

**State of California
Department of Fish and Wildlife**

**Initial Statement of Reasons for Regulatory Action
Add Section 723**

Title 14, California Code of Regulations

Re: Suspension or Revocation of Lake and Streambed Alteration Agreements

I. Date of Initial Statement of Reasons: April 5, 2024

II. Public Hearing

Any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held virtually via webinar/teleconference at 11:00 a.m. on Tuesday, June 18, 2024, and will continue until 12:00 p.m. Instructions for participation in the webinar/teleconference hearing will be posted at www.wildlife.ca.gov/Notices/Regulations/LSA-Revocation-Suspension in advance of the meeting.

III. Description of Regulatory Action

(a) Statement of Specific Purpose of Regulatory Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary

Fish and Game Code section 1602¹ requires an entity, as defined in section 1601, to notify the California Department of Fish and Wildlife (“Department”) before the entity substantially alters the flow, bed, channel, or bank of any river, stream, or lake. If the Department determines the project described in the notification could substantially adversely affect an existing fish or wildlife resource, the project will require a Lake or Streambed Alteration agreement (“agreement”) from the Department that includes resource protection measures, among other terms. (Fish & G. Code, §§ 1602, 1603.)

An agreement may not exceed five years unless the entity requests a longer term, the entity agrees to provide a status report to the Department every four years (Fish & G. Code, § 1605, subd. (g)(2)), and the other conditions set forth in section 1605(g) are met.

An entity violates Fish and Game Code section 1600 et seq. by: 1) failing to notify the Department as required under section 1602; 2) not complying with an agreement; or 3) not submitting a timely status report when a report is required (see Fish & G. Code 1605, subd. (g)(2)). Section 1612, and therefore the proposed regulation, addresses the last two types of violations (i.e., “failure to comply” and “failure to report”). Specifically, under section 1612, the Department may suspend or revoke an agreement if the Department determines the entity is not in compliance with their agreement or fails to provide timely status reports, provided the Department “adopt[s] regulations establishing the procedure for suspension or revocation of an agreement.” (Fish & G. Code, § 1612.)

Any violation of section 1600 et seq. may be prosecuted by the Attorney General or a district or city attorney (“section 1600 violation”). (Fish & G. Code, §§ 1615, subd.

¹ All section references are to the Fish and Game Code unless otherwise specified.

(d); 12000.) The Attorney General may only prosecute the violation as a civil penalty case “upon complaint” by the Department (Fish & G. Code, § 1615, subd. (d)), in which case the Department must reimburse the office for its costs. A district or city attorney may prosecute a section 1600 violation without complaint by the Department. However, it is almost always the case that a district or city attorney will not prosecute a section 1600 violation without a referral from the Department because a referral is usually how the office learns of the violation. Even then, however, the city or district attorney may decline to prosecute the violation at their discretion. In addition, if the city or district attorney decides to prosecute, because it is their case, they will decide how to proceed with, and conclude the case.

Section 1612 gives the Department the ability to address “failure to comply” and “failure to report” violations without the need to refer the violation to the Attorney General, district attorney, or city attorney, i.e., the violations can be addressed by administrative action. As provided in section 1612, the Department may suspend or revoke an agreement if the Department determines the entity is not in compliance with the terms of the agreement or fails to provide timely status reports. Therefore, if the Office of Administrative Law approves the proposed regulation, the Department will no longer need to rely on the Attorney General or district or city attorney to address these types of violations. This will allow the Department to reserve “failure to notify” cases for the Attorney General or district or city attorney, which are usually more serious than “failure to comply” violations and always more serious than “failure to report” violations. Doing so will reduce the number of Department referrals to these offices, and therefore the workload related to preparing and handling these referrals. Also, it should take much less time to resolve a section 1600 violation administratively, compared to prosecuting the violation through the Attorney General or district or city attorney.

The ability for the Department to suspend or revoke agreements administratively has become increasingly important. Department staff have been reporting an increase in the level of noncompliance by entities, with many unwilling to cooperate with the Department. In addition, many of these entities are causing harm to fish and wildlife resources by not adhering to the terms in their agreements. In these instances, Department staff would like to suspend or revoke the agreement to avoid more harm to fish and wildlife resources, rather than having such harm continue until sometime after the matter is referred to the Attorney General or district or city attorney, and only then if a prosecutor takes the case.

Entities cultivating cannabis are among those with the highest levels of non-compliance, and often with requirements to maintain adequate streamflow for fish life. These terms are even more critical when the entity is operating in an impaired watershed. The Medicinal and Adult Use Cannabis Regulation and Safety Act (“MAUCRSA”) (Bus. & Prof. Code, § 26000 et seq.) took effect on January 1, 2018. Under MAUCRSA, a person may cultivate cannabis commercially if, among other requirements, the person obtains a license from the Department of Cannabis Control (“DCC”). DCC may also suspend, revoke, or not renew a license, or not approve an application for a license if the licensee or applicant has an agreement, and is not in compliance with it. (Bus & Prof. Code, §§ 26030, subds. (a), (c), (d); subd. (b)(1);

26050.2, subd. (f)(2); 26057.) If an entity knew their license or license application could be in jeopardy due to noncompliance with their agreement, the entity would be much more likely to work with the Department to correct the deficiencies.

