

First Supplement to Memorandum 2022-30

Fish and Game Law: Narrow Reorganization in Place (Additional Discussion)

At its March 2022 meeting, the Commission¹ directed the staff to prepare a draft reorganization of the chapters of Division 2 of the Fish and Game Code, without reorganizing the articles or sections contained within those existing chapters.² Proposed legislation to accomplish that task is attached to Memorandum 2022-30.

In addition, some Commissioners requested that the staff prepare a discussion of the general advantages and disadvantages of statutory reorganization. The staff was also asked to give some thought to how further “reorganization in place” work might proceed, if the Commission decides to do such work. This supplement is a response to those requests.

ADVANTAGES AND DISADVANTAGES OF STATUTORY REORGANIZATION

Types of Disorganization

There are a number of ways that statutory law can be disorganized, including the following:

- *Jumbled provisions.* The law is easiest to use when similar provisions are grouped together, to the exclusion of dissimilar provisions. Often that approach is not followed. Similar provisions may be scattered across multiple locations. Dissimilar provisions may be grouped together. This makes it harder to locate relevant law and be confident that all relevant law has been found.
- *Poor use of organizational headings.* In some cases, large blocks of law are not divided into units with organizational headings. In other cases, organizational units include provisions that do not match the

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 Minutes (Mar. 2022), p. 3.

description in the organizational heading. This is a missed opportunity to make the law easier to use.

- *Problematic application of special rules.* Some special statutory rules have expressly prescribed application. A rule may apply globally to the entire code or more narrowly to a specified organizational unit. This practice, while useful, can lead to problems. A new provision may be placed within the area of application of a special rule, without any intention that the special rule be applied to the new provision. Or conversely, a new provision may be placed outside of the application of an existing rule, with a mistaken expectation that the special rule will apply to the new provision. Such concerns often arise with definitions of limited application.
- *Overly-long sections.* Some laws are expressed in very long code sections. For an example, see Government Code Section 65913.4, which spans 19 pages in the draft attached to Memorandum 2022-30. That section uses every level of internal organization that is known to the staff (subdivisions, paragraphs, subparagraphs, clauses, subclauses). Due to their length and the amount of content they contain, such provisions are difficult to use and maintain.

Advantages of Organizational Clean-Up

All of the problems described above can be minimized by careful recodification of disordered law.

By grouping similar provisions and separating dissimilar provisions, reorganization can create greater coherency in the law. This makes it easier to be sure that all relevant law on a topic has been found. It also reduces clutter that can interfere with locating and understanding the law.

Organizational headings can be used to provide a roadmap of the law. If done well, the resulting table of contents can be skimmed to get a good understanding of the elements of a complicated statute. It also allows a user to quickly locate elements that are relevant to an inquiry. This greatly enhances user-friendliness.

Fine-tuning the application of special rules can help to avoid expensive uncertainty and disputes.

Breaking up long sections into a series of shorter sections greatly improves the accessibility of the law and its maintenance. It also allows for the insertion of useful organizational headings. For example, Government Code Section 65913.4 could be broken up into dozens of short sections and converted into a chapter, with the resulting sections organized into function-specific articles.

It isn't possible to quantify the value of organizational improvement, but well-organized law is easier to use and understand, providing efficiency benefits for users. For instance, attorneys and judges who must understand and apply the law

will find it easier to do so, reducing the number of attorney hours expended navigating disordered law. Similarly, agency regulators will realize time savings in their work to interpret and apply the law. Legislators and their staff, and the Governor and the Governor's staff, will find it easier to assess the current state of the law, fashion substantive reforms, and implement those reforms legislatively. Again, this will result in a widespread reduction in the number of hours spent by legal and policy experts on their work.

Finally, organizational improvement supports democratic values, by making the law more accessible to the public. Byzantine expression of the law that requires a professional expert to parse does not support principles of public accountability and self-governance.

Disadvantages of Organizational Clean-Up

Statutory reorganization can cause transitional costs and errors.

Transitional Costs

For every existing statute, there is a body of experts who have already learned the law in its present form. Those existing experts will receive little benefit from improved organization. They have learned to navigate the disordered law.

