

Updated Informative Digest/Policy Statement Overview

Proposed Amendments to Section 699.5, Title 14, California Code of Regulations (CCR), Fees for Lake and Streambed Alteration Agreements:

Fish and Game Code (FGC) section 702 authorizes the Department to administer and enforce the provisions of the Fish and Game Code through regulations adopted by the Department.

FGC Section 1609 authorizes the Department to charge fees to any entity subject to FGC Section 1602 in an amount necessary to pay for the total costs the Department incurs in administering and enforcing Fish and Game Code Section 1600 *et seq.*, referred to by the Department as the Lake and Streambed Alteration (LSA) Program. The Department's existing fee schedule for Lake and Streambed Alteration Agreements (fee schedule) is in Section 699.5 in Title 14 of the California Code of Regulations (CCR).

FGC section 12029(d) requires the Department to adopt regulations "to enhance the fees on any entity subject to [FGC] Section 1602 for marijuana cultivation sites that require remediation."

Adoption of these proposed regulations will:

- Increase all fees in the existing fee schedule by 129% to generate near term revenues to maintain the existing LSA Program at its current level pursuant to Fish and Game Code (FGC) Section 713(g) and FGC Section 1609.
- Establish for the first time an additional fee for marijuana cultivation sites that require remediation pursuant to FGC Section 12029(d).
- Add a new category to the fee schedule to allow an entity to pay fees by credit card and to allow the Department to recover credit card company transaction fees.
- Reorganize some sections in the existing fee schedule.
- Add and amend some language and reformat some sections in the existing fee schedule.
- Modify the definition of "master agreement" in the fee schedule.
- Clarify that the Department has final authority to determine the type of lake or streambed alteration agreement (agreement) an entity may obtain for a particular project.

BENEFITS OF THE PROPOSED REGULATIONS

Fees for Lake or Streambed Alteration Agreements

The Department must adjust the fees in the fee schedule for lake or streambed alteration agreements periodically to pay the total costs it incurs to administer and enforce the Department's LSA Program. If the Department does not adjust the fees as

proposed, it will experience a significant budget shortfall that will affect its ability to administer and enforce FGC Section 1600 *et seq.*, the purpose of which is to protect and conserve the state's fish and wildlife resources, as set forth in FGC Section 1600.)

Fees for Projects to Remediate Marijuana Cultivation Sites

Rather than establish a new fee schedule under a separate section in CCR, Title 14, the Department has decided to establish these fees by adding a new fee category in the existing fee schedule for lake or streambed alteration agreements. This is because the code section that requires the Department to establish fees for these types of projects expressly require the fees be consistent with the fees the Department adopts under FGC Section 1609.

By adopting the proposed regulations, the Department does not anticipate benefits to the protection of worker safety, the prevention of discrimination, the promotion of fairness or social equity, or to the increase in openness and transparency in business and government.

The Department anticipates nonmonetary benefits to the health and welfare of California residents through the protection of aquatic and riparian habitats and the fish and wildlife resources that depend on them. The Department also anticipates benefits to the environment. The fee increases and new fees included in this rulemaking will enable the Department to maintain the LSA Program at its current level and to facilitate the remediation of marijuana cultivation sites, thereby conserving and protecting the state's fish and wildlife resources, the express purpose of FGC Section 1600 *et seq.* and FGC Section 12029.

EVALUATION OF INCOMPATIBILITY WITH EXISTING REGULATIONS

The Department has reviewed Title 14 in the CCR and has determined that the proposed action is neither inconsistent nor incompatible with existing state regulations.

UPDATE

Addendum to Initial Statement of Reasons – First 15-Day Continuation of Public Comment Period

On June 7, 2016, during the 45-day comment period the Department prepared an addendum to the Initial Statement of Reasons (ISOR) and a revised Economic and Fiscal Impact Statement (STD Form 399) at the request of the Department of Finance. The addendum and revised STD Form 399 provide a revised estimate of the revenue the Department may receive from fees for marijuana cultivation sites that require remediation. The Department estimates that it may inspect between 600 – 1000 marijuana cultivation sites annually. Based on 2015 data, the Department anticipates 540 – 900 of these sites will require remediation. Annual fee revenues for remediation of marijuana cultivation sites would range from \$1.8

million to \$4.5 million, depending on the actual number of sites inspected and the respective area (square-feet per site) requiring remediation.

As recommended by the Office of Administrative Law, the Department notified by email or first class mail *all* interested parties who received the original notice of the changes made to the ISOR, rather than only those persons who testified at the public hearing, those persons who provided written comments at the public hearing, persons whose comments were received during the public comment period, and those persons who requested notification of the availability of changes in the text of the proposed regulations, as Government Code section 11347.1, subdivision (b), requires only. (See “Statement of Mailing 15-Day Notice” in the rulemaking file.)

No changes to the originally proposed regulatory text were needed.

Change to Text of Proposed Regulation – Second 15-Day Continuation of Public Comment Period

On June 30, 2016, the Department modified the proposed regulatory text submitted with the original Notice of Proposed Action. New subsection 699.5(i)(3)(B) in Title 14 of the California Code of Regulations (CCR) underscores that the additional fees specified in Section 699.5(i)(2)(A) and (B) apply *only* to entities that must notify the Department to remediate a marijuana cultivation site. The language in the new subsection reads in its entirety:

“The additional fees specified in subsections (i)(2)(A) and (B) shall apply only to entities notifying the department for remediation associated with a marijuana cultivation site, and in no other circumstance.”

The Department added this clarifying language to eliminate a concern raised by some members of the regulated community that the Department is applying Fish and Game Code (FGC) Section 12029(d) to raise fees on all entities, rather than *only* those entities that must notify the Department and if necessary, obtain a Lake or Streambed Alteration Agreement to remediate a marijuana cultivation site.

