

Memorandum No. 7 .

A.C.R. 63, sponsored by Mrs. Davis, was adopted at the 1955 Session of the Legislature and is Resolution Chapter 204. It is as follows:

WHEREAS, The Fish and Game Code is unique among the codes by reason of the fact under Article 1, Chapter 2, Division 1 thereof, the Fish and Game Commission is granted authority to issue regulations in derogation of provisions of said code; and

WHEREAS, The Fish and Game Commission has exercised this authority with the result that there are numerous provisions in the code superseded by subsequent regulations, and, in addition, there are ambiguities and other defects in the code, so that such code does not provide a clear and accurate statement of the law of fish and game; and

WHEREAS, The net result of these conditions is that it is extremely difficult for the citizen to apprise himself of the law of fish and game; and

WHEREAS, The California Law Revision Commission has been created by the Legislature for the purposes, among others, of examining the statutes of the State and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms and of recommending, from time to time, such changes in the law as it deems necessary to eliminate antiquated and inequitable rules of law and to bring the law of this State into harmony with modern conditions; now, therefore, be it

Resolved by the Assembly of the State of California, the Senate thereof concurring, That the California Law Revision Commission is directed to undertake a study of the Fish and Game Code and to prepare a proposed revision of such code, which would eliminate obsolete, superseded, ambiguous, anachronistic, and other defective provisions of such code, and to submit such proposed revision to the Legislature not later than the tenth legislative day of the 1957 General Session of the Legislature; and be it further

Resolved, That the California Law Revision Commission is directed to study the problem of how best to inform the public of the provisions of the Fish and Game Code and regulations of the Fish and Game Commission and is directed to report to the Legislature its recommendations on this matter at the same time as it submits its proposed revision of the Fish and Game Code; and be it further

Resolved, That the Fish and Game Commission and personnel of the Department of Fish and Game are directed to cooperate with the California Law Revision Commission in its efforts pursuant to this resolution, and the California Law Revision Commission is authorized, for the purposes of this resolution, to consult with persons interested in the law of fish and game.

The commission discussed this matter at the meeting of March 18 and 19 and requested Mr. Bradley to inform Mrs. Davis that it would not be in a very good position to undertake such an assignment this year. Mr. Bradley

did so but Mrs. Davis was not dissuaded and it was felt that the commission should not actively oppose the resolution.

Attached hereto is a copy of a memorandum outlining some of the problems presented by this assignment. As you will see, it has a number of difficult aspects. Some immediate problems are discussed herein.

Ralph Kleps told me that Mrs. Davis discussed Res. Ch. 204 with him. In the course of that discussion he suggested to her that the commission might confine its efforts prior to the 1956 Session to making a study of the problem presented by Res. Ch. 204 and preparing a report outlining the job to be done and giving an estimate of the time and money which it would take to do it. She could then introduce a bill in 1956 authorizing the commission to proceed as outlined in the report and making an appropriation for the work. He reported that she seemed to be satisfied with this suggestion as to how the commission might proceed.

Shall we, then, discuss the matter with Mrs. Davis and, if she is agreeable, proceed along these lines? I assume that such a study and report would be done by this office and that the matter would be discussed with the Fish and Game Commission, the Department of Fish and Game, the Senate and Assembly Interim Committees on Fish and Game, and other interested persons and organizations.

If the commission should decide to proceed immediately with revision of the Fish and Game Code, a number of problems would be presented, including the following:

1. What shall the scope of the revision be? Shall it be less substantive than the Education Code revision? Shall it be confined to particular areas of the Fish and Game Code? How much money shall be allocated to the study?

Note language Res

2. Shall a research consultant be retained and, if so, what should his qualifications be and who are likely candidates? It seems doubtful that this job could be done by a single consultant but it might be if he were to hire assistants.

3. Shall a contract similar to the Education Code contract be made with Stanford or some other law school or institution?

4. When shall consultation with the Fish and Game Commission and the Department of Fish and Game be initiated and who shall undertake it?

5. Shall liaison with the Senate and Assembly Interim Committees on Fish and Game be established and maintained? If so, who shall do this? (See Memorandum No. 8 dealing with the general problem of liaison with the Legislature.)

