

Memorandum 2015-12

Fish and Game Law: Second Cumulative Draft

BACKGROUND

In this study, the Commission¹ is preparing a recodification of the entire Fish and Game Code, to improve its organization and make minor technical and substantive improvements throughout.

Because of the magnitude of the task, the Commission is preparing the recodification in a series of steps. The first step has been to present initial staff drafts of discrete parts of the code.

After public comment on any issue raised in an initial draft is received, the staff will present that comment to the Commission in conjunction with a second review of the code section at issue.²

After an individual staff draft is presented to the Commission, it is also added to a cumulative draft maintained by the staff, which is continuously updated to reflect all subsequent decisions made by the Commission. In the process of compiling this cumulative draft, the staff may note and bring to the Commission's attention additional issues relating to the recodification that require Commission decision.³

The staff's original intention had been to periodically present this cumulative draft to the Commission and public, to show how the whole effort was coming together. This would also present an opportunity for making any adjustments that might be needed to address issues that came to light when the piecemeal drafts were combined into a whole.

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, e.g., Memorandum 2013-49, Minutes (Dec. 2013), p. 13.

3. See, e.g., Memorandum 2014-16, First Supplement to Memorandum 2014-48.

The first cumulative draft, containing approximately 300 existing code sections, was presented to the Commission in December, 2013.⁴ Since then, the staff has added approximately 450 more code sections to the cumulative draft.

Considering the increasing size of the document, the staff thought it prudent to raise some issues relating to the draft with the Commission, before printing and distributing a second cumulative draft.

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

VALUE OF PRESENTING CUMULATIVE DRAFT

The first issue is whether the Commission wants to continue periodically receiving copies of the evolving and growing cumulative draft.⁵ The staff will of course continue to *compile* the cumulative draft. The question is whether the Commission finds it worthwhile to periodically receive and review updated versions of the document, and if so, how frequently.

The alternative would be to wait until we have a complete draft of the recodification, and present that document to the Commission as a draft tentative recommendation (or a series of tentative recommendations). Based solely on extrapolating from the number of sections and pages in the cumulative draft at this time, a draft tentative recommendation proposing a recodification of the entire existing code will likely run somewhere in the neighborhood of 1,500 pages.

What is the Commission’s preference with regard to receiving periodic cumulative drafts?

CLARIFICATION OF PROGRAM AUTHORITY

The genesis of this study was in part a letter to the Commission jointly signed by the Chair of the Senate Natural Resources and Water Committee (Senator Fran Pavley) and the Chair of the Assembly Water, Parks, and Wildlife Committee (Assembly Member Jared Huffman), urging the Commission to conduct a comprehensive review of the Fish and Game Code.⁶

4. See Memorandum 2013-58.

5. The cumulative draft is presently approximately 400 pages long.

6. Memorandum 2012-5, p. 22.

The letter states in part (with emphasis added):

As part of the Law Revision Commission's review, it would also be particularly helpful if the Commission could provide *a list of all of the mandates and responsibilities of the Department and the Fish and Game Commission*, identify areas where particular mandates and responsibilities may overlap with the mandates and responsibilities of other agencies, and identify programs that lack identified funding sources. In addition, it would be helpful if the Law Revision Commission could identify *areas where there may be a lack of clarity regarding the roles of the Department and the Fish and Game Commission, with recommendations on options as to how such lack of clarity might be addressed.*⁷

Similarly, the resolution assigning this study to the Commission authorized the Commission to study:

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.⁸

The staff sees two ways in which the existing code might create uncertainty as to the program authority of the Fish and Game Commission and the Department of Fish and Wildlife (hereafter, "Department"). They are discussed below.

Statutory Ambiguity

A provision in the existing code that creates a duty or new authority could be silent or otherwise ambiguous as to the entity that is being charged with the new duty or granted the new authority. When the staff proposes recodification of any such provision, we will do our best to determine which entity is properly the subject of the provision, using standard methods of legislative interpretation and extrapolating from general patterns within the code.⁹ However, we will then flag the issue in a Staff Note, for the Commission's attention and to invite public comment.

7. Memorandum 2012-5, Exhibit pp. 32-33.

8. 2014 Cal. Stat. res. ch. 63 (emphasis added).

9. E.g., Section 702 ("This code shall be administered and enforced through regulations adopted only by the department, except as otherwise specifically provided by this code or where this code requires the commission to adopt regulations.").

