

## Memorandum 2013-31

**Fish and Game Law: Public Comment on  
Proposed Division 2, Parts 1-3 (Administration)**

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In prior memoranda in this study,<sup>1</sup> the staff requested public comment on a number of issues relating to the proposed Fish and Wildlife Code.

The Department of Fish and Wildlife (the “Department”) has written to comment on issues raised in Memorandum 2013-13. The Department’s letter is attached as an Exhibit. Its comments are discussed below. They have been grouped by subject matter or type.

The staff greatly appreciates the Department’s input. Given the Department’s knowledge and expertise, the staff presumes that Department comments regarding its own administration and operations are correct. That presumption can be overcome where there is good reason to do so. But in the absence of any contrary information or reasoning, it seems appropriate to rely on the Department’s information and recommendations.

All statutory references in this memorandum are to the existing Fish and Game Code or to “proposed” provisions of the draft Fish and Wildlife Code.

**FISH AND GAME COMMISSION RULEMAKING PROCESS**

A number of the questions posed in Memorandum 2013-13 relate to possible changes to the statutory procedures governing Fish and Game Commission (“FGC”) rulemaking. The Department’s comments on those issues are discussed below.

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

## Article 1 Rulemaking

One of the main issues discussed in Memorandum 2013-13 is whether there is a need to continue an existing procedural distinction between “Article 1 rulemaking”<sup>2</sup> and “non-Article 1 rulemaking,”<sup>3</sup> or whether the code could be simplified by partially or wholly dropping that distinction.<sup>4</sup>

The Department defers comment on that issue, until FGC “has an opportunity to discuss the issues in a public meeting and develop a response to CLRC staff questions.”<sup>5</sup>

**The staff recommends postponing any further action on the Article 1 issue until after we have received comment from FGC and the Department.**

Because the resolution of this issue could have significant effects on the content and structure of the FGC rulemaking provisions, the staff will not prepare a new draft of any of the rulemaking provisions until the Article 1 issue has been settled.

## Factors to be Considered

Proposed Section 560 provides factors that FGC must consider when adopting regulations under proposed Section 555, which relates to the hunting of “resident game birds, game mammals and furbearing mammals.”

In reviewing those provisions, the staff saw no obvious policy reason that the factors in proposed Section 560 should not also apply to regulations adopted under proposed Section 565, which relates to the take of “fish, amphibia, and reptiles.”

A staff note following proposed Section 560 asks for public comment on whether that section should be broadened so that it also applies to rulemaking under proposed Section 565.

The Department supports broadening Section 560 in that way.<sup>6</sup> **Based on that input, the staff recommends that the provision be made applicable to proposed Section 565.**

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2. I.e., rulemaking conducted pursuant to the authority provided in existing Article 1 (commencing with Section 200) of Chapter 2 of Division 1 of the Fish and Game Code.

3. I.e., all FGC rulemaking that is not Article 1 rulemaking.

4. Memorandum 2013-13, pp. 3-11.

5. Exhibit p. 1.

6. *Id.*

## Spotted Fawns and Spike Bucks

By its terms, proposed Section 575 appears to prohibit FGC from adopting any regulation that would authorize the take of certain animal types. However, as explained in Memorandum 2013-13, the actual effect of the purported prohibitions is not entirely clear.<sup>7</sup> Rather than actually prohibiting regulation of certain topics, the purpose of proposed Section 575 may be to establish that such regulations are not encompassed within “Article 1 rulemaking.”

However, the staff identified one provision, proposed Section 575(a)(4), that appears to be in a different posture from the other “prohibitions.” That paragraph provides:

575. (a) The commission has no power under this article to make any regulation authorizing or permitting the taking of:

...  
(4) Any spike buck or spotted fawn. “Spotted fawn” means a young deer born that year which has spotted pelage. “Spike buck” means a male deer with unbranched antlers on both sides which are more than three inches in length.

A staff note following proposed Section 575 asked whether that provision was actually intended to be prohibitory:

[I]t may be that (a)(4) is intended to flatly prohibit FGC from adopting any regulation that permits the take of spotted fawns and spike bucks. Is that a correct reading of the provision?

The Department agrees that proposed Section 575(a)(4) is intended to be a flat prohibition on the FGC adopting a regulation that permits the take of a spotted fawn or spike buck.<sup>8</sup>

**The staff recommends that the provision be revised to make its meaning clearer.**

## DUPLICATIVE PROVISIONS

### Rulemaking References

Proposed Section 575(b)-(c) provide as follows:

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7. See Memorandum 2013-13, p. 7.

8. See Exhibit p. 1.

575. ...

(b) Any regulation establishing a season to compensate for closure of an area due to extreme fire hazard shall be made pursuant to Section 306.

