

Second Supplement to Memorandum 2014-57

**Fish and Game Law:
Technical Revisions and Minor Substantive Improvements: Part 1
(Draft Recommendation)**

Memorandum 2014-57 presents a staff draft recommendation on *Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 1)*.¹

This supplement presents additional information that may bear on issues presented in Memorandum 2014-57 and its First Supplement. Included in that information is an enrolled bill report from the Department of Finance, attached to this supplement as an Exhibit.²

The Commission has also received further comment on the draft recommendation from Sonke Mastrup, the Executive Director of the Fish and Game Commission. That comment, in the form of a response to a staff email, is also attached as an Exhibit.³

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

REVISION OF SECTION 2014

Section 2014 authorizes the state to sue persons or local agencies that negligently or unlawfully take or destroy protected animals. The Commission has been concerned with how to best revise subdivision (d) of that section, which lists three exemptions from that civil liability:

This section does not apply to persons or local agencies engaged in agricultural pest control, to the destruction of fish in irrigation

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. Exhibit, p. 1.

3. Exhibit, p. 2.

canals or works or irrigation drainages, or to the destruction of birds or mammals killed while damaging crops as provided by law.

The key issue is whether the phrase “as provided by law” that appears following the last of the three exceptions is meant to apply only to the last exception, or to all three of the listed exceptions.

At the last Commission meeting, the Commission directed the staff to prepare a modified revision of Section 2014(d) that would apply the phrase to all three exceptions. The staff presented that modified revision in Memorandum 2014-57.⁴

However, based on what the staff has since learned, there is a strong possibility that such a revision would substantively change existing law. Both legislative history as well as practitioner experience suggest that Section 2014(d) was intended to be read just as it is punctuated, with the phrase “as provided by law” applicable only to the last exception.

Legislative History

The predecessor to Section 2014, Section 21.4, was enacted in 1935.⁵ It provided for the same civil liability as does Section 2014, and contained a paragraph listing the same exceptions as Section 2014(d), punctuated in the same manner.

The California State Archives has no legislative history relating to the 1935 enactment of Section 21.4. However, there is archived material relating to a 1977 amendment of Section 2014 that made the provision applicable to local agencies.⁶

An enrolled bill report from the Department of Finance described the first two of the provision’s exceptions as follows:

This bill exempts agricultural pest control operations and excludes irrigation canals or drainages.⁷

The failure of the report to mention the “as provided by law” clause in conjunction with these exceptions suggests that the first two exceptions listed in Section 2014(d) were understood to be absolute. In other words, those two exceptions were *not* seen as being conditioned on the “lawfulness” of the exempted activity (or the lawfulness of the underlying take or destruction of animals).

4. Memorandum 2014-57, pp. 8-9.

5. 1935 Cal. Stat. ch. 455.

6. 1977 Cal. Stat. ch. 767.

7. Exhibit, p.1.

Although an executive branch agency's enrolled bill report is not evidence of the Legislature's intent, it is evidence of the Governor's understanding of Section 2014(d), at a time when it was being reviewed for possible amendment.

Informal Practitioner Input

The staff spoke informally with three representatives from the Department of Fish and Wildlife (hereafter, the "Department"), three attorneys who have represented irrigation districts for more than 20 years, and a representative of the California Agricultural Aircraft Association (CAAA), whose members provide agricultural pest control services.

The three representatives from the Department advised that Section 2014 has rarely been used by the Department to seek civil damages, and therefore no representative had any personal knowledge of any instance in which the scope of the exceptions in subdivision (d) had been litigated. However, the consensus was that the first two exceptions in Section 2014(d) were probably intended as blanket exemptions, with the phrase "as provided by law" applying only to the last exception.

The attorneys representing irrigation districts, including the attorney of record for the irrigation district in *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*,⁸ discussed in the First Supplement to Memorandum 2014-57,⁹ all believe that the irrigation exception was intended to provide blanket immunity from civil damages. None of the attorneys had ever been involved in or had heard of the Department suing an irrigation district under Section 2014 for any type of animal destruction.

Finally, the CAAA representative offered that he had checked with some members of the organization regarding the scope of the agricultural pest control exception, and none had heard of the state suing a pesticide applicator for the accidental or unintentional killing of wildlife.

