

## Second Supplement to Memorandum 2018-22

### **Fish and Game Law (Public Comment on Tentative Recommendation Part 1)**

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In this study, the Commission<sup>1</sup> is developing a proposed recodification of the Fish and Game Code.

In April 2017, the Commission released a tentative recommendation setting out “Part 1” of the proposed new Fish and Wildlife Code.

Letters from the Fish and Game Commission (“FGC”) and the Department of Fish and Wildlife (“DFW”), commenting on the tentative recommendation, were attached to Memorandum 2018-22.

That memorandum began the process of analyzing and discussing the comments. The First Supplement to Memorandum 2018-22 continued the process of analyzing the comments, but did not complete it. This supplement completes the staff’s review of the comments.

Most of the issues discussed in this supplement are fairly technical, and in most instances the staff’s recommendation is to take an approach that would accommodate the concerns expressed by DFW. For that reason, the staff proposes to take a consent approach to most of the issues discussed below. The staff will provide an opportunity for any Commissioner or member of the public to discuss each of these “consent items.” **If there is no discussion, the staff’s recommendation will be deemed approved.** Items that may warrant discussion will have the following symbol in their headings: “☞.” Those “discussion items” will be presented fully for the Commission’s decision.

Unless otherwise indicated, all statutory references in this memorandum are to the existing Fish and Game Code. All references to “proposed” code sections

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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](http://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.

are to the proposed Fish and Wildlife Code. References to the “Exhibit” are to the materials attached to Memorandum 2018-22.

## MISCELLANEOUS ISSUES

### Administrative Penalty

Proposed Section 3105 would continue Section 12014, which relates to administrative civil penalties.

The provision includes a list of sections that it governs, but adds “or any other provision of this code” to make clear that the list is nonexclusive: “After the expiration of the time period to appeal an administrative penalty imposed pursuant to Section 2301, 2302, 2582, or 2583, or any other provision of this code....”

A Note following the provision asks whether the partial list could be deleted, leaving only the catch-all language, thus: “After the expiration of the time period to appeal an administrative penalty imposed pursuant to ~~Section 2301, 2302, 2582, or 2583, or any other~~ a provision of this code....”

DFW does not object to that change, but suggests another possibility — supplement the partial list of sections so that it is complete.<sup>2</sup> **The staff recommends the first approach.** An attempt to create an exhaustive list would create a maintenance problem going forward. If any new provision were added to establish a deadline for appeal of an administrative civil penalty, the exhaustive list would need to be updated. That invites error. Simply making the list open-ended does not create the same potential problem.

DFW also points out that proposed Section 3105 is misplaced. It is included in a part of the proposed law that governs license-related penalties.<sup>3</sup> **The staff agrees that the section is misplaced and recommends that it be relocated to the part of the proposed law that collects general penalty provisions (i.e., move and renumber the provision as proposed Section 4430).**

### Accounting “System”

Proposed Section 3515 would continue Section 13201. The introduction to that provision contains an ambiguous cross-reference (emphasized in bold): “In

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2. See Exhibit comment 102.

3. *Id.*

establishing the appropriate programs or activities for **this system**, the department shall consider the following programs or activities....”

In response to a Note, DFW explains that the reference is to the accounting required by Section 13200 (proposed Section 3510).<sup>4</sup>

**Based on that information, the staff recommends that the introduction to proposed Section 3515 be revised as follows: “In establishing the appropriate programs or activities for this system the purposes of Section 3510, the department shall consider the following programs or activities....”**

Similarly, proposed Section 3525 (which would continue Section 13203) includes an ambiguous reference (emphasized in bold):

The basic principle of **this cost accounting system** shall be that the total cost of operation of the department shall be accounted for by accounting for the cost of each activity or program in which it is engaged.

In response to a Note asking for comment on the object of that reference, DFW refers back to its earlier response (presumably meaning that this provision also refers to Section 13200).<sup>5</sup>

**Based on that information, the staff recommends that proposed Section 3525 be revised as follows:**

The basic principle of this the cost accounting system required by Section 3510 shall be that the total cost of operation of the department shall be accounted for by accounting for the cost of each activity or program in which it is engaged.

