

Memorandum 2013-11

Fish and Game Law (Proposed Organization of Code)

In 2010, the California legislature passed Assembly Bill 2376 (Huffman) (2010 Cal. Stat. ch. 424), requiring the Secretary of the Natural Resources Agency to convene a committee to develop and submit a “strategic vision” for the Fish and Game Commission and the Department of Fish and Game (now the Department of Fish and Wildlife.)

One of the recommendations made in the resulting report was that the Law Revision Commission “clean-up” the Fish and Game Code. See *California Fish & Wildlife Strategic Vision, Recommendations for Enhancing the State’s Fish and Wildlife Management Agencies*, A13 (April 2012) (hereafter “Strategic Vision Report”).

That recommendation prompted a request from Senator Fran Pavley and Assembly Member Jared Huffman (the Chairs of the Senate Natural Resources and Water Committee and the Assembly Water, Parks, and Wildlife Committee) that the Commission conduct a comprehensive review and clean-up of the Fish and Game Code, noting “the need for a comprehensive, thorough review and updating of the Fish and Game Code, to identify obsolete, inconsistent or duplicative sections, and to provide support for more readily understood and enforceable fish and wildlife regulations.” See Memorandum 2012-5, pp. 22-23.

A concurrent resolution was then enacted authorizing the Commission to conduct the requested study. The resolution provided, in relevant part:

[The] Legislature approves for study by the California Law Revision Commission the new topic listed below:

Whether the Fish and Game Code and related statutory law should be revised to improve its organization, clarify its meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law[.]

2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).

PROPOSED APPROACH

The study poses two significant challenges. First, the scope of the study is extremely large. The Commission is tasked with reorganizing and cleaning up an entire code. Second, the Commission's staff has relatively little familiarity with this body of law. That makes it difficult to know where to find the inconsistent, unnecessary, ambiguous, or obsolete provisions that need to be cleaned up.

Given those challenges, the staff believes that it would be best to start by developing an improved organization for the code. We would use an incremental approach, starting by establishing the top-level organization of the code and then turning to lower levels of organization. That approach has at least three major advantages:

(1) *The work can begin immediately.* It is not necessary to have a full and detailed understanding of all of the intricacies of the entire code in order to begin developing a sound structural organization. We can start at the highest level of organization, identifying the main issues addressed by the code and then assigning a "division" of the code to each of those broad subject areas. The Commission can then take each of those divisions in turn, first determining what material should be included within the division, and then analyzing how to further subdivide that material. That process can be reiterated until all of the material in a division has been assessed and organized in a logical fashion.

(2) *The process of reorganization will expose inconsistencies.* The process of grouping functionally similar provisions together, placing them side-by-side in a coherent organizational scheme, should help to highlight any inconsistencies that exist between provisions addressing the same subject matter. Those problems can be noted as they are discovered, for later resolution.

(3) *The process of reorganization will help to identify ambiguities as to program authority and funding sources.* By systematically reviewing related material, in order to assess how best to organize it, the staff will have an opportunity to determine whether the program authority and funding for each function is clear. Any ambiguities can be noted as the organizational analysis proceeds.

The approach described above will allow the Commission to proceed incrementally, taking on one subject area at a time. It will also allow the Commission to "break ground" right away, making progress on the

organizational aspect of the study while it gradually uncovers the other types of defects that the Commission has been charged with correcting.

One potential disadvantage of the approach described above is that the segmentation of the material might obscure some inconsistencies or ambiguities that exist *between* different segments. In such cases, the problems might escape detection. To minimize that risk, the staff will consult closely with the Fish and Game Commission, the Department of Fish and Wildlife, and interested stakeholder groups, specifically requesting information about the existence of those sorts of cross-over problems.

The staff recommends the approach described above. The Commission can, of course, choose to follow a different approach. However, in the interest of making progress at the next meeting, the staff will follow the recommended approach until instructed otherwise.

CODE-WIDE ISSUES

In developing an improved organization for the Fish and Game Code, the Commission will need to decide several issues that relate to the code as a whole. Those issues are discussed below.

Code Name

As indicated above, the Department of Fish and Game has been renamed. It is now the Department of Fish and Wildlife. See 2012 Cal. Stat. ch. 559.

