

TITLE 14. DEPARTMENT OF FISH AND WILDLIFE
NOTICE OF PROPOSED RULEMAKING
November 13, 2015

NOTICE IS HEREBY GIVEN that the Department of Fish and Wildlife (Department) proposes to adopt the regulations described below regarding procedures for imposing civil penalties and conducting hearings pursuant to Fish and Game Code sections 12025, subdivision (e), and 12025.1, subdivision (d), after considering all comments, objections, and recommendations regarding the proposed action. The Department invites interested persons to present statements or arguments with respect to alternatives to the regulations at the scheduled hearing or during the written comment period.

PUBLIC HEARING

The Department will hold a public hearing on December 28, 2015, from 1:00 p.m. to 2:30 p.m., in the Resources Auditorium within the Resources Building located at 1416 9th Street, Sacramento, California. The Resources Auditorium is wheelchair accessible. At the public hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The Department requests, but does not require, that the persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department. All written comments must be received by the Department at the office below not later than 5:00 p.m. on December 28, 2015. The Department requests, but does not require, that all written comments include the true name and mailing address of the commenter. All relevant comments will be considered.

Written comments may be submitted by mail, fax, or e-mail as follows:

California Department of Fish and Wildlife
Regulations Unit
Attn: Craig Martz
1416 9th Street, 13th Floor
Sacramento, CA 95814
Telephone: (916) 653-4681
Fax: (916) 653-9890
Email: Regulations@wildlife.ca.gov

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

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

INFORMATIVE DIGEST

Existing Laws and Regulations Related Directly to the Proposed Action

The California Department of Fish and Wildlife (Department) proposes to adopt through regular rulemaking the existing emergency regulations for imposing civil penalties and conducting administrative hearings pursuant to Fish and Game Code sections 12025, subdivision (e), and 12025.1, subdivision (d). On July 10, 2015, the Office of Administrative Law approved the existing emergency regulations adopted by the Department under the Administrative Procedure Act (APA) to implement, interpret, and make specific Fish and Game Code sections 12025, subdivision (e), and 12025.1, subdivision (d). (Cal. Reg. Notice Register 2015, No. 30-Z; OAL File No. 2015-0703-01 E.) The existing emergency regulations are found in Title 14, section 748.5, California Code of Regulations (CCR) and will expire on January 6, 2016. The Department is initiating this regular rulemaking action in order to make the emergency regulations in Title 14, section 748.5, CCR permanent.

Existing law (Fish and Game Code section 12025) provides that a person who violates sections 1602, 5650, and 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.

Existing law (Fish and Game Code section 12025, subdivision (e)), enacted in June 2014, authorizes the Department to impose those civil penalties administratively, subject to specified requirements relating to complaint and hearing procedures. 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.

Existing law (Fish and Game Code section 12025, subdivision (e)(5)) provides that the Department may adopt regulations to implement subdivision (e).

Existing 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.

Existing law (Fish and Game Code 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.

Existing law (Fish and Game Section 12025, subdivision (d)(2)) provides that the Department shall adopt emergency regulations to implement subdivision (d).

Existing emergency regulations (Title 14, section 748.5, California Code of Regulations) were adopted by the Department pursuant to Fish and Game Code sections 12025, subdivision (e)(5), and 12025.1, subdivision (d)(2). The emergency regulations provide procedures to afford procedural and substantive due process rights to any person or entity on which a civil penalty may be imposed. The emergency regulations will expire on January 6, 2016. The Department is initiating this regular rulemaking action in order to make the procedures found in Title 14, section 748.5, California Code of Regulations permanent. The proposed regulations 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.

Existing 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 requirements for conducting administrative hearings. The proposed regulations comply with the requirements in Article 6. The proposed regulations are 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 regulations provide additional specificity not found in the default provision of Chapter 4.5 of the APA.

Existing law (Government Code, Title 2, Division 3, Part 1, Chapter 5, sections 11500 to 11529) provides procedures for formal hearings conducted under the APA. Although the Department is not directed by statute to conduct hearings in accordance to the procedures in Chapter 5, the proposed regulations include some 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). These requirements are necessary to afford procedural and substantive due process rights which are more protective and efficient than the minimum set forth specifically in Fish and Game Code sections 12025 and 12025.1, and the requirements set forth in the default provisions of Chapter 4.5, Article 6 of the APA.

