

Memorandum 2013-33

**Fish and Game Law: Proposed Division 3
(Law Enforcement)**

The Commission¹ has provisionally decided to divide the proposed Fish and Wildlife Code along these lines:²

- Division 1. General Provisions
- Division 2. Administration
- Division 3. Law Enforcement
- Division 4. Inter-Jurisdictional Compacts
- Division 5. Freshwater Fisheries
- Division 6. Marine Fisheries
- Division 7. Wildlife Management
- Division 8. Nongame and Endangered Species
- Division 9. Planning and Environmental Review
- Division 10. Miscellaneous Provisions

Prior memoranda in this study presented drafts of proposed Division 1 and Parts 1-4 of proposed Division 2.³ The staff has not yet prepared a draft of Part 5 of Division 2 ("Revenue and Accounting"). That material will be presented at a future meeting.

This memorandum discusses the content of proposed Division 3, addressing "Law Enforcement." However, it does not present a draft of proposed legislation. As discussed below, there are different ways in which the content of proposed Division 3 could be organized. **The staff needs guidance on which organizational approach to use, before preparing a draft.**

Unless otherwise indicated, all statutory references in this memorandum are to the Fish and Game Code.

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). 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.

2. See Minutes (April 2013), p. 11.

3. Memorandum 2013-12, Memorandum 2013-13, Memorandum 2013-32.

CONTENT

The law enforcement provisions of the Fish and Game Code can be divided into provisions addressing the following matters: (1) law enforcement personnel, (2) law enforcement procedures, and (3) sanctions. Those categories are discussed separately below.

Law Enforcement Personnel

There are a number of provisions that authorize and regulate county Fish and Game Wardens.⁴ These wardens are peace officers, charged with enforcing Fish and Game laws.⁵ **The staff recommends that the county warden provisions be included in proposed Division 3.**

There are also a small number of provisions that govern the law enforcement personnel of the Department of Fish and Wildlife (“DFW”).⁶ In Memorandum 2013-13, the staff recommended locating those provisions in proposed Division 2 (together with other provisions governing DFW personnel).⁷

Having had an opportunity to consider the scope of proposed Division 3, **the staff now recommends that the provisions on DFW law enforcement personnel be moved to proposed Division 3.** The DFW provisions are sufficiently similar to the county provisions that they should all be grouped together.

Law Enforcement Procedures

There are some provisions that specify procedures for the conduct of enforcement actions.⁸

Procedures that apply generally to the whole code should be located in proposed Division 3. For example, Section 12014 provides a procedure for judicial enforcement of an administrative civil penalty. It applies generally to any provision of the code that imposes a civil penalty. It should be included in the general law enforcement provisions of proposed Division 3.

Procedures that are specific to a particular sanction should be located together with the related sanction provision. For example, Section 12002.10(b)

4. Sections 875-882.

5. Section 878.

6. Sections 851-856.

7. Proposed Sections 1110-1130, 1145.

8. See, e.g., Sections 2587 (authority to retain counsel; limitations period), 12014 (judicial enforcement of administrative civil penalty), 12154(b) (appeal of license suspension or revocation), 12155.5 (procedure for hearing on license suspension or revocation).

provides an opportunity for a hearing before the suspension of an abalone license under Section 12002.10(a). Because the hearing provision is specific to the suspension sanction, the two should be located together.

One procedural provision, Section 309(a), requires the Fish and Game Commission to adopt regulations providing for due process in license suspension and revocation proceedings. In Memorandum 2013-13, the staff recommended that Section 309(a) be included in proposed Division 2 (together with other provisions that grant the Fish and Game Commission rulemaking authority).⁹

The staff has reconsidered that placement, and now recommends that Section 309(a) be moved to proposed Division 3, in proximity to other provisions governing enforcement proceedings. It would make sense for all of the provisions governing enforcement processes to be in the same place in the code.

Sanctions

There are dozens of sections that specify a sanction for a violation of a particular regulatory provision. The sanctions provided in those sections include all of the following:

- Criminal penalties.
- Civil penalties.
- Civil damages.
- Revocation or suspension of a license, permit, or other privilege.
- Seizure and forfeiture of property.
- Injunction.
- Mandatory remediation orders.

Under existing law, the provisions specifying a sanction for violation of a particular regulatory provision are organized in two different ways:

- (1) About half are consolidated in existing Division 9 (Sections 12000-12300), under the heading “Fines and Penalties.”¹⁰ Unfortunately, the provisions that have been consolidated in Division 9 are not well organized. Provisions that address different subject matters

9. See proposed Section 755.

10. See, e.g., Section 12006(a)(1) (“The punishment for a violation of Section 7370 is a fine of not less than five thousand dollars (\$5,000), or more than ten thousand dollars (\$10,000), imprisonment in county jail not to exceed one year, or both the fine and imprisonment.”).

and impose different types and levels of penalties are mixed together.

- (2) The remaining sanction provisions are distributed throughout the code, located near the regulatory provisions that they govern.¹¹

The staff recommends that the proposed law use only *one* of the organizational models described above. The sanction provisions should either *all* be consolidated in one location, or they should *all* be distributed to locations near the regulatory provisions that they govern.