That change appears to have been prompted by a proposal made as part of the strategic visioning process:

California Fish and Game Commission Recommendation #1:
The titles of both the California Department of Fish and Game (DFG) and the California Fish and Game Commission (F&GC) should be changed to the California Department of Fish and Wildlife and the California Fish and Wildlife Commission, respectively, in a manner that minimizes cost.

Strategic Vision Report at B1. The report goes on to explain that the name change “is necessary to more accurately reflect the scope of both entities’ jurisdiction in the 21st century.” *Id.*

As the staff discussed in Memorandum 2012-41, the Fish and Game Code appears to have expanded its scope over time. Initially the code focused primarily on fishing and hunting. The code now includes numerous provisions

addressing other matters, including species protection, habitat enhancement, conservation of natural areas, aquaculture, and fisheries restoration. That change in the content of the code probably explains why the term “wildlife” was seen as more descriptive of the Department’s current jurisdiction than the term “game.”

Given that change in the code’s scope, it may make sense to also change the name of the code. For example, the reorganized code could be named the “Fish and Wildlife Code.” Presumably, that would be a more accurate description of the current content of the code.

Bear in mind, however, that the Fish and Game Commission has *not* been renamed. That may be because the Fish and Game Commission was created by the California Constitution, and charged with the “protection and propagation of *fish and game*.” Cal. Const. art 4, § 20 (emphasis added). The Legislature may have felt unsure of its authority to rename an entity that was created and named in the Constitution. Whatever the reason for that decision, the staff sees no legal reason why the code could not be renamed. The Fish and Game Code was not created or named in the Constitution.

There is one further issue worth considering. It is not clear to the staff why the name of the code or the Department needs to include the word “fish.” Presumably “fish” are a variety of “wildlife” and could be subsumed within the broader term.

A counterargument might be that the code currently includes provisions that relate to aquaculture and commercial fishing. Fish & Game Code §§ 7600 *et seq.* (commercial fishing), 15000 *et seq.* (aquaculture). Fish “taken” under those circumstances might not be considered “game” or “wildlife.” On the other hand, the code also regulates commercial hunting and trapping. Fish & Game Code §§ 3200-3472.2 (commercial hunting), 4000-4043 (commercial trapping of fur bearing mammals). So it is not clear that the code treats “fish” in a distinctly different way than non-fish species.

Nonetheless, it may be that use of the word “fish” is valued as a matter of tradition or to emphasize an important constituency of the administering agencies. Removing the term from the title of the code or the name of the Department might be a controversial change for those reasons. Moreover, the Legislature just took the opportunity to rename the Department and in doing so, chose to retain the word “fish.” The Commission should perhaps defer to that very recent decision.

With all of that in mind, the Commission should consider changing the name of the code to “Fish and Wildlife Code.” **The staff invites public comment on the merits of doing so. Comment on whether the word “fish” needs to be retained would also be helpful.** If the name could be simplified to “Wildlife Code” without causing any problems or controversy, that might be the more straightforward choice.

Code Headings

In California, the Codes are divided into organizational subdivisions using standardized organizational headings. For example, the Family Code (which was created on the Commission’s recommendation) is divided into organizational segments, from largest to smallest, as follows:

Division
Part
Chapter
Article

So, for example, Family Code Section 1600 is contained within Article 1 of Chapter 2 of Part 5 of Division 4.

Four levels of organizational headings are probably sufficient for most purposes, but some codes also use a fifth: “Title.” For example, the Civil Code is organized as follows:

Division
Part
Title
Chapter
Article

Interestingly, use of the “title” heading varies throughout the Civil Code. In some places the “parts” of that code are divided into “titles.” See, e.g., Civ. Code § 654 *et seq.* In other places “parts” are not divided into “titles.” See, e.g., Civ. Code §§ 38-41. This may simply reflect variations in drafting practices over time. Or it may be that the “title” heading was intended to serve as a variable layer of organization, used only in those parts where further subdivision is needed.

