

Study R-100

August 5, 2022

First Supplement to Memorandum 2022-38

Fish and Game Law: Phase One Public Comment

In this study, the Commission¹ has been directed by the Legislature to recommend technical improvements to the Fish and Game Code, without making any significant substantive change to the law's effect.²

In December 2018 the Commission approved and distributed a tentative recommendation to recodify the existing Fish and Game Code in a proposed new Fish and Wildlife Code.³ The Commission received extensive public comment on the statutory revisions proposed in the tentative recommendation,⁴ and decided to divide further work on the study into two phases. "Phase One" of the study would evaluate public comment on nonorganizational improvements, which would be implemented in existing law rather than in a recodified code.⁵

Significant progress continues to be made in this phase of the study, with the Commission having made decisions on proposed revision of well over 100 existing code sections. We are now at the point of evaluating proposed revisions that required further consultation with the Department of Fish and Wildlife ("DFW") before an informed decision could be made.

This supplement presents several such proposed revisions for further consideration.⁶

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 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).

3. See Memorandum 2018-67 and its First Supplement; Minutes (Dec. 2018), p. 10.

4. All received comments were submitted by the Fish and Game Commission ("FGC") and the Department of Fish and Wildlife ("DFW").

5. See Memorandum 2021-11; Minutes (Feb. 2021), p. 5. "Phase Two" of the study, which has been discontinued, would have addressed organizational improvements. See Memorandum 2019-44, p. 10; Minutes (Sept. 2019), p. 4; Memorandum 2022-28, Minutes (May 2022), p. 3.

6. The original comments received on the proposed revisions discussed in this memorandum are reproduced in the attached Exhibit.

The staff proposes that all staff recommendations in this supplement be approved on a consent basis, without individual oral presentation at the meeting. However, as always, before voting to approve the presented staff recommendations, Commissioners and members of the public will have the opportunity to discuss any of the items presented.

Unless otherwise indicated, all statutory references in the supplement are to the existing Fish and Game Code, or to the proposed Fish and Wildlife Code as set out in the Commission's previously distributed tentative recommendation.

CHANGES THAT SHOULD PROVISIONALLY BE MADE

Each of the revisions to existing code sections proposed below have now been approved in principle by DFW, and are not opposed by FGC. **The staff recommends that the Commission provisionally approve each of these revisions for inclusion in a draft recommendation.**

The approval is requested to be provisional because this is the first time the revisions have been presented as amendments to existing code sections, and there theoretically could be concerns about how the revisions have been implemented. Following this provisional approval, as part of its recurring interaction with DFW, Commission staff will circle back with DFW to determine if there are any such concerns.

Once DFW has expressed the absence of objection to a revision provisionally approved by the Commission, the revision will be added to the cumulative draft of proposed legislation in this study.

Proposed Section 25130 (Existing Section 1122.5); Proposed Section 43850 (Existing Section 2356); Proposed Section 34210 (Existing Section 4341); Proposed Section 6500 (Existing Section 5653)

Each of the proposed sections listed above from the tentative recommendation in this study would have restated the corresponding existing section identified above. A Commission Note in the tentative recommendation following each proposed section inquired whether the revision would substantively change the meaning of the existing section. In each instance, one or both entities affirmatively indicated that the proposed revision would not create a substantive change (and neither entity indicated it would create such a change).

However, as neither entity affirmatively *approved* the proposed revision, the staff conducted further inquiry on that question. DFW has now indicated that it affirmatively approves in principle the proposed revisions, as set forth below.

§ 1122.5 (amended). Mount Whitney Fish Hatchery

1122.5. (a) Notwithstanding any other provision of law, the Director of General Services, with the consent of the department, may lease to the Friends of the Mount Whitney Hatchery, at no cost, and subject to any other terms and conditions that the director deems appropriate, for a term not to exceed 25 years, and with the possibility of renewal, the Mount Whitney Fish Hatchery ~~facilities, or any portion thereof, situated in the County of Inyo~~ part of the hatchery. The leased portion of the building

(b) Any part of the hatchery that is leased pursuant to subdivision (a) shall be used for environmental education purposes and other related activities designed to benefit the hatchery and the community.