### **Gifts, Grants, and Donations**

The proposed law includes an article heading of “Gifts, Grants, and Donations.” That article includes proposed Sections 3665 (commemorative licenses) and 3670 (wildlife officer stamp). Both involve the sale of purely commemorative items, solely as a fund-raising device.

DFW questions the inclusion of those provisions under the proposed heading, because they both involve the *sale* of items, rather than gifts or other donations.<sup>6</sup> The staff sees the distinction, but believes that in both cases, the purpose of the sale is to make a donation to the department’s operations.

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4. See Exhibit comment 109.

5. See Exhibit comment 110.

6. See Exhibit comments 111 & 112.

While article headings do not affect the meaning of the law,<sup>7</sup> perhaps the heading would be more useful if it were revised to read “Gifts, Grants, Donations, and Related Matters.” **Unless the Commission directs otherwise, the staff will make that change.**

In addition to addressing the matter discussed above, DFW commented on other technical issues relating to proposed Sections 3665 and 3670.

Regarding proposed Section 3665, a Note in the tentative recommendation asked whether a simplified cross-reference would cause any change in the provision’s effect. DFW indicates that it would not.<sup>8</sup> **No change is required in response to this comment.**

Proposed Section 3670 would continue an existing cross-reference to a “licensed agent authorized pursuant to Section 1055.1,” but would narrow that cross-reference to only include subdivision (c) of Section 1055.1 (proposed Section 3250). DFW suggests it would be more appropriate to revise the provision to cross-refer to subdivisions (a) and (b) of Section 1055.1 (proposed Section 3200).<sup>9</sup> On further reflection, the staff is not sure that either of these alternatives would be sufficient. Neither would define the term “license agent.” Instead, they would refer to different aspects of the license agent process — proposed Section 3200 governs applications to be a license agent, while proposed Section 3250 governs the provision of licenses to a license agent for sale.

**The staff instead recommends that the cross-reference in proposed Section 3670 be revised as follows: “The wildlife officer stamp may be purchased on a voluntary basis from the department or a licensed agent authorized pursuant to Section 3250 an authorized license agent for a donation of not less than five dollars (\$5).”** That should achieve the purpose of the provision, which does not seem to require a reference to other law on license agents.

### **Law Enforcement Personnel**

Proposed Sections 4100 through 4115 would continue Sections 851, 853, 854, and 856, which relate to DFW personnel. DFW points out that Sections 851 and 853 “are dormant authorities no longer in use” and suggests that those provisions be moved to the end of the title that contains them. Conversely,

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7. See Section 4.

8. See Exhibit comment 111.

9. See Exhibit comment 112.

Sections 856 and 854 should be moved to the beginning of the title (in that order).<sup>10</sup>

DFW is also suggesting that proposed Section 4120, which relates to law enforcement emblems, be moved to the next part of the proposed law, which addresses general law enforcement procedures.<sup>11</sup>

**The staff recommends that the Commission defer to DFW on these points and make the requested organizational changes.**

### **Differing Introductory Clauses**

Proposed Section 4400(a) and (b) would continue Sections 12000(a) and 12002(a), respectively:

4400. (a) Except as expressly provided otherwise in this code, any violation of this code, or of any rule, regulation, or order made or adopted pursuant to this code, is a misdemeanor.

(b) Unless otherwise provided, the punishment for a violation of this code that is a misdemeanor is a fine of not more than one thousand dollars (\$1,000), imprisonment in a county jail for not more than six months, or by both that fine and imprisonment.

As shown, those two provisions have different introductory clauses (“Except as expressly provided otherwise in this code...” and “Unless otherwise provided...”). A Note following proposed Section 4400 asked whether the difference between those clauses should be reconciled, by using the first clause for both provisions.

DFW believes that the difference was intentional and recommends against making any change:

CDFW cannot conclude, as suggested by the Commission, that the differences were inadvertent. Subdivisions (a) and (b) do completely different things, and CDFW has no reason to believe the Legislature did not intend for there to be a difference in these sections. COFW recommends that the original introductory language in 12000 and 12002 be retained.<sup>12</sup>

**The staff recommends that the Commission defer to DFW’s view on the matter and not make any change to the introductory clauses.**

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10. See Exhibit comment 114.

