Study R-100 March 29, 2018

Memorandum 2018-22

Fish and Game Law
(Public Comment on Tentative Recommendation Part 1)

In this study, the Commission[1] is developing a proposed recodification of the Fish and Game Code.

In April 2017, the Commission released a tentative recommendation setting out "Part 1" of the proposed new Fish and Wildlife Code, which included the first four divisions of the proposed code:

Division 1. General Provisions
Division 2. Administration
Division 3. Law Enforcement
Division 4. Inter-Jurisdictional Compacts

Public comment was requested, with a deadline of July 18, 2017. The Commission received comment letters from the Fish and Game Commission ("FGC") and the Department of Fish and Wildlife ("DFW"), which are attached in the Exhibit as follows:

The staff greatly appreciates FGC's and DFW's close review of the tentative recommendation and detailed comments. Such input is critical to the success of this study.

Ordinarily, the Commission would have considered those comments shortly after the July 2017 deadline for submission. But before it could do so, the Commission received a request from Resources Agency Secretary John Laird that

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.

it postpone further work on the recodification until it had conducted an analysis of the funding provisions of the Fish and Game Code.[2] The Commission agreed to do so and has spent the last few meetings examining those provisions.[3]

The Commission has reached a pause in that work (while a "discussion draft" that describes the funding provisions is out for public comment), and can now turn its attention back to the comments on the Part 1 tentative recommendation. This memorandum begins that process. Comments that are not discussed in this memorandum will be considered in a supplement or in a separate memorandum (or both).

Unless otherwise indicated, all statutory references in this memorandum are to the existing Fish and Game Code. All references to "proposed" code sections are to the proposed Fish and Wildlife Code.

For convenience of reference, the staff has numbered the issues raised in DFW's "Attachment A."[4] Those numbers (#1-#128), which are printed on the left margin of Attachment A's pages, *do not* appear in the original copy of DFW's letter.

GENERAL OBSERVATIONS

A clean-up and reorganization project of the type before the Commission necessarily involves numerous close judgment calls. A good example that is directly relevant to this memorandum is the decision whether to leave a particular definition close to the provisions that use the defined term, or move it to the collection of generally applicable definitions at the beginning of the code. As discussed further below, there are advantages and disadvantages to either approach.

Where a particular element of the tentative recommendation involves such a decision — especially where the Commission was itself unsure of the best approach and specifically requested comment on the matter — the staff is inclined to defer to the judgment of those with the greatest experience working with fish and game law. The Commission and its staff have no special expertise with that law (other than the familiarity gained in this study), and no compelling reason to second-guess the judgment of those who do.

2. See First Supplement to Memorandum 2017-38.
3. Minutes (Aug. 2017), p. 9.
4. See Exhibit pp. 7-41.

Where the Commission does have greater expertise — on matters of law reform and recodification generally — there might be reason to stick to an initial decision despite concerns from subject matter experts. But where an issue turns on practical concerns about the use of the code, the staff is inclined to defer to FGC and DFW. Although we did not receive any comment from recreational or industry stakeholders, the same principle would guide the staff's reaction to comments from those interested and expert parties.

One final point: If an issue is closely balanced between two alternative approaches, the Commission should consider the degree to which a change would disrupt the tentative recommendation. All other things being equal, the Commission should probably not make a change to the tentative recommendation that would require extensive redrafting.

Difficulty of Evaluating Partial Draft

Both FGC and DFW point out that it can be difficult to evaluate a proposed provision without seeing it in context. They request that the Commission provide ample opportunity to review a full draft of the proposed Fish and Wildlife Code.[5]

The Commission has already decided to accommodate that request. The current plan is to prepare a tentative recommendation that sets out the entire proposed Fish and Wildlife Code, for release some time after the end of the current fiscal year. That timing would permit the Commission to incorporate any changes that might be made to the Fish and Game Code as part of the budget process.[6]

Conforming Regulation Revisions

Any statutory recodification involves significant transitional costs. Stakeholders must learn new section numbers. Translation tables must be used to correlate prior case law to the new numbering. Secondary materials must be revised.

In this instance, the last point will be particularly burdensome, because the Fish and Game Code is backed by a large body of regulations. Those regulations will need to be revised to reflect the new numbering, both to correct cross-

5. See Exhibit pp. 2, 8.
6. Minutes (Aug. 2017), p. 9.

references and to update the required statement of statutory authority for each regulation. In addition, the entity revising the regulations will need to consider whether more substantive changes are required to reflect a substantive change in the law.

The process of revising regulations can be time-consuming and burdensome. Administrative rulemaking is governed by the exacting requirements of the Administrative Procedure Act ("APA"), which requires detailed supporting documents, public notice and comment, careful review by the Office of Administrative Law, and formal publication.[7]

Both FGC and DFW express concern about their ability to absorb that transitional cost within their existing resources. FGC observes that recodification

> would lead to a complete overhaul of the Fish and Game Code, subsequently creating significant workload for both FGC and CDFW in reviewing and completely revising Title 14 for consistency with the new Fish and Wildlife Code. Neither agency is in a position at this time to assume additional workload to ensure that Title 14 regulations conform to statutory revisions.[8]

Similarly, DFW explains that

> one of the greatest challenges the Department and stakeholders will face if the proposed changes become law will be conforming the Title 14 regulations to the statutory revisions. Although it is possible that a recodification of the code would simply require changes to the authorities identified in the Title 14 regulations, the Department's review of Memorandum 2017-15 suggests that changes to the regulations' texts would be necessary to reconcile Title 14 to the recodification. As CLRC staff have made clear to us recently, the presumption has been the Department will bear the transitional costs associated with required revisions including the cost of promulgating hundreds of new regulations, retraining staff, revising and reprinting related forms and publications, and educating stakeholders. The Department is concerned that funding for these types of substantial unanticipated expenditures will likely be unavailable.[9]

Such transitional costs cannot be entirely avoided. The Legislature has charged the Commission with improving the organization of the Fish and Game Code. Any significant organizational improvement will necessarily involve

7. See Gov't Code §§ 11340-11361.
8. See Exhibit p. 2.
9. See Exhibit p. 8.

renumbering, which will necessitate conforming changes to the associated regulations and other secondary materials.

In the Commission's experience, the benefits of a successful statutory reorganization (which are permanent and broad) will outweigh the transitional costs (which are temporary and concentrated). For example, when the Commission recodified the statutory law that governs common interest developments (i.e., developments managed by homeowner associations), over 40,000 associations had to assess whether their governing documents needed revision to conform to the reorganized law. But over four million homeowners (as well as policymakers in regulatory agencies and the Legislature) were permanently benefited by the new law's increased coherence and ease of use.

That said, the Commission typically tries to do everything reasonably possible to reduce transitional costs. Some possible ways to minimize the burden of promulgating conforming regulations are discussed below.

Urgency

Promulgating conforming regulation changes will take time. That work cannot begin in earnest until a recodification bill has been enacted. This could create a sense of urgency to complete conforming revisions, as the validity of existing regulations might be cast into doubt once they are inconsistent with the associated statutory law. That inconsistency could also create operational confusion, which it would be desirable to quickly alleviate.

A sense of urgency could make the transitional burden more acute, by requiring the FGC and DFW to commit a greater share of their available resource to the task immediately, rather than spreading the cost over a longer period of time.

That urgency could be ameliorated in two ways:

- *Defer the operation of the proposed Fish and Wildlife Code.* It is a well-established practice for the Commission to defer the operation of a recodification, in order to provide a longer period of time for stakeholders to adjust their materials and practices to the new law. **The staff recommends doing so in this study as well.** Deferred operation would combine certainty as to the effect of the new law with a longer period of time to make conforming regulatory changes (and changes to other secondary materials). A one-year deferred operation date would probably be sufficient, and would not overly-complicate the legislative process during the transition

period (when bills affecting fish and game law would need to amend both the old and new codes).

- *Further emphasize that enactment of the new law does not affect the validity of a regulation that refers to the former law.* This would be a specific statement of the general rule in proposed Section 10(b), which states: "A reference in a statute or regulation to a previously existing provision that is restated and continued in this code shall, unless a contrary intent appears, be deemed a reference to the restatement and continuation." **The staff recommends that language be added to expressly provide that the failure to amend a regulation to conform to the new law does not affect the validity of the regulation.** If the Commission agrees, the staff will present implementing language in a future draft of the tentative recommendation.

The changes recommended above would allow FGC and DFW to take more time to complete the process of amending regulations to conform to the new law. That should help to reduce the disruptive effect of that task.

Rulemaking Process

In numerous cases throughout the codes, the Legislature has wholly exempted specific agency rules from the rulemaking requirements of the APA. For example, in the Fish and Game Code, Section 1799.1(c) provides, in relevant part:

> The department shall adopt and amend guidelines and criteria to implement this chapter. … Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code shall not apply to the development, adoption, or amendment, of guidelines or criteria pursuant to this section. …

That kind of broad exemption certainly simplifies the rulemaking process. But it also has significant drawbacks. For one thing, the APA rulemaking provisions ("Chapter 3.5") require that regulations be filed with the Secretary of State, posted to the promulgating agency's website, and printed in the California Code of Regulations.[10] A regulation that is wholly exempt from the APA would also be exempt from those sensible transparency requirements.

Exemption of a rule from the entirety of Chapter 3.5 would also exempt that rule from the APA's provision on judicial review of the validity of a regulation.[11]

10. See Gov't Code §§ 11343-11343.8, 11344.
11. See Gov't Code § 11350.

There is an alternative that would seem to strike a better compromise between efficiency and transparency. The Office of Administrative Law, the entity charged with adopting regulations to effectuate the APA rulemaking procedure, has established a streamlined process for "changes without regulatory effect:"

> (a) Subject to the approval of OAL as provided in subsections (c) and (d), an agency may add to, revise or delete text published in the California Code of Regulations without complying with the rulemaking procedure specified in Article 5 of the APA only if the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision. Subject to the approval of OAL, the Department of Social Services may add to, revise or delete text published in the department Manual of Policies and Procedures (MPP) without complying with the rulemaking procedure specified in Article 5 of the APA only if the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of the MPP. The addition, revision or deletion is a "change without regulatory effect." Changes without regulatory effect include, but are not limited to:
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> (1) renumbering, reordering, or relocating a regulatory provision;
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> (2) deleting a regulatory provision for which all statutory or constitutional authority has been repealed;
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> (3) deleting a regulatory provision held invalid in a judgment that has become final, entered by a California court of competent jurisdiction, a United States District Court located in the State of California, the United States Court of Appeals for the Ninth Circuit, or the United States Supreme Court; however, OAL shall not approve any proposed change without regulatory effect if the change is based on a superior court decision which invalidated the regulatory provision solely on the grounds that the underlying statute was unconstitutional;
>
> (4) revising structure, syntax, cross-reference, grammar, or punctuation;
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> (5) changing an "authority" or "reference" citation for a regulation; and,
>
> (6) making a regulatory provision consistent with a changed California statute if both of the following conditions are met:
>
> (A) the regulatory provision is inconsistent with and superseded by the changed statute, and
>
> (B) the adopting agency has no discretion to adopt a change which differs in substance from the one chosen.
>
> (b) In submitting a change without regulatory effect to OAL for review the agency shall:

> (1) submit seven copies of the regulations with an addition shown in underline or italics and a deletion shown in strike-out; and
>
> (2) attach to each copy a completed Form 400, with at least one Form 400 bearing an original signature; and
>
> (3) submit a written statement explaining why the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.
>
> (c) OAL shall determine whether a change submitted is a change without regulatory effect within 30 working days of its receipt. OAL shall send written notification of the determination to the agency which submitted the changes.
>
> (d) If OAL determines that the submitted change is a change without regulatory effect, OAL shall file it with the Secretary of State and have it published in the California Code of Regulations. If the change without regulatory effect is a change to the MPP, OAL shall file the change with the Secretary of State and the Department of Social Services shall publish the change in the MPP.[12]

The kinds of regulation revisions that would be required to conform to the proposed law — mostly cross-reference updating — would seem to fall squarely within the scope established by OAL for "rules without regulatory effect," that is:

> the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.

It is therefore very likely that the *procedural* burden of promulgating such revisions under existing law would be relatively manageable. FGC or DFW would simply submit seven copies of the draft revisions, showing changes in strikeout and underscore, with a specified form and a written statement explaining why the changes are without regulatory effect. If OAL concurs that the changes have no regulatory effect, then the revisions would be filed with the Secretary of State and published in the Code of Regulations.

Although that process would be fairly simple for FGC and DFW, it would impose a significant burden on OAL. OAL would be required to review all of the revisions to confirm that they are nonsubstantive. It is possible that OAL would balk at this task, deciding that such a revision package would be simply too complex and large to proceed under streamlined processes.

One way to avoid those problems would be to add a provision that would effectively deem certain rule changes to be without regulatory effect. If FGC or

12. 1 Cal. Code Regs. § 100.

DFW were to submit such changes to OAL, OAL would file them with the Secretary of State and publish them in the California Code of Regulations, without first reviewing or approving them. Thus:

> 100. (a) The commission or the department may make a conforming rule change without complying with the rulemaking procedure specified in Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, if the rule change meets all of the requirements of this section.
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> (b) To proceed under this section, the commission or department shall submit all of the following to the Office of Administrative Law:
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> (1) A completed and signed form STD 400.
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> (2) A statement declaring that each proposed rule change in the submission is a conforming rule change.
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> (3) A copy of the text of each regulation to be changed, with strikeout and underscore showing the changes.
>
> (c) On receipt of a submission described in subdivision (b), the Office of Administrative Law shall file the changed regulations with the Secretary of State and have them published in the California Code of Regulations.
>
> (d) "Conforming rule change" means a change to a regulation in Title 14 of the California Code of Regulations that deletes a reference to a former provision of the Fish and Game Code and replaces it with a reference to the provision of this code that restates or continues the former provision. "Conforming rule change" includes a change to a regulation's citation of authority or reference, to delete a reference to a former provision of the Fish and Game Code and replace it with a reference to the provision of this code that restates or continues the former provision.[13]

Because the language set out above could only be used to update cross-references to conform to the effect of the recodification, use of a simplified procedure seems justified. **Should such a provision be added to the proposed law?**

Drafting Conforming Revisions

The process of preparing a draft of the necessary conforming revisions will also be time-consuming. FGC and DFW will need to update every obsolete cross-reference in their regulations, to reflect the new numbering in the proposed Fish and Wildlife Code.

13. The second sentence of proposed subdivision (d) is intended to make clear that the streamlined process can be used to update the citations required when a regulation is printed in the California Code of Regulations. See Gov't Code § 113439(b) ("authority"), (e) ("reference).

That task will be substantially simplified by use of the detailed tables of disposition and derivation that the Commission routinely prepares when recommending a recodification. These tables will make it much easier to find the appropriate replacement citation for the correction of obsolete cross-references. Nonetheless, there will still be a large volume of work to be done, most of which will need to be done by attorneys.

That transitional burden could be greatly reduced if the Commission were willing to have its staff assist in the process. A Commission staff attorney could, without too much difficulty, prepare an initial draft of the conforming revisions for the FGC and DFW regulations. That document could be provided to FGC and DFW as a starting point for their preparation of the formal regulation revisions. This would be an unusual use of the Commission's resources, but is not too different from the creation of detailed disposition tables, which the Commission routinely prepares as an extrinsic aid to use of reorganized law. The staff believes that this work could be done without a major impact on the Commission's other work. **Should it offer to do so?**

COMMISSION COMMENTS

Per its usual practice, the Commission has prepared a "Comment" for each section in the proposed law. The primary purpose of such Comments is to document the derivation of the section and highlight any changes from existing law. Sometimes, the effect of the provision is briefly explained, or important related law is cross-referenced.

Over its history, the Commission has developed an informal taxonomy that it uses in an attempt to standardize the terminology used in its Comments. That taxonomy is described in the Comment to proposed Section 10.

That Comment draws a distinction between a provision that continues former law "without change" and one that does so "without substantive change," providing (in relevant part):

> (1) *Continues without change.* A new provision "continues" a former provision "without change" if the two provisions are identical or nearly so. In some cases, there may be insignificant technical differences, such as where punctuation is changed without a change in meaning. Some Comments may describe the relationship by simply stating that the Fish and Wildlife Code provision "continues" or is "the same as" a former provision, or is "the same as" a provision of a uniform act.