Organizational Confusion

Most provisions of the new code will be organized according to the subject matter of the provision, rather than by reference to which of the two entities is charged with administering the provision. The one exception is “Division 2. Administration,” which sets out the general administrative provisions applicable to the two entities, in two distinct statutory parts.¹⁰

This means that a reader will not be able to find compiled all in one location provisions specifying the duties and authority of the Fish and Game Commission, or the Department. Provisions creating those duties and authority will be sprinkled throughout the code, embedded with other provisions to which they relate.

That might make it harder for a researcher to comprehensively identify “program authority” for either entity across the entire code. One way to address that would be to add one or more “signposting” provisions to Division 2, pointing to other provisions throughout the code assigning duties or authority to a particular entity.

For example, because most of the provisions of the existing code assign responsibility or authority to the Department, a provision along the following lines could be added to Part 1 (“Fish and Game Commission”) of Division 2, containing a nonexclusive catalog of the provisions assigning authority to the Fish and Game Commission:

§ __. Other provisions relating to Commission authority

__. (a) This chapter includes provisions relating to the authority of the Commission, but is not intended to contain all provisions relating to that authority. Other provisions in this code that may relate to that authority include, but are not limited to, the following provisions:

- (1) Sections 302 and 303, relating to black bears.
- (2) Section 306, relating to special seasons area closed due to extreme fire hazard.
- (3) Section 307, relating to daily bag limits and possession limits.
- (4) Section 308, relating to Fish and Game District 22.
- (5) Section 308.5, relating to animals in arid regions.
- (6) Section 309 relating to hearing procedures.
- (7) Section 310, relating to salmon spawning areas.
- (8) Section 312, relating to organized survival training course.

10. See proposed “Part 1. Fish and Game Commission” and “Part 2. Department of Fish and Wildlife.”

- (9) Section 313, relating to the tuna.
- (10) Sections 314 and 315, relating to take under specified circumstances.
- (11) Section 315.3, relating to inland waters.
- (12) Section 316, relating to Pacific halibut.
- (13) Section 316.5, relating to salmon.
- (14) Section 317, relating to hunting permits.
- (15) Sections 325-330, relating to hunting in cases of surplus, damaging of property, or overgrazing.
- (16) Section 331, relating to antelope.
- (17) Section 332, relating to elk.
- (18) Section 340, relating to mountain lions as game mammals.
- (19) Sections 355 and 356, relating to migratory game birds.
- (20) Sections 395-398, relating to falconry.
- (21) Section 442, relating to use of department-managed lands.
- (22) Section 500, relating to adopting guidelines for the imposition of civil penalties.
- (23) Section 1415, relating to public uses of department-managed lands.
- [(24)]
- (b) The listing of a provision in subdivision (a) has no effect on the meaning of the listed provision.

Comment. Section ___ is new.

Other codes have made use of statutory signposting. For example, the California Public Records Act contains several very long sections that simply list exemptions from that Act.¹¹

As indicated, the benefit of signposting is that it would provide a single list of the provisions creating duties or authority in one or the other of the affected agencies. This might be helpful to a researcher who needs to be able to quickly compile such information.

But there are also disadvantages:

- *The signposting provision could arguably change the meaning of a listed provision.* The sample provision set out above was drafted to very generally describe each referenced provision, and was expressly caveated to minimize any problematic interpretive implications.¹² Despite that, an attorney, judge, or member of the public might draw an unintended inference from the fact that some provisions have been included while others have not, or might argue that wording used to refer to a provision creates an unintended inference.

11. See Gov't Code § 6275 *et seq.*

12. See the introductory language of proposed subdivision (a), and proposed subdivision (b).

- *The catalog in the provision is likely to become inaccurate over time.* Considering the huge number of legislative changes that are made every year, often under very tight timing constraints, it seems likely that some changes to agency authority will eventually be made without a corresponding change being made to the signposting provision. This will cause the utility of the list as a comprehensive source of information to degrade over time.
- *Creating and maintaining the catalog in the provision would use resources that might be better used elsewhere.* This would be true for the Commission in this study, and for the Legislative Counsel going forward. It isn't obvious that the benefit provided by this type of signposting would justify the amount of work that would be involved in those tasks.