For those existing experts, reorganization makes the law *harder* to use, at least initially. The existing organization, which they already know, is discarded and replaced with a new organization that they must learn.

Renumbering also makes legal research more difficult. When searching for cases involving a particular statute, the search must include both the old section number (to locate cases prior to the reorganization) and the new section number (to locate post-reorganization cases).

In addition, there is an entire body of regulations authorized by the Fish and Game Code. In some cases, the regulations will need to be amended to update statutory cross-references (including the legally-required "authority" and "reference" citations). Fortunately, the Office of Administrative Law has established a simplified process for "changes without regulatory effect," which applies to purely technical corrections. That would help to reduce the cost of any regulation amendments required by renumbering.

In addition, secondary practice materials will need to be revised to reflect the new organization and numbering.

Errors

Large-scale reorganization of the law also introduces scope for errors. This includes the possibility of drafting errors or interpretive errors.

The Commission does what it can to minimize the risk of drafting errors. Drafts prepared by staff are checked by another staff attorney before release. The drafts are then distributed publicly, for discussion at a public meeting. Comment from interested groups and persons helps to discover and cure any defects. Any final proposed legislation must then be proposed as a bill and enacted through the normal legislative process. This presents another opportunity for review by subject matter experts in the Legislature and stakeholders. In addition, the Commission typically includes a one-year deferred operation date for large-scale reorganization legislation. This provides another significant period, after the new law is on the books, during which errors can be detected and remedied.

Even if a reorganization is error free, the fact of reorganization could itself lead to misunderstanding. More casual users of the law may not understand the limited purpose and effect of a technical reorganization. Users may see changes in the *expression* of the law and infer that there must have been changes to its *meaning*.

The Commission does what it can to minimize that risk by including special rules of construction (to emphasize the nonsubstantive effect of reorganization), detailed disposition and derivation tables to help users adjust to the new structure and numbering, and individual Comments after every affected section to specifically affirm the nonsubstantive effect of the proposed changes. Courts have long treated Commission Comments as evidence of legislative intent.

Discussion

The draft of proposed legislation attached to Memorandum 2022-30 was specifically framed to minimize transitional costs.

Most of the code sections within the scope of the draft would remain in their current locations, allowing them to retain their existing section numbers.

The reorganization would be limited to moving a small number of chapters as intact units. No changes to the internal organization of chapters or sections would be made.

The draft was intended to serve as a test case. Reaction to the proposal would help the Commission gauge whether there is appetite for organizational improvement of the Fish and Game Code.

POSSIBLE SCHEDULE FOR FURTHER WORK

Some possibilities for continued reorganization in place were discussed in Memorandum 2022-30 and orally at the March meeting. Such work could include:

- Merge the bulk of existing Divisions 2 and 3 of the Fish and Game Code into a single division that governs wildlife and habitat protection programs. This would be done by repealing the heading of existing Division 3 and relocating some chapters that are predominantly about take and possession of wildlife, to be located near other such statutes.
As noted before, the staff recognizes that hunting and fishing are important elements of wildlife conservation. However, there is an operational distinction between conservation programs that depend mostly on take and those that depend mostly on protection. Neither is more important than the other. They are just functionally different, which justifies placing them in different organizational locations in the code.
- Create a new “Division 11. Interjurisdictional Cooperation,” which would include programs of that type. Some of those programs are already located in that part of the code. Others would be moved there (including Chapter 1.5 of Division 2).
- Reorganize the internal content of the chapters that are within proposed new Division 2.5. This would involve breaking large sections up into their discrete elements, reorganizing those elements into a more rational order, and using article headings to further differentiate between the kinds of elements.

That work would likely consume a year of attorney work and Commission meetings. If that work was successful, the Commission might move on to repeat the process on other divisions of the Fish and Game Code.

The staff is not sure which division of the Fish and Game Code would be best as the next candidate for such work. Making that judgment would involve an assessment of the degree of disorder in the remaining divisions, so as to prioritize the ones most in need of improvement. **The staff is reluctant to commit the resources to that analysis until the Commission has decided whether to proceed with the proposal attached to Memorandum 2022-30 and we learn whether such a proposal can be enacted.**

Respectfully submitted,

Brian Hebert
Executive Director