> (2) *Continues without substantive change*. A new provision "continues" a former provision "without substantive change" if the substantive law remains the same but the language differs to an insignificant degree.

It is often difficult to draw a bright line between the two cases described above — one that involves "an insignificant technical difference" versus language that "differs to an insignificant degree." Consequently, there is scope for inconsistent use of the two descriptors. This is especially true when, as in this study, different parts of the proposed code were drafted by different counsel, or under different operational circumstances. For example, when the Executive Director drafted proposed Divisions 15-17, he placed a priority on completing the work without avoidable delay. Consequently, the stricter phrase, "without change," was almost never used. Instead, the looser phrase, "without substantive change," was used to describe any provision that would continue former law without significant rewording and without a change to its substantive effect. This expedited the process of drafting Comments, without significant loss of informational value.

The attempt, in the earlier parts of the proposed code, to distinguish more carefully between the two cases has caused some confusion. DFW explains:

> In the notes the CLRC says that some sections are "without change" and "without substantive change." In some cases, this is not accurate. For example new section 640 purports to recite current section 711.2 (a) "without change." This is not true. Section 640 deletes an important introductory phrase from the section, so it is not "without change." Similarly, CLRC has said that some sections are "without substantive change" including, for example in new section 430 which now excludes "a mature Nelson bighorn ram" from the definition of a fully protected mammal suggesting that only one ("a") may be hunted. Currently section 4700 does not include the word "a." This is a substantive change while the notes say it is not. The incorrect characterization of the notes can make it challenging for CDFW to prioritize its review of the changes because we cannot count on the fact that "no change" sections actually result in no change to the effect of the law.[14]

While it is important for the Commission to carefully consider any suggestion that an intended nonsubstantive change is, in fact, substantive, it is much less important for the Commission and reviewers to worry about the distinction between the descriptors "without change" and "without substantive change." In

14. See Exhibit pp. 8-9.

both cases, the intention is to signal that there has been no substantive change and little or no change to language.

Nor is the distinction of great value as a way to focus reviewer attention. The "Notes" that follow individual provisions are a much more reliable indicator of a need for focused reviewer attention. Such Notes raise questions that the Commission has about the meaning of an existing provision, the merits of a proposed minor substantive change, and whether a proposed rewording of a provision would be problematic. Provisions that merely continue former law without substantive change do not have such Notes.

In light of the foregoing, the staff recommends that the distinction between "without change" and "without substantive change" be dropped in this study. If the Commission agrees, the staff will replace every "without change" descriptor in the proposed law with the descriptor "without substantive change." **It might also make sense to remove the discussion of the Comment descriptors from the Comment to proposed Section 10.** That discussion could invite counterproductive attention to overly-fine distinctions.

COMPACTS

Some provisions of the Fish and Game Code were enacted to effectuate California's participation in two specific inter-jurisdictional compacts, the Wildlife Violator Compact[15] and the Pacific Marine Fisheries Compact.[16]

DFW asks whether amending those provisions would somehow disrupt the established agreements:

> What is the effect of making any change to a compact? Presumably, the other states have enacted similar (identical?) provisions. Will we need to go back to those other states to get their concurrence?[17]

That is a justifiable concern, as the Wildlife Violator Compact includes express language requiring participant assent to any "amendment":

> (a) This compact may be amended periodically. Amendments shall be presented in resolution form to the chairperson of the board, and shall be initiated by one or more participating states.

15. Sections 716-717.2.
16. Sections 14000-14105.
17. See Exhibit p. 8.

(b) The adoption of an amendment requires endorsement by all participating states and becomes effective 30 days after the date of the last endorsement.

(c) The failure of any participating state to respond to the appropriate authority within 60 days after receipt of a proposed amendment constitutes endorsement thereof.[18]

However, in the staff's view, that amendment process seems aimed at securing unanimous consent to *substantive* amendments of the agreement. It is not clear that minor technical variation between participating states' enacting language would need to be run through that process.

To the contrary, both compacts contain language expressly stating that the participant states' statutes need not be in exactly the same form:

716.9. (a) This chapter shall become effective at such time as it is adopted *in substantially similar form* by this state and one or more other states, subject to the following conditions:

(1) The entry into the compact shall be made by resolution executed and ratified by authorized officials of the applying state and submitted to the chairperson of the board of contract administrators.

(2) *The resolution shall substantially be in the form and content as provided in the compact manual*, and shall include all of the following:

(A) A citation of the authority authorizing the state to become a party to this compact.

(B) An agreement to comply with the terms and provisions of this compact.

(C) An agreement that the state entering into the compact agrees to participate with all participating states in the compact.

…

14001. The form and contents of the Pacific Marine Fisheries Compact shall be *substantially as provided in this section* and the effect of its provisions shall be interpreted and administered in conformity with the provisions of this division:

…

That degree of flexibility makes sense, as requiring strict uniformity would be needlessly constraining (and often impossible, given varying numbering and drafting conventions in the different participating states).

With the foregoing in mind, the staff examined all of the differences between the existing compact provisions and the proposed recodified compact provisions. Those differences can be divided into two categories — cross-reference adjustments and style edits. They are discussed further below.

18. Section 717.

Cross-Reference Adjustments

In the proposed law, cross-references were adjusted to reflect the compact provisions' numbering and location within the proposed code. Such changes seem unproblematic. When California first enacted the compact statutes, it must have been necessary to conform the compact language to our heading and numbering conventions, which cannot have matched those used in other participant states. That kind of technical variation surely falls within the scope of the "substantially similar form" latitude noted above.

If all of that is correct, then non-substantive adjustment of cross-references to reflect the new numbering and organization should be unproblematic.

Style Edits

The staff also made a number of minor style edits, consistent with the prevailing practice in California statute drafting. Gendered terminology was made gender-neutral; the use of "such" as a pronoun was eliminated (and replaced with equivalent language); grammatically incorrect use of "which" was corrected; etc. For example, Section 14101 would be recodified in proposed Section 5955 as follows (with strikeout and underscore showing changes from existing law):

> The term of each commissioner shall be four years. A commissioner shall hold office until ~~his~~ a successor shall be appointed and qualified but ~~such~~ the successor's term shall expire four years from the legal date of expiration of the term of ~~his~~ the predecessor. Any commissioner may be removed from office by the Governor upon charges and after a hearing. The term of any commissioner who ceases to hold the qualifications required shall terminate when a successor may be duly appointed. Vacancies occurring in the office of a commissioner from any reason or cause shall be filled for the unexpired term in the same manner as for a full term appointment.

Such changes would seem to fall within the scope of nonsubstantive variation that is expressly allowed. But, unlike the cross-reference adjustments described above, the style edits are not strictly *necessary*. They could be removed from the proposed law. **Does the Commission wish to do so?**

REVISION OF LANGUAGE ADDED BY THE VOTERS

In preparing the proposed law, the Commission has been on the watch for provisions that were added by citizen initiative. Such provisions are subject to

constraints on amendment that need to be considered (and flagged for public comment). For example, a note following proposed Section 460 invites comment on whether the recodification of Section 3950.1 would be problematic, given its enactment by initiative:

> ☞ **Note.** Existing Fish and Game Code Section 3950.1 (which would be continued by proposed Section 460(b) and (c)) was added to the existing code in 1990 pursuant to an initiative statute, Proposition 117.
>
> Under Article 2, Section 10(c) of the California Constitution, an initiative statute may be amended or repealed by the Legislature only when expressly permitted by the text of the initiative statute. The text of Proposition 117 provides in pertinent part that any section added to the Fish and Game Code by the proposition may be subsequently amended by the Legislature "only by a statute approved by a vote of four-fifths of the members of both houses of the Legislature,' and that any such amendment "shall be consistent with, and further the purposes of," the proposition. The text does not address a subsequent repeal of any section added by the proposition.
>
> However, courts have held that, for the provisions of Article 2, Section 10(c), a legislative enactment only amends an initiative statute when it "prohibits what the initiative authorizes, or authorizes what the initiative prohibits." *People v. Superior Court (Pearson)*, 48 Cal. 4th 564, 571; 227 P.3d 858; 107 Cal. Rptr. 3d 265 (2010). (The Commission has located no authority directly addressing whether this principle also applies to a repeal of an initiative statute.)
>
> Based on interpretative case law, the office of Legislative Counsel has informally expressed to the Commission its view that the repeal and recodification of an initiative statute in a single enactment is not precluded by Article 2, Section 10(c), if the recodification does not substantively change the meaning of the repealed initiative statute.
>
> Existing Section 3950.1 reads as follows:
>
> "3950.1. (a) Notwithstanding Section 3950 or any other provision of this code, the mountain lion (genus Felis) shall not be listed as, or considered to be, a game mammal by the department or the commission.
>
> (b) Section 219 does not apply to this section. Neither the commission nor the department shall adopt any regulation that conflicts with or supersedes this section."
>
> **The Commission invites comment on whether the proposed recodification of existing Section 3950.1 would substantively change the meaning of that provision, or would for some other reason violate Article 2, Section 10(c) of the California Constitution.**

DFW points out that there are other provisions that were added by initiative, that were not highlighted for such special attention:

> How does the Legislature change law that was enacted by the voters? The CLRC discusses this in relation to Prop. 117 (mountain lions) but there are also proposed changes to some trapping sections that were also enacted via an initiative.[19]

19. See Exhibit p. 8.

As part of the process of preparing a comprehensive tentative recommendation, the staff will again look for any initiative-derived Fish and Game Code provisions that need specialized attention. In doing so, the staff will request assistance from FGC and DFW. Their greater familiarity with the history of the code's development should help to ensure that all such provisions are identified and flagged for attention.

RULES OF CONSTRUCTION

The proposed law includes certain boilerplate rules of construction, of the type that the Commission typically includes in its recodification projects. Those provisions ensure continuity between the former law and the corresponding new law, dispel anticipated problematic inferences that might be drawn from the fact of recodification, and establish baseline rules for the retroactive or prospective application of the new code and any future changes to the code.[20]

DFW expressed some concerns and suggestions regarding those provisions. They are discussed below.

Restatement and Continuation

Proposed Section 10 provides:

> 10. (a) A provision of this code, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof, and not as a new enactment.
>
> (b) A reference in a statute or regulation to a previously existing provision that is restated and continued in this code shall, unless a contrary intent appears, be deemed a reference to the restatement and continuation.
>
> (c) A reference in a statute or regulation to a provision of this code that is substantially the same as a previously existing provision, shall, unless a contrary intent appears, be deemed to include a reference to the previously existing provision.

That provision's references to "restatement and continuation" are consistent with the terminology used in the first sentence of existing Section 3: "The provisions of this code, insofar as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations thereof, and not as new enactments."

20. See proposed Sections 10 (restatement and continuation), 15 (judicial decisions), 20 (constitutionality of provisions), 25 (transitional provision).

DFG notes that the Commission's Comment to proposed Section 10 attributes similar, but different meanings to the words "restatement" and "continuation." "[A] continuation includes no significant changes, where a restatement may include significantly different language that is substantively the same."[21] Read strictly, that distinction is in tension with the language of Section 3 and proposed Section 10, which refer to provisions being both a restatement *and* a continuation.[22] DFW suggests some minor changes to the proposed statutory language to reconcile the statute and Comment.[23]

To the extent that the inconsistency described above is a source of confusion, the problem does not seem to be the statutory language, which is drawn from existing law and time-tested Commission boilerplate. Rather, it is the Comment language that is causing the perceived dissonance.

That problem seems similar to an issue discussed above (relating to the Comment descriptors "without change" and "without substantive change"), where overly-fine distinctions drawn in the Comments appear to be causing more confusion than clarity. Regarding that earlier issue, the staff has recommended, among other things, deleting the terminology discussion from the Comment to proposed Section 10.

The staff believes that step would also help to address the DFW concern discussed here. There is no need to draw a distinction between "continuation" and "restatement" in the Comment to proposed Section 10, in a way that appears to conflict with the language used in that section ("continuation and restatement"). If that distinction is dropped from the Comment, the potentially confusing tension with the language of the statute could be minimized.

"Substantially the Same"

Proposed Section 10(b) expressly provides that a reference to former law is deemed to include a reference to the new law that restates and continues the former law. Conversely, proposed Section 10(c) expressly provides that a reference to a new provision is deemed to include a reference to a provision of former law if the new provision is "substantially the same" as the "previously existing provision." These reciprocal rules of construction ensure that references to former law are treated as references to the corresponding new law and vice

21. See Exhibit comment 1.
22. *Id.*
23. *Id.*

versa. This preserves the seamless continuity of materials that refer either to former law or the new law (e.g., prior case law, regulations, forms).

DFW suggests that proposed Section 10(c) be deleted:

> Delete because this suggests a scenario that is not covered under existing law and unnecessary, while at the same time creating the possibility of differing interpretations of what is "substantially the same."[24]

While subdivision (c) is not strictly *necessary* (because it can be inferred from subdivision (b)), the staff believes that it would provide useful guidance.

The potential for disagreement about whether a new provision is substantially the same as a former provision is unavoidable (as it is in subdivisions (a) and (b)). In applying proposed Section 10, it will always be necessary to determine whether a new provision is substantially the same (i.e., continues and restates) a former provision.

Fortunately, that task will be fairly straightforward, for two reasons:

(1) For the most part, the proposed law continues former law without substantive change, in a way that is an obvious continuation of the substance of the former law.

(2) The Commission's Comments state expressly which provision of former law is continued by a new provision and state whether there is any substantive change. Courts at all levels, in both the state and the federal systems, recognize the Commission's Comments as evidence of legislative intent.[25]

The staff recommends against deleting proposed Section 10(c).

Judicial Decisions

Proposed Sections 15 and 20 provide as follows:

> 15. (a) A judicial decision interpreting a provision of the former Fish and Game Code is relevant in interpreting any provision of this code that restates or continues that provision of the former Fish and Game Code.
>
> (b) However, in enacting the Fish and Wildlife Code of 2019, the Legislature has not evaluated the correctness of any judicial decision interpreting a provision of the former Fish and Game Code.

24. See Exhibit comment 2.

25. See, generally, *2016-2017 Annual Report*, 44 Cal. L. Revision Comm'n Reports 755, 771-76 (2016).

(c) The enactment of the Fish and Wildlife Code of 2019 is not intended to, and does not, reflect any assessment of any judicial decision interpreting any provision of the former Fish and Game Code.

20. (a) A judicial decision determining the constitutionality of a provision of the former Fish and Game Code is relevant in determining the constitutionality of any provision of this code that restates or continues that provision of the former Fish and Game Code.

(b) However, in enacting the Fish and Wildlife Code of 2019, the Legislature has not evaluated the constitutionality of any provision enacted by that act, or the correctness of any judicial decision determining the constitutionality of any provision of the former Fish and Game Code.

(c) The enactment of the Fish and Wildlife Code of 2019 is not intended to, and does not, reflect any determination of the constitutionality of any provision enacted by that act.

Proposed Sections 15(b)-(c) and 20(b)-(c) are intended as disclaimers. They make clear that the mere fact of enactment of the proposed new law does not signal legislative acquiescence in the holdings of prior Fish and Game Code cases or signal any legislative position on the constitutionality of any Fish and Game Code provision. As the Comments to those provisions explain:

> Subdivisions (b) and (c) [of proposed Section 15] make clear that in enacting the Fish and Wildlife Code of 2019, the Legislature has not taken any position on any judicial opinion interpreting any provision of the former Fish and Game Code.
>
> Subdivisions (b) and (c) [of proposed Section 20] make clear that in enacting the Fish and Wildlife Code of 2019, the Legislature has not taken any position on the constitutionality of any provision of that act, or of any provision of the former Fish and Game Code.

DFW suggests that those provisions are problematic and should be deleted:

> Delete sections (b) and (c). They unnecessarily undermine existing cases that have interpreted the code.[26]

Those provisions are not intended to undermine prior case law. Their purpose is to take make clear that the fact of *recodification* does not bear, pro or con, on the correctness of prior case law. Without such provisions, it could be argued that legislative approval of prior decisions should be inferred from the

26. See Exhibit comments 3 & 4.

fact of recodification. Although that inference would likely be weak,[27] it could be argued for every provision in the code.