There is also one *general* sanction provision, Section 12000(a). That section provides that every violation of the Fish and Game Code or an implementing regulation or order is a misdemeanor, unless a different penalty is specified. **Because that provision potentially applies to any provision of the code, it should be located with other general law enforcement provisions.**

ORGANIZATIONAL ALTERNATIVES

As noted above, there are two main ways in which the sanction provisions of the Fish and Game Code could be organized. They could be *consolidated* in a single location or *distributed* throughout the code, with each sanction provision located near the regulatory provision that it governs. Each of those alternatives is discussed below.

Consolidated Organization

The main advantage of consolidating all of the sanction provisions in one place is that users would know where to find them. Regardless of where the related regulatory provisions are located, one would always look to proposed Division 3 to find the sanction for a violation.

In theory, consolidation would also simplify future maintenance of the code. As new sanction provisions are added to the law, the Legislature would know to locate them in proposed Division 3.

In practice, however, things might not work out so cleanly. There is an obvious logic to locating a sanction provision with the regulatory provision that

11. See, e.g., Section 8582(b) ("It shall be a misdemeanor for any person operating under a permit *pursuant to this article* to sell or possess for sale or personal use any marlin. In the event a marlin is taken incidentally in a drift gill net, the permittee shall notify the department immediately that the fish is on the boat. No marlin may be removed from the boat except for delivery to the department.") (emphasis added).

it governs. It seems likely that the Legislature would use that approach from time to time, even if most of the sanction provisions were consolidated.

One secondary advantage of consolidation is that it would probably make the law more accessible for policy analysts. If all penalties were located in one place, it would be easier for analysts to assess the overall character of the sanction regime. That would simplify the task of maintaining penalty proportionality going forward. It might also facilitate any future attempt to simplify or rationalize the sanction regime as a whole.

If the Commission were to consolidate all sanction provisions in one place, it would be helpful to organize them according to some clear and logical principle. The staff sees two possibilities.

Subject Matter of the Underlying Offense

One approach would be to organize the sanction provisions according to the subject matter of the underlying offense. For example, the provisions could be organized along these general lines:

- Title 1. Hunting and Fishing Generally
- Title 2. Hunting
 - Chapter 1. Birds
 - Chapter 2. Mammals
 - Article 1. Deer
- ...
- Title 3. Freshwater Fisheries
- Title 4. Marine Fisheries
- Title 5. Nongame and Endangered Species
- Title 6. Habitat Conservation

Such an approach should make it fairly easy for users to find provisions governing any particular topic. Suppose that a person needs to find all of the sanctions specific to deer hunting. Those provisions could be found in Article 1 of Chapter 2 of Title 2.

Type of Sanction

An alternative would be to organize the sanction provisions by type of sanction, thus:

- Title 1. Crimes
 - Chapter 1. Infractions
 - Chapter 2. Misdemeanors
 - Chapter 3. Felonies
- Title 2. Civil Remedies

Chapter 1. Civil Penalties
Chapter 2. Damages
Chapter 3. Injunction
Chapter 4. Remediation
Title 3. Suspension or Revocation of Privileges
Title 4. Seizure and Forfeiture

That approach would make the law more accessible to policymakers. Because all sanctions would be organized by type and severity, analysts could more easily evaluate the overall proportionality of the sanctions regime.

However, that approach would not be very user-friendly. Unless a user already knows the type and severity of the penalty for a particular violation, there would be no simple way to determine where the sanction provision is located. Moreover, penalties that relate to a single subject would not necessarily be grouped together. For example, if a particular violation could be punished as a misdemeanor, along with civil damages, revocation of privileges, and a seizure of property, all of the individual penalty provisions would be in different locations. This would make it harder for a user to find all of the law governing a particular offense.

Recommendation

If the Commission decides to consolidate all sanction provisions in one place, the staff recommends that the provisions be organized according to the subject of the underlying offense. This would be a more user-friendly organizational approach.

Distributed Organization

The other main organizational alternative would be to distribute all of the sanction provisions throughout the code, so that they are located with the regulatory provisions that they govern. For example, the sanction for violating a restriction on deer hunting would be located with the provision that sets out the restriction.

As noted earlier, this is a logically intuitive organizational scheme. It makes sense that a sanction for violating a regulatory requirement or prohibition would be located with the related regulatory provision. Users might well expect to find a regulatory provision and its related enforcement sanction in the same place.

The main drawback to a distributed organizational model is that it would complicate policy analysis. If all of the various sanctions imposed under the Fish

and Game Code are scattered throughout the code, it would be difficult to discern a pattern of severity or type of sanction. This would make it slightly more difficult to maintain proportionality or effect comprehensive reform of the sanction regime as a whole.

That said, convenience for policy analysts is probably not important as convenience for those who must use and understand the code on a regular basis (i.e., regulated members of the public, law enforcement, practitioners, and judges).

RECOMMENDATIONS

The law enforcement provisions that have code-wide application should be located in proposed Division 3. Such provisions include provisions governing law enforcement personnel and general procedures (enforcement procedures that relate to a specific sanction should be located with the related sanction provision). They also include any sanction provisions that have general application.

The staff makes no recommendation on whether to consolidate or distribute the violation-specific sanction provisions. There are advantages to either approach. **However, if the Commission decides to consolidate the sanction provisions, the staff recommends that the consolidated provisions be organized according to the nature of the underlying offense.**

The choice of one or another organizational approach will likely have significant practical effects on those who must understand and use the law. **For that reason, the staff requests public comment on which approach would be most advantageous, and why.**

Once the Commission has decided how to organize the sanction provisions, the staff will prepare a draft of proposed Division 3, for presentation at a future meeting.

Respectfully submitted,

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