6. Shall we make an effort at the outset to advise interested groups about this assignment and solicit their views? If so, what groups should be included?

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRM:tb

Revision of the Fish and Game Code

General coverage of the code and the regulations. The Fish and

Game Code has seven major divisions:

- Division 1. Department of Fish and Game. 10 - 59.5
- 2. Districts. §§ 60 - 243
- 3. Refuges and Preserves. §§ 250 - 380
- 4. Birds, Mammals, and Fish. §§ 400 - 1395
- 4A. Other Wild Life. §§ 1400 - 1405
(Desert tortoises, burros and wild boar).
- 5. Fines and Penalties. §§ 1410 - 1417
- 6. Wild Life Conservation. §§ 1420 - 1475

There is little apparent logic to this organization and any overall revision of the code should probably include a complete reorganization.

Division 4 contains most of the important provisions of the code. Part 1 of Division 4 contains provisions relating to sporting fishing and hunting licenses, reciprocal licenses, and agreements with other states. The Fish and Game Commission is given limited discretion as to the terms and conditions upon which it may grant licenses. Part 2, entitled Fish, covers a variety of topics: importation and inspection; use of various kinds of nets, screens and obstructions; season, bag and possession limits for the different species in different localities; commercial licenses for fishing, packing, reduction and breeding; commercial regulations and reports. The Fish and Game Commission is given limited discretion to implement the provisions regulating commercial activity. Part 3, entitled Birds and Mammals, regulates the importation and transportation of wild birds and animals and predatory animals. It also contains miscellaneous provisions relating to hunting clubs and domestic game breeding. It is principally concerned, however, with season, bag, possession, age and sex limits for different kinds and species of birds and mammals in different localities.

The regulations of the Fish and Game Commission, in addition to the provisions relating to sporting licenses and commercial activity, contain a number of miscellaneous provisions which implement specific sections or groups of sections in the code pursuant to authority specifically delegated by those sections. However, the major portion of the regulations deal with season, bag, possession, age and sex limitations upon the taking of fish, birds, and mammals for sport.

Special problems re sections of the code modified by the regulations.

Although the Concurrent Resolution directs the commission to revise the entire Fish and Game Code, it seems clear that the sponsor has primarily in mind problems arising out of the fact that the Fish and Game Commission has power to modify the provisions of the code by regulation.

As the Concurrent Resolution states, the authority of the Fish and Game Commission to modify, by regulation, the provisions of the Fish and Game Code is quite unique. The commission, which exists by virtue of Article IV, Section 25 1/2 of the California Constitution, derives this broad rule-making power from the following sections of the Fish and Game Code.

§ 14. Powers delegated to commission. There is hereby delegated to the commission the power to regulate the taking of fish and game to the extent and in the manner prescribed in this article. No power is delegated to the commission by this article to regulate the taking, processing or use of fish, mollusks, crustaceans, kelp or other aquatic plants for commercial purposes and none of the provisions of this code relating or applying thereto nor any order, rule, or regulation of the commission made pursuant to such provisions shall be affected by this article or any order made pursuant to this article.

§ 15.4 Scope of orders. Any order of the commission pursuant to this article which relates to fish, mollusks, crustaceans, amphibia and reptiles may apply to all or any districts or portions thereof, at the discretion of the commission, and may do any or all of the following as to any or all species or varieties:

(a) Establish, extend, shorten, or abolish open seasons and closed seasons.

(b) Establish, change, or abolish bag limits, possession limits, and size limits.

(c) Establish and change territorial limits for the taking of any or all species or varieties.

(d) Prescribe the manner and the means of taking any species or variety.

§ 16.3 Orders as to birds and mammals: Scope:

Animals in preserves protected. Any order of the commission pursuant to this article relating to birds and mammals may apply to all or any districts or portions thereof, at the discretion of the commission, and may do any or all of the following as to any or all species or varieties:

(a) Establish, extend, shorten, or abolish open seasons and closed seasons.

(b) Establish, change, or abolish bag limits and possession limits.

(c) Establish and change territorial limits for the taking of any or all species or varieties.

(d) Prescribe the manner and the means of taking any species or variety.

(e) Establish, change, or abolish restrictions based upon sex, maturity, or other physical distinctions.