DFW's concern may be that the proposed language could undercut a presumption of legislative acquiescence that could be drawn from the reenactment (or lack of amendment) of a provision *prior* to the recodification. While that isn't the intent of the proposed language, it could perhaps be misconstrued that way. That could be a problem where a presumption of legislative acquiescence from *prior* legislative acts or omissions is justified and valuable.

Should the disclaimer provisions be retained in the proposed law?

Transitional Provision

Proposed Section 25 would provide guidance on the retroactivity or prospectivity of new law within the proposed Fish and Wildlife Code. "New law" would include the enactment of the new code as a whole, as well as any future changes to provisions of that code.[28] Section 25 is drawn from the Commission's prior large-scale recodification studies.[29]

Ordinarily, there is a presumption that a statute does not apply retroactively.[30]

Proposed Section 25 would expressly rebut that presumption, subject to some important qualifications. In general, every provision of "new law" would apply retroactively to events and circumstances that occurred prior to the operative date of the new law, "including, but not limited to, commencement of a proceeding, making of an order, or taking of an action."[31] However:

- If a document or paper were filed before the operative date of the new law, the contents, execution, and notice rules would be governed by former law.[32]

27. See, e.g., Cianci v. Superior Court, 40 Cal. 3d 903, 923 (1985) ("Legislative silence after a court has construed a statute gives rise at most to an arguable inference of acquiescence or passive approval, the weaknesses of which have been exposed elsewhere. But something more than mere silence should be required before that acquiescence is elevated into a species of implied legislation.").
28. See proposed Section 25(a)(1).
29. See Fam. Code § 4; Prob. Code § 3.
30. See 10 Witkin, Summary of California Law *Const. Law* § 701 (2016).
31. Proposed Section 25(c).
32. Proposed Section 25(d).

- If an order is made or an action on an order is taken before the operative date of the new law, the validity of the order or action would be governed by former law.[33]
- No person is liable for an action taken before the operative date that was proper at the time the action was taken.[34] **If proposed Section 25 is retained, it might be helpful to add language making clear that this rule applies to both civil and criminal liability.** That would help to avoid any unconstitutional *ex post facto* application of new criminal laws.[35]

Importantly, proposed Section 25(h) provides a catch-all that allows a party to object to the application of new law where such application would "substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date…." This provides a case-by-case mechanism to prevent retroactive application of a statute where such application would violate due process.

DFW has three concerns about proposed Section 25, which are discussed below.

Impairment of Rights and Privileges

DFW writes:

> It is unclear where new section 25 preserves the following in existing section 3: "This code shall not impair any privilege granted or right acquired under any of the laws of this state prior to the date it takes effect."[36]

The referenced language from Section 3 appears to be designed to prevent any unconstitutional retroactive effect. That is also the purpose of proposed Section 25(h) (although that provision provides a case-by-case remedy, rather than making a blanket declaration of legislative intent). Replacement of the existing declaration with proposed Section 25(h) was not meant to negate the spirit of the existing declaration.

However, the staff agrees with DFW that the express declaration should be included. Any implication that the impairment of existing rights might result from recodification would be problematic. If the Commission agrees, the staff

33. Proposed Section 25(e).
34. Proposed Section 25(f).
35. See generally 1 Witkin Cal. Crim Law *Introduction to Crimes* § 11 *et seq.* (2016).
36. See Exhibit comment 5.

will work the existing Section 3 language into the upcoming draft tentative recommendation.

Savings Provisions

Proposed Sections 25(d)-(g) provide as follows:

> (d) If a document or paper is filed before the operative date, the contents, execution, and notice thereof are governed by the old law and not by the new law, but subsequent proceedings taken after the operative date concerning the document or paper, including an objection or response, a hearing, an order, or other matter relating thereto is governed by the new law and not by the old law.
>
> (e) If an order is made before the operative date, or an action on an order is taken before the operative date, the validity of the order or action is governed by the old law and not by the new law. Nothing in this subdivision precludes proceedings after the operative date to modify an order made, or alter a course of action commenced, before the operative date, to the extent proceedings for modification of an order or alteration of a course of action of that type are otherwise provided in the new law.
>
> (f) No person is liable for an action taken before the operative date that was proper at the time the action was taken, even though the action would be improper if taken on or after the operative date, and the person has no duty, as a result of the enactment of the new law, to take any step to alter the course of action or its consequences.
>
> (g) If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its repeal or amendment by the new law.

DFW suggests deleting those provisions as unnecessary:

> Sections (d)-(g) should be deleted. If the effect of this recodification is truly non-substantive, there should be no need for these overly detailed sections specifying the old and new laws will apply.[37]

The staff sees two counter-points. First, it is not certain that the proposed law will be *entirely* nonsubstantive. The resolution that assigned this study bars the Commission making any *significant* substantive changes.[38] While there is no bright line between significant and insignificant substantive changes (and the Commission is unlikely to make many substantive changes of any kind), it is possible that some "insignificant" substantive changes could be included in the

37. *Id.*
38. See 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).

proposed new code. Second, proposed Section 25 would not only apply to the act that enacts the new code. It would also apply to all future changes to that code. Future additions and changes to the code will undoubtedly include substantive changes. Section 25(d)-(g) would usefully apply to such changes.

While there may be arguments against including Section 25, the staff does not believe that the mostly nonsubstantive character of the recodification is one of them.

Substantive Change

As mentioned above, Section 25(h) provides a mechanism for parties to object to retroactive application of new law, on a case-by-case basis, if such application would impair their rights:

> If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference.

DFW describes this as a substantive change and seems to be suggesting that it would be problematic:

> This seems to be a substantive change to the code. It adds a new cause of action or legal theory allowing someone to ask a court to apply either the new law or the old law based on a standard that is unclear (e.g., substantial interference).[39]

If the proposed law includes proposed Section 25, the staff believes that it should include a provision like subdivision (h). Otherwise, blanket retroactive application of new law could operate to impair vested rights, thereby violating due process. Subdivision (h) provides a way to avoid such impairment.

General Discussion

A provision along the lines of proposed Section 25 would be helpful, if "new law" in the proposed Fish and Wildlife Code is to be routinely given retroactive effect. Proposed Section 25 would accomplish that by expressly rebutting the presumption against retroactive effect. It would also implement safeguards to

39. See Exhibit comment 5.

avoid unfairness and possible due process violations. The validity of prior filings, orders, and actions would be saved. A party who believes that retroactive application would impair a procedural or substantive right would have standing to petition for relief.

While that approach does not seem to have caused any problems in the Family Code and Probate Code, perhaps it does not make sense in the Fish and Game context. Fish and Game law is regulatory. Rather than providing rules for the fair resolution of private matters — marital dissolution, custody of children, inheritance — the Fish and Game Code protects the public trust and regulates commercial activity. It involves the exertion of state coercive power, including the power to punish criminally, seize property, and suspend or revoke important commercial rights. In that context, there may be a greater likelihood that retroactive application would impair vested rights (or constitute an *ex post facto* criminal prohibition). Moreover, the staff understands that Fish and Game law enforcement resources are tight, and anything that would add a point of litigation to enforcement proceedings could act as a drag on the enforcement process. It might be better to avoid the complications that would follow from retroactive application of new laws, especially in the context of the current study, which is expected to be almost entirely nonsubstantive. The prospective or retroactive application of a nonsubstantive continuation of the law is immaterial; in either case, the result should be the same. That argues in favor of choosing whichever application is more cost-effective.

Ultimately, the staff does not believe that proposed Section 25 is clearly beneficial in this context. **Given DFW's concerns, the staff recommends that it be deleted.**

Use of English

Proposed Section 50 would provide:

> Whenever a statement or report is required to be made, it shall be made in the English language. Nothing in this section shall prohibit the department from providing an unofficial translation of a statement or report in a language other than English.

When that provision was drafted, the second sentence of the provision was proposed new language, drawn from Code of Civil Procedure Section 185. The Comment reflected that fact.

Subsequently, the second sentence was added to the Fish and Game Code, on the Commission's recommendation.[40] Unfortunately, the Comment in the tentative recommendation was not updated to reflect that enactment. DFW points this out.[41] **The staff will correct the error in the next draft tentative recommendation.**

DEFINITIONS

Many of the comments from FGC and DFW express concerns about the definitions in proposed Division 1. Those comments fall into the following categories, which are discussed separately:

- Generalization of "Marine Life" definitions.
- Generalization of commercial fishing definitions.
- Proposed new definitions.
- Changed definitions (to be discussed in a future memorandum).

Where multiple comments relate to a common issue, they will be aggregated for discussion as a group.

Generalization of "Marine Life" Definitions

The existing Fish and Game Code begins with a division that contains definitions. The division is divided into two chapters, "Chapter 1. General Definitions" and "Chapter 2. Marine Life Definitions."

The former applies to the entire code. The latter has limited application, to "Chapter 7 (commencing with Section 1700) of Division 2 and Division 6 (commencing with Section 5500) and all regulations adopted pursuant to those provisions."[42]

Generalization of Definitions

In the tentative recommendation, the Commission proposed combining both of the existing definition chapters, thereby giving code-wide application to the "Marine Life" definitions that are currently in Chapter 2. It appeared that this change might be appropriate, because nearly every provision in Chapter 2 is

40. See *Fish and Game Law: Technical Revisions and Minor Substantive Improvements* (Part 1), 44 Cal . L. Revision Comm'n Reports 115 (2015); 2015 Cal. Stat. ch. 154.
41. See Exhibit comment 6.
42. Section 90.

expressly limited, by its own terms, to marine life or marine fisheries. The exceptions are Sections 91 ("discards") and 98.5 ("population" or "stock").

Notes in the tentative recommendation ask for comment on whether the generalization of the Chapter 2 definitions would be problematic.[43]

DFW believes that those changes would be problematic and should not be made:

> … Memorandum 2017-15 proposes to remove definitions from the many places they now exist in the Code and place them in a centralized location with the effect of generalizing many sections that have applied to only specific statutory schemes up until now. One area of the Code where this is common is the definitions that have applied specifically to marine fisheries. For example, the definition of "fishery" is moved from a section titled "Marine Life Definitions". Existing section 94 only includes within it marine fish/fisheries. Yet "fishery" is used in other parts of the code to include freshwater fisheries, such as "wild trout fishery" in Section 1762. This sort of imprecision will create unnecessary confusion.
>
> We realize that CLRC staff reflected on this general concern early in their consideration of changes to the Fish and Game Code. In CLRC Memo 2013-12 related to the General Provisions Division that would include a section on general definitions, CLRC staff noted that "[p]roposed Part 2 does *not* include the special definitions that are provided in Chapter 2 (commencing with Section 90) … Pursuant to Section 90, those definitions only apply to specified provisions of the code, relating to the regulation of fish and other aquatic resources. When the Commission addresses these provisions, later in the course of the study, it can decide where it would be best to locate the special definitions." (See p. 4.) However, despite recognizing the distinction between general and special definitions in 2013, Memorandum 2017-15 would include special definitions in the generalized section of the Code. We think this will result in unnecessary confusion and have elaborated on those concerns in our attached comments.[44]

While a few of DFW's comments on this issue raise concerns specific to a particular provision,[45] most express the following more general objections:

> Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions.
>
> The special definitions in FGC 90-99.5 were part of AB 1241, so the Marine Life Management Act and the definitions are properly

43. See Notes following proposed Sections 265, 340, 350, 365, 410, 525, 540, 600, 605, 610, 615, 625, 670, 745, 750.

44. See Exhibit p. 8. See also Exhibit comments 12, 19-20, 22, 30, 44, 47, 52, 54-55, 60, 72, 73- 75.

45. See Exhibit comments 30 (fishery), 44 (marine living resources), 55 (population), 75 (sustainable use).

> analyzed with each other. If these provisions are folded into the generic FGC definitions it becomes more difficult to use them for purposes of interpreting the statutory construction of the MLMA. This is an important consideration should our implementation of a particular fishery management plan be legally challenged.
>
> Some terms concern marine fisheries (i.e. 365, 520, 525, 530, 540, 560, 600-625) but some concern only the commercial sector (i.e. 235, 240, 255, 2565, 290, 385-400). Putting all of these definitions together in one [part] is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.[46]

FGC raises similar concerns about one of the definitions at issue ("fishery"):

> Generalizing the definition for fishery as found in Fish and Game Code Section 94 is problematic since the definition, as written, excludes non-marine fish and plants. In addition, attempting to apply the same definition to inland freshwater environments may be problematic since management considerations are different for inland, freshwater environments than for marine and estuarine environments.[47]

As DFW notes, the decision to locate the "Marine Life" definitions with the code-wide definitions was made fairly late in the development of the tentative recommendation.[48] And, as noted at the outset of this memorandum, the decision whether to generalize definitions is a close call and the staff is inclined to defer to stakeholders on the matter.[49] **In light of the concerns raised by FGC and DFW, the staff recommends that those changes be reversed.** If the Commission agrees, the staff will do so in the upcoming draft tentative recommendation.

Definition of "Adaptive Management"

On a related point, one of the "Marine Life" definitions, of the term "adaptive management,"[50] was omitted from the tentative recommendation. The term is not used in any of the provisions that are governed by the existing definition, so it appeared to be obsolete. The Commission specifically requested comment on whether the omission would cause any problems.[51]

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46. See, e.g., Exhibit comment 22.
47. See Exhibit p. 3.
48. See Memorandum 2017-15.
49. See discussion of "General Observations," *supra*.
50. See Section 90.1.
51. See Note following proposed Section 205 (which defines "adaptive management" differently than existing Section 90.1, for application in other parts of the code).

Although FGC and DFW recognize that the term is not used in any statute or regulation, they believe it has continuing usefulness. FGC writes:

> [W]hile not specifically used in Title 14 regulations, the Section 90.1 definition is memorialized in the master plan for marine protected areas and the Marine Life Management Act master plan, both important elements of ecosystem-based management programs. The Section 90.1 definition contains an important statement about designing management actions to provide useful information for future actions, even in the case of failure, which is absent from the Section 13.5 definition proposed to apply code-wide. The omission is problematic.[52]

Similarly, DFW writes:

> The note asks if it would be problematic to discontinue the special definition in existing 90.1. This definition is part of AB 1241, which enacted the Marine Life Management Act, and so should remain in code.
>
> This proposed change is problematic because it dilutes and confuses the legislative intent as an aid to interpreting the MLMA.
>
> In addition, use of the term adaptive management may be used by marine region staff extensively in various program documents. The marine specific definition may be useful or necessary in that context, even if not used in the applicable code or associated regulations.[53]

Given FGC's and DFW's reasons for retaining the special definition of "adaptive management," the staff recommends that it be included in the proposed law. If the Commission agrees, that change will be made in the upcoming tentative recommendation.

Generalization of Commercial Fishing Definitions

In addition to generalizing the existing "Marine Life" definitions, the tentative recommendation would also generalize a number of definitions used in the provisions that regulate commercial fishing and fish businesses. DFW objects to these changes for some of the same reasons it objects to generalization of the "Marine Life" definitions. It believes that moving them to the front of the code would be confusing and would invite misapplication of terms that are intended to have specialized application.[54] The same objections were raised in response to

52. See Exhibit p. 3.

53. See Exhibit comment 7.

54. See Exhibit comments 8 ("bait net"), 9 ("beach net"), 11 ("bucket trap"), 18 ("deeper nearshore species"), 39 ("general trap permit"), 48.5 ("nearshore species"), 53 ("overfished"), 56 ("popup"), 60 ("restricted access"), 61 ("round haul nets"), 62 ("set line"), 63 ("set net"), 69

the proposed generalization of the definitions of "marine mammal" and "marine finfish aquaculture."[55]

The staff recommends that the definitions discussed here not be generalized. If the Commission agrees, the staff will move them to appropriate locations closer to the provisions that they currently govern.

Proposed New Definitions

The tentative recommendation proposes the creation of some new definitions, which the Commission thought might be helpful in understanding and applying the code. Those definitions fall into the following categories, which are discussed separately below:

- Definition of "license."
- Definitions relating to licensees.
- Definitions relating to "game" animals.

Definition of "License"

Several of the general licensure provisions that would be recodified by the tentative recommendation use some variation of the phrase "license, permit, tag, reservation, or other entitlement." For example, Section 1050(a) provides: "All licenses, permits, tags, reservations, and other entitlements authorized by this code shall be prepared and issued by the department."

