the

proposed regulations, the Department considered two different potential alternatives.

This first alternative would delete the more detailed hearing procedures set forth in Title 14, section 748.5(i)(1) through (12) which only apply to cases in which the proposed penalty is \$25,000 or greater and instead require that all hearings be conducted pursuant to the default procedures in the APA (Government Code, Title 2, Division 3, Part 1, Chapter 4.5, sections 11400 to 11475.70).

The second alternative would require respondents to submit all evidence to support their defense within a set time period after their request for a hearing. The hearing would be limited to a finding of fact based on the documents submitted and evidence submitted prior to the hearing. Respondents would be able to introduce new information at the hearing only after showing that they were unable to do so within the set time period to present evidence in their defense.

(b) No Change Alternative

If no regulatory action occurs, the existing emergency regulations in Title 14, section 748.5 will expire by law on January 6, 2016. The Civil Penalty Statutes require that the Department conduct a hearing when a person upon whom a civil penalty is imposed pursuant to these statutes requests a hearing to present their defense. Without the existing regulations in Title 14, section 748.5, hearing procedures will be unclear to the regulated community. The absence of supporting regulations would hinder the successful implementation of the Civil Penalty Statutes because necessary rules would not be defined to ensure consistent procedures to afford procedural and substantive due process rights to any person on whom a civil penalty may be imposed. Finally, if the Department does not adopt the existing emergency regulations through a regular rulemaking action, it will be at risk of being accused of acting arbitrarily or having “underground” regulations when it attempts to implement the Civil Penalty Statutes. The proposed regulatory action will avoid the scenarios mentioned above.

(c) Consideration of Alternatives

The primary objective of the Civil Penalty Statutes is to address the environmental impacts caused by the cultivation of marijuana and the unlawful construction or maintenance of devices that impede fish passage. The purpose of the procedures in Title 14, section 748.5, CCR is to provide any person upon whom a civil penalty may be imposed pursuant to the Civil Penalty Statutes a regulatory process that ensures that their due process rights are protected through the establishment of clear, detailed, and consistent hearing procedures. The first alternative was rejected because the default provisions of the APA lack the detail necessary to help respondents adequately prepare to present a defense against large civil penalties. The second alternative would substantially streamline the process, but would provide less protection to the regulated community than the proposed regulations. Because the proposed regulations

provide greater opportunity for respondents to present evidence, the second alternative was rejected in favor of a more robust process under the proposed rulemaking.

In light of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the proposed regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

V. Mitigation Measures Required by Regulatory Action

The proposed regulatory action will not have negative impact on the environment; therefore no mitigation measures are needed.

VI. Economic Impact Assessment

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, including the Ability of California Businesses to Compete with Businesses in Other States

The Department does not anticipate a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states as a result of the proposed regulatory action. The proposed regulatory action is limited to the adoption through regular noticed rulemaking of existing emergency regulations in effect as previously adopted by the Department in July 2015. The proposed revisions to the existing emergency regulations are relatively minor non substantive corrections to text of the regulations. The proposed regulations are design to implement the Civil Penalty Statutes by establishing regulatory procedures to impose civil penalties and conduct hearings in an orderly and just manner. The Civil Penalty Statutes provide the Department an additional process it may use to enforce existing laws meant to protect fish and wildlife and their habitats. The proposed regulations do not make compliance with existing law more difficult or costly, and do not expand the application of the Civil Penalty Statutes or increase the penalties imposed thereby.

(b) Effects of the Regulation on the Creation or Elimination of Jobs Within the State

The Department does not anticipate the creation or elimination of jobs within the state as a result of the proposed regulatory action. The proposed regulatory action adopts existing emergency regulations in effect and adopted by the Department in July 2015. The proposed regulations implement the Civil Penalty Statutes by establishing procedures to impose civil penalties and conduct hearings in an orderly and just manner. These regulations are procedural in nature and therefore do not create requirements that would either create or

eliminate jobs in California.

(c) Effects of the Regulation on the Creation of New Businesses or the Elimination of Existing Businesses Within the State

The Department does not anticipate the creation of new businesses or elimination of existing businesses within the state as a result of the proposed regulatory action. The proposed regulatory action adopts existing emergency regulations in effect and adopted by the Department in July 2015. The proposed regulations implement the Civil Penalty Statutes by establishing procedures to impose civil penalties and conduct hearings in an orderly and just manner. The regulations are not relevant to the creation or elimination of businesses in California because the regulations are procedural in nature. Furthermore, the proposed regulations enforce existing laws and do not create any new requirements that would increase or decrease the costs of doing business in California. Therefore, the regulations do not create additional impacts on the business community.

(d) Effects of the Regulation on the Expansion of Businesses Currently Doing Business Within the State

The Department does not anticipate any impacts on the expansion of businesses currently doing business within the state as a result of the proposed regulatory action. The proposed regulatory action adopts existing emergency regulations in effect and adopted by the Department in July 2015. The proposed regulations implement the Civil Penalty Statutes by establishing procedures to impose civil penalties and conduct hearings in an orderly and just manner. The regulations are not relevant to the expansion of businesses currently doing business within the state because the regulations are procedural in nature. Furthermore, the proposed regulations do not make compliance with existing law more difficult or costly, and do not expand the application of the Civil Penalty Statutes or increase the penalties imposed thereby. Therefore, the proposed regulations do not create new requirements that would impact the expansion of businesses currently doing business in California.

(e) Benefits of the Regulation to the Health and Welfare of California Residents

The Department anticipates benefits to the health and welfare of California residents from better protection of the State's natural resources.

(f) Benefits of the Regulation to Worker Safety

The Department does not anticipate any benefits to worker safety as a result of the proposed action because this regulatory action will not impact working conditions or worker safety.

(g) Benefits of the Regulation to the State's Environment

The Department anticipates benefits to the environment through more efficacious administrative hearings to address violations of laws that advance the reduction of adverse impacts from marijuana cultivation on stream flows, water quality, and stream habitat. The proposed regulations will therefore provide indirect benefits to ecosystems impacted by the cultivation of marijuana. The Department also anticipates additional benefits to the environment through the prevention of unlawful fish passage barriers that threaten the long-term survival of anadromous fish populations.

(h) Cost Impacts on a Representative Private Person or Business

The Department does not anticipate increased cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

(i) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State

The Department assessed the economic impact of addressing violations pursuant to the Civil Penalty Statutes through administrative hearings rather than civil litigation. The Department anticipates incurring costs of no more than \$15,000 per year for conducting approximately 5 to 9 administrative hearings in any given year. Hearing costs will be absorbed by the Department. The Department estimates some potential savings in civil litigation costs formerly incurred for the Attorney General's Office representation in civil cases. The Department does not anticipate any costs or savings to any other State agency as a result of the proposed regulatory action. There are no related costs or savings in Federal funding to the state associated with the proposed regulatory action.

(j) Nondiscretionary Costs/Savings to Local Agencies

None

(k) Programs Mandated on Local Agencies or School Districts

None

(l) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code

None

(m) Effect on Housing Costs

None

VII. Duplication or Conflict with Federal Regulations

The proposed regulations set forth procedures for imposing civil penalties and conducting administrative hearings pursuant to sections 12025, subdivision (e) and 12025.1, subdivision (d), of the Fish and Game Code. The proposed regulations do not duplicate or conflict with federal regulations.