Representatives from all the groups also pointed out that blanket immunity from liability under either of the first two exceptions in Section 2014(d) did not preclude civil or even criminal liability under *other* legal authority. Depending on the conduct involved, other code sections or regulations might authorize such liability.

8. 8 Cal. App. 4th 1554, 11 Cal. Rptr. 2d 222 (1992).

9. See First Supplement to Memorandum 2014-57, p. 5.

All of the practitioners contacted, including those working with the Department, construed the phrase “as provided by law” in Section 2014(d) as applying only to the last of the three listed exceptions in the subdivision.

Recommendation

Although the information above is not conclusive, it reinforces the staff’s concern that revising Section 2014(d) to make the “as provided by law” clause applicable to all three of the listed exceptions could result in a significant substantive change in the law. The staff’s legislative history research and informal inquiries with practitioners did not produce any information that would allay that concern.

Based on this information, the staff recommends, consistent with the recommendation made in the First Supplement to Memorandum 2014-57, that Section 2014 be removed from the draft recommendation. The issue discussed above could then be revisited as part of the broader recodification process, with an invitation for interested members of the public to provide further information that might bear on the matter.

CROSS-REFERENCES IN SECTION 7707

Section 7707 provides that a reduction plant¹⁰ that uses fish in violation of specified sections of the Fish and Game Code may be deemed a nuisance and abated. The section was enacted in 1957,¹¹ and has not been amended since.

Several of the sections referenced in Section 7707 have since been repealed. In addition, 16 years after the repeal of one of those sections — Section 8154 — another section with that same number was added to the Fish and Game Code.

The Commission needs to decide whether and how to revise the references to the repealed sections.

Cross-Referenced Provisions

The cross-references in Section 7707 fall into three categories:

10. A plant that reduces or converts fish into fish meal, oil, or other fish byproducts. Section 7700(a).

11. 1957 Cal. Stat. ch. 456. Section 7707 recodified former Section 1076, which was enacted in 1933. See 1933 Cal. Stat. ch. 73.

- Sections 7700 to 7708 regulate the operation of reduction plants generally. These provisions have not been repealed.
- Sections 8075 to 8080 restrict the reduction of whole fish. These provisions have not been repealed.
- Sections 8151 to 8157, *all of which had been repealed by 1973*,¹² regulated the use of sardines in reduction plants.

In 1957, Sections 8151 to 8157 read as follows:

8151. Sardines for use in a reduction plant, or by a packer, may be taken only in accordance with this article, and at the following times in the following places:

- (a) In District 4,
- (b) Elsewhere in the State,

8154. Any person engaged in canning sardines may take and use in a reduction plant 32½ percent of the amount of sardines actually received at his canning plant during each calendar month.

8155. In determining the percentage of sardines that may be used for reduction purposes by a cannery, it shall be deemed that a ton of sardines suitable in size and condition for canning will produce 960 one-pound oval cans of sardines, or the equivalent if other size cans are used.

8156. A person engaged in preserving sardines by the common methods of drying, salting, smoking, or pickling may use in a reduction plant or by a reduction process such sardines, or fish delivered mixed with sardines, as are unfit for drying, salting, smoking, or pickling, which are not intentionally taken into the plant in a condition unfit for processing for human consumption.

8157. Fish which are mixed with sardines when delivered to the packer are the equivalent of sardines and shall be included within the percentage of the total amount of sardines received by the packer during the calendar month.¹³

The staff has not found any subsequent enactments that address the substance of those repealed provisions. It appears that regulating the use of sardines in reduction plants is no longer a legislative concern.¹⁴ **The cross-references to those repealed provisions should be deleted as obsolete.**

12. See 1969 Cal. Stat. ch. 1384 (repealing Section 8151, 8157); 1973 Cal. Stat. ch. 638 (repealing Section 8154, 8155, and 8156).

13. 1957 Cal. Stat. ch. 456. Although Section 7707 when enacted also cross-referenced Section 8153, this appears to have been a drafting error, as the 1957 Fish and Game Code did not contain a Section 8153.