(c) The lease shall require the Friends of the Mount Whitney Fish Hatchery to permit reasonable public access to the ~~facility~~ hatchery, to obtain and maintain liability insurance for the leased portion of the ~~facility~~ hatchery, and to maintain the leased portion of the ~~facility~~ hatchery at all times. The lease shall provide that any work done on the ~~facility~~ hatchery shall be performed in consultation with the State Office of Historic Preservation. The lease shall also provide that the state, agents of the state, the department, and agents of the department shall be held harmless from, and indemnified against, any liability resulting from the acts or omissions of the Friends of the Mount Whitney Fish Hatchery ~~performed in the course of the lease agreement~~ arising out of performance of the lease.

Comment. Section 1122.5 is amended for clarity, and to add subdivision designations.

§ 2356 (amended). Transport of trout

2356. (a) It is unlawful ~~at any time~~ to offer for shipment, ship, or receive for shipment, or transport from this state, any trout taken in the waters of this state, except ~~that the~~ as provided in subdivision (b).

(b) The following persons may personally transport from this state not more than one daily bag limit of trout:

(1) The holder of a nonresident ~~angling sport fishing~~ license, or any

(2) A person on active military duty with the armed forces of the United States ~~or on active military duty with an auxiliary branch thereof~~ who possesses a valid angling license, ~~may personally transport from this state not more than one daily bag limit of trout.~~

(3) A person on active military duty with an auxiliary branch of the armed forces of the United States who possesses a valid angling license.

Comment. Section 2356 is amended for clarity, and to add subdivision designations.

§ 4341 (amended). Countersigning

4341. Any person legally killing a deer in this state shall have the tag for that deer countersigned by a person employed ~~in~~ by the department, a person designated for ~~this~~ that purpose by the commission, ~~or by~~ a notary public, a postmaster, ~~postmistress,~~ a peace officer, or an officer authorized to administer oaths, before transporting ~~such~~ the deer, except ~~for the purpose of taking it to transport the deer~~ to the nearest person authorized to countersign the tag, on the route ~~being followed from the point from~~ where the deer is taken to that person.

Comment. Section 4341 is amended for clarity.

§ 5653 (amended). Vacuum or suction dredging

5653. (a) The use of vacuum or suction dredge equipment by a person in a river, stream, or lake of this state is prohibited, except as authorized under a permit issued to that person by the department in compliance with the regulations adopted pursuant to Section 5653.9. Before a person uses vacuum or suction dredge equipment in a river, stream, or lake of this state, that person shall submit an application to the department for a permit to use the vacuum or suction dredge equipment, specifying the type and size of equipment to be used and other information as the department may require pursuant to regulations adopted by the department to implement this section.

(b)(1) The department shall not issue a permit for the use of vacuum or suction dredge equipment until the permit application is deemed complete. A complete permit application shall include any other permit required by the department and one of the following, as applicable:

(A) A copy of waste discharge requirements or a waiver of waste discharge requirements issued by the State Water Resources Control Board or a regional water quality control board in accordance with Division 7 (commencing with Section 13000) of the Water Code.

(B) A copy of a certification issued by the State Water Resources Control Board or a regional water quality control board and a permit issued by the United States Army Corps of Engineers in accordance with Sections 401 and 404 of the Federal Water Pollution Control Act (33 U.S.C. Secs. 1341 and 1344, respectively) to use vacuum or suction dredge equipment.

(C) If the State Water Resources Control Board or the appropriate regional water quality control board determines that waste discharge requirements, a waiver of waste discharge requirements, or a certification in accordance with Section 1341 of Title 33 of the United States Code is not necessary for the applicant to use of vacuum or suction dredge equipment, a letter stating this determination signed by the Executive Director of the State Water

Resources Control Board, the executive officer of the appropriate regional water quality control board, or their designee.

(c) Under the regulations adopted pursuant to Section 5653.9, the department shall designate waters or areas wherein vacuum or suction dredge equipment may be used pursuant to a permit, waters or areas closed to the use of that equipment, the maximum size of the vacuum or suction dredge equipment that may be used, and the time of year when the equipment may be used. If the department determines, pursuant to the regulations adopted pursuant to Section 5653.9, that the use of vacuum or suction dredge equipment does not cause any significant effects to fish and wildlife, it shall issue a permit to the applicant. If a person uses vacuum or suction dredge equipment other than as authorized by a permit issued by the department consistent with regulations ~~implementing this section~~ adopted pursuant to Section 5653.9, that person is guilty of a misdemeanor.