In the interest of simplified drafting and avoiding inadvertent inconsistency, the tentative recommendation proposes to add the following definition of "license," which would be limited in its application to the general licensing provisions in Part 4 of Division 2 of the proposed law:

> 2800. For the purposes of this part, "license" includes any license, permit, tag, reservation, or other entitlement authorized by this code.

DFW believes that this definition would cause several problems:

> This new definition creates problems throughout this part. As described in the new definition, "license would include licenses and permits, tags, reservations, or other entitlements." However, in this part, "license" also follows its historical usage, i.e., in reference to specific entitlements that are now called "licenses." See, for

("stamp"), 76 ("trawl net"), 77 ("troll line"), 78 ("vertical fishing line"), 79 ("vessel owner"). The same objections were raised in response to the proposed generalization of the definitions of "marine mammal" and "marine finfish aquaculture."

55. See Exhibit comments 43 & 45.

> example, [proposed] Section 2930(a) ("A person shall not obtain more than one license, permit, reservation, or other entitlement of the same class, or more than the number of tags") or (b), (b)(3), (c). This is confusing, because it is unclear which meaning of license applies. It should be the meaning in Section 2800 throughout this part, but in some sections, the context suggests otherwise.
>
> CDFW recommends deleting this section and restoring all of the sections that were changed as a result of this new definition.[56]

The point seems to be that the tentative recommendation has not consistently employed the proposed new definition, creating confusing redundancy where the term "license" is still included in a list of entitlements (rather than replacing that list). The staff has confirmed that this is correct. There are a few instances where use of the definition was erroneously omitted.

That oversight could be cured relatively easily. However, having taken a second look at the affected provisions, the staff sees another possible problem.

There may be provisions covered by the proposed definition that were intended to apply only to licenses, and not to any of the other kinds of entitlements listed in the proposed definition. For example, Section 1051 provides: "Licenses of each class shall be uniquely numbered. Every license shall contain its expiration date and the fee for which it is issued. If no fee is either required by this code or established by the commission pursuant to Section 1050, the license shall so indicate."

It is possible that Section 1051 was not intended to apply to "permits, tags, reservations, and other entitlements." Thus, under existing law, there may not be any obligation to serially number such documents and include expiration and fee information. If so, application of the broader definition to Section 1051 could impose new substantive requirements.

In light of these concerns, the staff recommends that DFW's suggestion be implemented (i.e., delete the special definition of "license" and reverse the revisions that were made in reliance on it). If the Commission agrees, the staff will implement that approach in drafting the upcoming tentative recommendation.

Definitions Relating to Licensees

The Fish and Game Code defines a "commercial fisherman" as "a person who has a valid, unrevoked commercial fishing license…."[57] The code then repeatedly

56. See Exhibit comment 94.
57. Section 8031(a)(4).

uses the term "commercial fisherman" in provisions that regulate commercial fishing.

When working with those provisions, the staff wondered whether that approach could create a problematic gap in enforcement. If the provisions that regulate commercial fishermen only apply to those who hold a valid unrevoked commercial fishing license, can those provisions be enforced against a commercial fisherman who fishes without such a license?

To address that concern, the tentative recommendation defines "commercial fisherman" as "a person engaging in an activity for which a commercial fishing license is required," without regard for whether the person actually has such a license.[58] The idea was that this would provide clear authority to enforce commercial fishing laws against a scofflaw who acts without being properly licensed. A note following the proposed definition explained the proposed change and asked for comment on its merits.

Similar reasoning was the basis for the addition of a number of proposed new definitions, which refer to persons engaged in various kinds of fish businesses. For example, "commercial passenger fishing boat owner" would be defined as a person engaging in an activity for which a commercial passenger fishing boat license is required…."[59]

FGC objects to the proposed definition of "commercial fisherman":

> A commercial fisherman is not someone who is simply engaged in fishing activities for commercial purposes; a license is required to be a commercial fisherman, otherwise the activity is currently interpreted to be recreational fishing and there are significantly different repercussions for selling recreationally-caught fish. The current Fish and Game Code Section 7850 language is more direct and accurate in the overall context of how commercial and recreational fishing laws are applied.[60]

DFW also finds that definition to be unnecessary and problematic:

> The proposed definition is problematic because in many cases it will make it difficult to determine what laws (commercial or recreational) apply to individuals, and it would significantly change the potential penalties that could be imposed for violations. The approach of treating every person who engages in an activity

58. See proposed Section 280.

59. See proposed Section 300. See also proposed Sections 385 ("fish importer"), 390 ("fish processor"), 395 ("fish receiver"), 400 ("fish retailer"), 405 ("fish wholesaler"), 500 ("live freshwater bait fish dealer"), 510 ("marine aquaria collector"), 515 ("marine aquaria receiver").

60. See Exhibit p. 3.

> that would require a license as a licensee subject to all laws applying to those licensees is not appropriate, would not add clarity, and would make significant substantive changes to the law. Under existing law, a person without a commercial fishing license who buys or sells fish would not necessarily be prosecuted as a commercial fisher. Rather, the person could be prosecuted for violating recreational sport fishing regulations, which have much stricter penalties than those that may apply to commercial fishing violations. For example, existing code sections such as 12002.3, 12006, 12009, 12012, and 12013 provide for heavy fines for sport fishing violations related to the purchase or sale of recreationally taken fish. Under existing law, prosecutors have discretion to charge violators with violating commercial fishing provisions or for violating other more generally applicable laws. The proposed regulation would introduce confusion and uncertainty regarding this discretion. The proposed change may also produce unintended consequences regarding landing taxes, qualifications, forfeitures, and licensing and permit transfers.[61]

The staff still suspects that existing law could present problems of the type that the proposed definition was intended to address. For example, it seems doubtful that a prosecutor would have discretion to enforce a statute regulating a "commercial fisherman" against a person who does not fall within the statutory definition of "commercial fisherman." That could be problematic if the commercial fishing laws are a better fit for activity that is de facto commercial fishing. For example, it is not clear whether a person who is not a "commercial fisherman" could be compelled to pay landing fees.

Nonetheless, the staff is convinced by FGC and DFW that the change to the definition of "commercial fisherman" should not be made. Those agencies are the best judge of whether the proposed approach would improve enforcement flexibility and more fully effectuate existing policy; they believe it would not. The staff also agrees that the approach could have unintended effects. In particular, as FGC and DFW point out, it is not clear whether a person who takes fish for sale without a license *should* be punished in the same way as a legitimate businessperson who violates a regulatory rule.

DFW raises similar objections to the proposed new definitions that would define the kinds of tradespeople conducting various kinds of fish businesses (e.g., fish receiver).[62] **The staff finds those objections equally convincing, and**

61. See Exhibit comment 13.
62. See Exhibit comments 16-17, 25-29, 40-42.

recommends that those definitions be deleted. Revisions that were made in reliance on them should also be reversed.

Definitions Relating to "Game" Animals

In 2014, then-director of FGC Sonke Mastrup asked the Commission to consider the meaning of certain provisions that refer to different classes of "game" animals. The Commission did so in 2016.[63] In connection with that analysis, the Commission wondered whether it would be helpful to add definitions for the presently undefined terms "game fish," "game amphibian," and "game reptile." Thus:

> 445. "Game amphibian" means an amphibian that can be lawfully taken for a noncommercial purpose.
>
> 455. "Game fish" means a fish that can be lawfully taken for a noncommercial purpose.
>
> 465. "Game reptile" means a reptile that can be lawfully taken for a noncommercial purpose.

Notes following those proposed new definitions asked for comment on their usefulness.

Regarding the proposed definition of "game amphibian," DFW writes:

> This definition should be deleted because it would create a new classification that is not used in the FGC. It is anticipated that stakeholder groups would be abashed at the notion that there are amphibians that can be taken by hunting.
>
> "Game" has a connotation that is narrower than "can be lawfully taken for a noncommercial purpose." Merriam-Webster defines "game" as "animals under pursuit or taken in hunting; especially: wild animals hunted for sport or food." The average person might read "game amphibian" to mean some type of amphibian that can be lawfully hunted in California with an appropriate license.
>
> Since the Department has regulatory authority over both game and non-game animals, this definition is confusing. The same is true of "game fish" (proposed § 455) and "game reptile" (proposed § 465).
>
> It is also an unnecessary addition. Amphibians are included in the definition of fish, so this is duplicative of the definition for game fish.[64]

63. See Second Supplement to Memorandum 2016-47.
64. See Exhibit comment 33. See also Exhibit comments 35 ("game fish"), 38 ("game reptile").

The staff was initially puzzled by DFW's position, because there are, in fact, several kinds of amphibians that can be lawfully taken in California with an appropriate license.[65] There are also regulations that permit the take of particular species of reptiles with an appropriate license.[66] The staff assumed that the authorized take is for sport (or even, in some cases, food), rather than a commercial purpose.

However, Comments from FGC helped staff to understand DFW's concern:

> Game amphibian is new and seems to be an attempt to satisfy the desire for "non-commercial" consistency, However, the term "game amphibian" is not currently used in Fish and Game Code, as amphibians are included in the definition of fish. Game is generically defined as any animal hunted/fished for sport or for food; so technically, this proposed definition fits under 'non-commercial purposes'. However, in the broader context, "noncommercial" purposes also includes take for scientific purposes (under SCPs); there are a number of species (amphibians, reptiles, and fish) that are collected for scientific purposes that are not taken for recreational purposes. Would species collected under an SCP now be considered 'game' species and would it change how they are regulated? Creating a new definition not currently in use is a significant change to the Fish and Game Code. Will the public now expect that amphibians can be "hunted" or "fished" with the appropriate permit? Finally, current Fish and Game Code and Title 14 language essentially define "game" as any species that are actively managed to maintain sustainable populations in order to provide recreational opportunities (i.e., waterfowl, upland game, bass, salmon, deer); these species are regularly monitored, with season and bag limits often changing based on monitoring data. Amphibians and reptiles are not actively monitored and managed but, rather, are treated more like furbearers and nongame mammals. Applying "game" to amphibians and reptiles sets a different tone for how they would be managed.[67]

The staff finds those arguments convincing and recommends that the proposed definitions of "game" amphibians and reptiles be deleted.

Both FGC and DFW also expressed concern about the proposed definition of "game fish." FGC writes:

> While game fish is used several times in Fish and Game Code, it does not have a distinctly different meaning from "fish." Statutory changes in recent years have focused on the importance of all

65. 14 Cal. Code Regs. § 5.05.
66. 14 Cal. Code Regs. § 5.60.
67. See Exhibit pp. 3-4.

> marine species to the health of marine and estuarine environments, while creating a new definition for "game fish" could imply that some species are more important than others; we have learned on the terrestrial side that such a distinction can be problematic.[68]

Similarly, DFW writes:

> It is problematic to create a distinction between game fish and other fish. Although the four sections cited by the CLRC do use the term, the word "game" appears to be superfluous in all four cases. A better option would be to delete the word "game" in each of the sections cited in the note. There are significant negative connotations of classifying some fish as "game fish" while treating all others as having less value because they are not taken for sport.[69]

In the staff's view, those arguments provide a sufficient basis for deleting the proposed definition of "game fish." The staff recommends doing so.

What is not as clear is whether to make the other change recommended by DFW, deleting the word "game" from the provisions that use the term "game fish." This could be done by making the following changes to existing law:

> 307. (a) Whenever after due investigation the commission finds that ~~game~~ fish, resident or migratory birds, game or fur-bearing mammals, amphibians, or reptiles have decreased in numbers in an area, district, or portion of an area or district to the extent that a scarcity exists, the commission may reduce the daily bag limit and the possession limit on those game fish, birds, mammals, amphibians, or reptiles that are in danger of depletion, for a period of time that the commission may specify, or until new legislation addressing the scarcity becomes effective.
>
> …
>
> 2003. (a) Except as specified in subdivisions (b), (c), and (d), it is unlawful to offer a prize or other inducement as a reward for the taking of a game bird, mammal, fish, reptile, or amphibian in an individual contest, tournament, or derby.
>
> (b) The department may issue a permit to a person authorizing that person to offer a prize or other inducement as a reward for the taking of a ~~game~~ fish, ~~as defined by the commission by regulation,~~ if it finds that there would be no detriment to the resource. The permit is subject to regulations adopted by the commission. The application for the permit shall be accompanied by a fee in the amount determined by the department as necessary to cover the reasonable administrative costs incurred by the department in issuing the permit. However, the department may waive the permit

68. See Exhibit p. 4.
69. See Exhibit comment 35.

fee if the contest, tournament, or derby is for persons who are under 16 years of age or have a physical or mental disability, and the primary purpose of the contest, tournament, or derby is to introduce those anglers to or educate them about fishing. All permits for which the fee is waived pursuant to this subdivision shall comply with all other requirements set forth in this section.

…

2005. (a) Except as otherwise authorized by this section, it is unlawful to use an artificial light to assist in the taking of a game bird, game mammal, or ~~game~~ fish.

…

8183. …

(f) Any ~~game~~ fish caught incidentally in bait nets shall be released by use of a hand scoop net or by dipping the cork line.

…

Such changes could be made in the tentative recommendation, with notes asking for input on their appropriateness.

Alternatively, the use of "game fish" in existing law could be left unaltered in the tentative recommendation. That more conservative approach would avoid any unintended consequences. For example, does Section 8183 require that *all* incidentally caught fish be released from a bait net?

How would the Commission like to address this issue?

NEXT STEPS

As noted above, this memorandum does not address all of the comments made by FGC and DFW. The remaining comments will be discussed in future memoranda.

Once all of the comments have been considered, the staff will prepare a draft tentative recommendation of the entire proposed Fish and Wildlife Code, which incorporates all of the decisions made in response to the FGC and DFW comments.

Respectfully submitted,

Brian Hebert
Executive Director

STATE OF CALIFORNIA
Edmund G. Brown Jr., Governor

Fish and Game Commission

Wildlife Heritage and Conservation
Since 1870

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August 9, 2017

Susan Duncan Lee, Chairperson
California Law Revision Commission
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Via email to commission@clrc.ca.gov

Re: Comments on the Tentative Recommendation for Part I (Divisions 1-4) of the Proposed Fish and Wildlife Code

Dear Chairperson Lee:

Thank you for the opportunity to provide comments on the California Law Revision Commission (CLRC) tentative recommendation for Fish and Wildlife Code Part 1 (Divisions 1-4).

Conducting a comprehensive review of the existing Fish and Game Code to identify obsolete, inconsistent or duplicative sections and then recommending changes to improve its organization, clarify meaning, standardize terminology, and clarify program authority and funding sources without making any significant substantive changes to the effect of the law is a formidable task. We applaud CLRC and its staff's effort to conduct this study in a timely and transparent fashion.

Recently the California Fish and Game Commission (FGC) was made aware by its staff that there are some concerns with elements of the tentative recommendation. At its June 2017 meeting, FGC delegated to me, as its executive director, authority to submit comments on the tentative recommendation, which are identified through this memo.

Concerns with the tentative recommendation come from multiple sources, including our sister agency, the California Department of Fish and Wildlife (CDFW). FGC sets policy and adopts regulations for the state's fish and wildlife resources, while CDFW has substantial management authority and day-to-day responsibility over those resources, much of which is set out not only through Fish and Game Code but also in Title 14 of the California Code of Regulations. A number of concerns with the tentative recommendation identified by CDFW also give pause to FGC. However, even if there were complete agreement with the

tentative recommendation, the subsequent adoption of that recommendation would lead to a complete overhaul of the Fish and Game Code, subsequently creating significant workload for both FGC and CDFW staff in reviewing and completely revising Title 14 for consistency with the new Fish and Wildlife Code. Neither agency is in a position at this time to assume additional workload to ensure that Title 14 regulations conform to statutory revisions.

Specific FGC concerns with the tentative recommendation fall into five general categories: (1) Ability to interpret without sufficient context, (2) significant substantive changes, (3) changes with potential unintended consequences, (4) changes without clear benefit, (5) additional necessary research, and (6) more appropriate placement and incorrect references.

