

First Supplement to Memorandum 2016-25

Fish and Game Law: Public Comment on Divisions 6 through 12 (Types of Animals)

Memorandum 2016-25 presents a draft of Divisions 6 through 12 of the proposed Fish and Wildlife Code,¹ containing provisions of the existing Fish and Game Code governing specific types of animals.

On May 23, 2016, the Commission received an email from Harold Thomas, a special deputy District Attorney in Butte County, commenting on provisions in the draft attached to Memorandum 2016-25. **The staff greatly appreciates Mr. Thomas's continued assistance in this study.**

That email is attached to this memorandum as an Exhibit. The issues raised in the email are discussed below.

Unless otherwise indicated, all statutory references in this supplement are to the existing Fish and Game Code, or to the "proposed" provisions of the contemplated Fish and Wildlife Code.

CREATION OF SEPARATE "INVERTEBRATE" DIVISION

The staff draft presented by Memorandum 2016-25 proposes to group provisions of the proposed law that specifically govern invertebrates (e.g., clams, crabs, lobster, shrimp) in their own division,² separate from the division that contains provisions governing the types of fish commonly known as finfish (e.g., bass, salmon, shark, trout).³

Mr. Thomas's first expressed concern is that this organization could cause "collateral impacts or changes to meaning."⁴ This apprehension may be based on

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. Proposed Division 9 (commencing with Section 30600) ("Invertebrates").

3. Proposed Division 8 (commencing with Section 25000) ("Fish").

4. Exhibit, p. 1.

a perception that the organization might somehow change the existing statutory definition of “fish.” That definition, which applies generally throughout the code,⁵ includes more than just *fish*; it also includes invertebrates (and amphibians).⁶

The staff does not believe that the establishment of separate divisions for provisions that regulate specific types of fish (none of which are invertebrates) and specific types of invertebrates (none of which are finfish) would have any effect on the defined meaning of “fish.” The existing definition would be continued without change, as would all sections that use the term in its defined sense. Note also that the proposed law would include a fairly standard rule of construction, expressly providing that headings have no effect on the meaning of the law.⁷

Nonetheless, Mr. Thomas’s concern could perhaps be addressed by adding clarifying Comment language to provisions of the proposed draft. Each of the proposed new divisions that contain provisions governing specific types of animals begins with a non-exclusivity provision. For example, the proposed first section in the “Invertebrates” division reads as follows:

30600. Animals governed by this division are also governed by other provisions of this code, including but not limited to Division 5 (commencing with Section 5000).

Comment. Section 30600 is new

(“Division 5” is the division of the proposed law containing provisions governing “Hunting, Trapping, and Fishing Generally.”)

It would be a simple matter to expand the explanation in the Comment to that section, thus:

30600. Animals governed by this division are also governed by other provisions of this code, including but not limited to Division 5 (commencing with Section 5000).

Comment. Section 30600 is new. It makes clear that this division does not contain the only provisions of the code governing invertebrates, and that invertebrates governed by this division may also be governed by other law. For example, as the definition of “fish” includes invertebrates, invertebrates may also be governed by other provisions of the code that apply by their terms to “fish.” See Sections 200, 355.

5. See proposed Section 200 (continuing existing Section 2).

6. See proposed Section 355 (continuing existing Section 45).

7. See existing Section 4, proposed Section 20.

If such a change were made, it should probably also be made in the division that governs amphibians (which are also within the statutory definition of “fish.”).

Does the Commission want to make those changes?

Insects

The proper treatment of insects is worth further discussion. Mr. Thomas’s comments focus specifically on aquatic insects as a source of food for fish. In the draft attached to Memorandum 2016-25, there is a separate division for insects. At present, it only includes provisions governing one type of insect.

After considering Mr. Thomas’s comments, the staff has had second thoughts about creating a separate division for insects. Organizationally, it would be odd to have a separate division for one type of invertebrate, while lumping all other types of invertebrates together in another division. There is no obvious reason for singling out insects in that way.

The staff recommends that the insect provisions in the proposed draft be moved into the division governing specific types of invertebrates, rather than being included in a separate division.