Considering that we will be writing on a blank slate in this study, it would probably make sense to give ourselves as much organizational flexibility as possible. **For that reason, the staff recommends using the five levels of headings set out above.**

Section Numbering

In assigning section numbers to the provisions of the reorganized code, we should leave plenty of room between individual sections. We should also leave significant numbering gaps between the organizational subdivisions of the code (e.g., between the articles within a chapter, etc.). This will make the code easier to maintain in the future, providing space for new provisions to be added in organizationally appropriate locations (without the need to squeeze sections in using decimal numbers or other number-conserving techniques). That is a standard Commission practice when drafting large statutes. **The staff recommends that we follow it in this study.**

Short Sections

The use of short sections is the preferred drafting technique of the California Code Commission, the Legislature, the Legislative Counsel, and the Law Revision Commission.

Short sections have numerous advantages. They enhance readability and understanding of the law, and make it easier to locate and refer to pertinent material. In contrast to a long section, a short section can be amended without undue technical difficulties and new material can be inserted where logically appropriate, facilitating sound development of the law.

The staff recommends, as a general practice, that long code sections be broken up into smaller sections in the process of reorganizing the law.

PROPOSED DIVISIONS

In developing a logical organizational scheme for the content of the Fish and Game Code, the first step will be to determine its top-level organizational divisions. In other words, what are the primary types of provisions within the code?

Precedent from the structure of other codes provides a partial answer. In most codes, the first organizational division is comprised of “general provisions” (e.g., code-wide definitions and rules of construction, transitional rules, and the like).

If there is a particular agency charged with enforcing and administering the code, that entity is usually established, and its general powers and duties defined, in the second organizational division of the code.

Following those precedents, the staff recommends that the new code begin with “Division 1. General Provisions” and “Division 2. Administration. Consistent with that recommendation, Memoranda 2013-12 and 2013-13 will present preliminary drafts of those two divisions. This will provide an opportunity to refine the organizational process while working on relatively straightforward material.

The remainder of the Fish and Game Code is mostly comprised of detailed provisions that regulate conduct and establish department programs. Those provisions address a wide range of topics, but the staff believes that most of them can be organized into two groups, addressing the following issues:

- *“Taking” of Wildlife.* This group includes provisions regulating sport fishing and hunting, commercial fishing and hunting, aquaculture, and the taking of “depredator” animals.
- *Protection of Wildlife and Habitat.* This group includes provisions relating to species protection, wildlife refuges, habitat conservation, invasive species control, fisheries restoration, pollution controls, dam and waterways, and the like.

While the staff recognizes that the lines between the first two groups can overlap — for example, hunting can play an important role in population management necessary for habitat conservation — the two categories seem to present a sound basis for organizing most of the regulatory and programmatic provisions of the code. For example, the provisions addressing hunting and fishing have many features in common (licensure requirements, bag limits, season limits, and the like) and so should probably be grouped together. By contrast, the provisions regulating hunting and fishing have little functional overlap with provisions establishing wildlife refuges. Those two distinctly different types of provisions should probably be placed in different organizational divisions.

There are two other smaller groups of provisions that may warrant separate divisions:

- *Inter-Jurisdictional Compacts.* This group includes provisions for establishing compacts between California and other jurisdictions. See, e.g., Fish & Game Code §§ 375 (California-Arizona Compact), 14000-14105 (Pacific Marine Fisheries Compact), 16000-16011 (State-Tribal Agreements Governing Indian Fishing), 16500-16541 (State-Tribal Agreement Governing Indian Fishing on the Klamath River).

- *Miscellaneous Provisions.* This group includes provisions regulating wildlife that do not fall cleanly within any of the divisions discussed above. For example, provisions regulating falconry and frog-jumping contests. The staff suspects that other such miscellaneous provisions are scattered throughout the code.

As a provisional matter, the staff recommends that the remainder of the code be organized using the divisions discussed above. In other words, if the Commission agrees, the top-level organization of the code would be as follows:

- Division 1. General Provisions
- Division 2. Administration
- Division 3. Inter-Jurisdictional Compacts
- Division 4. Taking of Wildlife
- Division 5. Protection of Wildlife
- Division 6. Miscellaneous Provisions

The staff invites public comment on the merits of that organizational scheme. Are the proposed divisions appropriate? Are there others that should be added? Early input on these issues would be extremely helpful.

Respectfully submitted,

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