1. Inability to Interpret without Sufficient Context

Elements of the tentative recommendation have been moved from within the context of specific chapters to new sections that may have applicability in a broader context that has not yet been revealed through tentative recommendations for the remaining chapters of the new Fish and Wildlife Code. Examples include:

- *Section 205 definition of adaptive management.* The proposed definition of "adaptive management" uses the definition in Fish and Game Code Section 13.5 without change, and omits the definition used in the context of fishery management in current Section 90.1. The Section 13.5 definition may not be appropriate in the context of other chapters, which cannot be fully understood without the remaining chapters of the new Fish and Wildlife Code.
- *Section 375 definition of finfish.* The new sections replacing 9001.6, 9001.7 and 9006 are not included in this tentative recommendation, so it is not possible to understand the context for application of the definition.
- *Section 1300 regarding authority to compel testimony and production of evidence.* There is no explanation for where the remainder of existing Fish and Game Code Section 309(a) is proposed to move and, if that language stricken, the rationale for its exclusion.

2. Significant Substantive Changes

Page 1 of the tentative recommendation states that the new Fish and Wildlife Code, proposed to replace the existing Fish and Game Code "...would continue the substance of the former code in a more user-friendly form, without making any significant substantive change to the effect of existing law." However, it is our belief that some of the recommendations are, in fact, significant substantive changes. Examples include:

- *Section 90 regarding possession of animals taken out of state.* Removing the language, "Unless otherwise provided..." appears to be a substantive change as it leaves no room for appropriate exceptions (i.e., commercial importation).

- *Section 95 definition for animal parts.* Removing the language "Unless the provision or context otherwise requires..." appears to be a substantive change as it leaves no room for appropriate exceptions.
- *Section 205 definition for adaptive management.* This definition omits the definition used in the context of fishery management currently found in Section 90.1 of Fish and Game Code; while not specifically used in Title 14 regulations, the Section 90.1 definition is memorialized in the master plan for marine protected areas and the Marine Life Management Act master plan, both important elements of ecosystem-based management programs. The Section 90.1 definition contains an important statement about designing management actions to provide useful information for future actions, even in the case of failure, which is absent from the Section 13.5 definition proposed to apply code-wide. The omission is problematic.
- *Section 280 definition for commercial fisherman.* A commercial fisherman is not someone who is simply engaged in fishing activities for commercial purposes; a license is required to be a commercial fisherman, otherwise the activity is currently interpreted to be *recreational* fishing and there are significantly different repercussions for selling recreationally-caught fish. The current Fish and Game Code Section 7850 language is more direct and accurate in the overall context of how commercial and recreational fishing laws are applied.
- *Section 410 definition for fishery.* Generalizing the definition for fishery as found in Fish and Game Code Section 94 is problematic since the definition, as written, excludes non-marine fish and plants. In addition, attempting to apply the same definition to inland freshwater environments may be problematic since management considerations are different for inland, freshwater environments than for marine and estuarine environments.
- *Section 445 definition for game amphibian.* Game amphibian is new and seems to be an attempt to satisfy the desire for "non-commercial" consistency, However, the term “game amphibian” is not currently used in Fish and Game Code, as amphibians are included in the definition of fish. Game is generically defined as any animal hunted/fished for sport or for food; so technically, this proposed definition fits under ‘non-commercial purposes’. However, in the broader context, "noncommercial" purposes also includes take for scientific purposes (under SCPs); there are a number of species (amphibians, reptiles, and fish) that are collected for scientific purposes that are not taken for recreational purposes. Would species collected under an SCP now be considered ‘game’ species and would it change how they are regulated? Creating a new definition not currently in use is a significant change to the Fish and Game Code. Will the public now expect that amphibians can be "hunted" or "fished" with the appropriate permit? Finally, current Fish and Game Code and Title 14 language essentially define "game" as any species that are actively managed to maintain sustainable populations in order to provide recreational opportunities (i.e., waterfowl, upland game, bass, salmon, deer); these species are regularly monitored, with season and bag limits often changing based on monitoring data. Amphibians and reptiles are not actively monitored and managed but, rather, are treated more like

furbearers and nongame mammals. Applying "game" to amphibians and reptiles sets a different tone for how they would be managed.

3. Changes with Potential Unintended Consequences

Page 2 of the tentative recommendation states that the primary purpose of the study leading to the recommendation "...is to simplify and improve the organization and expression of the Fish and Game Code, to make it more understandable and useable...." While the effort to simplify is well-intentioned, there are some proposed changes that appear to have potential unintended consequences which, in some cases, are significant. Examples include:

- *Section 90 regarding possession of animals taken out of state.* The source language for this change is housed in Fish and Game Code Division 3 (Fish and Game Generally), Chapter 1 (Taking and Possessing in General), but the proposed location applies to the new code in its entirety. Moving the language suggests that it now applies to commercial importation, which was likely not the intent nor is it the current interpretation of Section 2013 of Fish and Game Code.
- *Section 280 definition of commercial fisherman.* The current Fish and Game Code Section 7850 language is more direct and accurate in the overall context of how commercial and recreational fishing laws are applied, while the proposed definition may have unintended consequences for licensing and permitting, landing taxes, and other laws and regulations currently applicable to commercial and recreational fishing.
- *Section 445 definition for game amphibian.* There are a number of potential unintended consequences from creating a new, distinct definition for "game amphibian." See comments under "Significant Substantive Changes."
- *Section 450 definition for game bird.* This definition is not consistent with the new sections 445, 455 and 465, which are not consistent with the existing "game mammal" definition in Section 460. The method for identifying game used in sections 3500(a), 3500(b) and 3950(a) is to specify which species are included in the term "game bird"; this method works for defining game birds and game mammals since there are nongame species (coyote, crows, starlings) identified in Fish and Game Code that can be taken for non-commercial purposes but are not managed as game species. By creating a new definition that is more broadly applied, there are significant unintended consequences.
- *Section 455 definition for game fish.* While game fish is used several times in Fish and Game Code, it does not have a distinctly different meaning from "fish." Statutory changes in recent years have focused on the importance of all marine species to the health of marine and estuarine environments, while creating a new definition for "game fish" could imply that some species are more important than others; we have learned on the terrestrial side that such a distinction can be problematic. See similar and related comments for proposed Section 445 under "Significant Substantive Changes."

4. Changes without Clear Benefit

Page 2 of the tentative recommendation states that the primary purpose of the study leading to the recommendation "...is to simplify and improve the organization and expression of the Fish and Game Code, to make it more understandable and useable...." While the effort is well-intentioned, there are some proposed changes that do not appear to have a clear benefit of simplification, improved organization, or more understandable and useable language. Examples include:

- *Section 445 definition for game amphibian.* Game amphibian is new and seems to be an attempt to satisfy the desire for "non-commercial" consistency, However, the term is not currently used in Fish and Game Code, as amphibians are included in the definition of fish. There is no clear benefit to creating a new, distinct definition for game amphibian.
- *Section 450 definition for game bird.* While the term "game bird" is not specifically defined in Fish and Game Code, the species included in that term are clearly articulated such that there is no confusion about which species are, or are not, affected by game bird laws and regulations. While a desire for consistency in how fish, bird and mammal "game" are defined is understandable, it shows a misunderstanding of how those species are managed; there is no clear benefit to the proposed new definition.

5. Additional Necessary Research

In some cases, elements of the tentative recommendation may not be appropriate for addition or change as currently written, necessitating additional research. Examples include:

- *Section 375 definition of finfish.* Finfish is not specifically defined in Fish and Game Code; however, the proposed definition is drawn from Section 1.46 of Title 14 of the California Code of Regulations, which was adopted by FGC in 2007. The Title 14 definition of finfish needs updating given recent scientific classification changes to fishes, such as hagfish and lamprey that are neither bony nor cartilaginous fish.
- *Section 445 definition for game amphibian.* Note also that F&G Code Section 8183(f) currently states that, "Any game fish caught incidentally in bait nets shall be released by use of a hand scoop net or by dipping the cork line." Are there any bait fish that are also defined as game fish?

6. More Appropriate Placement and Incorrect References

In some cases, elements of the tentative recommendation may more appropriately be placed elsewhere within the new Fish and Wildlife Code. In another case there appears to be an incorrect reference. Examples include:

- *Section 1200 regarding commission practices and processes.* This section seems more appropriate for Division 2 (Administration), Part 1 (Fish and Game

Commission), Title 1 (Organization) since it is specific to FGC organizational practices and processes rather than powers and duties.

- *Section 1205 regarding disposition of accidentally killed birds and mammals.* This section seems more appropriate for Division 2 (Administration), Part 1 (Fish and Game Commission), Title 2 (Powers and Duties), Chapter 1 (Regulation of Take and Possession Generally), Article 1 (Authority) since it grants authority to FGC to promulgate regulations related to the subject. We also believe that it would not be a significant substantive change to correct the sentence grammar by changing it to say "...or mammals that are accidentally killed."
- *Section 3210 regarding wildlife area passes and native species stamps.* The language references "this article," but there is no article in the proposed chapter.
- *Section 4300 regarding rewards.* This does not seem to be an appropriate location for this provision and would be better placed in proposed Division 2 (Administration), Part 6 (General Financial Provisions), Title 1 (State), Chapter 4 (Expenditures) since it governs how funds are to be expended for rewards.

Conclusion

Thank you again for the opportunity to provide our comments on the tentative recommendation for Fish and Wildlife Code, Part 1. While examples have been provided in this memo and by CDFW in a separate memo, it is our hope that additional conversations can be held among CLRC, FGC and CDFW staff to discuss and address in more detail our concerns with the tentative recommendation and future recommendations. I can be reached at Valerie.Termini@fgc.ca.gov or (916) 653-4899.

Sincerely,

Valerie Termini, Executive Director

ec: Members, California Fish and Game Commission
Wendy Bogdan, General Counsel, California Department of Fish and Wildlife
Stafford Lehr, Deputy Director, California Department of Fish and Wildlife
Brian Hebert, Executive Director, California Law Revision Commission

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August 15, 2017

Susan Duncan Lee, Chairperson
California Law Revision Commission
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Re: Comments on Memorandum 2017-15 Fish and Game Law: Tentative Recommendation

Dear Ms. Lee:

The Department of Fish and Wildlife ("Department") has had the opportunity to review the California Law Revision Commission ("CLRC") proposals related to new Divisions 1-4 of the Fish and Game Code (proposed to be renamed the "Fish and Wildlife Code"). We would like to start by acknowledging the work that CLRC staff have done to begin implementing the recommendations of the California Fish and Wildlife Strategic Vision and the California Legislature.

Several of the Strategic Vision recommendations that relate to the CLRC's work included recommendations to:

> *Review the California Fish and Game Code and Title 14 of the California Code of Regulations to identify and make recommendations to (1) resolve inconsistencies; (2) eliminate redundancies; (3) eliminate unused and outdated code sections; (4) consolidate sections creating parallel systems and processes; and (5) restructure codes to group similar statutes and regulations. (Strategic Vision p. 21.)*
>
> *Develop and implement equitable funding mechanisms that ensure funding is directed to program priorities to the maximum extent possible. (Strategic Vision p. 15.)*
>
> *Pursue a high-level task force that reviews and makes recommendations regarding Fish and Game Commission and Department of Fish and Game funding and efficiencies (Strategic Vision p. 19.)*
>
> *Pursue a high-level task force that reviews and makes recommendations regarding Fish and Game Commission and Department of Fish and Game mandates. (Strategic Vision p. 19.)*

Based on these and other Strategic Vision recommendations, the California legislature approved the CLRC to study,

> *Whether the Fish and Game Code and related statutory law should be revised to improve its organization, clarify its meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law. (ACR 98 Wagner.)*

Over the last five years, the CLRC has made progress in a number of the areas covered by the legislature's direction including proposals to modernize terminology in the Fish and Game Code, standardize the Fish and Game Commission rulemaking process, and proposals to delete references to repealed sections of the Code, all important steps in improving the usefulness of the Code for the regulated community. In addition, the CLRC adopted additional standards to guide its consideration of proposals to change the Code. The CLRC determined,

> *A proposed change should only be considered for inclusion in the proposed law if it meets all three of the following criteria:*
> *(1) It is plainly beneficial.*
> *(2) It does not present a significant risk of unintended consequences. (i.e., its effects seem straightforward and circumscribed.*
> *(3) It is not likely to be controversial. (CLRC Meeting Minutes September 22, 2016.)*

Interestingly, this is the first time the CLRC has worked on a full code reorganization for a regulatory entity like the Department, a fact that raises a number of novel and challenging issues for the Department and the community of users that work with the Fish and Game Code on a regular basis.

With the foregoing in mind, the Department respectfully notes that while the proposals in Memorandum 2017-15 may present a reorganized code, in some instances the Department is concerned that the proposed method of rearranging the code would not meet the standard of being plainly beneficial, avoiding unintended consequences and avoiding controversy. Rather, the new approach would likely make it more difficult for the regulated community and others to determine what the law is as applied to any particular activity.

For example, Memorandum 2017-15 proposes to remove definitions from the many places they now exist in the Code and place them in a centralized location with the effect of generalizing many sections that have applied to only specific statutory schemes up until now. One area of the Code where this is common is the definitions that have applied specifically to marine fisheries. For example, the definition of "fishery" is moved from a section titled "Marine Life Definitions". Existing section 94 only includes within it marine fish/fisheries. Yet "fishery" is used in other parts of the code to include freshwater fisheries, such as "wild trout fishery" in section 1762. This sort of imprecision will create unnecessary confusion.

We realize that CLRC staff reflected on this general concern early in their consideration of changes to the Fish and Game Code. In CLRC Memo 2013-12 related to the General Provisions Division that would include a section on general definitions, CLRC staff noted that "[p]roposed Part 2 does *not* include the special definitions that are provided in Chapter 2 (commencing with Section 90)...Pursuant to Section 90, those definitions only apply to specified provisions of the code, relating to the regulation of fish and other aquatic resources. When the Commission addresses those provisions, later in the course of the study, it can decide where it would be best to locate the special definitions." (See p. 4.) However, despite recognizing the distinction between general and special definitions in 2013, Memorandum 2017-15 would include special definitions in the generalized section of the Code. We think this will result in unnecessary confusion and have elaborated on those concerns in our attached comments.

In addition, while not a surprise, it bears noting that one of the greatest challenges the Department and stakeholders will face if the proposed changes become law will be conforming the Title 14 regulations to the statutory revisions. Although it is possible that a recodification of the code would simply require changes to the authorities identified in the Title 14 regulations, the Department's review of Memorandum 2017-15 suggests that changes to the regulations' texts would be necessary to reconcile Title 14 to the recodification. As CLRC staff have made clear to us recently, the presumption has been that the Department will bear the transitional costs associated with the required revisions, including the cost of promulgating hundreds of new regulations, retraining staff, revising and reprinting related forms and publications, and educating stakeholders. The Department is concerned that funding for these types of substantial unanticipated expenditures will likely be unavailable.

We appreciate preliminary conversations with Commission staff regarding strategies to reduce such adverse impacts. Continued discussions about these issues are critical to avoiding any risk of unintended consequences, or a result that is anything other than plainly beneficial.

The Department has other general concerns about the Commission's proposals such as:

- How does the Legislature change law that was enacted by the voters? The CLRC discusses this in relation to Prop. 117 (mountain lions), but there are also proposed changes to some trapping sections that were also enacted via an initiative.

- What is the effect of making any change to a compact? Presumably, the other states have enacted similar (identical?) provisions. Will we need to go back to those other states to get their concurrence?

- Frequently there are references to sections of the Fish and Game Code that do not currently exist, and which we imagine will be new renumbering of existing sections. However, it is hard to evaluate some of the current proposed changes without seeing those sections. Examples are commercial fishing license (new § 290) and fully protected mammal (new § 430.)

- In the notes, the CLRC says that some sections are "without change" and "without substantive change." In some cases, this is not accurate. For example, new section 640 purports to recite current section 711.2(a)

"without change." This is not true. Section 640 deletes an important introductory phrase from the section, so it is not "without change." Similarly, CLRC has said that some sections are "without substantive change" including, for example in new section 430 which now excludes "a mature Nelson bighorn ram" from the definition of a fully protected mammal suggesting that only one ("a") may be hunted. Currently section 4700 does not include the word "a." This is a substantive change while the notes say it is not. The incorrect characterization of the notes can make it challenging for CDFW to prioritize its review of the changes because we cannot count on the fact that "no change" sections actually result in no change to the effect of the law.