Under section 1612, the Department has the discretion “to suspend *or* revoke an agreement at any time.” (Italics added.) The Department interprets this language to mean that the Department does not have to suspend an agreement before revoking it; under section 1612, the Department can revoke the agreement in the first instance. Although the Department could adopt a regulation that takes this “either/or” approach, the Department has elected to take a “stepped” approach where the Department must first suspend an agreement before it may revoke. The Department decided on this approach for the following reasons:

- After the Department issues an entity an agreement, the Department’s goal is for the entity to comply with its terms. From the Department’s perspective, an entity will be motivated to comply with their agreement whether the first consequence is suspension or revocation. In either case, the entity will need to stop the work the agreement authorizes.
- From the Department’s perspective, it is more reasonable to suspend an agreement than to revoke it if the entity fails to correct a deficiency after being given their first chance to do so. This is especially the case when the deficiency might be the result of an oversight.
- If the Department decided to adopt the “either/or approach” described above, the Department would need to identify the factors it would use to suspend an agreement in one case and revoke it in another after the entity fails to correct any deficiency. The factors supporting revocation would need to be more serious, i.e., more “weighted,” than those for suspension, but as a practical matter, the Department could not come up with a set of factors that would warrant revocation rather than suspension after an entity fails to correct a deficiency on their “first try.”

Following the Department’s decision to adopt a “stepped” approach where an agreement must be suspended before being revoked, the basic procedure to suspend or revoke an agreement in the proposed regulation is as follows:

Step 1: The Department determines the entity has failed to comply with the terms of their agreement or to file a timely status report. The Department sends the entity a notice of non-compliance that describes the deficiency, as that term is defined in the proposed regulation; directs the entity to correct each deficiency by the date in the notice; and explains that the Department will suspend the agreement unless the entity corrects each deficiency by the date in the notice.

Step 2: If the entity demonstrates each deficiency has been corrected by the date in the notice of non-compliance, the Department must notify the entity the agreement remains in effect. If the entity does not demonstrate each deficiency has been corrected by the date in the notice, the Department must send the entity a notice of suspension that explains: 1) the agreement is suspended; and

2) if each deficiency has not been corrected by the date in the suspension notice, the agreement will be revoked.

Step 3: If the entity demonstrates each deficiency has been corrected by the date in the notice of suspension, the Department must notify the entity the suspension has been released and the agreement is again in effect. If the entity does not demonstrate each deficiency has been corrected by the date in the notice, the Department must send the entity a notice of revocation that explains the agreement has been revoked.

The specific purpose and necessity of each subdivision in the proposed regulation are explained below.

Subdivision (a): Definitions

- Purpose: The purpose of subdivision (a) is to define the terms “deficiency”; “Lake or Streambed Alteration agreement” or “agreement”; “entity,” and “status report” as used in the proposed regulation for clarity and economy.
- Necessity.
 - Subdivision (a)(1): “Deficiency.” Fish and Game Code section 1612 provides, “The department may suspend or revoke an agreement at any time if it determines that an entity is not in compliance with the terms of the agreement or fails to provide timely status reports as required by section 1605(g). The department shall adopt regulations establishing the procedure for suspension or revocation of an agreement [that]...provide[s] the entity with an opportunity to correct any *deficiency* before the department suspends or revokes the agreement.” (Italics added.)

Based on this language, “deficiency” at a minimum means noncompliance with an agreement or failure to provide a timely status report when a report is required. However, an entity’s noncompliance with the terms of their agreement is sometimes intertwined with some actual or potential harm to fish and wildlife resources. As mentioned above, every agreement includes terms to protect fish and wildlife resources. Indeed, this is the principal purpose of an agreement. (Fish & G. Code, §§ 1600; 1602, subd. (a)(4); 1603, subd. (a).)

To make sure the entity complies with their agreement and at the same time addresses any harm to resources they might have caused by failing to comply, the Department has defined deficiency in the proposed regulation to mean “the term or terms of the Lake or Streambed Alteration agreement the entity is not in compliance with, and any harm such noncompliance has caused, is causing, or could cause to fish and wildlife resources....” In this way, when an entity is required to “correct any deficiency” to avoid suspension or revocation of their agreement under the proposed regulation, they may need to not only get into compliance with their agreement, but also address any resource harm arising from

such noncompliance. In this way, violation of a term or terms in an agreement can be remedied *in full* under the proposed regulation.²

The following hypothetical illustrates why the proposed regulation defines “deficiency” to include harm to resources:

An entity has an agreement to install a culvert crossing on a stream. The project description in the agreement includes the design specifications for the crossing, such as the width and bottom elevation of the culvert, and the agreement includes a term that requires the entity to complete the project as designed. If the entity ends up installing a smaller culvert that washes out in a heavy rain event, the culvert, road base, and other material will end up in the stream. Based on the definition of “deficiency” in the proposed regulation, the Department’s notice of non-compliance would direct the entity to reconstruct the culvert crossing as described in the agreement and to restore the stream to the conditions before the culvert failed by removing the washed-out culvert and other debris from the stream.

If the proposed regulation defined “deficiency” to mean only “the term or terms of the Lake or Streambed Alteration agreement the entity is not in compliance with...,” the notice of non-compliance would be limited to directing the entity to reconstruct the culvert crossing as described in the agreement. To address the stream damage, the Department would need to refer the *entire* case to the Attorney General or district or city attorney for prosecution; it would be impracticable, if not impossible, not to. Given that, as mentioned above, an entity’s noncompliance with the terms of their agreement is sometimes intertwined with some actual or potential harm to fish and wildlife resources, the proposed regulation would have much less utility if “deficiency” was not defined to include harm to resources.

