Study R-100 April 5, 2018

First Supplement to 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.

Letters from the Fish and Game Commission ("FGC") and the Department of Fish and Wildlife ("DFW"), commenting on the tentative recommendation, were attached to Memorandum 2018-22.

That memorandum began the process of analyzing and discussing the comments. This supplement continues (but does not complete) that process. The comments that have not yet been addressed will be discussed in a future memorandum.

Most of the issues discussed in this supplement are fairly technical, and in most instances the staff's recommendation is to take an approach that would accommodate the concerns expressed by DFW. For that reason, the staff proposes to take a consent approach to most of the issues discussed below. The staff will provide an opportunity for any Commissioner or member of the public to discuss each of these "consent items." **If there is no discussion, the staff's recommendation will be deemed approved.** Items that may warrant discussion will have the following symbol in their headings: "☞." Those "discussion items" will be presented fully for the Commission's decision.

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

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.

are to the proposed Fish and Wildlife Code. References to the "Exhibit" are to the materials attached to Memorandum 2018-22.

NEW DEFINITIONS

Memorandum 2018-22 discussed some of the proposed new definitions that were the subject of FGC or DFW comments. Others are discussed below.

"Sport Fishing"

Proposed Section 715 would define "sport fishing" as "the take of a fish, amphibian, or reptile, for a purpose other than profit." As explained in the Comment to that provision, the definition was drawn from a handful of sections that address sport fishing licenses. For example:

> 7145. (a) Except as otherwise provided in this article, every person 16 years of age or older who takes any fish, reptile, or amphibian for any purpose other than profit shall first obtain a valid license for that purpose …

For similar language, see Sections 7149.05, 7149.2, 7150, 7151, 7180.1.

A note following proposed Section 715 points out that the term "sport fishing" is also used, without definition, in several existing code sections (some of which are listed). The note asks for comment on whether the application of the proposed definition to such provisions would be problematic.

DFW believes that it would be:

> 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.
>
> 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 a substantive change.[2]

As discussed above, the language referring to the take of amphibians and reptiles for a purpose other than profit is used in the existing provisions that

2. See Exhibit comment 66.

prescribe the kind of activity that requires a sport fishing license. The proposed definition is substantively consistent with those provisions.

The staff has reviewed the existing provisions that use the term "sport fishing" without definition. The proposed definition would apply to those sections. Of those sections, many do not establish requirements or prohibitions that would involve enforcement. The concern about substantively changing the elements of regulatory provisions would not be an issue for such provisions. Those that do clearly involve requirements or prohibitions do so by referencing the sport fishing license. For example, Section 7232 provides (with emphasis added):

> Notwithstanding Section 7121 any offal from a fish *taken under a sport fishing license* which is delivered by the license holder to a fish canner or fish processor may be processed, used, or sold by that fish canner or fish processor.
>
> Nothing in this section authorizes *a holder of a sport fishing license* to sell, or a fish canner or fish processor to purchase from *a holder of a sport fishing license*, any fish, or any portion thereof, taken under a sport fishing license.

Because such provisions already incorporate the sport fishing license requirement, *they also incorporate the scope of activities that require such a license* (i.e., they apply to the take of fish, amphibians, and reptiles, for a purpose other than for profit). For that reason, proposed Section 715, which merely reiterates the application of the sport fishing license requirement in convenient form, would not seem to change the substance of regulatory provisions that incorporate a sport fishing license requirement (such as Section 7232).

In short, the staff did not find any provisions that use the term "sport fishing" without definition where application of proposed Section 715 would seem to cause a substantive change.

Nonetheless, the addition of the proposed definition was primarily for drafting convenience. While the benefits of a such an addition would be real, they would also be modest. **Given DFW's concern, the staff recommends a compromise: move the definition from the front of the code to the provisions that govern sport fishing licenses, with its application limited to those provisions.** That would accomplish much of the drafting convenience of having a separate definition of "sport fishing," while reducing or eliminating any appearance of a problematic substantive change.