14. Related regulations have also been repealed. See 14 Cal. Code Regs. §§ 141, 156.

That still leaves one issue unresolved – what should be done with the cross-reference to the *new* version of Section 8154, which was added in 1989?¹⁵ That section reads as follows:

No person shall receive, possess, or sell sardines for any purpose except for that purpose specified on the fish receipt completed at the time of landing of those sardines pursuant to Section 8043.¹⁶

There is a very strong argument that the Legislature did not intend to cross-reference this provision in Section 7707, and that the cross-reference in Section 7707 to Section 8154¹⁷ should therefore also be deleted. When the Legislature repealed the sardine-related provisions in the 1970s, it should have amended Section 7707 to delete the cross-references to the deleted provisions. The failure to do so was clearly inadvertent. It is improbable that the enactment of a new Section 8154, which happened to fall within the scope of the obsolete cross-references, was intended to “revive” an otherwise obsolete cross-reference and give it new meaning.

The only reason to entertain that possibility is that this new Section 8154 also relates to the use of sardines, and includes a prohibition that theoretically could be grounds for sanctioning a reduction plant that uses sardines. In other words, new Section 8154 is not obviously incompatible with the purpose of the cross-reference in Section 7707.

However, the staff has reviewed the legislative history of the 1989 enactment of Section 8154, and found no discussion of reduction plants. Instead, it appears that the bill adding Section 8154 was focused on a completely different objective — restricting the take of sardines for use as dead bait.¹⁷

The staff also spoke informally with Department staff to ask whether Section 8154 is understood to have any connection to the regulation of reduction plants. Although the Department personnel were unable to offer any opinion on that specific issue, they did advise that both the California sardine industry and the use of reduction plants in California have decreased dramatically since 1957.¹⁸

15. 1989 Cal. Stat. ch. 858.

16. A “landing receipt” is a Department form that must be filled out by either a commercial fisherman delivering fish, or a person licensed to receive a delivery of fish, specifying various information about the delivered fish, which in the case of sardines includes the intended use of the delivered fish.

17. See 1989 Cal. Stat. ch. 858.

18. See also <<http://www1.american.edu/ted/sardine.HTM>>, <<https://swfsc.noaa.gov/publications/CR/1992/92104.PDF>>.

No one could recall an instance in which Section 7707 had been relied upon by the Department for any purpose, and the consensus appeared to be that the reduction of sardines in “reduction plants” rarely if ever occurs any more.

Recommendation

Based on the information above, the staff recommends that **Section 7707 be revised to repeal all of the cross-references to repealed provisions**, thus:

Fish & Game Code § 7707 (amended). Reduction plant as nuisance

SEC. ____ . Section 7707 of the Fish and Game Code is amended to read:

7707. (a) Any reduction plant in which any fish ~~or any part thereof~~ is used in violation of the provisions of Sections 7700 to 7706, inclusive, 7708, ~~8151, 8153 to 8157, inclusive,~~ and 8075 to 8080, inclusive, of this code, or in violation of any regulation of the commission, is a nuisance.

(b) Whenever the existence of ~~such a~~ nuisance under subdivision (a) is shown to the satisfaction of the superior court of the county in which the reduction plant is situated, by complaint filed in the name of the people of the State of California, the court may issue a temporary injunction to abate and prevent the continuance or recurrence of ~~such the~~ nuisance. If the existence of a nuisance is established in ~~such that~~ action, an order of abatement shall be entered as part of the judgment in the case, ~~which order shall direct the closing~~ directing that, for 12 months, of the building or place where such the nuisance was maintained shall be closed, and, ~~during such time, the building or place shall be and remain placed~~ in the custody of the court.

Comment. Section 7707 is amended to delete a superfluous reference to animal parts. See Section 80 (reference to animal generally includes part of animal).

The section is also amended to delete repealed cross-references, and to make other nonsubstantive stylistic changes.

RELOCATION OF DEFINITION OF “WILDLIFE”

Memorandum 2014-57 discusses a proposal to relocate the existing statutory definition of “wildlife,” which by its terms applies to the entire Fish and Game Code, so that it would be located near the front of the code in a chapter with most other code-wide definitions.¹⁹ From an organizational standpoint that

19. See Memorandum 2014-57, pp. 15-16.

relocation would make sense, as the definition would then appear where readers would expect to find it.

However, the relocation would also have an arguable substantive effect. Based on its new placement, the provision would be governed by Section 2.²⁰ Under that section, the definition of “wildlife” would, as a default rule, also apply to all regulations adopted under the code. The staff was concerned that this could produce substantive changes in the meaning of regulations that use the term “wildlife.”