PRIMA FACIE EVIDENCE OF UNLAWFUL ACT

The Commission has previously discussed an existing provision⁸ declaring that, in a specified geographic area, possession of a net is “prima facie” evidence that the net is or was used in an unlawful manner.⁹ The staff expressed concern about whether such a rule might be unconstitutional under the reasoning of *People v. Roder*,¹⁰ which held that a jury instruction based on a similar “mandatory presumption” provision in the Penal Code¹¹ rendered a criminal conviction under that section unconstitutional.

The Commission directed the staff to conduct further research on that issue for Commission consideration.¹²

The staff has not yet completed that research. However, the draft presented by Memorandum 2016-25 contains three more provisions that present the same

8. See existing Section 8664, which would be continued by proposed Section 10965.

9. See First Supplement to Memorandum 2015-41, pp. 5-6; Minutes (Oct. 2015), p. 8.

10. *People v. Roder*, 33 Cal. 3d 491, 658 P.2d 1302, 189 Cal. Rptr. 501 (1983).

11. See former Pen. Code § 496(2.).

12. Minutes (Oct. 2015), p. 8.

issue. Notes following those sections indicate that the staff will be conducting further research into the underlying issue.

Mr. Thomas, who has previously indicated his view that provisions of this type pass constitutional muster,¹³ questions why “authority relevant to a single stolen property case decided over thirty years ago should signpost a critical (adverse) legal opinion in an authoritative report.”¹⁴ He also asks why, if neither the Legislature nor any court has found these provisions to be problematic, the issue is even being raised in the staff draft.¹⁵

Mr. Thomas seems to be suggesting that the issue be dropped, without further research.

The staff would prefer to research the issue further before asking the Commission to decide whether or not to do so. **Is that acceptable?**

FISH AND GAME COMMISSION AUTHORITY TO PROHIBIT
TAKE OR POSSESSION OF SALMON

Existing Section 316.5, which would be continued verbatim by proposed Section 27410, provides as follows:

The commission may prohibit the taking or possessing of salmon in the same manner as the taking or possessing of salmon is prohibited by federal law or by rules or regulations adopted by the United States Secretary of Commerce, notwithstanding any other provision of this code.

Mr. Thomas suggests that this provision “creates federal preemption over the general subject of take or possession of salmon whereas current preemption is limited to the jurisdiction of the Magnuson Act administered by the US Secretary of Commerce.”¹⁶ As a result, “[c]onfusion will arise if this provision is applied now or in the future to jurisdictions where salmon live and reproduce in state water far from the Pacific waters regulated by federal catch quotas and law.”¹⁷ Finally, Mr. Thomas believes that either a limiting note or clarification of this statutory language is needed to limit the preemptive effect of “the new placement.”

13. See First Supplement to Memorandum 2015-41, pp. 5-6.

14. Exhibit, p. 1.

15. *Id.*

16. *Id.*

17. *Id.*

It is not clear whether Mr. Thomas objects to the *content* of the existing provision, or its *location* in the draft recodification (or both).

The staff does not believe that the location of the provision would cause the problem that Mr. Thomas describes. The existing provision is located with other provisions that grant the Fish and Game Commission miscellaneous regulatory powers. The provision is not near any material that references the Magnuson Act. Consequently, the proposed relocation of the provision would not disrupt any existing context that would give the provision the meaning that Mr. Thomas believes appropriate.

If the problem is the language of the section itself, it might be helpful to ask for public comment on whether it should be revised, and if so, how. **Should the draft include a note along the following lines?**

☛ **Staff Note.** Existing Section 316.5 provides that the Fish and Game Commission may prohibit the taking or possessing of salmon “in the same manner” as prohibited by federal law. Should this provision be revised to make clear that the Commission’s authority to regulate the take or possession of salmon is not *limited* to take or possession that is regulated by federal law?

LOCATION OF PENALTY PROVISIONS

In the existing code, most provisions that specify a criminal penalty for violation of another code section are grouped in a separate “Fines and Penalties” division.¹⁸ In the draft recodification, specific penalty provisions have been located near the violation provisions to which they relate.