CHANGED OR RELOCATED DEFINITIONS

A number of comments focus on proposed changes to the terms or location of existing definitions. Those are discussed below.

"Department-Managed Lands"

Section 1745(a)(1) provides a special definition of the term "department-managed lands," which applies only to the other provisions of that section. The definition limits the term to lands acquired for specified purposes, thus:

> "Department-managed lands" includes lands, or lands and water, acquired for public shooting grounds, state marine (estuarine) recreational management areas, ecological reserves, and wildlife management areas.

That definition would be continued in proposed Section 2000, which would apply to the entire chapter that contains it. That chapter would continue the substance of Section 1745, which is unproblematic, but it would also continue Section 1745.1 (in proposed Section 2040).

Consequently, the definition of "department-managed lands" would apply the use of that term to a provision that is not currently governed by it (Section 1745.1). A note following proposed Section 2040 asks for comment on whether that would cause any problems.

DFW is concerned about the change in application of the definition and suggests that it be avoided:

> 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."[3]

The staff finds that reason convincing and recommends that the definition of "department-managed lands" in Section 1745(a) not be made applicable to Section 1745.1. The approach recommended by DFW might be enough to achieve that result, but it could lead to misunderstanding (because the terms

3. See Exhibit comment 91.

"department lands" and "department-managed lands" are so similar). **The staff recommends a more direct approach, expressly stating that the definition does not apply to proposed Section 2020.**

"Game Bird"

DFW had two comments on the provisions defining different types of game birds.

Organization of Definitions

Section 3500(a) lists "resident game bird" species; subdivision (b) lists "migratory game bird" species. Subdivision (c) then states: "References in this code to 'game birds' means both resident game birds and migratory game birds."

In the proposed law, those three subdivisions are each separate sections.[4] This facilitates their alphabetical placement in the collection of definitions at the beginning of the proposed code.

As a general matter, DFW would prefer that the three provisions be combined in a single section, as they are in existing law:

> 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 Law Revision Commission's definition of "game mammal" below.[5]

The staff agrees that the law would be slightly more difficult to use if a reader needed to find all three definitions separately (i.e., to determine the meaning of "game bird"). But the proposed law would be easier to use in a situation where the reader only needs to find one of the specific definitions (e.g., "migratory game bird" or "resident game bird"). If the definitions are separate sections, they can be located alphabetically. If they are all combined in a single section, they cannot (or worse, they would be located alphabetically based on only one of the three terms).

The likelihood of one or the other situation arising is probably about equal, meaning that the convenience of the two approaches is probably equivalent. **Given that, the staff recommends sticking to the more conventional drafting approach of defining each term separately, in its own alphabetically-sorted definition provision.**

4. See proposed Sections 450, 545, 665.
5. See Exhibit comments 34, 48, 59.

Wild Turkeys

A note following the definition of "resident game bird"[6] states:

> Existing Fish and Game Code Section 3500(a)(11) (which would be continued by proposed Section 665(k)), lists "wild turkeys of the order Galliformes" as a resident game bird. It is the Commission's understanding that all wild turkeys are of the order Galliformes, making the reference to the order superfluous. The Commission also notes that existing Section 3683(a)(12), which identifies those resident game birds that constitute upland game birds, refers only to "wild turkeys."

DFW agrees that the reference to the order Galliformes is not required.[7] **No Commission action is required on this matter.**

"Fully Protected Mammal"

Section 4700(b) defines the term "fully protected mammal" by reference to a list of species. The list includes:

> Bighorn sheep (Ovis canadensis), except Nelson bighorn sheep (subspecies Ovis canadensis nelsoni) as provided by subdivision (b) of Section 4902.

Proposed Section 430(a) would continue that law, but would rephrase the exception to Bighorn Sheep as fully protected mammals, to incorporate some of the substantive elements of the cross-referenced exception:

> Bighorn sheep (Ovis canadensis), except a mature Nelson bighorn ram (subspecies Ovis canadensis nelsoni) when the object of sport hunting authorized by subdivision (b) of Section [4902].