11. See Exhibit comment 116.

12. See Exhibit comment 118.

## ☞ Segmentation of Penalty Provisions

The tentative recommendation would break up two fairly lengthy penalty provisions, Sections 12000 and 12025.<sup>13</sup>

DFW has some specific concerns about the segmentation of Section 12000. For example, DFW asserts that a revised cross-reference would result in a significant change in the effect of the law.<sup>14</sup> DFW also says that the proposed reorganization of the parts of Section 12000 would cause confusion.<sup>15</sup> **If the Commission decides to continue the approach of breaking up and reorganizing the parts of Section 12000, the staff will make adjustments to address DFW's specific concerns.**

However, DFW's comments raise a broader issue that should be considered more generally. In addition to specific concerns about the manner in which the proposed law reorganized Section 12000, DFW seems strongly disposed against breaking up the penalty provisions at all.<sup>16</sup>

This issue is most clearly framed in the treatment of Section 12025. In the proposed law, that lengthy section would be divided into six sections. Those six sections would comprise the entirety of a new article. This approach ensures that all of the components of the section are co-located and simplifies reference to the provisions collectively. There should be no difficulty locating the content of Section 12025, or reading its constituent parts together.

Nonetheless, DFW strongly recommends against dividing the content of Section 12025 in that way, seeing "no benefit" from doing so:

There is no benefit from breaking up existing section 12025 into multiple sections. This is one of only a few sections that authorize CDFW to bring an administrative penalty action, and it makes sense that provisions that relate to that authority be contained in one section. The existing format has not been problematic in the cases that CDFW has brought using this section.<sup>17</sup>

It is the Commission's long-standing practice to break long sections into smaller sections. The benefits of doing so are explained on page 7 of the tentative recommendation. That explanation is set out below for ease of reference (with footnotes omitted):

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13. See proposed Sections 4400, 4410, 4700-4725. Section 12000(b)(1) & (3) would be continued in provisions that are outside the scope of Part 1 of the tentative recommendation.

14. See Exhibit comment 119.

15. *Id.*

16. *Id.*

17. See Exhibit comment 122. See also comments 123-126.

One common problem in statutory drafting is code sections that are excessively long. Excessively long sections can obscure relevant details of law, especially if a single section addresses several different subjects.

A better approach is to divide the law into a larger number of smaller sections, with each section limited to a single subject. Short sections have numerous advantages. They enhance readability and understanding of the law, and make it easier to locate and refer to pertinent material. In contrast to a long section, a short section can be amended without undue technical difficulties and new material can be inserted where logically appropriate, facilitating sound development of the law. The use of short sections is the preferred drafting technique of the California Code Commission, the Legislature, the Legislative Counsel, and the Law Revision Commission.

In the staff's view, those benefits would accrue from the proposed treatment of Section 12025, without any significant disadvantages (because the parts of the section would be co-located and organized as an article). Nonetheless, DFW strongly recommends against that approach.

That position may reflect DFW's general preference that penalty provisions be consolidated in a single place in the code, rather than distributed throughout the code. That issue was first raised in Memorandum 2013-33. In that memorandum, the staff noted that there were two possible general approaches to the organization of penalty provisions, "consolidation" or "distribution," each with its own advantages and disadvantages.

Consolidation would probably be best for law enforcement officials, who would benefit from being able to look in one place in the code to find penalties for every kind of violation. There would also be some benefit to lawmakers who could more easily assess the proportionality of the penalties provided in the code.

Distribution would be best for those who are researching the law on a single topic (e.g., abalone) and would like to easily find the relevant law in a single location. This might be the case for legislators, other policy makers, and persons who are only interested in one particular issue.

Existing law is a mixture of both consolidation and distribution. It seems likely that efforts at a consolidated approach gave way over time, as the law was subjected to piecemeal reforms.