- Subdivision (a)(2): “Lake or Streambed Alteration agreement” and “agreement.” To ensure the public understands that “agreement” means a final agreement compared to a draft agreement (see Fish & G. Code, §§ 1602, subd. (a)(4)(D), and 1603) and includes long-term agreements, the proposed regulation in subdivision (a)(1) defines “agreement” to mean “an individual agreement described in subdivision (a)(4)(B) of section 1602 of the Fish and Game Code, which includes a long-term agreement the department may issue under subdivision (g) of section 1605 of the Fish and Game Code.”
- Subdivision (a)(3): “Permittee.” Section 1601 defines “entity” to mean “any person, state or local governmental agency, or public utility that is subject to this chapter.” Notwithstanding the term “agreement” is used throughout section 1600 et seq entities with an agreement are referred to

² This discussion mostly applies to cases where the entity has failed to comply with the terms of their agreement, rather than failing to file a timely status report. This is because it is highly unlikely that failing to file a timely status report will cause harm to fish and wildlife resources.

as a “permittee.” In some cases, an entity may notify the Department as required under section 1602, but not need an agreement because the Department determines the project will not substantially adversely affect an existing fish or wildlife resource (Fish & G. Code, § 1602, subd. (a)(4)(A)(i)) or the Department fails to meet the 60-day deadline to submit a draft agreement to the entity (Fish & G. Code, §1602, subd. (a)(4)(D)).

In this case, the entity would not be a permittee.

As a result, rather than using the term “entity” throughout the proposed regulation, the term “permittee” is used to clarify that the proposed regulations refer specifically to entities that have been issued an agreement. “Permittee” is not otherwise defined in section 1600 et seq., so the proposed regulation in subdivision (a)(2) defines “permittee” as the entity responsible for complying with the terms of an agreement and submitting timely status reports. As a result, “permittee” is used when referring to the proposed regulations below.

- Subdivision (a)(4): “Status report.” Section 1612 allows the Department to suspend or revoke an agreement if an entity “fails to provide timely status reports as required by section 1605(g).” “Status report” appears throughout the proposed regulation. Rather than adding “as required by subdivision (g) of section 1605” after “status report” everywhere it appears in the proposed regulation, and for the reader’s convenience, the Department borrows the language from section 1605(g) and (g)(2) to define “status report” as “a written report an entity with a long-term agreement must provide the department every four years in accordance with subdivision (g)(2) of Section 1605 of the Fish and Game Code.”

Subdivision (b): Basis for Suspension or Revocation

- Purpose: The purpose of subdivision (b) is to specify when the Department may suspend or revoke an agreement following the language in section 1612.
- Necessity: Section 1612 specifies the requirements that must be met before the Department may suspend or revoke an agreement. Subdivision (b) follows these requirements to ensure the regulations are consistent with, and do not exceed the Department’s authority in section 1612. Specifically, under subdivision (b), the Department may suspend or revoke an agreement if it determines the entity is not in compliance with the terms of the entity’s agreement or fails to provide timely status reports if the entity obtained a long-term agreement. Suspension or revocation of an agreement can only occur if the Department notifies the entity and gives the entity an opportunity to correct the deficiencies in accordance with the proposed regulation.

Subdivision (c): Notice of Non-Compliance

- Purpose: The purpose of subdivision (c) is to make specific the information the Department must provide a permittee after the Department determines

the permittee is not in compliance with the terms of their agreement or fails to provide timely status reports when the permittee has a long-term agreement.

- Necessity: Section 1612 requires the Department to establish a procedure for suspension or revocation of an agreement and specifies two requirements the procedure must include: 1) written notice that explains the basis for suspension or revocation (i.e., failure to comply with an agreement or failure to provide timely status reports or both); and 2) an opportunity to correct these “deficiencies” before the Department suspends or revokes. Sending the permittee a written notice of non-compliance that includes the information listed in subdivisions (c)(1)-(5) is the first step in this procedure.
 - As section 1612 requires, subdivision (c)(1) requires the notice of non-compliance to explain the basis for the Department’s notice, whether failure to comply with an agreement or failure to provide timely status reports or both. If the former, the Department would identify each term the permittee is not in compliance with.
 - Subdivisions (c)(2)-(5) are needed to “provide the entity an opportunity to correct any deficiency before the department suspends...the agreement,” as section 1612 also requires.
 - Under subdivision (c)(2), the notice of non-compliance must specify the action(s) the entity must take to correct each deficiency. Providing this information to the permittee is critical so the permittee knows the actions that need to be taken to avoid suspension of their agreement.
 - Subdivision (c)(3) requires the notice of non-compliance to include the end date by which each deficiency must be corrected. This provides the permittee with a deadline to correct the deficiencies to avoid suspension of their agreement.
 - Under subdivision (c)(4), the notice of non-compliance must include a description of the procedure set forth in subdivision (d). Subdivision (d) explains that after a permittee receives a notice of non-compliance, the permittee must contact the Department by the end date in the notice and demonstrate each deficiency has been corrected to avoid suspension of their agreement. By describing the procedure in subdivision (d), the permittee will understand the steps they must take after receiving a notice of non-compliance and know from the start that failure to correct the deficiencies identified in the notice will result in suspension of their agreement.
 - Under subdivision (c)(5), the notice of non-compliance must provide a Department contact and their information, so the permittee knows who in the Department to correspond with regarding the notice and how to reach the employee. Identifying a contact person will help avoid any delay or miscommunication that could make it more difficult for the entity to correct any deficiencies by the end date in the notice. The

contact information will include the name of the Department employee, their mail and email addresses, and their primary telephone number, whether office or mobile.