Section 40, Title 1, CCR deems changes to the original text of a regulation “nonsubstantial” “if they clarify without materially altering the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text.” (Cal. Code Regs., tit. 1, § 40.) For the reasons below, the Department considers this additional language in Section 699.5(i), Title 14, CCR to be “nonsubstantial” as that term is used in Government Code section 11346.8(c), and therefore a change without regulatory effect under Section 100, Title 1, CCR. Nonetheless, the Department elected to provide notice of the change consistent with Government Code Section 11346.8(c) and Section 44, Title 1, CCR.

- As set forth in the ISOR, this rulemaking would: 1) increase all fees in the existing fee schedule to generate near term revenues to maintain the *current* Lake and Streambed Alteration Program at its current level, pursuant to FGC Sections 1609 and 713(g), and 2) separately, would establish *for the first time* an additional fee for any entity that must notify the Department to remediate a marijuana cultivation site, pursuant to FGC Section 12029(d). (See ISOR, p. 1, pp. 2 – 4.)
- Accordingly, even absent the proposed additional language, the fee schedule's structure indicates (e.g., separate fee categories) and the text in Section 699.5(i)(1) provides that an entity would only need to pay the additional fee in Section 699.5(i)(2)(A) or (B) if the entity were to notify the Department to remediate a marijuana cultivation site.
- The Department is relying on separate statutes to increase the fees in the existing fee schedule (FGC Sections 1609 and 713(g)) and to add a new fee category for remediation of marijuana cultivation sites (FGC Section 12029(d)).

FGC Section 1609 requires the Department to charge fees in an amount necessary to pay for the total cost it incurs to administer and enforce FGC Section 1600 *et seq.* FGC Section 1609 also specifies that the Department may adjust the fees in the schedule pursuant to FGC Section 713. FGC Section 713(g) provides: “[A]t least every five years, [the Department] shall analyze all fees for licenses, stamps, permits, tags, and other entitlements issued by it to ensure the appropriate fee amount is charged.”

In contrast, FGC Section 12029(d) requires the Department to adopt regulations to enhance the fees on any entity subject to FGC Section 1602 for marijuana cultivation sites that require remediation. As the Department goes on to explain in the ISOR, to implement FGC Section 12029(d), it is adding a new fee category, Section 699.5(i), Title 14, CCR.

In sum, the ISOR, the original regulatory text, and the statutory authority the Department is relying on for this rulemaking indicate that: 1) the Department is not applying FGC Section 12029(d) to all entities, but *only* those entities that need to notify the Department to remediate a marijuana cultivation site; and 2) *only* those entities that notify the Department to remediate a marijuana cultivation site will need to pay the additional fee set forth in proposed Section 699.5(i)(2)(A) or (B), Title 14, CCR. For these reasons, the Department views the addition of the additional language in Section 699.5(i)(3)(B) as a nonsubstantial change.

An agency is not required to make available to the public nonsubstantial changes to the original text of a regulation. However, as mentioned above, the Department elected to send a notice of the modified regulatory text consistent with

Government Code Section 11346.8(c) and Section 44, Title 1, CCR so: 1) those members of the regulatory community that raised the concern described above would know the Department took their concern seriously and addressed it by adding the clarifying language; 2) those members would be able to comment on the language, and 3) whether or not the change the Department made to the regulatory text is nonsubstantial, it is “sufficiently related,” as defined in Section 42, Title 1, CCR, for the same reasons explained above.

The notice was sent by electronic mail on June 30, 2016 and July 1, 2016 to all persons who testified at the public hearing, all persons who submitted written comments at the public hearing, all persons whose comments were received during the public comment period (as continued by the first 15-day notice), and all persons who had requested notification of regulatory changes. Notice was sent to all recipients at least 15 days before the Department adopted the regulations on July 19, 2016.

Non-Substantive Changes Made to Text of Proposed Regulations after Close of Second 15-Day Continuation of Public Comment Period

The Department reopened the rulemaking file on August 24, 2016, and closed it again on August 26, 2016, to make the following changes to the text of the proposed regulations, all of which are non-substantive (Cal. Code Regs., tit. 1, § 100):

- **§699.5(a)(3)(B)**: Added “for” in strikeout before “to complete” because “for” is existing regulatory text that was inadvertently left out.
- **§699.5(a)(8)(B)**: Changed “must” to “shall” to be consistent with other parts of the final regulatory text where the Department changed “must” to “shall.”
- **§699.5(n)(1)**: Moved “or” in strikeout to follow “notification,” to match existing regulatory text.
- **§699.5(o)(2)**:
 - Added Payment” after “Credit Card” to match the exact title of the form: “Credit Card Payment Authorization Form.”
 - Added “(DFW 1443b (8/15)), incorporated herein by reference” after “Credit Card Payment Authorization Form” in accordance with Section 20(c)(4), Title 1, CCR. The Department incorporated the form by reference because the form is often subject to change by credit card companies, and therefore it would be cumbersome and impractical to publish it in the California Code of Regulations. The form was available to the affected public on the Department’s website and at Department offices throughout California during the rulemaking, and it will continue to be available from these

sources after the proposed regulation takes effect. A copy of the form follows the Final Regulatory Text (Rulemaking File, Exhibit K).

- **Reference:** Added FGC section 1605 to the reference section because the proposed regulation implements, interprets, or makes specific various provisions in section 1605. (Cal. Code Regs, tit. 1, § 14, subd. (b).)

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action. The Department adopted the proposed regulations as amended on July 19, 2016.