On balance, the staff is not convinced of the overall utility of creating a statutory list of agency duties and authority. Another possibility would be to include an informal list as an appendix to the Commission's recommendation. Such a list would not clutter up the codes, or impose any duty of statutory maintenance.

On the other hand, since no one would be updating that list, it would become stale fairly quickly. In addition, without any reference to the list in the proposed law, it might remain unknown to many researchers.

Does the Commission wish to pursue either of the described options for listing agency authority and duties?

Other Possible Clarification of Program Authority

Does the Commission or any member of the public see any other steps that could be taken by the Commission to clarify program authority?

NEW ORGANIZATION

At its last meeting, the Commission decided that provisions of the proposed law that apply to specific types of animals (e.g., bears, deer, etc.) or to broader classes of animals (e.g., mammals, fur-bearing mammals, etc.) should generally be located together in the proposed law under headings identifying those types or classes of animals, rather than under headings corresponding to the *activities* described in the provisions (e.g., hunting, sale, propagation, conservation, etc.).¹³

13. See First Supplement to Memorandum 2014-48, pp. 1-3; Minutes (Oct. 2014), p. 5.

Consistent with the Commission's decision, the cumulative draft has been reorganized along the following lines:

- Division 1. General Provisions
- Division 2. Administration
- Division 3. Law Enforcement
- Division 4. Inter-Jurisdictional Compacts
- Division 5. Hunting, Trapping, and Fishing Generally
 - Part 1. General Provisions
 - Part 2. Hunting
 - Part 3. Trapping
 - Part 4. Fishing
- Division 6. Types of Animals
 - Part 1. Birds
 - Title 1. General Provisions
 - Title 2. Classes of Birds
 - Chapter 1. Migratory Birds
 - Chapter 2. Game Birds
 - Chapter 3. Nongame Birds
 - Chapter 4. Birds of Prey
 - Chapter 5. Fully Protected Birds
 - Title 3. Specific Types of Birds
 - Chapter 1. Birds of Paradise
 - Chapter 2. Ducks and Geese
 - Chapter 3. Egret
 - Chapter 4. Goura
 - Chapter 5. Numidi
 - Chapter 6. Osprey
 - Chapter 7. Pheasants
 - Chapter 8. Racing Pigeons
 - Chapter 9. Sparrows and Starlings
 - Chapter 10. Wild Turkeys
 - Part 2. Mammals
 - Title 1. General Provisions
 - Title 2. Classes of Mammals
 - Chapter 1. Game Mammals
 - Chapter 2. Fur-Bearing Mammals
 - Chapter 3. Nongame Mammals
 - Chapter 4. Fully Protected Mammals
 - Chapter 5. Marine Mammals
 - Title 3. Specific Types of Mammals
 - Chapter 1. Antelope
 - Chapter 2. Bears
 - Chapter 3. Beavers
 - Chapter 4. Bighorn Sheep

Chapter 5. Bobcats
Chapter 6. Burros
Chapter 7. Deer
Chapter 8. Elk
Chapter 9. Mountain Lions
Chapter 10. Muskrats
Chapter 11. Rabbits and Hares
Chapter 12. Red Foxes
Chapter 13. Squirrels
Chapter 14. Wild Pigs
Chapter 15. Wild Rodents

Part 3. Fish

Title 1. General Provisions
Title 2. Classes of Fish
Title 3. Specific Types of Fish

Part 4. Reptiles

Title 1. General Provisions
Title 2. Classes of Reptiles
Title 3. Specific Types of Reptiles

Part 5. Amphibians

Title 1. General Provisions
Title 2. Classes of Amphibians
Title 3. Specific Types of Amphibians¹⁴

In this organizational structure, any provision of the existing code that applies to a specific animal or class of animals would be placed somewhere in Division 6 of the proposed law, absent a reason to do otherwise.

Is that approach acceptable?

PROVISIONS THAT GOVERN MULTIPLE TYPES OF ANIMALS

One small complication presented by this organizational structure relates to a handful of provisions that apply to *multiple* types of animals, or classes of animals. For example, existing Section 3006 provides (with emphasis added in bold):

3006. Except as authorized under a domesticated game breeder's license, any **deer, elk, or bear** kept in captivity may be killed only with the approval of the department, and under such regulations as the commission may prescribe. The carcass, or any

14. As the provisions that would be placed in Part 3 (Fish), Part 4 (Reptiles), and Part 5 (Amphibians) have not yet been recodified, the titles in these parts may be either expanded (as is virtually certain with regard to fish) or contracted (as is likely with regard to reptiles or amphibians).

part thereof, of any such mammal may not be sold, and shall be disposed of in such manner as the department may direct.