Subdivision (d): Determination after Notice of Non-Compliance

- Purpose: The purpose of subdivision (d) is to explain the steps the permittee must take by the end date specified in the notice of non-compliance to correct the deficiencies identified in the notice to avoid suspension of the agreement.
- Necessity: Subdivision (d) is the second step in the procedure to suspend or revoke an agreement. Specifically, if after providing a permittee the notice of non-compliance described in subdivision (c), the permittee does not timely correct the deficiencies identified in the notice of non-compliance, the Department must suspend the agreement after providing the notice of suspension described in subdivision (e).
 - Under subdivision (d)(1), the permittee must notify by email the Department contact identified in the notice of non-compliance by the end date and demonstrate that any deficiencies identified therein have been corrected. The burden is on the permittee because they are responsible for complying with the agreement. (See Fish & G. Code, §§ 1615, 12000.)

Notification by email is required because it is reliable and the primary method of communication between Department employees and permittees. In addition, because email delivery is immediate, there is no need to establish in the regulation the effective date of the notice; the date the permittee sends the notice and the date the Department receives it will be the same, and therefore the effective date will be the date the notice is sent by email.

- Under subdivision (d)(2), if the Department determines the permittee has demonstrated the deficiencies have been corrected by the end date specified in the notice of non-compliance, the Department must notify the permittee in writing that the agreement remains in effect.
- Under subdivision (d)(3), if the Department determines the permittee has not demonstrated the deficiencies have been corrected by the end date specified in the notice of non-compliance, the Department must suspend the agreement after providing the notice of suspension described in subdivision (e).

As explained above, the Department must describe this subdivision (d) procedure in any notice of non-compliance so the permittee understands the steps they must take after receiving a notice of non-compliance and that failure to correct the deficiencies identified in the notice will result in suspension of their agreement.

Subdivision (e): Notice of Suspension

- Purpose: The purpose of subdivision (e) is to specify the procedure the Department must follow to suspend an agreement when the Department determines a permittee has failed to correct the deficiencies identified in a notice of non-compliance, as required under subdivision (d)(3).
- Necessity: Section 1612 does not identify a specific process the Department must follow when it decides to suspend an agreement. To administer and enforce section 1612, the process needs to be part of the “regulations establishing the procedure for suspension or revocation of an agreement.” (Fish & G. Code, § 1612.) Subdivision (e), in conjunction with subdivisions (c) and (d), meets this requirement. Specifically, subdivision (e) requires the Department to notify the permittee in writing that their agreement is being suspended and to include in the suspension notice the information listed in subdivisions (e)(1)-(5), below.
 - Subdivision (e)(1) requires the Department to identify each deficiency identified in the notice of non-compliance the permittee failed to correct by the date in the notice.
 - Subdivisions (e)(2)-(5) are needed to provide the permittee an opportunity to correct any remaining deficiencies before the department revokes the agreement.
 - Subdivision (e)(2) requires the notice of suspension to specify the effective date of the suspension, which must be 10 days from the date of the notice. The Department considered but decided against making the effective date of the suspension the date of the notice. The Department decided against this because the permittee would likely be conducting the project or activities their agreement authorizes up until they receive the notice of suspension. Because this would be after the date of the notice, the permittee would end up violating the notice of suspension at no fault of their own.

The Department also considered but decided against making the effective date of the suspension the date the permittee receives the notice. The Department decided against the latter because typically it would require the Department to send the notice using a “Certified Mail Special Service” by the U.S. Postal Service (“USPS”): “Return Receipt Signature Restricted Delivery” to ensure the notice is delivered only to the permittee. Using this method is not reliable if the permittee is not at their address when USPS arrives, or the permittee refuses or evades delivery. USPS cannot leave certified mail without a signature. If the permittee does not receive the notice, USPS will leave a note that a delivery attempt was made. USPS only makes one delivery attempt. After that, USPS would return the notice to the nearest post office. Because the Department will have sent the notice with restricted delivery, the permittee would need to go to the post

office and show identification to retrieve the notice. In addition, the permittee would have only 15 days to do so; USPS will only hold undelivered certified mail for 15 days before returning it to the sender. Finally, the Department would need to confirm delivery via a receipt to the Department, whether in the form of a postcard signed by the permittee or an e-mail with an electronic copy of the permittee's signature such as DocuSign or similar Adobe signature.³

These complications informed the Department's decision under subdivision (k) (Notice Delivery) to require any notice under the proposed regulation to be sent to a permittee by regular mail and email using the entity's mailing and email addresses listed in their notification under section 1602. Both are used by the Department to communicate with a permittee on matters related to the permittee's agreement. Both are reliable delivery methods, and delivery by email is immediate.

Using 10 days from the date of a notice of suspension as the effective date of the suspension in subdivision (e)(2), in conjunction with the requirement that the notice must be sent by regular mail and email under subdivision (k), is comparative to the "extension rule" in Code of Civil Procedure section 1013 that governs service by mail of notices and other papers. In these cases, "Service by mail is complete at the time of deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California...." In addition, the Department considers 10 days sufficient time for a permittee to safely suspend the activities the agreement authorizes.