(d)(1) Except as provided in paragraph (2), the department shall issue a permit upon the payment, in the case of a resident, of a base fee of twenty-five dollars (\$25), as adjusted under Section 713, when an onsite investigation of the project size is not deemed necessary by the department, and a base fee of one hundred thirty dollars (\$130), as adjusted under Section 713, when the department deems that an onsite investigation is necessary. Except as provided in paragraph (2), in the case of a nonresident, the base fee shall be one hundred dollars (\$100), as adjusted under Section 713, when an onsite investigation is not deemed necessary, and a base fee of two hundred twenty dollars (\$220), as adjusted under Section 713, when an onsite investigation is deemed necessary.

(2) The department may adjust the base fees for a permit described in this subdivision to an amount sufficient to cover all reasonable costs of the department in regulating suction dredging activities.

(e) It is unlawful to possess a vacuum or suction dredge in areas, or in or within 100 yards of waters, that are closed to the use of vacuum or suction dredges.

(f) A permit issued by the department under this section shall not authorize an activity in violation of other applicable requirements, conditions, or prohibitions governing the use of vacuum or suction dredge equipment, including those adopted by the State Water Resources Control Board or a regional water quality control board. The department, the State Water Resources Control Board, and the regional water quality control boards shall make reasonable efforts to share information among the agencies regarding potential violations of requirements, conditions, or prohibitions governing the use of vacuum or suction dredge equipment.

(g) For purposes of this section and Section 5653.1, the use of vacuum or suction dredge equipment, also known as suction dredging, is the use of a mechanized or motorized system for removing or assisting in the removal of, or the processing of,

material from the bed, bank, or channel of a river, stream, or lake in order to recover minerals. This section and Section 5653.1 do not apply to, prohibit, or otherwise restrict nonmotorized recreational mining activities, including panning for gold.

Comment. Subdivision (c) of Section 5653 is amended to more precisely identify regulations referenced in that subdivision.

Proposed Section 5350 (Existing Sections 12002(c) and 12010))

Proposed Section 5350 would have combined and restated existing Section 12010 and a part of existing Section 12002(c), each of which specified punishment for a violation of Section 3503.5 relating to birds-of-prey. As neither entity responded to a Commission Note in the tentative recommendation inquiring whether the combination and restatement would cause any substantive change, the staff met with DFW to address the issue.

Following that discussion, DFW proposed that Section 12002(c) be left unrevised, as the punishment specified in that provision for a violation of Section 3503.5 also applies to a violation of several other code sections. However, DFW agrees that Section 12010 should be revised to eliminate substantial duplicative language.

The staff therefore proposes that Section 12010 be revised as follows:

§ 12010 (amended). Birds of prey

12010. (a) Notwithstanding Section 12002, the maximum punishment for each violation of Section 3503.5 relating to a bird-of-prey that is either designated as endangered, threatened, or fully protected, or taken from the wild and subsequently reported to the department as having been bred in captivity, is a fine of five thousand dollars (\$5,000) or imprisonment in the county jail for a period of not to exceed one year, or both the fine and imprisonment.

~~(b) Notwithstanding Section 12002, the maximum punishment for a violation of Section 3503.5 relating to any bird-of-prey that was taken from the wild and that is subsequently reported to the department as having been bred in captivity is a fine of five thousand dollars (\$5,000) or imprisonment in the county jail for a period of not to exceed one year, or both the fine and imprisonment.~~

Comment. Section 12010 is amended to eliminate duplicative text.

Proposed Section 46010 (Existing Section 5522(c))

Proposed Section 46010 would have continued existing Section 5522(c), a provision that includes a reference to fees derived from an abalone “stamp” as a

source of revenue for an abalone recovery and management plan. As the Commission understood that commercial take of abalone was now authorized by a “report card” rather than a “stamp,” a Commission Note following the proposed provision invited comment on whether the reference to a “stamp” should be revised.

In their initial response to the Note, FGC and DFW both agreed that the reference should be revised, but disagreed on what the substituted reference should be. At the urging of the staff, DFW met with FGC to see if the two entities might reach a joint recommendation.

Both entities now agree, in light of uncertainty as to how future abalone recovery and management planning will be funded, that the provision should refer to both an abalone report card *and* stamp.