The staff sees two alternative ways that such provisions could be added to the organization described above. Both methods have advantages and disadvantages.

Duplication

One approach would be to add copies of these provisions in appropriate locations, based on the animal types affected. For example, copies of Section 3006 could be added to the chapters of the proposed law that would contain provisions relating to deer, elk, and bear, with each copy tailored to omit material relating to the other animal types.

This would allow a researcher who is only interested in the code's treatment of a single animal type to find all of the relevant provisions in one place.

The only apparent disadvantage of this approach is that it would fragment provisions that currently may be intentionally linked together to create a common regulatory scheme. Under existing law, if the Legislature were to improve that scheme by adjusting a rule, the adjustment would automatically apply uniformly to all animal types referenced in the rule. If in the proposed law these provisions are segmented throughout the code, that same reform would require locating all of the copied provisions, and then duplicating the reform in each of the copies.

On the other hand, segmentation might make it easier to make changes that are suitable for just one animal type, without affecting the other animal types governed by a common provision.

Signposting

An alternative approach would be to leave these multi-animal provisions intact, locate them based on the effect of the provision, and then add signposting provisions to the animal-specific parts of the code.

For example, Section 3006 (set forth above) could be continued in a location relating to its subject matter, and a signposting provision could be added to each of the parts of the law that contain the deer, elk, and bear provisions (the animals referenced in Section 3006) along the following lines:

____. This chapter includes provisions relating to [deer], but does not necessarily include all provisions relating to [deer]. Other [deer]-related provisions include, but are not limited to, the following provisions:

(a) Section 3006.

[(b)]

However, even if the Commission decides to use signposting as a general approach rather than duplication, there may be circumstances where some provisions should be duplicated. For example, the Commission previously decided to locate penalty provisions near the violation provisions to which they relate.¹⁵ In at least one instance, that decision will require duplication of a penalty provision that applies to several different animals as well as to several different violations.¹⁶

The staff is inclined to use the duplication approach described above, rather than the signposting approach. Does the Commission have a preference on this issue?

FORMAT OF COMMISSION COMMENTS

Commission Comments are used to explain the effect of a Commission-recommended revision of a specific code section, or the derivation of a new section. The staff strives to be uniform in the terminology used in Comments, consistent with prior practice.

Historically, when a provision would continue an existing code section without substantively changing the former section's meaning (even though altering its text), the Comment to the new section has explained that the former section has been "continued without substantive change" (where there are very minor technical changes to language) or "restated without substantive change" (where the nonsubstantive changes to language are more significant).

When the Commission recodified the Davis-Stirling Common Interest Development Act,¹⁷ it adopted a much more meticulous approach to drafting Comments. The Comments described nearly every textual change made to the former provision, no matter how minor or technical. This was done to reassure stakeholders who were opposed to the recodification in part because they

15. Minutes (June 2013), p. 16.

16. See existing Section 12013.3.

17. *Statutory Clarification and Simplification of CID Law*, 40 Cal. L. Revision Comm'n Reports 235 (2010).

thought undisclosed minor or technical language changes might nevertheless result in a substantive change to a provision's meaning.

In this study, we have used a similarly detailed approach in drafting Comments, unsure of whether stakeholders might have similar concerns. For example, the Comment to proposed Section 675 reads as follows:

Comment. Section 675 continues former Section 219 without change, except as indicated below:

The following nonsubstantive changes are made:

- The subdivisions and paragraphs are renumbered.
- In subdivision (a), the words "or both" are added.
- In subdivision (a), a reference to "this article" is revised to refer to "Article 1 (commencing with Section 550)."
- In subdivision (a), the word "which" is changed to "that."
- In subdivision (b), the word "which" is changed to "that."

However, the amount of time required to include that level of detail in the Comments has become significant in a study of this size. The staff would like to raise the possibility of reverting to our historical Comment practice, under which the Comment to Section 675 would simply read:

Comment. Section 675 continues former Section 219 without substantive change.

Making this change would allow us to make swifter progress through the code.

What is the Commission's preference?

Respectfully submitted,

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