

Memorandum 2013-51

Fish and Game Law: Organization of Proposed Law

In this study, the Commission¹ is proposing to recodify the entirety of the Fish and Game Code, in order to improve its organization and make minor technical and substantive improvements throughout.

To date, the Commission has completed its review of the code-wide provisions of the Fish and Game Code (which mostly relate to administrative matters) and has proposed that those provisions be restated and reorganized into the following Divisions of a proposed Fish and Wildlife Code:

- Division 1. General Provisions
- Division 2. Administration
- Division 3. Law Enforcement
- Division 4. Inter-Jurisdictional Compacts

With that work completed (subject to any modifications that may later prove necessary), the Commission can now begin working on the program-specific provisions of the Fish and Game Code.

At a prior meeting, the Commission decided to organize those program provisions as follows:²

- 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

That decision was expressly provisional.³ At the time that it was made, the Commission contemplated the possibility of revisiting the matter, once it had

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. Minutes (April 2013), p. 11.

3. *Id.*

greater familiarity with the content of the Fish and Game Code. This memorandum provides an opportunity to reconsider the organization of the program elements of the code, before beginning the process of analyzing and recodifying those elements.

Unless otherwise indicated, all statutory references in this memorandum are to the Fish and Game Code or to the “proposed” Fish and Wildlife Code.

CURRENTLY PROPOSED APPROACH

The current approach is largely based on a suggestion made by the Department of Fish and Wildlife (hereafter “Department”).⁴ The Department proposed that the code would be easier to use if it were organized “by department function,” which it suggested could be based on the categories specified for use in the Department’s accounting system:

In establishing the appropriate programs or activities for this system, the department shall consider the following programs or activities:

- (a) Freshwater fisheries activities.
- (b) Marine fisheries activities.
- (c) Wildlife management activities.
- (d) Planning and environmental review.
- (e) Law enforcement.
- (f) Nongame and endangered species.
- (g) General administration.⁵

The staff agrees that a functional organization makes sense. The Department’s staff are organized by function, and it would be easier if the law that the Department is charged with administering were similarly organized. Moreover, a functional organization should be user-friendly for members of the public. For example, a person who is interested in sport fishing would probably be best served if all of the laws on sport fishing were in one place.

However, the accounting categories set out above are not the only possible model for a functional organization of the code and they may not be the best. Before discussing a possible alternative, the staff will describe two apparent shortcomings of the current organizational model: overlap between categories and the omission of useful categories.

4. See Second Supplement to Memorandum 2013-11, Exhibit p. 1.

5. Section 13201.

Overlap Between Categories

Categories (a) through (c) above relate to three broad wildlife communities (freshwater fisheries, marine fisheries, and terrestrial wildlife respectively). That community-based classification makes sense with regard to provisions that are specific to particular types of wildlife or habitat. For example, all provisions that are specific to freshwater fish would be located in the first category.

However, there are a number of provisions that relate to more than one of the communities discussed above. For example, provisions on the following topics apply to all three communities:

- Taking and possessing wildlife generally.
- Importing, transporting, and sheltering all restricted wildlife.
- Hunting and sport fishing generally.
- Habitat protection and enhancement generally.

In addition, provisions on the following topics would seem to apply to both marine and freshwater fisheries:

- Sport fishing generally.
- Fisheries restoration.
- Fish hatcheries.
- Aquaculture.
- Water pollution.

If the community-based organizational model is used, these sorts of category-spanning provisions would need to be duplicated in each division to which they relate. For example, provisions regulating all hunting and sport fishing would need to be included in all three divisions, and provisions regulating all sport fishing would need to be included in both the freshwater and marine fisheries divisions.

This kind of duplication of identical provisions can be problematic for two reasons. First, it is an inefficient way to draft. Rather than having a single section that applies to multiple related subjects (e.g., all hunting and sport fishing), there have to be three substantively identical provisions in three widely-separated locations in the code. That bulks up the law, adds slightly to the cost and complexity of future amendments, and increases the risk of error.

The second potential problem is inadvertent drift in the content and meaning of provisions that should be identical. If a section addressing a single general

topic (e.g., the general prohibition on using night vision gear in hunting and sport fishing⁶) is duplicated in each community-based division, future reforms may only affect one of the three communities. This could lead to interpretative problems, where inadvertent differences between the related sections are seen as evidence of different meanings. It could also lead to missed opportunities for improvement of the law, where a generally useful reform is only applied to one of the three communities.

Omitted Categories

The other potential problem with the existing organizational approach is that the three community-based categories discussed above (freshwater fisheries, marine fisheries, terrestrial wildlife) may cover too much ground, encompassing functions that could usefully be broken out as their own categories.

For example, a division addressing “marine fisheries” would likely include provisions on all of the following topics:

- Sport fishing.
- Commercial fishing.
- Aquaculture.
- Pollution control.
- Habitat protection.

Grouping all such provisions together could obscure important functional distinctions between different types of provisions. For example, it might make sense to treat pollution control as a separate functional category. The various provisions that regulate water pollution would seem to have more in common with each other than they do with provisions that regulate sport fishing. Similarly, habitat protection provisions as a class seem functionally different from the other types of provisions listed above.