The staff recommends that the following proposed revision be included in the draft recommendation in this study:

§ 5522 (amended). Abalone recovery and management plan

5522. (a) On or before January 1, 2003, the department shall submit to the commission a comprehensive abalone recovery and management plan. The plan shall contain all of the following:

(1) An explanation of the scientific knowledge regarding the biology, habitat requirements, and threats to abalone.

(2) A summary of the interim and long-term recovery goals, including a range of alternative interim and long-term conservation and management goals and activities. The department shall report why it prefers the recommended activities.

(3) Alternatives for allocating harvest between sport and commercial divers if the allocation of the abalone harvest is warranted.

(4) An estimate of the time and costs required to meet the interim and long-term recovery goals for the species, including available or anticipated funding sources, and an initial projection of the time and costs associated with meeting the final recovery goals. An implementation schedule shall also be included.

(5) An estimate of the time necessary to meet the interim recovery goals and triggers for review and amendment of strategy.

(6) A description of objective measurable criteria by which to determine whether the goals and objectives of the recovery strategy are being met and procedures for recognition of successful recovery. These criteria and procedures shall include, but not be limited to, the following:

(A) Specified abundance and size frequency distribution criteria for former abalone beds within suitable habitat not dominated by sea otters.

(B) Size frequency distributions exhibiting multiple size classes as necessary to ensure continued recruitment into fishable stock.

(C) The reproductive importance to the entire ecosystem of those areas proposed for reopening to harvest and the potential impact of each reopening on the recovery of abalone population in adjacent areas.

(b) Where appropriate, the recovery and management plan may include the following:

(1) A network of no-take abalone reserves.

(2) A total allowable catch, reflecting the long-term yield each species is capable of sustaining, using the best available science and bearing in mind the ecological importance of the species and the variability of marine ecosystems.

(3) A permanent reduction in harvest.

(c) Funding to prepare the recovery and management plan and any planning and scoping meetings shall be derived from the fees collected for ~~the abalone stamp~~ an abalone report card or stamp.

(d) On or before January 1, 2008, and following the adoption of the recovery and management plan by the commission, the department may apply to the commission to reopen sport or commercial fishing in all or any portion of the waters described in Section 5521. If the commission makes a finding that the resource can support additional harvest activities and that these activities are consistent with the abalone recovery plan, all or a portion of the waters described in Section 5521 may be reopened and management measures prescribed and implemented, as appropriate. The commission may close or, where appropriate, may establish no-take marine refuges in any area opened pursuant to this section if it makes a finding that this action is necessary to comply with the abalone management plan.

(e) If the commission determines that commercial fishing is an appropriate management measure, priority for participation in the fishery shall be given to those persons who held a commercial abalone permit during the 1996–97 permit year.

Comment. Subdivision (c) of Section 5522 is amended to revise a reference to fees collected for an abalone stamp to also include fees collected for an abalone report card.

CHANGES THAT SHOULD NOT BE MADE

Following further input from one or both of the commenting entities, the staff recommends that the following revisions *not* be included in the draft recommendation.

Proposed Section 31110 (Existing Section 4181(a))

Proposed Section 31110 would have restated and continued existing Section 4181(a). A Commission Note in the tentative recommendation following the proposed section invited comment on whether the restatement would cause a substantive change in the meaning of the subdivision.

In response, FGC and DFW both expressed that the restatement, in referring to animals identified in the subdivision in the singular rather than in the plural, would cause a substantive change in the meaning of the subdivision. As the staff thought it possible that this issue could be resolved, the staff recommended seeking further input from the entities relating to that possibility.⁷

However, in a subsequent discussion about the provision, DFW advised that any revision relating to this issue could be viewed as a substantive change, and no other proposed revision of the section was needed or desirable.

The staff recommends that no revision be made to the existing section at this time.

Proposed Section 34515 (Existing Section 456)⁸

Proposed Section 34515 would have restated and continued the first and third sentences of existing Section 456, which requires DFW to biennially report to the Legislature and FGC on California's deer herds. A Commission Note in the tentative recommendation following the proposed section invited comment on whether the restatement would cause a substantive change in the meaning of the section.

In response to the Note, FGC advised that the proposed revision would not cause any substantive change. DFW did not address that issue, but contended that the report required by the section, and presumably the section itself, were obsolete. As FGC disputed that contention, the staff recommended seeking further input from the entities relating to a reconciliation of their competing positions.⁹

DFW has since indicated that it has conferred with FGC, defers to FGC's view on the issue, and requests that no further change be proposed to the language of the existing section.