- Given the concerns raised above and the scope of the recodification, the Department requests ample opportunity to review, provide comments, and hear CLRC responses to our comments on a single, cumulative presentation of all proposed changes to the Fish and Game Code and related amendments to other code provisions.

In addition to these general concerns, the Department has attached a number of specific comments on the CLRC's proposals. (Attachment A.)

We look forward to continuing to discuss these issues with the Commission and also to working with CLRC staff on their efforts to "clarify program authority and funding sources" for the Department.

Thank you for considering our input.

Sincerely,

Angela S. Bonlan for

Wendy Bogdan
General Counsel

Attachment

ATTACHMENT A

	Old F&G Code Section Number	Old Title	New F&W Code Section Number	New Title	Comment
#1	3	Restatements and continuations	10	Restatement and continuation	New section 10/Old section 3: "Restatement" and "continuation" are described in the comments as being different actions – a continuation includes no significant changes, where a restatement may include significantly different language that is substantively the same, however subdivision (b) suggests a code section would be both restated and continued. Suggest revising subdivision (b) as, "A reference in a statute or regulation to a previously existing provision that is restated andor continued in this code shall, unless a contrary intent appears, be deemed a reference to the restatement andor continuation.
#2			10(e)	Restatement and continuation	Delete because this suggests a scenario that is not covered under existing law and unnecessary while at the same time creating the possibility of differing interpretations of what is "substantially the same."
#3			15	Judicial decisions	Delete sections (b) and (c). They unnecessarily undermine existing cases that have interpreted the code.
#4			20	Constitutionality of provisions	Delete sections (b) and (c). They unnecessarily undermine existing cases that have interpreted the code.
#5	3, second sentence	Restatements and continuations	25	Transitional provision	It is unclear where new section 25 preserves the following in existing section 3: "This code shall not impair any privilege granted or right acquired under any of the laws of this State prior to the date it takes effect." Sections (d) – (g) should be deleted. If the effect of this recodification is truly non-substantive, there should be no need for these overly detailed sections specifying when the old and new laws will apply. (h) This seems to be a substantive change to the code. It adds a new cause of action or legal theory allowing someone to ask a court to apply either the new law or the old law based on a standard that is unclear (e.g. substantial interference).
#6	7	Statement and report requirements	50	Use of English in statements and reports	The note after section 50 says the second sentence was drawn from the Code of Civil Procedure Section 185, but it is also taken from former section 7 without change.
#7	13.5	Adaptive management defined	205	Adaptive management	The note asks if it would be problematic to discontinue the special definition in existing 90.1. This definition is part of AB 1241, which enacted the Marine Life Management Act, and so should

Old F&G Code Section Number	Old Title	New F&W Code Section Number	New Title	Comment
				remain in code. This proposed change is problematic because it dilutes and confuses the legislative intent as an aid to interpreting the MLMA. In addition, use of the term adaptive management may be used by marine region staff extensively in various program documents. The marine specific definition may be useful or necessary in that context, even if not used in the applicable code or associated regulations.
8780(a), first sentence	Bait net; use in districts specified	235	Bait net	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Some terms concern marine fisheries (i.e. 365, 410, 525, 530, 540, 560, 600-625) but some concern only the commercial sector (i.e. 235, 240, 255, 265, 290, 385-400). Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
8800	Beach net	240	Beach net	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Some terms concern marine fisheries (i.e. 365, 410, 525, 530, 540, 560, 600-625) but some concern only the commercial sector (i.e. 235, 240, 255, 265, 290, 385-400). Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
3003.1	Use of body-gripping traps prohibited; buy, sell, barter, etc. fur from animal trapped with prohibited trap	250	Body-gripping trap	For consistency, body-gripping trap should be placed in quotes. Examples of traps that would not fit the definition should be placed in a separate subsection (see FWC § 225).
9000.5(a)	Definitions	255	Bucket trap	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Some terms concern marine fisheries (i.e. 365, 410, 525, 530, 540, 560, 600-625) but some

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				concern only the commercial sector (i.e. 235, 240, 255, 265, 290, 385-400). Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
90.5	Definitions	265	Bycatch	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. The special definitions in FGC 90-99.5 were part of AB 1241, so the Marine Life Management Act and the definitions are properly analyzed with each other. If these provisions are folded into the generic FGC definitions, it becomes more difficult to use them for purposes of interpreting the statutory construction of the MLMA. This is an important consideration should our implementation of a particular fishery management plan be legally challenged. Some terms concern marine fisheries (i.e. 365, 410, 525, 530, 540, 560, 600-625) but some concern only the commercial sector (i.e. 235, 240, 255, 265, 290, 385-400). Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
Drawn from 8040(a) and 7850	8040 – Commercial fisherman; landing tax 7850 – Persons required to obtain license; exceptions	280	Commercial fisherman	The proposed definition is problematic because in many cases, it will make it difficult to determine what laws (commercial or recreational) apply to individuals, and it would significantly change the potential penalties that could be imposed for violations. The approach of treating every person who engages in an activity that would require a license as a licensee subject to all laws applying to those licensees is not appropriate, would not add clarity, and would make significant substantive changes to the law. Under existing law, a person without a commercial fishing license who buys or sells fish would not necessarily be prosecuted as a commercial fisher. Rather, the person could be prosecuted for violating recreational sport fishing regulations, which have much stricter penalties than those that may apply to commercial fishing violations. For example, existing code sections

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				such as 12002.3, 12006, 12009, 12012, and 12013 provide for heavy fines for sport fishing violations related to the purchase or sale of recreationally taken fish. Under existing law, prosecutors have discretion to charge violators with violating commercial fishing provisions or for violating other more generally applicable laws. The proposed regulation would introduce confusion and uncertainty regarding this discretion. The proposed change may also produce unintended consequences regarding landing taxes, qualifications, forfeitures, and licensing and permit transfers.
		285	Commercial fishing entitlement	Addition of this definition characterizing all commercial fishing authorizations as entitlements is not plainly beneficial because not all authorizations, permits, stamps, licenses, registrations, or privileges are necessarily entitlements. Since characterization of a privilege or authorization as an entitlement can be a factor when determining the procedural sufficiency of administrative actions to deny, suspend, or revoke that privilege or authorization, the proposed change risks producing unintended substantive consequences. The Commission also assumes the Legislature inadvertently described authorizations related to commercial fishing in different ways, but the Legislature may have had reasons for using different terms in different contexts. If so, the Commission's proposed standardization of terms is contrary to those purposes and may result in unintended consequences.
8031(a)(4)	Process fish; wholesale; import; commercial fisherman	290	Commercial fishing license	"Commercial fishing license" means a valid, unrevoked commercial fishing license issued pursuant to Section 14500. License suspension as revocation affects validity. I suggest the following: "Commercial fishing license' means a valid commercial fishing license issued pursuant to Section 14500 that has not been revoked or suspended." Although the original omits "suspension," it occurs elsewhere in the same context (e.g. FGC 7857, 8032.5, 8681).
7920	Persons required to procure license	295	Commercial passenger fishing boat	Guide boats can also permit a passenger to take fish from the vessel for profit. (See current F&GC § 46). As written, this definition is written too broadly and blurs the distinction between guide boats and commercial passenger fishing boats – an important distinction in the Code for licensing and other purposes.

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				Superfluous definition. The original section 7920 is clear and the definitions do not add or clarify. Suggest deleting. Alternatively, insert new definition "commercial passenger fishing boat license" means a license issued pursuant to [FGC Section 7920].
7920	Persons required to procure license	300	Commercial passenger fishing boat owner	Superfluous definition. The original section 7920 is clear and the definitions do not add or clarify. Suggest deleting.
9000.5(b)	Definitions	330	Deeper nearshore species	Definitions applicable only to marine fisheries should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
90.7	Depressed	340	Depressed	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature. The special definitions in FGC 90-99.5 were part of AB 1241, so the Marine Life Management Act and the definitions are properly analyzed with each other. If these provisions are folded into the generic FGC definitions it becomes more difficult to use them for purposes of interpreting the statutory construction of the MLMA. This is an important consideration should our implementation of a particular fishery management plan be legally challenged.
91	Discards	350	Discards	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the

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				Legislature. The special definitions in FGC 90-99.5 were part of AB 1241, so the Marine Life Management Act and the definitions are properly analyzed with each other. If these provisions are folded into the generic FGC definitions it becomes more difficult to use them for purposes of interpreting the statutory construction of the MLMA. This is an important consideration should our implementation of a particular fishery management plan be legally challenged.
93	Essential fishery information	365	Essential fishery information	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. The special definitions in FGC 90-99.5 were part of AB 1241, so the Marine Life Management Act and the definitions are properly analyzed with each other. If these provisions are folded into the generic FGC definitions it becomes more difficult to use them for purposes of interpreting the statutory construction of the MLMA. This is an important consideration should our implementation of a particular fishery management plan be legally challenged. Some terms concern marine fisheries (i.e. 365, 410, 525, 530, 540, 560, 600-625) but some concern only the commercial sector (i.e. 235, 240, 255, 265, 290, 385-400). Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
3514	Exotic nonresident game birds – types and classification	370	Exotic nonresident game bird	Delete the parenthetical to avoid ambiguity.
CCR Tit. 14, section 1.46	Finfish defined	375	Finfish	CDFW does not think it is a good practice to import definitions and other regulations into the Code. Doing so limits the Commission's authority to change them and would make it necessary for the Legislature to make changes.
8036(a)	Fish importers license; fee	385	Fish importer	The proposed definition alters the potential penalties that may attach to the person who

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				violates fish and game regulations. The change would categorize all persons "engaging in activity" that requires a fish importer's license as a fish importer. This is inappropriate. Under current law, a person who holds a recreational sport fishing license that obtains fish outside of California and resells it within California would not necessarily be prosecuted as a fish importer. Rather, the person could be prosecuted for violating recreational sport fishing regulations, which in some cases have stricter penalties than those that may apply to a fish importer who violates terms of the fish importer's license. The prosecutor should maintain discretion to determine whether the person should be charged for violating fish importer license conditions or for violating other more generally applicable fish and game regulations. In addition, this term is not used extensively throughout the code in a way that suggests ambiguity or a need for clarity that would justify the inclusion of the definition.
8034(a)	Fish processors license; fee	390	Fish processor	The proposed definition alters the potential penalties that may attach to the person who violates fish and game regulations. The change would categorize all persons "engaging in activity" that requires a fish processor's license as a fish processor. This is inappropriate. Under current law, a person who holds a recreational sport fishing license that processes fish for profit would not necessarily be prosecuted as a fish processor. Rather, the person could be prosecuted for violating recreational sport fishing regulations, which in some cases have stricter penalties than those that may apply to a fish processor who violates terms of the fish processor's license. The prosecutor should maintain discretion to determine whether the person should be charged for violating fish processor license conditions or for violating other more generally applicable fish and game regulations. In addition, this term is not used extensively throughout the code in a way that suggests ambiguity or a need for clarity that would justify the inclusion of the definition.
8033	Fish receiver's license and annual fee	395	Fish receiver	The proposed definition alters the potential penalties that may attach to the person who violates fish and game regulations. The change would categorize all persons "engaging in activity" that requires a fish receiver's license as a fish receiver. This is inappropriate. Under current law, a person who holds a recreational sport fishing

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				license that purchases fish from a commercial angler for commercial use would not necessarily be prosecuted as a fish receiver. Rather, the person could be prosecuted for violating recreational sport fishing regulations, which in some cases have stricter penalties than those that may apply to a fish receiver who violates terms of the fish receiver's license. The prosecutor should maintain discretion to determine whether the person should be charged for violating fish receiver license conditions or for violating other more generally applicable fish and game regulations. In addition, this term is not used extensively throughout the code in a way that suggests ambiguity or a need for clarity that would justify the inclusion of the definition.
8033.5(a)	Fisherman's retail license; fee	400	Fish retailer	The proposed definition alters the potential penalties that may attach to the person who violates fish and game regulations. The change would categorize all persons "engaging in activity" that requires a fish retailer's license as a fish retailer. This is inappropriate. Under current law, a person who holds a commercial fishing license that sells fish for profit would not necessarily be prosecuted as a fish retailer. Rather, the person could be prosecuted for violating commercial fishing regulations, which may have stricter penalties than those that apply to a fish retailer who violates terms of the fish retailer's license. The prosecutor should maintain discretion to determine whether the person should be charged for violating fish retailer license conditions or for violating other more general regulations applicable to commercial fishermen. In addition, this term is not used extensively throughout the code in a way that suggests ambiguity or a need for clarity that would justify the inclusion of the definition.
8035	Fish wholesaler's license; fee	405	Fish wholesaler	The proposed definition alters the potential penalties that may attach to the person who violates fish and game regulations. The change would categorize all persons "engaging in activity" that requires a fish wholesaler's license as a fish wholesaler. This is inappropriate. Under current law, a person who holds a recreational sport fishing license that processes fish for profit would not necessarily be prosecuted as a fish wholesaler. Rather, the person could be prosecuted for violating recreational sport fishing regulations, which in some cases have stricter penalties than those that may apply to a fish wholesaler who

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				violates terms of the fish wholesaler's license. The prosecutor should maintain discretion to determine whether the person should be charged for violating fish wholesaler license conditions or for violating other more generally applicable fish and game regulations. In addition, this term is not used extensively throughout the code in a way that suggests ambiguity or a need for clarity that would justify the inclusion of the definition.
94	Fishery	410	Fishery	Generalizing this marine fisheries-specific definition could confuse interpretation of non-marine sections, such as Section 1728(c), regarding wild trout fisheries. The management considerations applicable to inland, freshwater fisheries are addressed through the Fish and Game Commission's broad rulemaking authority and do not require the statutory specificity that marine fisheries do.
4700(b)	Fully protected mammals	430	Fully protected mammal	Is 35900 a new provision continuing 4902(b)? It is difficult to confirm this definition without that context, as there is no existing section 35900. By adding "when the object of sport hunting", the CLRC's language could be interpreted to mean that they are only excluded when they are being hunted and makes it unclear that possession of legally hunted bighorns will continue even after the hunt is over. This is important because the current language allows people to possess legally taken bighorn mounts. In addition, by adding "except a mature Nelson...." there is a suggestion that only one sheep can be the subject of sport hunting. The original language referred to "sheep" rather than "a ram." To avoid confusion the revision should not make a change to use the singular form.
CLRC incorrectly cites section 3900. Should be Section 4000	Definition of fur-bearing mammals	435	Fur-bearing mammal	Section is out of alphabetical order.
		445	Game amphibian	This definition should be deleted because it would create a new classification that is not used in the FGC. It is anticipated that stakeholder groups would be abashed at the notion that there are amphibians that can be taken by hunting.

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				"Game" has a connotation that is narrower than "can be lawfully taken for a noncommercial purpose." Merriam-Webster defines "game" as "animals under pursuit or taken in hunting; especially: wild animals hunted for sport or food." The average person might read "game amphibian" to mean some type of amphibian that can be lawfully hunted in California with an appropriate license. Since the Department has regulatory authority over both game and non-game animals, this definition is confusing. The same is true of "game fish" (proposed § 455) and "game reptile" (proposed § 465). It is also an unnecessary addition. Amphibians are included in the definition of fish, so this is duplicative of the definition for "game fish."
3500(c)	Game birds	450	Game bird	The proposed approach would require looking at three different definitions, making the code less clear and accessible. A better option would be to include the text of existing FGC 3500(a) and (b), and this would be more consistent with the LRC's definition of "game mammal" below.
		455	Game fish	See comment for proposed section 445 "Game amphibian." It is problematic to create a distinction between game fish and other fish. Although the four sections cited by the CLRC do use the term, the word "game" appears to be superfluous in all four cases. A better option would be to delete the word "game" in each of the sections cited in the note. There are significant negative connotations of classifying some fish as "game fish" while treating all others as having less value because they are not taken for sport.
3950(a)	Definitions of game mammals	460	Game mammal	Including mountain lions as game mammals without a close reference like that found in current sections 3950 and 3950.1 is expected to be extremely controversial. Removing mountain lion from the list of game mammals seems consistent with the purposes of the LRC's review and not inconsistent with the Prop 117.