The commission has no power under this article to make any order authorizing or permitting the taking of any bird or mammal in any refuge or preserve heretofore or hereafter established by statute and no order of the commission authorizing or permitting such taking shall hereafter be effective for such purpose; provided, however, the provisions of this paragraph shall not apply to Districts 1M and 4F until the ninety-first day after final adjournment of the 1955 Regular Session of the Legislature.

§ 19. Provisions continued in effect. The provisions of this code relating to the taking, processing or use of birds, mammals, fish, mollusks, crustaceans, amphibia or reptiles, excepting those provisions which relate or apply to or affect the taking, processing or use of fish, mollusks, crustaceans, kelp and other aquatic plants for commercial purposes, are continued in effect as orders of the commission and as limited by Sections 15.4 and 16.3 but not otherwise and shall remain in effect as such orders until modified or superseded by orders of the commission pursuant to this article.

§ 19.2. Duration of orders. Any order of the commission pursuant to this article shall remain in effect for the period specified therein or until superseded by a subsequent order of the commission or by statute.

§19.4 Regulation of natural resources or commercial activity. Nothing in this article confers upon the commission any power to regulate any natural resource or commercial or other activity connected therewith, except as specifically provided.

§19.6 Duration of effect of article. The provisions of this article shall be effective until the ninety-first day after final adjournment of the 1955 Regular Session of the Legislature and thereafter shall have no force or effect.

S.B. 400, introduced in the 1955 Session by Senator Brown, would extend the effective date of the article two years. It was passed by the Legislature and sent to the Governor.

It should be noted that the Fish and Game Commission does not have power to modify the provisions of the code which pertain to commercial activities. Furthermore, even in the sports area, the commission's extraordinary power is limited to some degree by Sections 15.4 and 16.3. The commission cannot, for example, modify the provisions of the code relating to noncommercial fishing and hunting licenses. However, as to season, bag, possession, age or sex limitations upon the taking of fish, birds or mammals in various localities, the commission has broad and somewhat undefined powers.

Sections 14 to 19.6, which constitute Article 1, Chapter 2, Division 1, were enacted in 1945 (Chapter 648). By virtue of Section 19 all the provisions of the code relating to the "taking, processing or use" of fish or wild life were "continued in effect as orders of the commission and as limited by Sections 15.4 and 16.3 but not otherwise" This unusual provision presents two general problems which will have to be decided before a revision along the lines indicated by the Concurrent Resolution can begin.

1. What was the effect of Section 19 on provisions in the code when it was enacted in 1945? Were they technically repealed and reenacted as "legislative" fish and game orders? The answer to this question is important for two reasons.

First: Sections 15.4 and 16.3 appear to authorize the Fish and Game Commission to issue orders relating only to the taking of fish and wildlife. Yet Section 19 states that the provisions of the code relating to taking, processing or use "are continued in effect as orders of the commission and as limited by Sections 15.4 and 16.3 but not otherwise and shall remain in effect as such orders" It is not entirely clear whether the effect of this language is to continue in effect or to repeal provisions relating to processing and use; the answer would seem to depend on what is meant by the words "and as limited by Sections 15.4 and 16.3 but not otherwise." If this language had the effect of repealing the provisions relating to processing and use but not continuing them in effect as orders of the commission they should be eliminated from the code; if not, their status should be clarified.

Second: The Fish and Game Commission has in fact issued many orders modifying provisions relating to taking which were in the code in 1945. If all the provisions relating to taking were technically repealed in 1945, it would follow that at least those which have been superseded by later commission orders should be eliminated from the code.

2. What is the extent of the power of the Fish and Game Commission with regard to sections enacted after Section 19? Section 19.2 is important to a consideration of this question. It provides: "Any order of the commission pursuant to this article shall remain in effect for the period specified therein or until superseded by a subsequent order of the commission or by statute."

It is quite clear that any order - whether it be a provision of the code enacted before 1945 and continued in effect as an order, or an order later adopted by the commission - ceases to have any force when a statute covering the same subject matter is adopted by the Legislature. What is not clear is whether the commission can thereafter make an order which will, in turn, supersede the statute. Does Section 19 have prospective effect, i.e., does it operate to change all statutes, as they are enacted, into fish and game "orders" which can later be modified by the commission? The question is given an added emphasis by the absence in Section 19 of any qualifying language, such as, "the provisions of this code now in effect" There are no cases or Attorney General's Opinions on the point.