A note following proposed Section 430 asks for comment on the added language.

DFW finds the added language to be problematic:

> 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

6. Proposed Section 665.
7. See Exhibit comment 59.

> avoid confusion the revision should not make a change to use the singular form.[8]

The staff is convinced by the objection in the first paragraph and recommends that the original language be used without change (except to update the cross-referenced section number). If the Commission agrees, that would obviate the need to resolve the singular-versus-plural issue raised in the second paragraph. However, in case the Commission decides that changes should be made to the language of the existing definition, it is worth briefly discussing the matter.

As a matter of law, changing from the plural to the singular case would have no substantive effect. Like most codes, the Fish and Game Code includes a general rule of construction stating that "[T]he singular number includes the plural, and the plural, the singular."[9] In other words, the use of the singular or plural has no effect on construction; the provision can be applied to both cases. The Commission's preferred practice is to use the singular. It generally produces simpler and more direct language. Exceptions are made when sticking to that practice would be confusing or sound awkward.

In this instance, the staff does not believe that use of the singular would lead to any actual confusion. It would not be plausible to construe the provision as only applying to a single sheep. But, as noted, this issue would be obviated in this instance by reversion to the existing language.

"Game Mammal"

Section 3950(a) defines the term "game mammal," by reference to a list of species. DFW has two comments on that provision, the first related to bighorn sheep, the second to mountain lions.

Bighorn Sheep

Proposed Section 460 would continue Section 3950(a) but would add an entry for Nelson Bighorn sheep, to the extent that they are allowed to be hunted under Section 4902(b). Thus:

> Mature Nelson bighorn ram (subspecies Ovis canadensis nelsoni), only when the object of sport hunting authorized by subdivision (b) of Section 35900.

8. See Exhibit comment 31.
9. Section 10.

DFW has the same objections to that language as those expressed in connection with the definition of "fully protected mammal" (discussed immediately above).[10]

Whatever approach the Commission takes in referring to bighorn sheep in the definition of "fully protected mammal" should be paralleled in the definition of "game mammal."

☞ *Mountain Lions*

Section 3950 includes mountain lions within the definition of "game mammal." However, Section 3950.1, which was added by initiative, supersedes that rule:

> (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.

Section 219 is an unusual provision that allows an FGC regulation to supersede a code section.

Sections 3950 and 3950.1 would be continued in proposed Section 460. DFW has a suggestion for revision of that provision:

> 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 Law Revision Commission's review and not inconsistent with the Prop. 117.[11]

The staff believes that proposed Section 460 would faithfully preserve existing law. In fact, the proximity between the language defining a mountain lion as a game mammal and the overriding prohibition on treating a mountain lion as a game mammal is arguably closer than in existing law. Rather than being in consecutive *sections*, those two provisions are in consecutive *subdivisions* of the same section.

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10. See Exhibit comment 37.
11. See Exhibit comment 36

The staff had considered deleting mountain lions from the defined list of game mammals, in accord with Section 3950.1, but was unsure about whether that might have a substantive effect.

The approach taken in the initiative was odd. It could easily have deleted mountain lions from the definition of "game mammal." Instead, it left that definition unchanged and instead forbid the FGC and DFW from "listing" or "considering" mountain lions to be game mammals. The staff wasn't sure whether that prohibition left some space for the treatment of mountain lions as game mammals in some other way. If not, why take that convoluted approach rather than the simple and direct one (i.e., deleting mountain lions from the definition of "game mammal")?

Out of caution, the staff continued the current approach without change.