The Commission provisionally decided in favor of distribution of offense-specific penalties and consolidation of general code-wide penalties.<sup>18</sup>

After having made that decision, Kevin Hunting, Chief Deputy Director of DFW, wrote to request that the Commission take a different approach: “The Department’s law enforcement division prefers for the sanction provisions of the code to be consolidated in one section for ease of use.”<sup>19</sup> Despite that input, the Commission decided to stick to its prior decision on the issue.<sup>20</sup>

The staff strongly believes that it would be helpful to have a general discussion of this issue at this time. If the upcoming draft tentative recommendation is based on the Commission’s prior decision on the issue, it seems possible that DFW will raise numerous objections to provisions that have been distributed. Objections might involve substantive concerns about changed references or the loss of interpretive context (issues of the type raised about breaking up Section 12000). Or they might be more general objections to the perceived difficulty that law enforcement personnel would face if penalty provisions were distributed (which seems to be the basis for objecting to the proposed break-up of Section 12025).

If the Commission were to decide to switch to DFW’s preferred approach and consolidate all penalty provisions in one place in the code, it would be much easier to do so now, rather than making that decision after the staff has prepared a draft tentative recommendation containing the entire code. **How would the Commission like to proceed on this point?**

#### ☞ Failure to Appear

Proposed Section 4420 would continue Section 12020:

Any person willfully violating his or her written promise to appear in court, or before a person authorized to receive a deposit of bail, is guilty of a misdemeanor, regardless of the disposition of the charge upon which he or she was originally arrested.

A Note following that provision asks whether it should be limited to a violation of the code or a regulation enacted pursuant to the code. Otherwise, read literally, the provision would apply to criminal proceedings that are unrelated to fish and game law.

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

19. First Supplement to Memorandum 2013-37.

20. Minutes (Aug. 2013), pp. 5-6.



DFW argues against making such a change:

CDFW does not support narrowing this section so it applies only to violations of the Fish and Game Code and regulations. This section applies to violators regardless of what they were charged with and CDFW believes that provision provides it with the broadest possible coverage.<sup>21</sup>

Despite the staff's posture of general deference to the commenters, it is not clear why a penalty provision in the Fish and Game Code should apply to the violation of laws located outside that code. **The Commission should consider whether to revise the proposed law to address this issue.**

### **Migratory Bird Conservation Act**

Proposed Section 4910 would continue Section 10682, which addresses payments made by the federal government to counties, in lieu of taxes, for property acquired by the federal government for migratory bird reservations. A Note following the provision asks for input on the meaning of an ambiguous reference in proposed Section 4910 (shown in bold below):

If in any year, on lands hereafter acquired, the in lieu payments from the United States to the county, **pursuant to the provisions of law**, do not equal the taxes assessed on a given project, the department shall pay from income derived from hunting privileges on the project an amount equal to the balance of the taxes on the entire project.

DFW responded to the Commission's request for input:

CDFW suggests deleting "pursuant to the provisions of law" entirely. The term is so broad that as pointed out in the comment, it is difficult to discern whether it is supposed to mean state laws, federal laws, or both. In any event, it should be assumed that in lieu payments would be made pursuant to the provisions of all applicable laws, state and/or federal.<sup>22</sup>

The staff believes that the proposed deletion would be appropriate. As DFW notes, any in lieu payments made by the federal government will be pursuant to some legal requirement. The source of that requirement need not be specified in order to achieve the purpose of this provision. **The staff recommends that the language be deleted as proposed by DFW.**

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21. See Exhibit comment 121.

22. See Exhibit comment 127.

## ☞ Compensation of Pacific States Marine Fisheries Commission Members

Proposed Section 5960 would continue Section 14102, which prescribes \$10 as the per diem compensation of members of the Pacific States Marine Fisheries Commission. Proposed Section 5960 would revise existing law to increase the compensation to \$100, consistent with Government Code Section 11564.5, which establishes a minimum per diem rate for certain government officials. A Note following proposed Section 5960 asks for Comment on whether the revision would be problematic.

On the substance, DFW sees no problem with the proposed revision.<sup>23</sup> However, as a technical matter, DFW wonders about the consequences of revising language that was enacted to implement an interstate compact.<sup>24</sup> That question was discussed more generally at pages 12 to 14 of Memorandum 2018-22.