- Subdivision (e)(3) requires the notice of suspension to include the end date by which any remaining deficiencies must be corrected to release the suspension. This deadline ensures that the permittee knows when the deficiencies need to be corrected to avoid revocation of the agreement.
- Under subdivision (e)(4), the notice of suspension must include a description of the procedure set forth in subdivision (f). Subdivision (f)

³ The information on Certified Mail is from the following sources:

<https://faq.usps.com/s/article/Certified-Mail-The-Basics#whatiscm>

<https://redstagfulfillment.com/usps-certified-mail/#:~:text=Certified%20Mail%20is%20a%20service,mail%2C%20such%20as%20a%20receptio nist>

<https://www.certifiedmaillabels.com/blog/what-is-certified-mail-a-complete-overview>

explains that after a permittee receives a notice of suspension, the permittee must contact the Department by the end date in the notice to demonstrate each remaining deficiency has been corrected to avoid revocation of their agreement. By describing the procedure in subdivision (f), the permittee will understand the steps they must take after receiving a notice of suspension and know from the start that failure to correct the deficiencies identified in the notice will result in revocation of their agreement.

- Under subdivision (e)(5), the notice of suspension must provide a Department contact and their information, so the permittee knows who in the Department to correspond with regarding the notice and how to reach the employee. Identifying a contact person will help avoid any delay or miscommunication that could make it more difficult for the entity to correct any deficiencies by the end date in the notice. The contact information will include the name of the Department employee, their mail and email addresses, and their primary telephone number, whether office or mobile.

Subdivision (f): Determination after Notice of Suspension

- Purpose: The purpose of subdivision (f) is to explain the steps the permittee must take by the end date specified in the notice of suspension to correct the remaining deficiencies identified therein and that if the entity fails to do so, the Department must revoke the permittee's agreement.
- Necessity: Subdivision (f) is the last step in the procedure to suspend or revoke an agreement. Specifically, if after providing a permittee the notice of suspension described in subdivision (e), the permittee does not timely correct the remaining deficiencies identified in the notice, the Department must revoke the agreement after providing the notice of revocation described in subdivision (g).
 - Under subdivision (f)(1), the permittee must notify by email the Department contact identified in the notice of suspension by the end date and demonstrate that any remaining deficiencies identified therein have been corrected. The burden is on the entity because the entity is responsible for complying with the agreement. (See Fish & G. Code, §§ 1615, 12000.) Notification by email is required because it is reliable and the primary method of communication between Department employees and permittees. In addition, because email delivery is immediate, there is no need to establish in the regulation the effective date of the notice; the date the permittee sends the notice and the date the Department receives it will be the same, and therefore the effective date will be the date the notice is sent by email.
 - Under subdivision (f)(2), if the Department determines the permittee has demonstrated the remaining deficiencies have been corrected by the end date specified in the notice of suspension, the Department must notify the

permittee in writing that the suspension has been released and the agreement is again in effect.

- Under subdivision (f)(3), if the Department determines the entity has not demonstrated the remaining deficiencies have been corrected by the end date specified in the notice of suspension, the Department must revoke the agreement after providing the notice of revocation described in subdivision (g).

As explained above, the Department must describe this subdivision (f) procedure in any notice of suspension so the permittee will understand the steps they must take after receiving a notice of suspension and know from the notice that failure to correct the remaining deficiencies identified therein will result in revocation of their agreement.

Subdivision (g): Notice of Revocation

- Purpose: The purpose of subdivision (g) is to specify the procedure the Department must follow to revoke an agreement when the Department determines a permittee has failed to correct the remaining deficiencies identified in a notice of suspension, as required under subdivision (f)(3).
- Necessity: Section 1612 does not identify a specific process the Department must follow when it decides to revoke an agreement. To administer and enforce section 1612, such a process needs to be part of the “regulations establishing the procedure for suspension or revocation of an agreement.” (Fish & G. Code, § 1612.) Subdivision (g), in conjunction with subdivisions (c), (d), and (e), meets this requirement. Specifically, subdivision (g) requires the Department to notify the entity in writing that their agreement is being revoked and to include in the notice of revocation the information listed in subdivisions (g)(1)-(3), below.
 - Under subdivision (g)(1), the notice of revocation must explain the basis for the Department’s decision to revoke the permittee’s agreement, including the remaining deficiencies identified in the notice of suspension that were not corrected by the end date specified in the notice.
 - Under subdivision (g)(2), the notice of revocation must include the effective date of the revocation, which, like the effective date for a notice of suspension and for the same reasons (see subdivision (e)(2)), must be 10 days from the date of the notice of revocation.
 - Under subdivision (g)(3), the notice of revocation must provide a Department contact and their information, so the permittee knows who in the Department to correspond with regarding the notice and how to reach the employee. Identifying a contact person will help avoid any delay or miscommunication that could make it more difficult for the entity to correct any deficiencies by the end date in the notice. The contact information will include the name of the Department employee, their mail and email addresses, and their primary telephone number, whether office or mobile.

Subdivision (h): End Date to Correct Deficiency in Notice of Non-Compliance

- Purpose: Subdivision (h) identifies the factors the Department must consider when setting the date by which a permittee must correct any deficiency identified in a notice of non-compliance.
- Necessity: To properly administer and enforce section 1612, every notice of non-compliance must specify the date by which a permittee must correct any deficiency identified therein for the entity to avoid suspension of their agreement. The proposed regulation does not set a period by which a permittee must correct the deficiency, e.g., within 30 days of the notice. Rather, the date will be determined on a case-by-case basis depending on the deficiency and the action(s) the permittee must take to correct it. For this reason, the proposed regulation gives the Department discretion to set the period in each case and identifies the factors the Department must consider in setting the “end date” in a notice of non-compliance.

Because the purpose of an agreement is to protect fish and wildlife resources, a permittee’s failure to comply with an agreement can cause harm to these resources. For this reason, the first factor the Department must consider is the harm each deficiency is causing or will cause to fish and wildlife resources until the deficiencies are corrected. In these cases, the greater the harm, the greater the need to correct the deficiencies as quickly as possible. At the same time, as a practical matter, how quickly the deficiencies can be corrected depends on the work that will be required. For this reason, the second factor the Department must consider is the permittee’s ability to correct the deficiencies by the end date based on the type and scope of work required. By balancing these two factors, the Department will determine how much time to give a permittee to correct any deficiency in a notice of non-compliance.