If the Commission would like to handle it differently, proposed Section 460 could be revised as follows:

> 460. (a) "Game mammal" means any of the following mammals:
> (1) Black and brown or cinnamon bear (genus Euarctos).
> (2) Deer (genus Odocoileus).
> (3) Elk (genus Cervus).
> (4) Jackrabbit and varying hare (genus Lepus), cottontails, brush rabbits, pigmy rabbits (genus Sylvilagus).
> (5) Mature Nelson bighorn ram (subspecies Ovis canadensis nelsoni), only when the object of sport hunting authorized by subdivision (b) of Section 35900.
> (6) ~~Mountain lion (genus Felis).~~
> ~~(7)~~ Prong-horned antelope (genus Antilocapra).
> ~~(8)~~ (7) Tree squirrel (genus Sciurus and Tamiasciurus).
> ~~(9)~~ (8) Wild pig, including feral pig and European wild boar (genus Sus).
> (b) Notwithstanding ~~subdivision (a) 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.
> (c) Section 1025 does not apply to subdivision (b). Neither the commission nor the department shall adopt any regulation that conflicts with or supersedes this subdivision, or subdivision (b).

How would the Commission like to proceed on this point?

☞ **"Master"**

Sections 12002.7 and 12002.8 both use the term "master of a vessel." Proposed Section 535 would continue the definition without substantive change.

Regarding that approach, DFW writes:

> 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.[12]

The staff does not understand the comment. Moving the definition out of its present context may make it harder to find, leading to it being overlooked in some cases, but it should not change the substantive effect of the language. Unfortunately, the reference to other related comments does not help. DFW did not number its comments, so the staff could not find comment "[A48]." **Further explanation would be appreciated.**

"Nongame Bird"

Proposed Section 570 would provide:

> "Nongame bird" means a bird occurring naturally in California that is not a resident game bird, migratory game bird, or fully protected bird.

That language would continue the first sentence of Section 3800, without substantive change.

DFW suggests that the language could be simplified, if "resident game bird" and "migratory game bird" were replaced with the aggregate term "game bird."[13] This should be a nonsubstantive improvement because "game bird" is defined as "a resident game bird or a migratory game bird."[14]

The staff recommends that the change be made.

☞ **"Project"**

Section 711.02(a) defines "project" as follows:

> For purposes of this code, unless the context otherwise requires, "project" has the same meaning as defined in Section 21065 of the Public Resources Code.

That definition would be continued by proposed Sections 200 and 640 (read together):

> 200. Unless a provision or the context otherwise requires, the definitions in this part govern the construction of this code and all regulations adopted pursuant to this code.

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12. See Exhibit comment 46.
13. See Exhibit comment 50.
14. See Section 3500(c), proposed Section 450.

640. "Project" has the same meaning as defined in Section 21065 of the Public Resources Code.

DFW notes that reliance on Section 200, in lieu of the existing "unless the context otherwise requires" language would be a change from Section 711.02(a). That contradicts the Comment to Section 640, which says that it continues Section 711.02(a) "without change," rather than "without substantive change."[15] That is a specific example of the general issue that was discussed in memorandum 2018-22 at pages 10-12. **The resolution of that general issue should resolve this specific one.** The staff does not intend to discuss it further here.

However, the staff does see a previously unnoted issue, which may or may not be a problem. Under existing law, the definition of "project" only applies to the code. Under proposed Section 200, it would also apply to regulations adopted pursuant to the code. **The staff requests that FGC and DFW consider whether that would be a problem.**

"Spike Buck" and "Spotted Fawn"

The proposed law would move the definitions of "spike buck" and "spotted fawn" to the front of the code, with the other definitions that have unlimited application.[16] Currently those definitions are located within the only code section that uses the defined terms.[17] DFW thinks that the existing location is the better one. "Moving the definition[s] 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 Law Revision Commission's objective of enhancing clarity and accessibility."[18]

One advantage of locating general definitions at the beginning of the code is that they are available for use in new provisions that might be added to the code later. This is convenient and it also reduces the likelihood of the code using the same term with slightly different defined meanings in different parts of the code. The disadvantage is the one pointed out by DFW.