In this instance, the revision is not strictly necessary (though it would provide helpful clarity), because Government Code Section 11564.5 would seem to be controlling. If the Commission is sufficiently concerned about deviating from language that implements a compact, it could continue the superseded \$10 amount in proposed Section 5960, with the Comment explaining that the amount is actually \$100. **How would the Commission like to address this issue?**

### TECHNICAL ISSUES

#### Obsolete Provision

Proposed Section 3355 would continue existing Section 1055.6(e), relating to the Colorado River special use validation. DFW comments: “This authority is obsolete. There is no longer a Colorado River special use validation.”<sup>25</sup>

**Based on that information, the staff recommends that proposed Section 3355 be deleted.**

However, the staff notes that the Colorado River special use validation is referenced in four other provisions.<sup>26</sup> **In preparing the next version of the tentative recommendation, the staff will presume that those references are also obsolete and should be deleted. Notes will be added asking for comment on those deletions.**

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23. See Exhibit comment 128.

24. *Id.*

25. See Exhibit comment 106.

26. Sections 7180.1, 7181.1, 7182.1, 12002.2.1.

## **Restatement of Language and Substantive Change**

In a number of instances, the proposed law would restate language that is hard to read and understand. Each time that is done, a Note following the restated provision asks whether the revisions would cause any problems.

For one of those provisions, DFW has indicated that the revisions would not cause any substantive change in the meaning of the provision.<sup>27</sup> **No action is required regarding this provision.**

## **Section Heading**

As discussed on pages 18 and 19 of the First Supplement to Memorandum 2018-22, the headings given to code sections are not part of the law. They are a mere editorial convenience, with every publisher of the law crafting its own section headings. Consequently, section headings have no legal effect.

DFW suggests that the heading of proposed Section 3205 be revised for greater accuracy.<sup>28</sup> **The staff will do so in the next version of the tentative recommendation, as follows: “License Nonprofit as license agent for sale of lifetime licenses.”**

### **MORE INFORMATION REQUESTED**

In some instances, noted below, the Comments offered by FGC or DFW are not sufficient to provide the staff with a clear understanding of the matter discussed. In those instances, the staff respectfully requests further explanation.

#### **☞ Providing Licenses to License Agent Under Automated License Data System (ALDS)**

Proposed Section 3250 would continue Section 1055.1(b)-(c). A Note following proposed Section 3250 discusses the fact that the language at issue was derived from a pre-ALDS provision and does not seem well-adapted to the way that the staff understands ALDS to work. The Note asks whether the provision at issue should be deleted or revised.

DFW asserts that existing law is clear and does not require any revision. However, that position seems to be based on DFW’s view that Section 1055.1(b)-(c) does not apply to ALDS sales.<sup>29</sup> The staff does not understand this view.

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27. See Exhibit comment 113.

28. See Exhibit comment 103.

29. See Exhibit comment 104.

Section 1055.1(h) expressly states that the section applies to ALDS sales. **Additional explanation is requested.**

#### ☞ Dashboard Cameras

Proposed Section 4320 would continue Section 856.5, which authorizes the use of dashboard cameras in law enforcement vehicles, and provides rules for their use. In the proposed law, that provision is located under “Part 2. General Procedures” of “Division 3. Law Enforcement.”

DFW suggests that the provision would be better located under “Part 1. Personnel” of Division 3:

Since this is the section that authorizes CDFW to install, and wildlife officers to use, dashcams, it seems like this section would be more appropriately placed in Part 1, Title 1.<sup>30</sup>

The staff is unsure why a provision regulating the use of a particular type of law enforcement *device* should be located with provisions that regulate law enforcement *personnel*. **Additional explanation is requested.**

#### NEXT STEPS

This supplement completes the process of discussing the comments received from FGC and DFW. Once the Commission decides how to address those comments, the staff will prepare a draft tentative recommendation setting out a complete Fish and Wildlife Code. Before doing so, the staff will determine whether any budget-related legislation would need to be incorporated.

Respectfully submitted,

Brian Hebert  
Executive Director

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30. See Exhibit comment 117.