There are advantages and disadvantages to either approach. These have been discussed in prior memoranda.¹⁹ After considering the matter, the Commission decided to take the approach used in the draft recodification.²⁰ The Commission later reaffirmed that decision.²¹

Mr. Thomas urges the Commission to reconsider that organizational approach.²²

18. See existing Division 9 (commencing with Section 12000).

19. See Memorandum 2013-33, pp. 3-4; Memorandum 2013-37.

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

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

22. Exhibit, p. 2.

Now that a significant part of the proposed recodification has been drafted, the Commission is in a good position to evaluate the effect of distributing, rather than aggregating, the penalty provisions.²³

Would the Commission like to revisit that issue?

Respectfully submitted,

Steve Cohen
Staff Counsel

23. See, e.g., proposed Sections 25725(b), 27890(b), 28710(b), 29360(b), 30010(b), 30700(d), 30850, and 30855, in the draft attached to Memorandum 2016-25.

**EMAIL FROM HAROLD THOMAS, BUTTE COUNTY DISTRICT
ATTORNEY'S OFFICE
(MAY 23, 2016)**

Steve, Thank you for the opportunity to comment at the June 1, 2016 meeting in Sacramento. I hope our comments can be circulated to the Commissioners prior to the meeting. This is truly a significant effort and I hope our comments are received in the spirit of cooperation in which they were considered and forwarded.

1. We recognize that in any effort to clarify law by consolidating or dividing the existing statutory scheme there will be collateral impacts or changes to meaning. All one can hope is that these changes are anticipated and noted in the staff commentary. An example of our concern might be a decision to separate aquatic invertebrates from the provisions governing finfish. We suggest eliminating footnote (3) (found at page 3) as the legislature has already included aquatic invertebrates, the main food supply for finfish, within laws governing harm to or take of fish. For instance current Fish and Game Code 5650 prohibits industrial discharges deleterious to fish, a category which includes the aquatic invertebrates. These invertebrates, which finfish must have to survive and reproduce, are the only insect regulated in the current Fish and Game Code. Why attempt to regulate the fish and its required food supply separately. The current law is based on an ecological definition that was adopted by the legislature and works quite well today.

2. The fish and game code does not regulate insects generally including such important groups as honey bees, or other pollinators. While this might be an excellent policy the legislature has stopped short of including this particular type of wildlife along with a host of other less loved insects including spiders, beetles, wasps, and other flying insects. They made a single exception for aquatic invertebrates because of the importance to the food supply of the fishery including the trout and salmon that we all enjoy on our plate. We recommend leaving aquatic insects within the definition of fish and perhaps by staff note following new section 25000 merely identify the broader definition endorsed by the legislature.

3. Staff notes at pages 112 and 193 raises questions of the constitutional validity of the possession of protected wildlife as sufficient *mens rea* for criminal conviction. While our office and the commission staff have visited this discussion in earlier drafts, we do not agree that a notation that cites authority relevant to a single stolen property case decided over thirty years ago, should signpost a critical (adverse) legal opinion in an authoritative report. If the legislature and the appellate system of judicial decisions has not joined the issue to date why should the staff of the CLRC raise such an effort?

4. The federal conformity language at new sections 27410 (p. 68) creates federal preemption over the general subject of take or possession of salmon whereas current preemption is limited to the jurisdiction of the Magnuson Act administered by the US Secretary of Commerce. Confusion will arise if this provision is applied now or in the future to jurisdictions where salmon live and reproduce in state water far from the Pacific waters regulated by federal catch quotas and law. Either a limiting note or language clarification is needed to limit the preemptive effect of the new placement.

5. Lastly, We would encourage staff to revisit the decision to incorporate penalty provisions in the individual animal sections. An example of this is found at new provision

30700(d). Currently most of the penalty provisions are in the sections 12000 et seq. area of the Code. There is some certainty of placing all the penalty provisions in a single section of the Code. While the decision to distribute enforcement terms or to consolidate is a close call, convenience and clarity would argue for following the current scheme and keeping enforcement provisions consolidated.

Outside of the above comments the proposed draft language appears reasonable and an improvement. Thank you for the opportunity to comment.