For the general reasons discussed on pages 2-3 of Memorandum 2018-22, the staff is inclined to defer to DFW on points like this one. **The staff recommends that the definitions of "spike buck" and "spotted fawn" be moved to the provision that uses those terms.**

15. See Exhibit comment 57.
16. See proposed Sections 705, 720.
17. Section 200.
18. See Exhibit comments 65 & 67. See also comment 80.

"State Waters" and "Waters of the State"

Section 89.1 provides:

> "Waters of the state," "waters of this state," and "state waters" have the same meaning as "waters of the state" as defined in subdivision (e) of Section 13050 of the Water Code.

In the proposed law, that definition would be broken into two sections, thus:

> 740. "State waters" means "waters of the state," as defined in Section 790.
>
> 790. "Waters of the state" or "waters of this state" have the same meaning as "waters of the state" as defined in subdivision (e) of Section 13050 of the Water Code.

This was done to enhance user convenience. The defined meaning of the term "state waters" could be found by searching the general definitions alphabetically. That cannot be done with the existing approach, which buries the term "state waters" in the middle of a definition that is alphabetized under "waters."

DFW suggests preserving the existing approach:

> The reference to "state waters" should be included in the definition of "waters of the state" … 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).[19]

DFW has not offered any reason for making its suggested change and the staff sees none. There appear to be 25 sections of the Fish and Game Code that use the term "state waters." Readers of those sections would benefit from having an alphabetized definition of the term (even though they would then need to look up the definition of "waters of the state"). Without that convenience, readers could easily overlook the fact that the term "state waters" is defined. **The staff recommends keeping the approach used in the tentative recommendation.**

19. See Exhibit comments 70-71.

Rulemaking Authority

Existing Section 203.1 provides a set of factors that the FGC is to consider when adopting regulations that govern resident game birds, game mammals, and fur-bearing mammals (under Section 203):

> When adopting regulations pursuant to Section 203, the commission shall consider populations, habitat, food supplies, the welfare of individual animals, and other pertinent facts and testimony.

In a preliminary draft, the Commission asked for public comment on whether the application of that provision should be broadened so that it also applies to FGC regulations that govern fish, amphibia, and reptiles (under Section 205).[20] In response, DFW wrote to express its support for such a change: "The Department supports broadening the language of this section to include proposed Section 565 [former Section 205], in addition to Section 555 [proposed Section 203]." The Commission made that change in the tentative recommendation.[21]

DFW now opposes that change:

> 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.[22]

That comment provides a specific reason to reverse the proposed change and restore the existing scope of Section 203.1 (the risk of increased litigation). That strikes the staff as a legitimate concern. The fact that this concern only became apparent after a second reading of the proposed law does not bear on its substantive merit. **In light of this latest input, the staff recommends that the proposed law be revised to revert to the existing scope of Section 203.1.**

20. See Memorandum 2013-13, attached draft p. 4.
21. See Memorandum 2013-31, p. 2; Minutes (June 2013), p. 15.
22. See Exhibit comment 81.

☞ **Survey or Evaluation of Private Land**

Section 857(f) (which would be continued as proposed Section 1610(f)) provides:

> If the department conducts a survey or evaluation of private land that results in the preparation of a document or report, the department shall, upon request and without undue delay, provide either a copy of the report or a written explanation of the department's legal authority for denying the request. The department may charge a fee for each copy, not to exceed the direct costs of duplication.

A note following proposed Section 1610 asked two questions about the meaning of Section 857(f), with an eye toward clarifying possible ambiguities:

> (a) Is subdivision (f) intended to apply only to a survey or evaluation of private land that occurs as a result of an entry authorized under other provisions of Section 857?
> (b) Is the subdivision intended to require the Department to provide a copy of the prepared document or report referenced by the subdivision (or alternatively, a written explanation for not doing so) to any requester, or only to the owner of the private land?

