Study R-100 August 30, 2016

First Supplement to Memorandum 2016-47

Fish and Game Law: Scope of Study

In 2012, the Legislature approved a resolution authorizing the Commission[1] to review and recommend legislation to clean up the Fish and Game Code:

> [The] Legislature approves for study by the California Law Revision Commission the new topic listed below:
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> 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[.][2]

Acting on that authority, the Commission has been steadily working its way through the Fish and Game Code and developing a recodification draft that would make the kinds of improvements requested by the Legislature.

Recently, the staff was contacted informally by senior staff in both the legislative and executive branches of state government. Those staff expressed concern that the Commission's examination of the prima facie evidence ("PFE") issue discussed in Memorandum 2016-47 might be improper, because it is beyond the scope of authority conferred by the resolution language set out above.

The Commission needs to give some further thought to which kinds of issues are within the scope of its authority in this study. This is necessary for the immediate purpose of deciding how to address the Fish and Game Code's PFE provisions and to provide the staff with guidance on how to handle similar

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. 2012 Cal. Stat. res. ch. 108.

matters that might come up in the remainder of the study. This memorandum is intended to provide a platform for discussion of those matters.

RESOLUTION LANGUAGE

As indicated above, the Legislature authorized the Commission to recommend revision of the Fish and Game Code to make a number of specific types of improvements. These include eliminating obsolete provisions and resolving inconsistencies. A strong argument can be made that identifying language that may be at odds with constitutional rights or controlling federal law, and recommending corrective revisions, would fall within the scope of that direction.

However, the authority granted by the resolution is subject to an overarching limitation. The Commission may not recommend any revision that would make a significant substantive change to the effect of the law. This seems to be the crux of the objection raised by the commenters. They appear to be arguing that any change to the PFE provisions would be both significant and substantive in effect.

The inclusion of the word "significant" in the limiting language was probably intended to create some space for the Commission to recommend *minor* substantive improvements. When the Legislature has wanted a Commission study to be *entirely* nonsubstantive, it has said so.[3] And, in fact, the Commission has already recommended minor substantive improvements in this study, and there have been no objections that they were outside the authority conferred by the Legislature.[4] The question of whether a proposed change is "significant" would seem to be a judgment call, without any obvious bright-line test.

The question of whether a proposed revision would be *substantive* is a little more complicated. The staff had been operating on an assumption that curing a clear constitutional infirmity would not be a "substantive" change because it would not have any effect on outcomes under the law. The Constitution is self-executing. To the extent that it trumps state law, that law is inoperative. Pruning such dead wood from the codes can be seen as merely a technical clean-up, rather than substantive reform.

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3. For example, when directing the Commission to recodify the deadly weapon provisions in the Penal Code, the Legislature expressly directed that the Commission should "[neither] expand nor contract the scope of criminal liability under current provisions." 2006 Cal. res. ch. 128.

4. See, e.g., *Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 2)* (Oct. 2015) (rationalizing Fish and Game Commission rulemaking procedures).

However, that argument only makes sense if it is clear that the state law at issue is unconstitutional. If there is any significant doubt on that point, then revising the state law could have an unintended substantive effect. That is why the staff only asked for public comment on whether the PFE language is problematic, rather than recommending revisions to that language.

Nonetheless, there may be considerations that would warrant treating such questions as wholly beyond the scope of the Commission's authority in this study. That possibility is discussed below.

POSSIBLE CONSIDERATIONS

The staff sees four reasons why the Commission might find that a particular topic is beyond the scope of the Commission's study:

Uncertainty

In many cases, the Commission may not be certain that a provision is obsolete or is superseded by other controlling law. In this situation, any revision that the Commission might propose to address the possible obsolescence or inconsistency might be misplaced. Rather than curing an existing defect, the revision might make an unnecessary substantive change in the law.