It is difficult to imagine that the Legislature would limit its future activities in this way, and it seems equally unlikely that a court would hold that a subsequent statute could be deprived of its effectiveness in this manner. Yet in 1953, in enacting the statutes which became Sections 1271 and 1251.5 of the Code, the Legislature provided:

"Section 1271 . . . This section supersedes any order of the commission under Article 1 of Chapter 2 of Division 1 of this code and the commission shall have no power to modify the provisions of this section by any order, rule or regulation pursuant to said article or any other provision of law . . ."

"Section 1251.5 . . . The provisions of this section shall not be subject to modification by any order, rule, or regulation of the commission pursuant to Article 1 of Chapter 2 of Division 1 of this code or any other provision of law . . ."

Moreover, there are several sections which were passed after Article 1, Chapter 2, Division 2 and was enacted and which were subsequently modified by the Fish and Game Commission. However, all these sections (or at least all the ones we have found) are based on earlier enactments and Section 4

of the Fish and Game Code would require them to be construed as continuations. Hence, the Fish and Game Commission was probably authorized to modify at least those of these sections which were formerly in the Fish and Game Code. As to sections formerly in other codes or the general law, the authority of the commission to modify them is not so clear because Section 19 "continues in effect as orders" only "the provisions of this code". This question would have to be answered before a repeal of any of those sections which have been superseded is proposed.

It seems quite clear that the entire question of the effect of Sections 14 to 19.6 must be very carefully studied and that the sections themselves should be clarified. Only after this has been done can the work of determining which sections have in fact been superseded commence.

Study re Dissemination of Information. In addition to a study of the code, Assembly Concurrent Resolution 63 directs the Law Revision Commission to "study the problem of how best to inform the public of the provisions of the Fish and Game Code and regulations of the Fish and Game Commission and is directed to report to the Legislature its recommendations on this matter at the same time as it submits its proposed revision of the Fish and Game Code; . . ."

In addition to elaborate notice requirements before hearings are held or orders issued, the Fish and Game Code contains the following provisions for informing the public what the law is.

§18. Publicity for orders: Publication and distribution of regulations: Mailing copies to district attorneys, county clerks and justices of the peace. The commission may do anything that it deems necessary and proper to provide publicity to its orders to the end that persons likely to be affected thereby may be informed, but the failure of the

commission to provide any notice of its orders other than by filing them with the Secretary of State shall not impair the validity of such orders. Within 60 days after the meeting in February of each year, the commission shall publish and distribute in booklet form such regulations as shall be adopted at such meeting.

Copies of all such publications shall be mailed to each district attorney, county clerk and judge of a municipal court or justice court throughout the state.

§ 31. Expenditures for research, field investigation and statistics. The commission shall expend such funds as may be necessary for biological research and field investigation and for the collection and diffusion of such statistics and information as shall pertain to the conservation, propagation, protection and perpetuation of birds and the nests and eggs thereof, mammals, fish and the eggs thereof, mollusks, and crustaceans.

§ 39.2 Reduction of bag and possession limit fish, birds or mammals in danger of depletion: Filing and publication of order. Whenever after due investigation the commission shall find that game fish, birds, or mammals have decreased in numbers in any district to such an extent that a scarcity exists, the commission is hereby authorized to reduce the daily bag limit and the possession limit on such species of game fish, birds or mammals as are in danger of depletion, for such period of time as may be specified or until such time as new legislation thereon enacted by the Legislature may become effective.

Any order issued under the provisions of this section shall be filed with the Secretary of State, and such filing shall be deemed a legal notice thereof, and such order shall be published twice in at least one newspaper of general circulation in any county affected by such order. Such publications shall be separated by a period of not less than one week and not more than two weeks. Such orders shall be posted in such public places in each county as the director may direct.

§ 39.9 Distribution of information on safe handling of firearms. The department shall furnish information on the safe handling of firearms which shall be distributed free of charge to applicants for hunting licenses by the persons appointed and authorized to issue such licenses.