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				See also the comment on new section 430 about bighorn sheep.
3950(a)	Definitions of game mammals	460	Game mammal	See comment on FWC § 430. Suggest rephrase of paragraph (5) of subdivision (a): "Mature Nelson bighorn ram (subspecies Ovis Canadensis nelson) taken as authorized by subdivision (b) of Section 35900."
		465	Game reptile	See comment on new Section 445 above.
9000.5(c)	Definitions	470	General trap permit	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. This term only applies to commercial fishing; grouping it with more generic definition can be confusing to the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
8460	Licensing and term to take, transport, or sell	500	Live freshwater bait fish dealer	The proposed definition alters the potential penalties that may attach to the person who violates fish and game regulations. The change would categorize all persons "engaging in activity" that requires a live freshwater bait fish dealer's license as a live freshwater bait fish dealer. This is inappropriate. Under current law, a person who holds a recreational sport fishing license that sells live freshwater fish for bait would not necessarily be prosecuted as a live freshwater bait fish dealer. Rather, the person could be prosecuted for violating recreational sport fishing regulations, which in some cases have stricter penalties than those that may apply to a live freshwater bait fish dealer who violates terms of the live freshwater bait fish dealer's license. The prosecutor should maintain discretion to determine whether the person should be charged for violating live freshwater bait fish dealer license conditions or for violating other more generally applicable fish and game regulations. In addition, this term is not used extensively throughout the code in a way that suggests ambiguity or a need for clarity that would justify the inclusion of the definition.

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8597(a)	Marine aquaria collector's permit; species allowed to be taken	510	Marine aquaria collector	The proposed definition alters the potential penalties that may attach to the person who violates fish and game regulations. The change would categorize all persons "engaging in activity" that requires a marine aquaria collector's license as a marine aquaria collector. This is inappropriate. Under current law, a person who holds a recreational sport fishing license that takes certain live species for marine aquaria pet trade purposes would not necessarily be prosecuted as a marine aquaria collector. Rather, the person could be prosecuted for violating recreational sport fishing regulations, which in some cases have stricter penalties than those that may apply to a marine aquaria collector who violates terms of the marine aquaria collector's license. The prosecutor should maintain discretion to determine whether the person should be charged for violating marine aquaria collector license conditions or for violating other more generally applicable fish and game regulations. In addition, this term is not used extensively throughout the code in a way that suggests ambiguity or a need for clarity that would justify the inclusion of the definition.
8033.1(a)	Marine aquaria receiver's license; requirements	515	Marine aquaria receiver	The proposed definition alters the potential penalties that may attach to the person who violates fish and game regulations. The change would categorize all persons "engaging in activity" that requires a marine aquaria receiver's license as a marine aquaria receiver. This is inappropriate. Under current law, a person who holds a recreational sport fishing license that purchases live marine species indigenous to California for commercial purposes would not necessarily be prosecuted as a marine aquaria receiver. Rather, the person could be prosecuted for violating recreational sport fishing regulations, which in some cases have stricter penalties than those that may apply to a marine aquaria receiver who violates terms of the marine aquaria receiver's license. The prosecutor should maintain discretion to determine whether the person should be charged for violating marine aquaria receiver license conditions or for violating other more generally applicable fish and game regulations. In addition, this term is not used extensively throughout the code in a way that suggests ambiguity or a need for

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				clarity that would justify the inclusion of the definition.
54.5	Marine finfish aquaculture defined	520	Maine finfish aquaculture	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
96	Marine living resources	525	Marine living resources	The term is only applied in the context of the Marine Life Management Act (FGC 7050 et seq.) and could be confused with the similar "living marine resources" used in the context of marine protected areas under the Marine Life Protection Act (FGC 2852) and other marine-related sections of the Public Resources Code (e.g. PRC 538, 5019.50, 36602, 36725).
4500©	Take marine mammals unlawful; exceptions; marine mammals	530	Marine mammal	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Some terms concern marine fisheries (i.e. 365, 410, 525, 530, 540, 560, 600-625) but some concern only the commercial sector (i.e. 235, 240, 255, 265, 290, 385-400). Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
12002.7	License of master of commercial fishing vessel – violation of section 7920; revocation or suspension	535	Master	The substantive change is that the definition is taken out of its original context, for example commercial fishing license revocation in the case of 12002.7 where it appears as the last sentence of the section. See Comment [A48] and previous related comments.
96.5	Maximum sustainable yield	540	Maximum sustainable yield	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. The special definitions in FGC 90-99.5 were part of AB 1241, so the Marine Life Management Act and the definitions are properly analyzed with each other. If these provisions are folded into the generic FGC definitions it becomes more difficult to use them for purposes of interpreting the statutory construction of the MLMA. This is an important

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				consideration should our implementation of a particular fishery management plan be legally challenged. Some terms concern marine fisheries (i.e. 365, 410, 525, 530, 540, 560, 600-625) but some concern only the commercial sector (i.e. 235, 240, 255, 265, 290, 385-400). Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
3500(b)	Game birds	545	Migratory game bird	Same comment as new section 450.
9000.5(e)	Definitions	560	Nearshore species	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Some terms concern marine fisheries (i.e. 365, 410, 525, 530, 540, 560, 600-625) but some concern only the commercial sector (i.e. 235, 240, 255, 265, 290, 385-400). Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
56	Net	565	Net	The Comment states section 565 continues former section 56 "without change." This is not the case. The CLRC may have inadvertently cut the word "of" from section 56. Either "of" should be restored or the word "the" (before grilling) should also be deleted.
3800(a)	Nongame birds and taking; exceptions	570	Nongame bird	By separately defining game bird in FWC § 450 to include both resident game birds and migratory game birds, for consistency this definition should be revised to state "...that is not a ~~resident~~ game bird, ~~migratory game bird~~, or fully protected bird."
61	Ocean ranching	590	Ocean ranching	NB: Existing section 61 was enacted by Statutes of 1982, Chapter 1486. The ocean ranching provisions of sections 15900-15908 (Statutes of

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				1983, Chapter 1300) were repealed by a 2001 sunset provision (Statutes of 1995, Chapter 677). New section 590 is an "orphan" with no legal significance or utility after the related provisions were repealed in 2001. Renumbering and moving an obsolete section won't hurt anything, but doesn't help either.
97	Optimum yield	600	Optimum yield	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature. The special definitions in FGC 90-99.5 were part of AB 1241, so the Marine Life Management Act and the definitions are properly analyzed with each other. If these provisions are folded into the generic FGC definitions it becomes more difficult to use them for purposes of interpreting the statutory construction of the MLMA. This is an important consideration should our implementation of a particular fishery management plan be legally challenged.
9705	Overfished	605	Overfished	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Some terms concern marine fisheries (i.e. 365, 410, 525, 530, 540, 560, 600-625) but some concern only the commercial sector (i.e. 235, 240, 255, 265, 290, 385-400). Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
98	Overfishing	610	Overfishing	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. The special definitions in FGC 90-99.5 were part of AB 1241, so the Marine Life Management Act and the definitions are properly analyzed with each

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				other. If these provisions are folded into the generic FGC definitions it becomes more difficult to use them for purposes of interpreting the statutory construction of the MLMA. This is an important consideration should our implementation of a particular fishery management plan be legally challenged. Some terms concern marine fisheries (i.e. 365, 410, 525, 530, 540, 560, 600-625) but some concern only the commercial sector (i.e. 235, 240, 255, 265, 290, 385-400). Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature. Some terms concern marine fisheries (i.e. 365, 410, 525, 530, 540, 560, 600-625) but some concern only the commercial sector (i.e. 235, 240, 255, 265, 290, 385-400). In my opinion, putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division).
98.5	Population or stock	625	Populatio n	"Population" as defined in 98.5 only applies to fish, but the term "population" appears in other places meant to apply to non-fish species as well, such as in the contents of a petition for listing or delisting under CESA in existing section 2074.5. There is also case law on the issue of "species and subspecies," and the implications for the Commission's listing authority. It is not particularly helpful to have such a potentially broadly used term defined generally for the Code, where the definition relates only to fish.
9000.5(f)	Definitions	630	Popup	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
711.2(a)	Wildlife and person	640	Project	The Comment says that this continues the definition of project contained in current section 711.2(a) "without change." This is not true. It leaves out the phrase "unless the context otherwise

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				requires". "Project" appears throughout the code and in most cases, it is used generically. For this reason, it is critical to retain in the new definitions section where "project will be defined the language found in current section 2, which in turn includes the language "unless the context otherwise requires" in section 711.2(a). New section 5 may cover the effect of this deletion, but the recommendation does, in fact, change this section.
		650	Raw fur	There is no section 3905(a) in FGC. Reference should be to FGC § 4005(a).
3500(a)	Game birds	665	Resident game bird	The LRC proposal would require looking at three different definitions, making the code less clear and accessible. A better option is to retain the text of existing 3500(a) and (b) in this section, which would also be consistent with the LRC definition of "game mammal." Wild turkey should continue on the list of game birds in section 450 without the reference to order Galliformes.
99	Restricted access	670	Restricted access	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. The special definitions in FGC 90-99.5 were part of AB 1241, so the Marine Life Management Act and the definitions are properly analyzed with each other. If these provisions are folded into the generic FGC definitions it becomes more difficult to use them for purposes of interpreting the statutory construction of the MLMA. This is an important consideration should our implementation of a particular fishery management plan be legally challenged. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.

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8750	Round haul nets	675	Round haul net	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
8601 and 9029.5	Set net; set line / Use of set lines, vertical fishing lines or troll lines prohibited, district 7 or 10	685	Set line	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
8601	Set net; set line	690	Set net	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
703(b)	General policy formation; timber harvesting			Where has Section 703(b) gone? This important section has been the subject of litigation. It is not included in the table beginning on page 133.
200(b)(2), sentence 3	Commission's power to regulate taking of fish and game	705	Spike buck	Delete this definition as unnecessary. The term only appears once in the entire code (former 200/proposed 1000). Moving this definition (and the definition of spotted fawn) out of that section will require the reader to consult multiple code sections in order to understand the meaning of one section, which appears detrimental to the LRC's objective of enhancing clarity and accessibility.
		715	Sport fishing	Fishing is just one method of taking and should not be used in reference to amphibians and reptiles. And "amphibians" are included in the current and new definition of fish so it is redundant here. Any definition of "sport fishing" should not include a reference to "profit", which has proven to be ambiguous and created enforcement obstacles in multiple contexts because of the notion that income must exceed expenses in order to be for profit.

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				Adding "for a purpose other than profit" creates a new element that would need to be proven in sport fishing violation criminal cases. This is s a substantive change.
200(b)(2), second sentence	Commission's power to regulate taking of fish and game	720	Spotted fawn	Delete this definition as unnecessary. The term only appears once in the entire code (former 200/proposed 1000). Moving this definition (and the definition of spike buck) out of that section will require the reader to consult multiple code sections in order to understand the meaning of one section, which appears detrimental to the LRC's objective of enhancing clarity and accessibility.
7700(d)	Reduction plant; packer; fish offal	730	Stamp	This is not a stand-alone definition. Stamps are more than electronic validations, but can include them. There should be a complete definition of stamp here.
7700(d)	Reduction plant; packer; fish offal	730	Stamp	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature. NB: Existing Section 7700(d) contains the qualifier "except where otherwise specified."
89.1	State waters	740	State waters	Suggest including "state waters" as an alternative wording for waters of the state in FWC § 790 rather than including it as a separate definition.
89.1	State waters	740	State waters	The reference to "state waters" should be included in the definition of "waters of the state" (new section 790) as an additional parenthetical. Delete "State waters" as its own definition. The Water Code generally uses the term "waters of the state" and so does the Fish and Game Code (see FGC Section 5650, 5652, 6400.)
98.5	Population or stock	745	Stock	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff

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				(particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature. The special definitions in FGC 90-99.5 were part of AB 1241, so the Marine Life Management Act and the definitions are properly analyzed with each other. If these provisions are folded into the generic FGC definitions it becomes more difficult to use them for purposes of interpreting the statutory construction of the MLMA. This is an important consideration should our implementation of a particular fishery management plan be legally challenged. NB: the note incorrectly states that existing section 98.5 provides a definition of the term for purposes of existing Section 1700. Section 98.5 provides the definition for purposes of the Marine Life Management Act (sections 7050 et seq).
98.5	Population or stock	745	Stock	This new definition should be deleted. Stock is used as a verb in FGC section 6401, 15202 and in the FGC regulations (14 CCR 238.5). The new definition only takes a narrow view of a relatively small part of how the word "stock" is used in the FGC and regulations.
99.5	Sustainable, sustainable use, sustainability	750	Sustainable, sustainable use and sustainability	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature. The special definitions in FGC 90-99.5 were part of AB 1241, so the Marine Life Management Act and the definitions are properly analyzed with each other. If these provisions are folded into the generic FGC definitions it becomes more difficult to use them for purposes of interpreting the statutory construction of the MLMA. This is an important consideration should our implementation of a particular fishery management plan be legally challenged.

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				NB: The note incorrectly states that existing section 99.5 provides a definition of the term for purposes of existing Section 1700. Section 99.5 provides the definition for purposes of the Marine Life Management Act (sections 7050 et seq).
99.5	Sustainable, sustainable use, sustainability	750	Sustainable, sustainable use and sustainability	The term sustainable is used in the Natural Community Conservation Planning Act, such as FGC § 2820, but is not defined. An extension of this term outside of the marine fishery context would constitute a substantive change to the law.
8830	Trawl net	765	Trawl net	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
9025.5	Troll lines and handlines; definitions; districts allowed	770	Troll line	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
9029.5	Use of set lines, vertical fishing lines or troll lines prohibited, district 7 or 10	780	Vertical fishing line	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. . Putting all these definitions together in one section is confusing for the public, the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
7601	Owner or vessel owner	785	Vessel owner	Definitions applicable only to marine fisheries and commercial fishing should not be mingled with generic definitions. Putting all these definitions together in one section is confusing for the public,

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				the regulated community, and department staff (particularly the Law Enforcement Division) because it invites application of the terms to situations that were never intended by the Legislature.
200	Commission's power to regulate taking of fish and game	1000	General authority	Since this is the only section in the code where the terms "spike buck" and "spotted fawn" appear, it makes sense to keep the definitions here rather than requiring readers to look at two additional sections.
203.1	Adoption of regulations – criteria	1020	Factors to be considered	This is a significant, substantive change without discussion or justification. Currently section 203.1 only applies to birds and mammals. Now this obligation to consider the "welfare of the individual animals" applies to regulations relating to fish, amphibians and reptiles. The "welfare of the individual animals" has been used as the basis for lawsuits against the Commission when individuals don't like the method of take (e.g. trapping). This will add potential causes of action against the Commission.
706	Government Code Provision – Applicability	1530	Incorporation of general law on state agencies	The language of the statute did not change; however, the title of the code section did change. The previous title was "Applicability of specified Government Code provisions" with the specific sections of the Government Code identified in the body of the statute. The proposed title is vague and overly broad in that it incorporates any "general law" which might apply to state agencies instead of the specific section cited in the language of this code section.
711.2(b)	Wildlife and person	1605	Legal defense of officers and deputies	The more narrow definition of "person" contained in new section 620 should be applied to this section. This defense-related section was added to the Code in 1957 as was the narrower "person" definition in existing section 67. The "person" definition in existing section 711.2 was added in 1990. Because of the dates of enactment, the more narrow definition should apply.
857	Private land entry – restrictions, etc.	1610	Entry onto private land	Subdivision (f) is intended to apply to surveys that occur pursuant to section 857. Further, CDFW believes that this section entitles a landowner on whose property the survey took place to a copy of the report.