(c) Any regulation setting a special hunting season for mammals, except deer, or game birds which have increased in number to such an extent that a surplus exists or which are damaging property or are overgrazing their range shall be made pursuant to Section 325.

A staff note following proposed Section 575 asked whether subdivisions (b) and (c) are necessary. They appear to be nonsubstantive “sign-posts,” referring to substantive law without adding anything of substance themselves. Such sign-posts can sometimes be helpful aids to navigating a code, but it is not clear whether they are needed in this context.

The Department comments that proposed Section 575(b) and (c) are duplicative of other law and can be omitted.<sup>9</sup> **This suggests that the Department finds these sign-posts to be unnecessary. Based on that input, the staff recommends that proposed Section 575(b)-(c) be deleted.**

#### **General Law Governing State Agencies**

Proposed Section 1030 provides that the Department is governed by specified provisions of the Government Code, which govern “state departments” generally. A staff note following that section asked whether it is necessary, given that the referenced provisions apply to the Department by their own terms.

The Department concurs that the provision is unnecessary for that reason. However, the Department stops short of recommending that the provision be omitted from the proposed law.<sup>10</sup>

**The staff recommends against omitting the provision unless the Commission gets clearer guidance from the department that the change would be beneficial.**

#### INSURANCE PROVISIONS

Proposed Sections 1600 and 1605 authorize the Department to procure insurance for specified purposes. A staff note following proposed Section 1605 asks whether the two provisions should be combined.

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9. *Id.*

10. See Exhibit p. 2.

The Department commented that the sections should not be combined.<sup>11</sup> **Unless we receive further information that provides a good reason for doing so, the staff recommends against revising the insurance provisions.**

## TERMINOLOGY

### **“Wildlife Officer”**

In a staff note following proposed Section 1125, the staff asks whether the title “fish and game warden” should be revised to reflect the renaming of the Department.

The Department supports using the title “wildlife officer” to refer to all of the Department’s peace officers.<sup>12</sup> That term seems appropriate. **The staff recommends that it be used throughout the proposed Fish and Wildlife Code.**

### **Educational Materials**

Proposed Section 1255 governs the display of “fish and game” educational materials at various events, including “sportsmen’s shows.”

In a staff note following proposed Section 1255, the staff asked two questions:

- (1) Should the reference to “fish and game” educational materials be revised to refer to “fish and wildlife” educational materials, consistent with the change of the Department’s name?
- (2) How should the term “sportsmen’s show” be revised to make it gender neutral?

On the first point, the Department supports changing “fish and game” to “fish and wildlife.”<sup>13</sup> **The staff recommends doing so. The staff also recommends that such changes be made consistently throughout the code, unless there appears to be good reason to preserve the existing terminology.**

On the second point, the Department suggests that “sportsmen’s show” be replaced with “sportsperson’s show.”<sup>14</sup>

That approach would work, but the staff often finds the substitution of “person” for “man” to be an awkward solution. Another possibility would be to instead use the term “hunting and sport fishing show.” That would seem to

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

convey the same meaning, without the use of awkward terminology. **The staff recommends the latter approach.**

#### RESTATED LANGUAGE

The draft attached to Memorandum 2013-13 restates three provisions,<sup>15</sup> in order to improve their clarity without making any substantive change to their meaning. Staff notes following the restated provisions ask for comment on whether the restated language would inadvertently change the meaning of the provisions.

The Department indicated that the restated language would not affect the meaning of the provisions.<sup>16</sup> **Based on that input, the staff recommends that the provisions be restated as proposed.**

In a staff note following proposed Section 1310, one particularly unclear sentence was flagged for attention. It reads:

The authority to enter into agreements for the purposes of this section shall include, but not be limited to, for the purposes of securing donations, memberships, corporate and individual sponsorships, and marketing and licensing agreements.

As the staff was not entirely sure of the meaning of that sentence, the draft provision itself was not revised. Instead a staff note asks whether the sentence should be restated as follows:

The authority to enter into agreements under this section shall include, but not be limited to, the authority to secure donations, memberships, corporate and individual sponsorships, and marketing and licensing agreements.

The Department supports the proposed revision, indicating that it would not change the sentence's existing meaning.<sup>17</sup> **Based on that input, the staff recommends that the sentence be revised as proposed.**

#### DISTRICTS

Proposed Sections 1700-1895 would continue existing provisions that divide the state into 37 districts. Those provisions name the districts and define their

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15. Proposed Sections 1030, 1135(a), 1310, 1315(b).

16. See Exhibit p. 2.

17. *Id.*

boundaries. In the proposed law, the staff made only minor technical changes to the district provisions, adding subdivisions where appropriate and omitting one enforcement provision.