ALTERNATIVE ORGANIZATIONAL MODEL

The Department’s *2013-14 Budget Fact Book*⁷ describes the Department’s mission, and the programs that it operates to fulfill that mission, as follows:

The CDFW mission has two parts, with each dependent on the other. The first part of the mission is to manage fish, wildlife, and

6. Section 2005(c).

7. Available at <<http://www.dfg.ca.gov/budget/>>.

plant resources for their ecological value. The second part is to manage those resources for their use and enjoyment by the public. The CDFW is able to fulfill its mission through the administration of the following six programs:

Program 20 - Biodiversity Conservation: This program encourages the preservation, conservation, maintenance, and restoration of wildlife resources, including the Ecosystem Restoration Program, under the jurisdiction and influence of the state. Activities involve the conservation, protection and management of fish, wildlife, native plants, and habitat to ensure maintenance of biologically sustainable populations of those species.

- Major Activities: Endangered & Threatened Species, California Environmental Quality Act, Habitat Conservation Plans, Timber Harvest Reviews, Water Quality Rights and Policy, Suction Dredging, Streambed Alteration Agreements, Scientific Permits, Habitat Recovery and Restoration, CALFED, Bay Delta, Fisheries Engineering, and Watershed Conservation.

Program 25 - Hunting, Fishing, and Public Use: This program facilitates diverse and sustainable hunting, fishing (recreational and commercial), trapping, and other public uses and associated economic benefits to the state. Activities include collection and assessment of information on the distribution and abundance of game fish and wildlife to determine the need for regulations (bag limits, gear restrictions, etc.) and to monitor the effects of those regulations. Major program elements are:

- 15 Sport Hunting
- 20 Commercial Fisheries
- 35 Sport Fishing
- Other Major Activities: Sport Hunting and Sport Fishing regulations and opportunities such as Deer, Migratory Game Birds, Upland Game, Private Lands Management, Bighorn Sheep, Mountain Lion, Pronghorn, Elk, Pigs, Bear, Wildlife Laboratories, Coldwater Fisheries, Warm-water Fisheries, Delta Striped Bass, Delta Sturgeon, Steelhead, Salmon, Aquaculture, and Marine Sport and Commercial Fishing. Also includes Screen Shops, Fish Health and Hunting, Fishing Outreach and Education.

Program 30 - Management of Department Lands and Facilities: This program manages CDFW owned or leased lands and facilities, including hatcheries, wildlife areas, ecological reserves, fish and wildlife laboratories, and public access areas, to

contribute to the conservation, protection, and management of fish and wildlife. Major program elements are:

- 10 Management of CDFW Lands and Facilities
- 20 Hatcheries and Fish Planting Facilities
- Major Activities: Land Management Plans, Wetlands, Water Quality, Interpretive Services, Engineering, Fish Hatchery Production and Distribution.

...

Program 50 - Spill Prevention and Response: This program prevents damage, minimizes environmental impacts, restores, and rehabilitates California's fish and wildlife populations and their habitats from the harmful effects of oil and other deleterious material spills in Marine waters and inland habitats. ...⁸

That description of the Department's programs provides another possible model for a functional organization of the proposed code's content. Under that model, the program-specific provisions of the code might be organized along the following lines:

Division 5. Hunting, Fishing, and Other Public Use
Division 6. Biodiversity
Division 7. Management of Public Lands and Facilities
Division 8. Pollution Prevention and Response
Division 9. Miscellaneous Provisions

Such an organization would have all of the general benefits of a functional organization. It would be intuitive to members of the public who are interested in particular topics. It would also parallel the Department's own classification of its programs, making it easier for staff in the Department's various divisions to find the law relevant to their areas of responsibility.

In addition, the model discussed above would help to avoid the shortcomings discussed earlier, relating to overlap between categories and omitted categories.

Overlap Between Categories

A functional organization that is based on the Department's budget program descriptions should be able to minimize the need to duplicate provisions across different divisions of the code. This is because provisions that are applicable across a range of circumstances could easily be organized as general provisions, thus:

8. *Id.*

Division 5. Hunting, Fishing, and Other Public Use
Part 1. General Provisions
Part 2. Hunting
Title 1. General Provisions
Title 2. Birds
Title 3. Mammals
...
Part 3. Sport Fishing
Title 1. General Provisions
Title 2. Freshwater Species
Title 3. Marine Species
...

Under that organization, provisions common to all hunting and fishing would be located in Part 1; provisions common to all hunting would be located in Title 1 of Part 2; etc.

Omitted Categories

The organization discussed above would also allow for a more fine-grained breakdown of Department functions than an organization that is based on the statutory accounting categories discussed earlier.

Provisions relating to biodiversity, management of Department lands and facilities, and pollution control could be organized in separate functional categories. They would not be split up and located as subordinate parts of other broad categories (i.e., freshwater fisheries, marine fisheries, and terrestrial wildlife).

RECOMMENDATION

Every organizational option has advantages and disadvantages. Furthermore, any body of law as large and complex as the Fish and Game Code will necessarily have areas of overlap and redundancy. That said, the staff believes that a functional organization based on the Department's budget programs would do a better job of grouping functionally-related material, with less overlap and redundancy, than an organization that is based on statutory accounting categories.

For that reason, the staff recommends that the program-specific provisions of the proposed Fish and Wildlife Code be organized along these general lines:

Division 5. Hunting, Fishing, and Other Public Use
Division 6. Biodiversity
Division 7. Management of Public Lands and Facilities
Division 8. Pollution Prevention and Response
Division 9. Miscellaneous Provisions

The staff also recommends that this organizational decision remain provisional. As we gain greater familiarity with the program-specific content of the code, we may find reason to change or supplement those categories.

Respectfully submitted,

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