Subdivision (i): End Date to Correct Deficiency in Notice of Suspension

- Purpose: Subdivision (i) identifies the factors the Department must consider when setting the date by which a permittee must correct any deficiency identified in a notice of suspension.
- Necessity: To properly administer and enforce section 1612, every notice of suspension must specify the date by which a permittee must correct any remaining deficiency identified therein to avoid revocation of their agreement. The proposed regulation does not set a period by which a permittee must correct the remaining deficiency, e.g., within 30 days of the date of the notice. Rather, the date will be determined on a case-by-case basis depending on the deficiency and the action(s) the permittee must take to correct it. For this reason, the proposed regulation gives the Department discretion to set the period in each case and identifies the factors the Department must consider in setting the “end date” in a notice of suspension.

The factors the Department must consider are the same two factors identified in subdivision (h) for the reasons explained above and the steps that have been taken to correct the deficiencies specified in the notice of suspension. This third factor is needed when determining the end date in a notice of suspension because the permittee will have already had an opportunity to correct the deficiencies after receiving a notice of non-compliance. As a result, more scrutiny is needed to ensure the permittee is taking the steps needed to come into compliance with their agreement, rather than delaying. If, for example, the permittee did not take any meaningful steps to correct the deficiencies by the end date in the notice of non-compliance, not only is suspension warranted, but giving the permittee less time to correct the deficiencies might also be needed to motivate the permittee to come into compliance knowing that failure to do so will result in revocation of their agreement.

Subdivision (j): Extension of End Dates

- Purpose: Subdivision (j) allows the Department to extend an end date in a notice of non-compliance or notice of suspension upon request by a permittee in the event the permittee is unable to correct any deficiency by this date.
- Necessity: As explained above under subdivisions (h) and (i), it can be difficult for the Department to determine how much time to give a permittee to correct any deficiency identified in a notice of non-compliance or notice of suspension. Further, if an entity does not meet the deadline, they face the serious consequence of having their agreement suspended or revoked. For these reasons, the proposed regulation allows an entity to request more time from the Department to correct a deficiency.

Under subdivision (j)(1)(A), the permittee must make any extension request at least 14 days before the end date in their notice of non-compliance or suspension. The Department will need at least this much time to evaluate the request and determine whether it should be granted or denied, especially if making this determination will require a site visit. In addition, because every day is a calendar day, 14 days will give the Department less than 14 working days to take final action on the request. The Department will grant or deny the request based on the factors described in subdivisions (j)(1)(B)-(D).

Under subdivision (j)(1)(B), the entity must demonstrate they have taken meaningful steps to correct any deficiency but have been unable to complete every step needed due to circumstances beyond their control. In addition, under subdivision (j)(1)(C), the permittee must explain to the Department how they will correct any deficiencies that remain. The requirements under subdivisions (j)(1)(B) and (C) are needed to demonstrate the permittee is taking a notice of non-compliance or suspension seriously, and diligently pursuing compliance.

Under subdivision (j)(1)(D), the Department must weigh any extension request against the harm each deficiency is causing or will cause to fish and wildlife resources, if any, until the deficiencies are corrected. For example, if there will not be any harm, the Department will likely grant the request if the permittee has met the requirements in subdivisions (j)(1)(B) and (C). By contrast, if there could be harm, the Department may deny the request or grant the permittee a shorter extension.

Under (j)(2), if the Department needs more time to determine whether to grant or deny the permittee's extension request, the end date automatically continues until such time as the Department makes this determination. This provision is needed to avoid any argument or uncertainty over the status of an agreement if the Department is unable to grant or deny the extension request between the time it receives the request and the end date in a notice of non-compliance or suspension.

Subdivision (k): Notice Delivery

- Purpose: The purpose of subdivision (k) is to establish how any notice or other writing under the proposed regulation must be delivered to the permittee for the notice to be effective.
- Necessity: Subdivision (k) makes clear the method the Department must follow to deliver notices and other writings to a permittee for the notice or writing to be effective: by regular mail and email. The Department decided against using USPS Certified Mail as the method to deliver notices and other writings to a permittee for the reasons explained under subdivision (e)(2). By specifying the method to deliver notices and other writings, subdivision (k) eliminates any confusion on how and where the Department must send notice and other writings to a permittee and takes away any claim by a permittee that the notice or writing was not effective, provided the Department adheres to subdivision (k) and has record of the mailing and email.

Subdivision (l): Penalties and Fines

- Purpose: The purpose of subdivision (l) is to make clear that a permittee that is not in compliance with the terms of an agreement or, if the permittee has a long-term agreement, has failed to provide timely status reports, is subject to all penalties and fines imposed by the Fish and Game Code, which includes section 1615 (civil penalty), section 12000 (misdemeanor), and section 12025 (administrative penalty), or any other law, regardless of whether the Department suspends or revokes the agreement under section 1612.
- Necessity: Subdivision (l) is needed to avoid an argument by a permittee that: 1) for the permittee to be subject to prosecution for failure to comply with the terms of the agreement or not providing timely status reports, the Department must first suspend or revoke the agreement; or 2) the permittee cannot be subject to prosecution if after receiving a notice of non-compliance

or notice of suspension by the Department under subdivision (c) or (e), respectively, the permittee corrects the deficiencies, or if the Department revokes the permittee's agreement.