The Department supports those technical changes.<sup>18</sup> **No Commission action is required in response to that comment.**

Memorandum 2013-13 notes that the existing system for naming the districts is a hodge-podge, using several different naming conventions. The memorandum discusses the benefits of imposing a uniform naming system.<sup>19</sup>

The Department supports that idea.<sup>20</sup>

Memorandum 2013-13 also discusses how to approach creating a new naming scheme. In order to reduce transitional costs and confusion, the memorandum suggests that language be added expressly authorizing reference to districts by their former names. That would avoid the need to quickly revise materials that refer to districts by their former names. For that approach to work, the new district names cannot duplicate any of the former names.

The staff has given this matter further thought and sees one approach that would work — name the districts after the sections that define them. For example, proposed Section 1710 could be revised as follows:

1710. (a) The following constitutes Fish and ~~Game~~ Wildlife District ~~1 3/8~~ 1710:

Those portions of the following counties not included in other districts: Alpine, El Dorado, Amador, Calaveras, Tuolumne and Mariposa.

(b) Except as otherwise provided, all of the provisions of this code relating to District ~~1 1705~~ shall apply to District ~~1 3/8~~ 1710.

(c) Any reference to "District 1 3/8" shall be construed as a reference to District 1710.

That approach has a number of advantages. First, it would satisfy the criteria discussed above. None of the new district names would duplicate an existing name. Second, a district's name would direct a reader to the provision that

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18. *Id.*

19. Memorandum 2013-13, p.

20. See Exhibit p. 2.

defines the district. Third, a system of names that is based on section numbers would be easy to maintain going forward.

**Should the staff prepare a draft using that approach?**

Respectfully submitted,

Brian Hebert  
Executive Director



**VIA FIRST CLASS MAIL AND ELECTRONIC MAIL**

May 23, 2013

Ms. Xochitl Carrion, Chairperson  
California Law Revision Commission  
c/o Mr. Brian Hebert, Executive Director  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303-4739

Subject: Comments on Memorandum 2013-13

Dear Ms. Carrion:

Regarding CLRC memorandum 2013-13, the Department of Fish and Wildlife has the following comments:

**Division 2: Administration Part 1. Fish and Game Commission**

- The Department defers comment on issues related to “Article 1 Rulemaking” and “non-Article 1 Rulemaking” and whether there are policy purposes that may justify the discrepancy between the two rulemaking processes until the Fish and Game Commission has an opportunity to discuss the issues in a public meeting and develop a response to CLRC Staff questions.

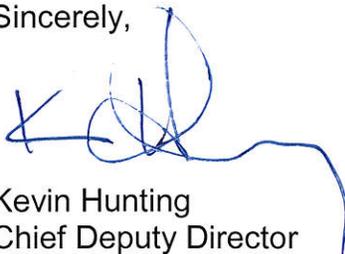
**Division 2: Administration Part 3. Districts**

- § 560. Factors to be considered: The Department supports broadening the language of this section to include proposed Section 565, in addition to Section 555.
- § 575(a)(4). The Department agrees with the CLRC Staff interpretation that this section is intended to flatly prohibit the Fish and Game Commission from adopting any regulation that permits the take of spotted fawns and spike bucks.
- § 575(b)-(c). The Department agrees with the CLRC Staff interpretation that these two sections are duplicative of existing Fish and Game Code sections 306 and 325 and, therefore, can be omitted.
- § 655 - 800: The Department defers comment on issues related to “Article 1 Rulemaking” and “non-Article 1 Rulemaking” and whether there are policy purposes that may justify the discrepancy between the two rulemaking processes until the Fish and Game Commission has an opportunity to discuss the issues in a public meeting and develop a response to CLRC Staff questions.

- **§ 1030. Incorporation of general law on state agencies:** The Department concurs with the CLRC Staff suggestion that existing Code section 706 is unnecessary as the referenced sections apply to all state agencies. The Proposed new language in section 1030 is a simpler articulation of the provision and does not have any new substantive effect.
- **§ 1125. Minimum age of warden:** The Department supports the name of “Wildlife Officer” as a general term referencing all of the Department’s peace officers.
- **§1135(a). Entry onto private land:** The Department supports the suggested revised language, as it does not cause any substantive change.
- **§ 1255. Educational Displays:** The Department supports the CLRC staff suggestion to use the phrase “fish and wildlife educational material.” The Department suggests using the term “sportsperson” in lieu of “sportsmen’s”.
- **§ 1310. Funding agreements:** The Department supports the suggested revised language , as it does not cause any substantive change.
- **§ 1315(b):** The Department supports the suggested revised language , as it does not cause any substantive change.
- **§ 1600-1605:** The Department supports maintaining the existing language of both sections.
- **§ 1700-1895:** The Department supports recommendations to correct defects to district boundary descriptions, adding subdivision designations for easier cross referencing, relocating certain provisions and creating a consistent naming scheme for districts.

Thank you again for your efforts and please contact us with any questions.

Sincerely,



Kevin Hunting  
Chief Deputy Director