DFW has answered those questions:

> 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.[23]

Given those answers, it might be appropriate to revise proposed Section 1610(f) as follows:

> If the department conducts a survey or evaluation of private land pursuant to this section, that results in the preparation of a document or report, the department shall, upon request and without undue delay, provide the landowner either a copy of the report or a written explanation of the department's legal authority for denying the request. The department may charge a fee for each copy, not to exceed the direct costs of duplication.

The staff invites comment on whether those changes should be made. If so, should they be described in the Comment as a clarification of existing law, or a minor substantive improvement?

23. See Exhibit comment 84.

☞ **Legal Defense of Officers and Employees**

Section 707 provides as follows:

> It is the duty of the attorney for the department to act as counsel in defense of any officer or deputy of the department in any suit for damages brought against the officer or deputy on account of injuries to persons or property alleged to have been received as a result of the negligence or misconduct of the officer or deputy occurring while the officer or deputy was performing his official duties.

That provision is in the same article as Section 711.2(b), which provides:

> For purposes of this article, "person" includes any individual, firm, association, organization, partnership, business, trust, corporation, limited liability company, company, district, city, county, city and county, town, the state, and any of the agencies of those entities.

Read strictly, it would appear that the definition provided in Section 711.2 applies to Section 707. The staff expressly preserved that application in proposed Section 1605:

> 1605. (a) It is the duty of the attorney for the department to act as counsel in defense of any officer or deputy of the department, in any suit for damages brought against the officer or deputy, on account of injuries to persons or property alleged to have been received as a result of the negligence or misconduct of the officer or deputy, occurring while the officer or deputy was performing official duties.
>
> (b) For purposes of this section, "person" includes any individual, firm, association, organization, partnership, business, trust, corporation, limited liability company, company, district, city, county, city and county, town, the state, and any of the agencies of those entities.

Without the special definition of "person" in proposed Section 1605(b), that section would be governed by the general code-wide definition of "person" in Section 67 (which would be continued in proposed Section 620):

> 620. "Person" means any natural person or any partnership, corporation, limited liability company, trust, or other type of association.

DFW argues that the definition in proposed Section 620 should apply to proposed Section 1605, rather than the definition in proposed Section 1605(b):

> The more narrow definition of "person" contained in new section 620 should be applied to this section. The 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.[24]

The argument seems to be that Section 67 should govern Section 707, because both provisions were enacted contemporaneously (in 1957). That historical argument requires that the plain language of Section 711.2 be disregarded. In general, where the language of a statute is clear, there is no need for special interpretation.

However, the staff sees another possible issue. In proposed Section 1605(a), the word "persons" is juxtaposed with "property" (i.e., "injuries to persons or property"). That usage may suggest that the word "person" is intended to describe a *kind* of injury (i.e., an injury to the person) rather than describing the class of entities that have suffered an injury. If so, expressly applying either definition of "person" could cause confusion.

The staff's intuition is that neither definition of "person" is relevant to proposed Section 1605, because the term "person" is being used to distinguish an injury to the *person* from an injury to *property*. **For that reason, the staff is inclined to delete proposed Section 1605(b), which might otherwise change the meaning of the provision. How would the Commission like to proceed on this point?**

Public Use of Department-Managed Lands

Section 1745 sets out certain rules for public use of department-managed lands. That section would be continued as proposed Sections 2000 to 2035, inclusive. Section 1745(h) prescribes the penalty for failure to obtain a required permit. The substance of that provision would be restated in proposed Section 2025 as follows:

> Failure to obtain a permit as required pursuant to this chapter is an infraction, punishable by a fine of not less than fifty dollars ($50) nor more than two hundred fifty dollars ($250). A person in possession of a valid hunting license, sport fishing license, or trapping license shall be exempt from a requirement to obtain a permit.

24. See Exhibit comment 83.

A Note following proposed Section 2025 asks two questions. They are discussed separately below.