(b) Goals and Benefits of the Proposed Regulation

- Every agreement includes measures the Department has determined are necessary to protect fish and wildlife resources that could be substantially adversely affected by the project the agreement authorizes. Status reports allow the Department to evaluate the efficacy of such measures in long-term agreements. The proposed regulation enables the Department to reduce or avoid harm to fish and wildlife resources by allowing the Department to suspend or revoke an agreement when the permittee is not in compliance with the agreement or fails to provide timely status reports.

Without the authority to suspend or revoke, the Department would need to seek cooperation from the permittee to address the violation or, as explained above, refer the violation to the Attorney General or a district or city attorney for relief. As to the former, the permittee may not be cooperative, and as to the latter, any relief, including injunctive relief, would not be immediate because of the time it takes to prepare a referral and meet with the prosecutor. In addition, the Attorney General or a district or city attorney may decline to take any action and the Department, like any other state agency, is responsible for the Attorney General's costs to prosecute a case.

- The proposed regulation will encourage permittees to comply with their agreements and provide timely status reports to avoid suspension or revocation.
- By adopting the proposed regulation, the Department will fulfill a statutory mandate that has been in effect since January 1, 2004, and give the Department unequivocal authority to suspend or revoke agreements in accordance with well-defined rules for Department staff and entities.

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

Authority: Sections 702, 1605 and 1612, Fish and Game Code. Reference: Sections 1601, 1602, 1605, and 1612, Fish and Game Code.

(d) Specific Technology or Equipment Required by Regulatory Change: None

(e) Identification of Reports or Documents Supporting Regulation Change: None.

(f) Public Discussions of Proposed Regulations Prior to Notice Publication: None.

IV. Description of Reasonable Alternatives to Regulatory Action

(a) Alternatives to Regulation Change

There are no reasonable alternatives which would be as effective and less burdensome than the proposed regulation. Section 1612 requires the Department to establish a procedure for suspension or revocation of an

agreement that: 1) requires the Department to provide the entity written notice explaining the basis for a suspension or revocation and 2) provides the entity with an opportunity to correct any failure to comply with the terms of an agreement or failure to file timely status reports before the Department suspends or revokes the agreement. The proposed regulation meets these requirements.

(b) No Change Alternative

The purpose of section 1612 is to allow the Department to take an administrative action against an entity for a “failure to comply” or “failure to report” violation, rather than referring either violation to the Attorney General or a district or city attorney for prosecution. The latter is usually much less efficient and effective for these types of section 1600 violations. In short, if the Department wants the ability to suspend or revoke an agreement for “failure to comply” and “failure to report” violations after the entity is given an opportunity to correct the deficiency, the no change alternative is not an option; the Department must adopt regulations establishing a procedure for suspension or revocation of an agreement in accordance with section 1612.

(c) Description of Reasonable Alternatives that Would Lessen Adverse Impact on Small Business: None.

V. Mitigation Measures Required by Regulatory Action

None.

VI. Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the proposed regulation has been assessed, and the following initial determinations relative to the required statutory categories have been made:

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

None. The Department concludes that the proposed regulation will not have any adverse economic impact on any business. The proposed regulation imposes no fees or costs, does not require any action by any business, and would only apply to a business if it has an agreement and the business, as a permittee, is not in compliance with it.

(b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California; Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State’s Environment:

None. The Department concludes that the proposed regulation will not create or eliminate jobs, create new businesses, eliminate existing businesses, or expand businesses in the state. As explained above, the purpose of the proposed regulation

is to allow the Department to suspend or revoke an agreement if after being given an opportunity to come into compliance with their agreement, the permittee fails to do so. The proposed regulation will not benefit the health and welfare of California residents or worker safety. However, the proposed regulation could benefit the state's environment by ensuring a permittee is following their agreement, the purpose of which is to protect fish and wildlife resources the project covered in the agreement could adversely affect.

(c) Cost Impacts on a Representative Private Person or Business:

None. 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 regulation. The proposed regulation does not impose any fees or costs.(d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None.

(e) Nondiscretionary Costs/Savings to Local Agencies: None.

(f) Programs Mandated on Local Agencies or School Districts: None.

(g) Costs Imposed on Any Local Agency or School District that are Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code: None.

(h) Effect on Housing Costs: None.

VII. Economic Impact Assessment

(a) Effects of the Regulation on the Creation or Elimination of Jobs Within the State: None. The cumulative effects of the changes statewide are expected to be neutral regarding the creation or elimination of jobs within the state.

(b) Effects of the Regulation on the Creation of New Businesses or the Elimination of Existing Businesses Within the State: None. The cumulative effects of the changes statewide are expected to be neutral regarding the creation or elimination of businesses within the state.

(c) Effects of the Regulation on the Expansion of Businesses Currently Doing Business Within the State: None. The cumulative effects of the changes statewide are expected to be neutral regarding the expansion of businesses within the state.

(d) Benefits of the Regulation to the Health and Welfare of California Residents: None. The cumulative effects of the changes statewide are expected to be neutral regarding the health and welfare of California residents.

(e) Benefits of the Regulation to Worker Safety: None. The cumulative effects of the changes statewide are expected to be neutral regarding worker safety

(f) Benefits of the Regulation to the State's Environment:

The purpose of the agreement is to protect fish and wildlife resources that may be substantially adversely affected by the project or activities the agreement

authorizes. The purpose of a status report for a long-term agreement is for the Department to evaluate the efficacy of these measures. By allowing the Department to suspend or revoke an agreement when a permittee is not in compliance with the terms of an agreement, which includes resource protection measures, or fails to provide timely status reports, the proposed regulation benefits the state's fish and wildlife resources. If the Department were unable to suspend or revoke an agreement in these circumstances, it would need to rely on the Attorney General or a district or city attorney to bring the permittee into compliance. This would take much longer and could result in greater harm to resources because of the delay, assuming the Attorney General or a district or city attorney even takes the case.