7. See First Supplement to Memorandum 21-39, p. 16.

8. The proposed section would have also discontinued the second sentence of the existing section as obsolete. In Memorandum 21-20, the Commission approved a staff recommendation, supported by both commenting entities, to revise Section 456 to delete the second sentence of the section.

9. See Memorandum 21-45, p. 10.

The staff recommends that no revision be made to the existing section at this time.

Respectfully submitted,

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Staff Counsel

PHASE ONE COMMENTS

The table below sets out the comments of the Fish and Game Commission and the Department of Fish and Wildlife on sections addressed in the First Supplement to Memorandum 2022-38.

Proposed Section	Existing Section	Fish and Game Commission	Department of Fish and Wildlife	Prior Presenting Memoranda
5350	12010, 12002(c)	no comment	no comment	21-49
6500	5653(c)	no comment	Sec. 5653(c) third sentence can be amended by replacing "implementing this section" with "adopted pursuant to Section 5653.9." This is consistent with the Commission's proposed revision described in the Note, which CDFW does not think would cause any problems.	21-26
25130	1122.5	no comment	CDFW believes there would be no substantive change in the meaning of the section.	21-39s1
31110	4181	FGC believes that the proposed restatement of sec. 4181 is not beneficial in that current law allows a depredation permit to be issued for a flock of turkeys, whereas the restatement suggests that permits must be issued for individual turkeys; this would be a significant substantive change in the meaning of the section, though easily could be remedied. FGC has no comment about the proposal to divide sec. 4181 by species as reorganization of the Fish and Game Code is outside the scope of the current review.	CDFW generally believes that the restatement of sec. 4181(a) causes a significant substantive change in the meaning of the section that is both not beneficial and would be controversial because under current law a depredation permit can be issued for multiple animals (e.g. flocks of turkeys, herd of deer) by the use of the term "animals". The restatement uses the term "the wild turkey" suggesting that permits must be issued for individual turkeys. Further, CDFW has no comment at this time about the changes to divide 4181 by species. The latter is beyond the scope of this review.	21-39s1
34210	4341	FGC believes that the restatement of sec. 4341 does not cause a substantive change in the meaning of that section.	CDFW believes that the restatement of sec. 4341 does not cause a substantive change in the meaning of that section.	21-45
34515	456	(1) FGC believes that while restoring California's deer herds may have been achieved (hence, leading to a conclusion that the subject report may be obsolete), maintenance is ongoing into perpetuity; as such, the subject report may still be valuable and should be reassessed in the context of the current management regime and status of deer.	Two comments: (1) & (2) CDFW continues to believe the report required by sec. 456 should be deleted because it is obsolete. Sec. 456 second sentence can be deleted. Obsolete. (2) CDFW continues to believe that the report required by sec. 456 should be	21-20 21-45

Proposed Section	Existing Section	Fish and Game Commission	Department of Fish and Wildlife	Prior Presenting Memoranda
		<p>The second sentence of sec. 456 makes reference to the first report being due in 1989; the report was prepared and FGC believes the reference can be deleted.</p> <p>(2) FGC believes that the proposed restatement of sec. 456 does not cause any substantive change in the meaning.</p>	deleted because it is obsolete.	
43850	2356	FGC believes that the proposed restatement of sec. 2356 does not cause a substantive change in the meaning of that section.	CDFW believes that the restatement of sec. 2356 does not cause a substantive change in the meaning of that section.	21-49
46010	5522(c)	<p>FGC notes that in years past, an abalone stamp fee was used for commercial abalone fisheries, but currently there is no active commercial fishery in California. The recreational abalone fishery uses an abalone report card, but currently there is no active recreational fishery in California. Given the two different tools used for funding purposes, FGC believes referring to "an abalone report card or stamp" is appropriate. FGC also notes that sec. 5522 applies to an Abalone Recovery and Management Plan, which was developed and has been used for managing the abalone fishery; while a significant portion of the section will soon be obsolete, the guidelines in sec. 5522 are important context during the current development of an abalone fishery management plan.</p>	Sec. 5522(c) can be amended to refer to an "abalone report card" in lieu of an "abalone stamp". However, there is no commercial or recreational fishery currently and the Abalone Recovery and Management Plan is being replaced by an Abalone fishery management plan.	21-49