The discussion of the Fish and Game Code PFE provisions, in Memorandum 2016-47, provides a concrete example of this. As explained in that memorandum, there are plausible arguments that can be made to conclude that the PFE language does not require any revision. Alternatively, if the PFE language should be revised, there are different (and partially incompatible) alternative ways in which it might be revised (depending on which interpretive theory the Commission finds most plausible). Given the degree of uncertainty, any revision that the Commission might recommend would bear some risk of making a significant substantive change in the law.

Justice Learned Hand famously observed that risk can be assessed by multiplying the likelihood of something occurring by the magnitude of harm if it does occur. This suggests that the risk discussed above will increase in severity in proportion to the magnitude of harm that could occur if the Commission makes the wrong decision. The staff has been informally told by commenters that an unnecessary restriction on the use of PFE language in the Fish and Game Code could have a significantly deleterious effect on the state's ability to enforce anti-

poaching laws. It is very rare for a game warden to directly observe the illegal killing of an animal. It is much more common to discover the crime as the poacher is returning from the field with the animal. If the state were required to prove that the poacher killed the animal, without the benefit of the PFE language, prosecution would often be extremely difficult. To the extent that is correct, it means that the risk of error on this point — that the Commission might unnecessarily make a significant substantive change in the law — argues in favor of a conservative posture.

In other words, when faced with uncertainty about whether a revision might effect a substantive change, the Commission should take into account the magnitude of the possible substantive change. The greater that magnitude, the greater the severity of the risk that the Commission will misjudge whether a revision falls within the scope of this study.

Political Question

Some questions are inherently political. That is to say, the best answer to the question cannot be determined solely by the application of logic and law. The best answer requires an exercise of policy judgment, by those who have been elected to represent the people.

When facing a question of that type, the Commission should perhaps adopt a more conservative approach to the question of whether the matter is within the authority that was conferred for this study. It would arguably be prudent to assume that the Legislature, in directing the Commission to prepare a mostly nonsubstantive cleanup of the Fish and Game Code, did not intend for the Commission to tackle political questions.

For example, earlier in this study, the staff came upon a body of statutory law that was enacted to conform to provisions of the California Constitution that had been added by initiative (restricting the use of gill and trammel nets).[5] Recognizing the fundamentally political nature of the legislative response to the initiative, the staff proposed that the Commission take a more conservative approach to those provisions than it had in the rest of the study. *The staff raised this possibility, even though it saw some possible tension between the statutory language and the governing provisions of the California Constitution.* As the staff explained:

> The subject matter involved was directly regulated by the People. Shortly thereafter, the Legislature and Governor decided

5. See generally Memorandum 2015-52.

> how to reconcile statutory law with the new citizen initiative. Those legislative decisions would have been made with a contemporaneous understanding of the complexities and policy implications of the new law. It also seems likely that all interested parties would have been monitoring the legislative implementation of the new law. The staff has no knowledge of any subsequent challenge to the constitutionality of the implementing legislation.
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> For those reasons, it might make sense to preserve the text and structure of all existing gill and trammel net provisions verbatim, except for technical revisions necessitated by the incorporation of the provisions into the proposed law. Arguably, the Commission is not in the best position to evaluate the subtleties of technical and policy decisions relating to that text and structure, many of which were made by others over 30 years ago. A hands-off approach may also be prudent in light of continuing concern and controversy about the use of gill nets off California's coasts. Tinkering with the language and organization of the gill and trammel net provisions might create concern that the Commission will somehow upset the existing policy balance.[6]

The Commission adopted a conservative approach on that matter.[7]

A similar argument for prudence could be made with respect to the PFE language. The earliest version of such language was enacted long ago and there is no concrete evidence that it has caused problems as applied. The commenters are suggesting that the PFE language is not causing problems and that it serves an important purpose that should not be disturbed. While there seems to be some scope for the PFE language to be construed and applied in an unconstitutional way, the decision posed — how to balance that risk against the concrete harm that would result from weakening the state's ability to protect wildlife resources from poachers — might be the kind of decision that requires a political judgment.