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1502	Feeding of game birds, mammals, or fish if necessary.	1730	Feeding animals	Proposed Section 1730 should apply to all game birds, mammals, and fish. It should not be limited to game mammals and game fish as this would be a significant substantive change limiting the department's authority under this subdivision.
8605/7600	Recovery of fish from overflowed areas / Part application – take and possess fish for commercial purposes	1735	Recovery of isolated fish	NB: The note states that existing Section 8605 limits the provision to commercial fishing but is inapt because it has "no obvious connection to commercial fishing." However, it is the gear type that makes the connection, particularly since some nets or other appliances may only be used in certain areas and only licensed fishermen can us them to take fish.
1226(b)	Department may enter into agreements to accept funds ; deposit of funds	1900	Service agreements	The department objects to the reference in this section making these agreements subject to "Chapter 1 (commencing with Section 200) of Title 5." It changes this important new section by making unclear its application. This "subject to" provision is broader than that which exists in existing law, namely "section 1745".
701.5	Waste management director or alternate	1915	Federal water pollution control act joint powers agreement	The language in the existing section 701.5, by stating that the director "may so designate" persons to serve such an entity, more clearly stated the director's ability to do so, and therefore CDFW would recommend maintaining the language from the existing statute. Section 701.5 was enacted in 1975 and at that time, the only definition of "person" was contained in existing section 67. CDFW is not aware of any intention of the Legislature to apply the broader definition of "person" in existing section 711.2 to section 701.5.
		Title 5, Chapter 1	Use of Department-Managed Lands	The Department suggests changing the proposed heading on Line 16 of Page 54, "Chapter 1: Use of Department-Managed Lands" to either "Department-Managed Lands" (the existing heading of Fish and Game Code Division 2, Chapter 7.4) or "Certain Rules Regarding Department-Managed Lands." Without change, the proposed heading could lead the public to conclude that Chapter 1

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				contains all of the statutes regarding public uses of Department land. Existing Fish and Game Code Division 2, Chapter 5, Article 2 (Section 1525, *et seq.*) and Article 4 (Section 1580, *et seq.*) include statutes regarding public uses that are more comprehensive than proposed new Chapter 1. The existing Articles 2 and 4 also provide important context for decision makers and the public by describing the purposes for which wildlife areas and ecological reserves are established. The proposed Chapter 1 title "Public Uses of Department-Managed Lands" may cause readers to think, incorrectly, that they are reading the full scope of statutes on this topic. The word "uses" in the proposed heading is also potentially confusing. The Department does not consider agricultural leases to be a "use" of Department land in the same way that farming or ranching on private land is seen as a land use, or that recreational activities are viewed as uses of Department lands. The Department regards agricultural activities, such as prescriptive grazing to favor native plant species or reduce fuel loads and growing certain field crops that provide habitat for waterfowl, shorebirds or upland game birds, as habitat management activities rather than uses.
1745(h)	Terms and definitions; nonprofit operation; preferred uses; collection of fees	2025	Failure to obtain permit	Note (1) beginning on Line 15 of Page 56 invites comment on how best to continue the reference to Section 12002.2.1 in proposed Section 2025. The existing reference to Section 12002.2.1 makes violation of existing Section 1745 (h) punishable as an infraction with a range of fine amounts as described in Section 12002.2.1. To avoid making a substantive change to the law, the Department recommends the Commission do two things. First, Section 2025 should continue to cross-reference the new version of existing 12002.2.1. In addition, the list of violations in the new version of existing 12002.2.1 (a) should include Section 2025. It is unnecessary to specify the range of fines for a first offense, as in the current draft of Section 2025. Item (2) in the Commission's Note that starts at the bottom of Page 56 and continues onto page 57 invites comment on which permit is intended to be

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				within the scope of the exemption in the second sentence of Section 1745 (h). The answer is the entry permit (also known as a Lands Pass) required for "non-consumptive" users on certain CDFW lands under existing Section 1745 (f).
1745.1	Department may lease department-managed lands for agricultural activities	2040	Leasing of department-managed lands	In the note following proposed Section 2040, beginning on Line 40 of Page 57, the Commission invites comment on whether making the definition of "department-managed lands" expressly applicable to existing Section 1745.1 would cause any problematic change in the meaning of that provision. The Department has not interpreted Section 1745.1 as being subject to the definition in Section 1745, instead viewing Section 1745.1 as applicable to all lands the Department manages. As a result, making the definition of "department-managed lands" expressly applicable to Section 1745.1 could bring about a substantive change that would hinder the Department's ability to return revenue from agricultural leases to the lands that generated it. To avoid making a substantive change, the Department suggests using "department lands" in Section 2020 in place of the defined term "department-managed lands."
		Title 7 2300	Unlawful acts	This title should not be named "Unlawful Acts" and then include one provision of law regarding submitting false information. There are hundreds of unlawful acts in the code that are not listed here.
		2500-2685	Districts	This part comes from section 11000 et seq. and appears to be accurate. However, it is important to make sure that other provisions in the Fish and Game Code that reference any of these Districts are accurate also. In at least one instance, that is not the case. Specifically, current section 5901 lists two Districts that do not appear in section 11000 et seq., and therefore presumably do not exist: Districts "1 7/8" and "2 ¾." Also, section 5901 excludes one District that does appear in section 11000 et seq.: "1 ¾" (current section 11004). It is not clear whether the latter is intentional, or a mistake or misprint. For example, is District "1 7/8" actually supposed to be "1 ¾"? The Department would like the CRLC to correct these problems when it is ready to address section 5901

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		2800	"License" defined	This new definition creates problems throughout this part. As described in the new definition, "license would include licenses and permits, tags, reservations, or other entitlements." However, in this part, "license" also follows its historical usage, i.e., in reference to specific entitlements that are now called "licenses." See, for example, Section 2930 (a) ("A person shall not obtain more than one **license**, permit, reservation, or other entitlement of the same class, or more than the number of tags ") or (b), (b)(3), (c). This is confusing, because it is unclear which meaning of license applies. It should be the meaning in Section 2800 throughout this part, but in some sections, the context suggests otherwise. CDFW recommends deleting this section and restoring all of the sections that were changed as a result of this new definition.
1050(b)	Preparation, issuance, displaying and establishment of fees	2805	Form	Despite the Comment saying there is no substantive change, the new section deletes the terms "the form of" in describing the Commission's authority over contrivances. While this change may not be significant, it is substantive.
1050(c)	Preparation, issuance, displaying and establishment of fees	2910	Terms and conditions of issuance	The revised section does not substantially change existing law.
1053.1(a)	One license, permit, etc. limit; exceptions	2930	Limitation on number of licenses issued to one person	The revised section does not substantially change existing law.
1061	License voucher; limits on use	2935	License voucher	These other entitlements are already included in the definition of "license." If the definition in Section 2800 is kept, the Department suggests deleting "permit, tag, or other privilege or entitlement."
1050(d)	Preparation, issuance, displaying and establishment of fees	3000	Commission authority to set or change license fees	The revised section does not substantially change existing law.

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1050(f)	Preparation, issuance, displaying and establishment of fees	3005	Applicati on fee	The revised section does not substantially change existing law.
12014	Application for judgment to collect administrative civil penalty	3105	Collectio n of administr ative penalty	The revised section does not substantially change existing law.
12014	Application for judgment to collect administrative civil penalty	3105	Collectio n of administr ative penalty	This section has nothing to do with licenses or licensing and does not belong in this Part, Title, or Chapter. CDFW does not object to replacing the referenced code sections with "a," but another option is to add existing sections 2022, 12025, and 12025.1 to the other references to make it a complete list. The CLRC's reference to existing section 1615 is misplaced and appears to confuse civil penalties imposed by a court with civil penalties that may be imposed administratively by CDFW.
1055.1(g)	License agent; fees	3205	License agent for sale of lifetime licenses.	CDFW suggests a new title for this section, as CLRC named it "License agent for sale of lifetime licenses." This is misleading because the section is strictly the authority for the auction of lifetime licenses by a nonprofit, which is a narrower authority. This exemption applies to license agents under this section (3205(b)), and does not apply generally. Nonprofit organizations are not the only persons who can sell lifetime licenses.
1055.1(b-c)	License agent; fees	3250	Provision of licenses.	CDFW believes this section should not be restated because it is clear. Further, this section was moved from the general license provision of the Code and moved to a section on ALDS. This section does not related to ALDS. DFW believes this section should not be deleted because it provides authority that CDFW may use in the future. This is also unrelated to ALDS and should be returned to the general license provisions. The exemption in section 1055.1(c) does not apply to ALDS sales.
1055.6(a), (b), (d)	License agent; remit fees to Department; reports; retention of fee	3255	Remittan ce	See Comment on Section 2800 above.

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1055.6(e)	License agent; remit fees to Department; reports; retention of fee	3355	Colorado River special use validation.	This authority is obsolete. There is no longer a Colorado River special use validation.
1057		3365	Separate accounting required.	Consistent with revised code section 3200 above, this section struck references to "permits, reservations, tags, or other entitlements." CDFW recommends restoring the language in light of its corresponding recommendation to delete section 2800.
1058		3375	Preferred claim	Consistent with revised code section 3200 above, this section struck references to "permits, reservations, tags, or other entitlements." CDFW recommends restoring the language in light of its corresponding recommendation to delete section 2800.
13201		3515	Program descriptions.	CLRC noted that the reference to "*this* cost accounting system" is ambiguous, as it has no clear antecedent. In the context of the Fish and Game Code, "this" appears to reference former section 13200 (proposed section 3510), which requires the department to account for revenues and expenditures of money in the Fish and Game Preservation Fund. Section 3525 (former section 13203) does not appear to reference the narrower payroll cost accounting defined in former section 3520 (former section 13202).
		3525	Basic principle of cost accounting system.	See comment on section 3515.
1050.8	Issuance of commemorative licenses; restrictions	3665	Commemorative license	The change of language omits the existing cross-references to specific sections of the current the Fish and Game Code (sections 1052(a), 1052.1, 3031, and 7145). The referenced sections discuss requirements and fees for sport fishing and hunting licenses, prohibition against transfer of any license, tag, stamp, permit, application, or reservation, and methods for replacing lost or destroyed unexpired licenses. The proposed language broadens the language to state that provisions that govern hunting and fishing licenses do not apply to the purchase of a commemorative license. The broader

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				language does not change the underlying nature of a commemorative license (e.g. no rights or privileges to hunt or fish to the holder). However, it is unclear why the sale of a commemorative license is under the section discussing gifts, grants and donations to the Department. A commemorative license is not a gift to the Department. It is an item purchased **from** the Department. Section 1050.8 was previously in Division 2, Article 2 – General License Provisions.
860	Issuance of Fish and Game Warden Stamp	3670	Wildlife officer stamp	It is unclear why this section was moved into Article 2 "Gift, Grants, and Donation". Presumably, it was because the statute refers to a donation. However, since this stamp is purchased this section might be better in the "Deposit of Revenue" in Article 1. "Licensed agent" is inconsistent with "license agent" defined currently Section 1055.1. The proposed Section 3250 appears to be used to define a "license agent" incorporating the existing language of Section 1055.1(c). Proposed Section 3200 is the better definition of license agent as it adopts the language of Section 1055.1 (a) and (b).
1050(e)	Preparation, issuance, displaying and establishment of fees	3750	Department authority to set or change fees	The section does not substantially change section 1050(e) so long as the reference to the other Fish and Game Code sections remain in the paragraph. The current draft does not contain a revised Section 711.4 or 1609. Deletion of those sections could substantively change this section.
851, 854, 856		4100 - 4115		Since existing Fish and Game Code sections 851 and 853 are dormant authorities no longer in use, it would improve the Code's organization, clarity, and accessibility if these sections were re-ordered. Rather than beginning with dormant authorities, this Title (Division 3, Part 1, Title 1) should begin with sections pertinent to existing Wildlife Officers (existing sections 856 followed by 854). It would also update and enhance the clarity of the Code to replace "deputized law enforcement officer" in subdivision (a) of existing section 856 with "wildlife officer."

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853	Deputizing employees for license checking; requirements, etc.	4110	Deputized law enforcement officer as peace officer	The Note says that the restated provision would "also make clear that a person who is already a peace officer does not lose that status as a result of being deputized under this section." It is not clear where this is in the restated provision.
858(b)	xxx	4120	Emblems	The section on emblems seems more appropriate to this Part, since it relates more to Law Enforcement General Procedures rather than to Personnel.
856.5	Installation of vehicle mounted video/audio systems; policies	4320	Dashboard cameras	Since this is the section that authorizes CDFW to install, and wildlife officers to use, dashcams, it seems like this section would be more appropriately placed in Part 1, Title 1.
12002(a)	Punishments; misdemeanors and other violations	4400	Misdemeanor as default criminal penalty	CDFW cannot conclude, as suggested by the Commission, that the differences were inadvertent. Subdivisions (a) and (b) do completely different things, and CDFW has no reason to believe the Legislature did not intend for there to be a difference in these sections. CDFW recommends that the original introductory language in 12000 and 12002 be retained.
2020	Violation of provisions of code of regulations	4405	Violation of regulations generally	The omission of a reference to section 4400 would make a significant and substantial change in the law and illustrates one of the problems with splitting up important provisions of law into multiple sections. It is important to correct this omission. Also, this provision should not be in this location, right between two important parts of former section 12000 that should be read together in order to be given their proper effect. This section should be moved elsewhere in order to keep the parts of former section 12000 together. Former section 12000 is an extremely important section to CDFW's Law Enforcement Division and prosecutors throughout the state because it tells the reader whether violation of a code section or regulation is only punishable as a misdemeanor or whether it may also be punished as an infraction. This is an important threshold issue implicating important constitutional rights of the accused, and it controls the subsequent criminal procedures that will apply.
12000(b)(4)-(12)	Violation of code – misdemeanor unless otherwise specified	4410	Violation	This comment is incomplete and misleading because it doesn't explain what happened to the statutory woblets listed in existing 12000(b)(1)-(3) and why the LRC has chosen to change the

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				purpose of this provision. This change will create confusion where none previously existed. This provision used to be the place that listed violations of the code and regulations that are punishable as woblers (either misdemeanors or infractions at the discretion of the prosecutor filing an action). Without any explanation, the LRC has chosen to make this section only about violations of regulations that are woblers. This undermines the clarity and accessibility of the Code. According to the CLRC's table beginning on page 133 of its Tentative Recommendation, existing 12000(b)(1) will become new section 8130(c), while existing 12000(3) will become new section 45700(d). These two statutory violations should be listed here, and the title of this section should be changed to reflect its purposes. [Note: CDFW does not object to the deletion of former 12000(b)(2) because the section listed in that provision has been repealed.] The proposed revisions would be significant, substantive, and problematic. The CLRC has not explained the basis for its belief that serves as the rationale for changing the definition of commercial fisherman and may be unaware of existing remedies for the problem it is trying to remedy. See CDFW's comments on proposed section 280.
12020	Violation of written promise to appear in court – misdemeanor	4420	Violation of promise to appear	CDFW does not support narrowing this section so it applies only to violations of the Fish and Game Code and regulations. This section applies to violators regardless of what they were charged with and CDFW believes that provision provides it with the broadest possible coverage.
12025(h)	Additional penalties – violation of sections 1602, 5650 or 5652 of this code	4700	Controlled substance defined	There is no benefit from breaking up existing section 12025 into multiple sections. This is one of only a few sections that authorize CDFW to bring an administrative penalty action, and it makes sense that provisions that relate to that authority be contained in one section. The existing format has not been problematic in the cases that CDFW has brought using this section.
12025(a)	Additional penalties – violation of sections 1602, 5650 or 5652 of this code	4705	Conduct on public land	Same as above. Strongly recommend against breaking up section 12025.
12025(b)	Additional penalties – violation of sections 1602, 5650 or 5652 of this code	4710	Conduct on other land	Same as above. Do not break up section 12025.

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12025(c), (d) (g)	Additional penalties – violation of sections 1602, 5650 or 5652 of this code	4715	Consideration of civil penalty in conjunction with other penalties	Same as above. Do not break up section 12025.
12025(d)	Additional penalties – violation of sections 1602, 5650 or 5652 of this code	4720	Apportionment of penalty	Same as above. Do not break up section 12025.
10682	Income from hunting – use for taxes	4910	Insufficient payments from United States to county	CDFW suggests deleting "pursuant to the provisions of law" entirely. The term is so broad that as pointed out in the comment, it is difficult to discern whether it is supposed to mean state laws, federal laws, or both. In any event, it should be assumed that in lieu payments would be made pursuant to the provisions of all applicable laws, state and/or federal.
14102	Commissioner's compensation	5960	Compensation	CDFW is uncertain of the legal effect of changing the language of a compact. CDFW agrees that the proposed change from $10 to $100 per diem for the non-official PSMFC member would be consistent. (There is only one non-official California member.)

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