

Fourth Supplement to Memorandum 2016-47

Fish and Game Law: Discussion of Issues

Memorandum 2016-47¹ presents an analysis of the term “prima facie evidence” (“PFE”), as it is used in certain provisions of the Fish and Game Code. The First Supplement to Memorandum 2016-47 discusses the scope of the Commission’s authority in this study, with specific discussion of whether revision of the prima facie evidence language could exceed that scope.

The Commission has received a letter discussing these matters from Wendy Bogdan, General Counsel for the Department of Fish and Wildlife. It is attached as an Exhibit.

The Department requests that the Commission take no action to amend the PFE language. That request is based on the view that amendments are not necessary or advisable, as well as a concern that any amendment the Commission might recommend could exceed the scope of the Commission’s authority in this study.

Respectfully submitted,

Steve Cohen
Staff Counsel

Brian Hebert
Executive Director

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.



via U.S. mail and e-mail <bhebert@clrc.ca.gov>, <scohen@clrc.ca.gov>

September 13, 2016

Mr. Taras Kihiczak, Chairperson
California Law Revision Commission
c/o Mr. Brian Hebert, Executive Director
UC Davis School of Law
400 Mrak Hall Dr.
Davis, CA 95616

Re: Memorandum 2016-47 Fish and Game Law: Outstanding Issues

Dear Mr. Kihiczak:

The Department of Fish and Wildlife (Department) appreciates the Law Revision Commission's (Commission) efforts to develop a recodification draft to improve the clarity, organization, and structure of the Fish and Game Code (Code). We value the working relationships forged between Department and Commission staff over the past four years, and we appreciate this opportunity to provide input to the Commission as it reflects on its examination of the prima face evidence (PFE) language, as well as the scope of the Legislature's charge to the Commission more generally.

Specifically with respect to the Commission's examination of the PFE language, the Department agrees with your staff's conclusion that its constitutionality "cannot be evaluated on the face of the statute" and "can only be evaluated as applied." (Memorandum 2016-47, p. 26.) The Department is unaware of any implementation problems or improper application of these provisions at any time during the history of the Code, and shares the concern noted in First Supplement to Memorandum 2016-47 that any amendments to the language bear risk of making significant substantive changes in the law exceeding the scope of this study. Accordingly, we respectfully ask the Commission to take no action to amend the PFE language, and instead allow the courts to resolve any constitutionality issues that might arise in the future.

Memorandum 2016-47 demonstrates how the two most likely applications of the PFE language are constitutional, or, at worst, do not conflict with any precedent that binds California courts. The Department agrees with several of Memorandum 2016-47's key conclusions, including that "courts should be construing PFE language as creating a constitutionally permissible permissive inference, rather than a mandatory presumption," and there is a "lack of any case law showing problematic application of the Fish and Game Code PFE provisions." (Memorandum 2016-47, pp. 9 and 27.) Even if we speculate that criminal law practitioners and the courts might fail to properly construe a PFE provision as a permissive inference, Memorandum 2016-47 suggests the most

likely error would be to construe the language as a presumption affecting the burden of producing evidence, which Commission staff acknowledges may be constitutional because the "United States and California Supreme Courts have expressly declined to decide whether such a presumption offends due process." (Memorandum 2016-47, p. 23.) Commission staff and the Department agree there is no indication that errors are occurring in implementing the PFE provisions. Since scenarios where these provisions might be applied inappropriately require us to speculate that both: (1) courts and criminal law practitioners would misconstrue the law; and (2) future binding precedent will make that construction unconstitutional, there is no need for the Commission to further consider recommending changing the PFE provisions.

Additionally, the Department observes that the Commission's consideration of the Code's PFE provisions illustrates how it might, in other areas of the Code as well, inadvertently exceed the scope of the Legislature's charge by creating some risk of making a significant substantive change to this or other sections of the Code. The Legislature charged this Commission with recommending revisions that improve the Code's organization, clarity, and "make other minor improvements, without making any significant substantive change to the effect of the law." (2014 Cal. Stat. res. ch. 63.) According to Memorandum 2016-47, your staff characterized the PFE provisions as potentially unconstitutional only because "it occurred to the staff that such [PFE] language could be construed as a mandatory presumption" that would violate due process. (Memorandum 2016-47, p. 3.) In such circumstances, CDFW shares the concern set forth in the First Supplement to Memorandum 2016-47: "[g]iven the degree of uncertainty, any revision that the Commission might recommend would bear some risk of making a significant substantive change in the law." (First Supplement to Memorandum 2016-47, p. 3.)

We appreciate the opportunity to provide input on the Commission's consideration of the Code's PFE provisions, and how that consideration might inform the Commission's approach going forward. Should you have any questions, please contact me at (916) 654-3815 or wendy.bogdan@wildlife.ca.gov.

Sincerely,



Wendy Bogdan
General Counsel