Pragmatism

The recodification of an entire code is a massive undertaking. It will require a major investment of the Commission's resources and the resources of those assisting the Commission by reviewing and commenting on its work. When the Commission has approved a final recommendation, and implementing legislation has been introduced, that burden will mostly shift to the Legislature

6. *Id.* at 4.
7. Minutes (Dec. 2015), pp. 5-6.

and Governor. Both will need to review a huge body of proposed legislation to determine whether it should be enacted, with or without amendments.

All aspects of such work would be much simpler to accomplish if the Commission were to adopt a relatively conservative posture in assessing what is within the scope of its authority in this study. For example, if the Commission had adopted a posture that would have deemed the PFE language issue to be outside the scope of this study, the Commission could have saved a great deal of its resources. And ultimately, if controversial substantive revisions are not included in the Commission's recommendation and implementing legislation, the Legislature and Governor will have a "clean" bill to consider, rather than one that is weighed down by a list of tricky substantive objections that need to be analyzed and resolved. With a bill of this magnitude, that could make the difference between enactment and nonenactment.

The staff is not suggesting that the Commission should shy away from every difficult question. However, it is reasonable to consider whether the Legislature *intended* for this massive, almost entirely technical recodification of the Fish and Game Code to be a vehicle for resolving such questions.

There is precedent for taking a pragmatic approach in a large recodification study. In addition to the Commission's cautious treatment of the gill and trammel net provisions, discussed above, the Commission also took a conservative approach in its successful recodification of the Davis-Stirling Common Interest Development Act. As explained by the staff:

> A proposed change should only be considered for inclusion in the proposed law if it meets all three of the following criteria:
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> (1) It is plainly beneficial.
> (2) It does not present a significant risk of unintended consequences (i.e., its effects seem straightforward and circumscribed).
> (3) It is not likely to be controversial.
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> Those criteria reflect the Commission's past practice in developing the proposed law. They are grounded in pragmatic concerns about the difficulty of achieving enactment of the proposed law. With a proposal of this type and size, the Legislature needs to receive a noncontroversial bill, so that it can focus its analytical resources on the primary purpose of the bill: to make the Davis-Stirling Act easier to use and understand.[8]

8. Memorandum 2009-53, pp. 45-46.

Those kinds of concerns are proportionally greater in this study, which is much larger in scope than the Davis-Stirling Act recodification.

Forest for the Trees

The staff sees one last general point that is worth making. In work of this type, there is a natural tendency to focus finely on the details of an issue. So, when faced with an objection that a particular issue is beyond the scope of the study, the natural response is to look closely for a legal and technical answer to the objection. Would a particular revision actually create a substantive change in the law? If so, how significant would it be?

But it might be helpful to take a step back and consider the bigger picture. When the Legislature drafted the resolution establishing the Commission's authority for this study, it is plain that they had in mind that the study would be mostly nonsubstantive. Notably, the resolution contains express language prohibiting significant substantive reforms. This suggests that the intention was for the study to be almost entirely a clean-up project, with no expectation that it would address major substantive issues.

GUIDANCE

With all of that in mind, the Commission first needs to decide whether the PFE issue should be set aside, as falling outside the intended scope of this study.

With that concrete issue resolved, the Commission should consider whether to adopt guidance on the scope of the study generally, to help the staff avoid this kind of controversy in the remainder of the study.

The staff does not have a specific proposal as to how such guidance might be framed, but believes that the following points should be considered as possible elements:

- How significant an effect would a proposed revision have on existing practices and outcomes?
- What degree of uncertainty exists as to whether a revision is actually required?
- Does the issue involve a question that would be best decided through the political process?
- How controversial would the proposed revision be?

- Technical arguments aside, is the proposed revision the kind of reform that the Legislature expected to be included in a mostly nonsubstantive cleanup project of this scale?
- If an issue falls outside the scope of the authority conferred in this study, should it be ignored by the staff? Should the staff acknowledge it but propose no change? Should the Commission's final report acknowledge it?

Respectfully submitted,

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