Difference from Existing, Comparable Federal Regulation or Statute

The Department has determined for purposes of the proposed action to adopt through regular rulemaking Title 14, section 748.5, CCR that there are no existing, comparable federal regulations or statutes. Absent such federal regulation or statute, there is no basis for comparison with and nothing related to compare to the proposed regulation.

Policy Statement Overview Regarding Broad Objectives and Specific Benefits

The purpose of the proposed regulations is to provide specific procedures to impose civil penalties and conduct administrative hearings. The overall objective of the proposed regulatory 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 (“respondent”) on whom a civil penalty may be imposed pursuant to Fish and Game Code sections 12025, subdivision (e), and 12025.1, subdivision (d) (“Civil Penalty Statutes”). 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 proposed regulations provide a number of specific benefits, including transparency and promotion of fairness. The administrative hearing 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 a more efficient procedure to timely address environmental damage through the administrative hearing process rather than through the more costly civil litigation process. In addition, the Department's enforcement efforts to resolve environmental violations will no longer be wholly reliant on county district attorneys, many of whom have limited resources or expertise 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.

Inconsistency or Incompatibility with Existing State Regulations

The Department conducted an evaluation of existing state regulations adopted for the purposes of imposing civil penalties and conducting administrative hearings. The proposed regulations are the only regulations that implement procedures to administratively impose civil penalties and conduct hearings under the Civil Penalty Statutes in the Fish and Game Code. Therefore, the proposed regulations are neither inconsistent nor incompatible with existing state regulations.

OTHER MATTERS PRESCRIBED BY STATUTE

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 administrative hearings generally, these regulations are also prescribed in part by the hearing provisions of the Administrative Procedure Act, Government Code section 11400 et seq.

DETERMINATION OF MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

The Department has determined that the proposed regulations do not impose a new mandate on local agencies or schools districts.

DISCLOSURES REGARDING THE PROPOSED ACTION

Cost or savings to any state agency: 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.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None

Other nondiscretionary cost or savings imposed on local agencies: None

Cost or savings in federal funding to the state: None

Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses of other states: The proposed action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states because 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.

Effect on small business: The Department has determined that the proposed regulations are unlikely to have a significant statewide adverse economic impact affecting small businesses because 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. The proposed regulations are intended to provide the Department an additional process it may use to enforce existing laws meant to protect fish and wildlife and their habitats while at the same time ensuring that the regulated community is afforded their full due process rights.

Cost impacts on a representative private person or business: The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant effect on housing costs: None

RESULTS OF THE ECONOMIC IMPACT ASSESSEMENT

The Department does not anticipate any impacts on the creation or elimination of jobs, the creation of new business, the elimination of existing businesses, the expansion of businesses in California, or benefits to worker safety. The Department anticipates benefits to the health and welfare of California residents from better protection of the State's natural resources.

The Department anticipates benefits to the environment through more efficient 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 a controlled substance. 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.

CONSIDERATION OF ALTERNATIVES

The Department must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective as and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

MITIGATION MEASURES REQUIRED BY REGULATORY ACTION

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

Department of Fish and Wildlife
Wildlife and Fisheries Division
Craig Martz, Regulations Unit Manager
1416 9th Street, 13th Floor
Sacramento, CA 95814
Telephone: (916) 653-4681
Email: Regulations@wildlife.ca.gov

The backup contact person is:

Department of Fish and Wildlife
Law Enforcement Division
Brian Naslund, Assistant Chief
1416 9th Street, 13th Floor
Sacramento, CA 95814
Telephone: (916) 651-9953
Email: Brian.Naslund@wildlife.ca.gov

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

AVAILABILITY OF THE INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

The Department will have the entire rulemaking file available for inspection and copying at its offices at the above addresses. As of the date this notice is published, the rulemaking file consists of this notice, the proposed text of the regulations, the Initial Statement of Reasons, the Economic Impact Assessment, and the Economic and Fiscal Impact Assessment (STD. Form 399).

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearing and considering all timely and relevant comments received, the Department may adopt the proposed regulations substantially as described in this notice. If the Department makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Craig Martz as indicated above. The Department will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Craig Martz as indicated above.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Website Access. The entire rulemaking file is available at:

<https://www.wildlife.ca.gov/Notices/Regulations>