The Department has no objection to the relocation of the definition.²¹

The Fish and Game Commission had previously indicated some possible reservation.²² However, Mr. Sonke Mastrup, the executive director of the Fish and Game Commission, has since indicated the Fish and Game Commission concurs with the proposed relocation.²³

The staff therefore recommends that **the following revisions (shown only in relevant part) be added to the draft recommendation:**

Fish & Game Code § 89.5 (added). “Wildlife”

SEC. ____. Section 89.5 is added to Chapter 1 of Division 0.5 of the Fish and Game Code to read:

89.5. “Wildlife” means and includes all wild animals, birds, plants, fish, amphibians, reptiles, and related ecological communities, including the habitat upon which the wildlife depends for its continued viability.

Comment. Section 89.5 continues a former portion of Section 711.2(a) that defined the term “wildlife.”

See also Section 2 (definitions in Chapter 1 govern the construction of all code provisions and all regulations adopted under the code, unless provision or context otherwise requires).

Fish & Game Code § 711.2 (amended). Definitions

SEC. ____. Section 711.2 of the Fish and Game Code is amended to read:

711.2. (a) For purposes of this code, unless the context otherwise requires, ~~“wildlife” means and includes all wild animals, birds, plants, fish, amphibians, reptiles, and related ecological communities, including the habitat upon which the wildlife~~

20. Section 2 provides that “Unless the provisions or the context otherwise requires, the definitions in this chapter govern the construction of this code and all regulations adopted under this code.”

21. See Exhibit to Memorandum 2014-57, p. 4.

22. Memorandum 2014-57, pp. 15-16.

23. Exhibit, p. 2.

~~depends for its continued viability and~~ “project” has the same meaning as defined in Section 21065 of the Public Resources Code.

(b) For purposes of this article, “person” includes any individual, firm, association, organization, partnership, business, trust, corporation, limited liability company, company, district, city, county, city and county, town, the state, and any of the agencies of those entities.

Comment. Subdivision (a) of Section 711.2 is amended to relocate the part of the subdivision defining the term “wildlife” to Section 89.5.

Fish & Game Code § 1348.3 (amended). Condemnation

SEC. ____. Section 1348.3 of the Fish and Game Code is amended to read:

1348.3. (a) No governmental entity may condemn any wildlife conservation easement acquired by a state agency, except as provided in subdivision (b). As used in this section, the following terms have the following meanings:

....
(2) “Wildlife” has the same meaning as set forth in Section ~~711.2~~
89.5.

....
Comment. Paragraph (2) of subdivision (a) of Section 1348.3 is amended to revise a cross-reference.

Fish & Game Code § 1932 (amended). Program administration

SEC. ____. Section 1932 of the Fish and Game Code is amended to read:

1932. There is hereby established the Significant Natural Areas Program which shall be administered by the department. The department, in administering this program, shall do all of the following:

....
(b) Develop and maintain a spatial data system that identifies those areas in the state that are most essential for maintaining habitat connectivity, including wildlife corridors and habitat linkages. This data should include information essential for evaluating the needs of wildlife species, as defined in Section ~~711.2~~
89.5, that require habitat connectivity for their long-term conservation, including distribution and movement patterns.

....
Comment. Subdivision (b) of Section 1932 is amended to revise a cross-reference.

Fish & Game Code § 2805 (amended). Definitions

SEC. ____. Section 2805 of the Fish and Game Code is amended to read:

2805. The definitions in this section govern the construction of this chapter:

....

(l) "Wildlife" has the same meaning as defined in Section ~~711.2~~ 89.5.

....

Comment. Subdivision (l) of Section 2805 is amended to revise a cross-reference.

TECHNICAL CORRECTION

In Memorandum 2014-57, the staff inquired whether Section 716.3(g), which defines the term "court," should be revised as follows:

Fish & Game Code § 716.3 (amended). Definitions

716.3. For purposes of this chapter, the following terms have the following meanings:

....

(g) "Court" means a court of law, including magistrate's court ~~and the justice of the peace court.~~

....