The cumulative effects of the changes statewide are expected to be minimal regarding the state's environment. This largely depends on the number of permittees out of compliance with their agreements and how many of these permittees the Department brings into compliance with the proposed regulation.

(g) Other Benefits of the Regulation: None.

Informative Digest/Policy Statement Overview

The Department proposes to add section 723, Suspension or Revocation of Lake or Streambed Alteration Agreements, to title 14 of the California Code of Regulations. Section 723 implements Fish and Game Code section 1612, which requires the Department to adopt regulations establishing a procedure for suspending or revoking a Lake and Streambed Alteration agreement (“agreement”) when the Department determines the permittee is not in compliance with the agreement or fails to provide timely status reports where the permittee has a long-term agreement. The procedure must require the Department to provide written notice to the permittee explaining the basis for suspension or revocation and an opportunity to correct any deficiencies.

BACKGROUND:

Fish and Game Code section 1602 requires an entity, as defined in section 1601, to notify the Department before the entity substantially alters the flow, bed, channel, or bank of any river, stream, or lake. If the Department determines the project described in the notification could substantially adversely affect an existing fish or wildlife resource, the project will require agreement from the Department that includes resource protection measures, among other terms.

The term of an agreement may not exceed five years unless the entity requests a longer term, and the Department agrees. (Fish & G. Code, § 1605, subds. (a)(1), (g).) To obtain a long-term agreement, the entity must agree to provide a status report to the Department every four years. (Fish & G. Code, § 1605, subd. (g)(2).)

REGULATORY PROPOSAL:

To meet the requirements under Fish and Game Code section 1612, the Department proposes adding section 723 to title 14 of the California Code of Regulations, which will do the following:

1. Define the following terms used in section 1612 and the proposed regulation: 1) “deficiency”; 2) “Lake or Streambed Alteration agreement” or “agreement”; 3) “permittee”; and 4) “status report.”
2. Allow the Department to suspend or revoke an agreement when the Department determines the entity is not in compliance with the terms of the agreement or fails to provide timely status reports where the entity has a long-term agreement.
3. Establish the following procedure the Department must follow before suspending or revoking an agreement in accordance with section 1612:

Step 1: The Department determines the entity has failed to comply with the terms of their agreement or to file a timely status report. The Department sends the entity a notice of non-compliance that describes the deficiency, as that term is defined in the proposed regulation, directs the entity to correct each deficiency by the date in the notice, and explains that the Department will suspend the agreement unless the entity corrects each deficiency by the date in the notice.

Step 2: If the entity demonstrates each deficiency has been corrected by the date in the notice of non-compliance, the Department must notify the entity the agreement remains in effect. If the entity does not demonstrate each deficiency has been corrected by the date in the notice, the Department must send the entity a notice of suspension that explains: 1) the agreement is suspended; and 2) if each deficiency has not been corrected by the date in the suspension notice, the agreement will be revoked.

Step 3: If the entity demonstrates each deficiency has been corrected by the date in the notice of suspension, the Department must notify the entity the suspension has been released and the agreement is again in effect. If the entity does not demonstrate each deficiency has been corrected by the date in the notice, the Department must send the entity a notice of revocation that explains the agreement has been revoked.

4. Provide that the effective date of any suspension or revocation shall be 10 days from the date of the notice of suspension or notice of revocation under steps 3 and 4, above.
5. Allow the Department to set the date by which an entity must correct any deficiency identified in a notice of non-compliance and notice of suspension (“end date”) on a case-by-case basis based on certain factors identified in the proposed regulation.
6. Allow the Department to extend any end date upon written request by the entity based on certain factors identified in the proposed regulation.
7. Specify that the method by which any notices or other writings the Department delivers to an entity must be by regular mail and email.
8. Clarify that that an entity that is not in compliance with the terms of an agreement or fails to provide timely status reports is subject to all fines and penalties imposed by the Fish and Game Code or any other law.

BENEFITS OF THE PROPOSED REGULATIONS:

The purpose of an agreement is to protect fish and wildlife resources that may be substantially adversely affected by the project or activities the agreement authorizes. The purpose of a status report for a long-term agreement is for the Department to evaluate the efficacy of these measures. By allowing the Department to suspend or revoke an agreement administratively when an entity is not in compliance with the terms of an agreement, which includes resource protection measures, or fails to provide timely status reports, the proposed regulation benefits the state’s fish and wildlife resources. Without the proposed regulation, the Department will need to continue relying on the Attorney General or a district or city attorney to bring the entity into compliance. This can take much longer than an administrative action by the Department under Fish and Game Code section 1612 and because of the delay, result in greater harm to resources.

CONSISTENCY AND COMPATIBILITY WITH EXISTING REGULATIONS:

The Legislature, through Fish and Game Code section 1612, has directed the Department to adopt regulations establishing a procedure for suspending or revoking an agreement. The Department has reviewed its existing regulations in title 14 of the California Code of Regulations and finds that the proposed regulation is neither inconsistent nor incompatible with the existing regulations in title 14. The Department has searched the regulations in all other titles of the California Code of Regulations and has found no other regulations that set forth the requirements in the Department's proposed regulation.