The revision was suggested because, after trial court unification, there are no longer any justice of the peace courts in California.²⁴

However, Section 716.3 is part of an interstate compact, and the definition of the term "court" in subdivision (g) can therefore also refer to a "court" in another state that is a member of the compact. As it turns out, some member states have justice of the peace courts.²⁵ **With respect to those states, the reference to justice of the peace courts in Section 716.3 is not obsolete, and should be retained.**

To avoid any confusion on this point, the Commission Comment corresponding to Section 716.3 (which would still be amended for another purpose) could be modified as follows:

Comment. ~~Subdivision (g) of Section 716.3 is amended to reflect elimination of the justice court. Cal. Const. art. VI, § 1.~~

24. Cal Const, Art. VI § 1.

25. See http://en.wikipedia.org/wiki/Interstate_Wildlife_Violator_Compact#Member_States, <http://www.graham.az.gov/judicial/justice-of-the-peace-2/>, http://www.co.collin.tx.us/justices_peace/Pages/misdemeanors.aspx.

Subdivision (k) of Section 716.3 is amended to correct an obsolete reference to the Department of Fish and Game. See Section 37 (“department” means Department of Fish and Wildlife).

The reference to “justice of the peace courts” in subdivision (g) is retained, notwithstanding the elimination of such courts in California, based on the existence of such courts in other states that are members of the Interstate Violator Compact.

Does the Commission wish to make this modification?

Respectfully submitted,

Steve Cohen
Staff Counsel

ENROLLED BILL REPORT

Form DF-44 (Rev. 5/75 4M)

AGENCY

DEPARTMENT OF FINANCE

AUTHOR

Behr

BILL NO.

SB 324

DATE LAST AMENDED

August 11, 1977

SUBJECT:

Authorizes a civil damage action against local agencies who negligently takes or destroys any bird, mammal, fish, reptile or amphibian protected by laws of this State unless civil penalties are assessed under the Porter Cologne Water Quality Control Act. Requires the State Water Resources Control Board to be notified of such a case under specified circumstances, and would permit the Board to join such an action.

HISTORY, SPONSORSHIP, AND RELATED BILLS

This bill is sponsored by the Department of Fish and Game.

ANALYSIS

A. Specific Findings

Under existing law, the State may recover damages from any person who wrongfully or negligently takes any protected bird, mammal, fish, reptile or amphibian.

This bill provides a similar cause of action against local agencies (i.e., any city, county, district, public authority) for damages incurred by their actions. If destruction was caused by a discharge of water pollutants, this bill requires notification of the State Water Resources Control Board. This bill prohibits recovery of such damages if civil penalties are assessed for the same reason under the Porter Cologne Water Quality Control Act.

This bill ~~excludes~~ agricultural pest control operations and excludes irrigation canals or drainages.

This bill would provide funds for the restocking or replenishing of species wrongfully or negligently destroyed. Apparently, the primary problem has been fish kills caused by unlawful waste discharges.

B. Fiscal Effect

This bill will not have any significant fiscal impact on the State. There may be some minor cost savings to the Department of Fish and Game in mitigating the effects of unlawful destruction of birds, mammals, fish, reptiles, and amphibians.

SUMMARY OF REASONS FOR SIGNATURE/VERB

This bill would provide a mechanism whereby the State may recover damages for the unlawful destruction and taking of fish and wildlife. The civil recovery can then be used to replenish or restock the affected species.

RECOMMENDATION

Sign the bill.

ANALYST

DTM

DEPARTMENT REPRESENTATIVE

DATE

DIRECTOR

DATE

EMAIL FROM STEVE COHEN (DECEMBER 27, 2014)

Mr. Mastrup,

Happy holidays.

I am wondering if you've had a chance to think about a comment from the Fish and Game Commission on a relocation of the code's definition of "wildlife" (Section 711.2(a)) so that the definition would apply not only code-wide, but also to all regulations adopted pursuant to the Code.

Please keep in mind that even if that relocation occurred, the definitional provision would still have a caveat providing that the code definition would *not* apply (to either another code provision or a reg), "if a provision or context otherwise required." (See Section 2 of the code.)

Also, it does not appear that the regs presently contain *any* "regulation-wide" definition of the term "wildlife." Does the Commission ever interpret that term, when it appears in a regulation, to mean anything other the definition presently in Section 711.2(a)?

....

Thanks very much, and again, happy holidays.

**EMAIL FROM SONKE MASTRUP,
EXECUTIVE DIRECTOR, FISH AND GAME COMMISSION
(JANUARY 5, 2015)**

I think we are good with the recommendation.