Severity

Section 1745(h) provides that the failure to obtain a required permit "shall be an infraction as described in Section 12002.2.1." Section 12002.2.1 sets out the penalties for a violation of specified provisions.

The Note asks whether the cross-reference to Section 12002.2.1 was intended to encompass *both* the monetary penalty that is specified in Section 12002.2.1(a) *and* the enhanced penalty for a repeat violation that is specified in Section 12002.2.1(b), or just the former.

DFW does not directly answer that question. Instead, they suggest that the best way to continue the existing incorporation of Section 12002.2.1 would be to add proposed Section 2025 to the list of provisions that are governed by Section 12002.2.1.[25] This would be done in proposed Section 13305, which is not included in Part 1 of the tentative recommendation. Thus:

> 13305. (a) Notwithstanding any other provision of law, a violation of Section 2025, 12905, 12910 or 12955 is an infraction, punishable by a fine of not less than fifty dollars ($50), nor more than two hundred fifty dollars ($250), for a first offense.
>
> (b) If a person is convicted of a violation of Section 2025, 12905, 12910, or 12955 within five years of a separate offense resulting in a conviction of a violation of Section 2025, 12905, 12910, or 12955, that person shall be punished by a fine of not less than one hundred dollars ($100), nor more than five hundred dollars ($500).
>
> (c) If a person is convicted of a violation of Section 2025, 12905, 12910 or 12955 and produces in court the required validation that was valid at the time of the violation, and if the sport fishing was otherwise lawful, the court may reduce the fine imposed for the violation to twenty-five dollars ($25).

The staff recommends that the suggested change be made.

Which Permit?

Section 1745 addresses a "[f]ailure to obtain a permit as required pursuant to this section…." The Note following proposed Section 2025 observes that Section 1745 mentions more than one kind of permit and asks which kinds are governed by the penalty rules provided in Section 1745(h).

DFW replies:

25. See Exhibit comment 90.

> 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).[26]

The staff recommends that proposed Section 2025 be revised to eliminate any ambiguity on that point, by making changes along the following lines (which do not include any changes to address the preceding "severity" issue):

> Failure to obtain ~~a~~ an entry permit as required pursuant to ~~this chapter~~ Section 2020 is an infraction, punishable by a fine of not less than fifty dollars ($50) nor more than two hundred fifty dollars ($250). A person in possession of a valid hunting license, sport fishing license, or trapping license shall be exempt from a requirement to obtain ~~a~~ an entry permit.

TECHNICAL ISSUES

Obsolete Provision

Section 61 (proposed Section 590) defines the term "ocean ranching." DFW points out that the provisions that use the term were repealed years ago. Consequently, the definition serves no present purpose.[27] **The staff recommends that it be repealed as obsolete.**

Error Correction

DFW points out several technical errors in the proposed legislation.[28] **The staff has confirmed that DFW is correct about those points and will make the necessary corrections in the next draft of the tentative recommendation.**

Timber Harvest Provision

DFW wonders whether Section 703(b) was inadvertently omitted from the proposed law.[29] It was not. The provision would be continued in a provision outside the scope of Part 1 of the tentative recommendation.

Section Heading

DFW objects to the generality of the section heading used for proposed Section 1530 ("Incorporation of general law on state agencies"):

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26. *Id.*
27. See Exhibit comment 51.
28. See Exhibit comments 10, 32, 49, 58.
29. See Exhibit comment 64.

> 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."[30]

The headings given to code sections are not part of the law. They are a mere editorial convenience, with every publisher of the law crafting its own section headings. Consequently, section headings have no legal effect. In this instance, it would be very simple to address DFW's concern. The heading could be revised to refer to "specified" law, rather than "general law." **The staff will do so in the next draft of the tentative recommendation.**

Name of Title

The proposed law includes the proposed heading "Title 7. Unlawful Acts" within "Part 2. Department of Fish and Wildlife" of "Division 2. Administration." Proposed Title 7 would contain only a single provision, proposed Section 2300:

> 2300. (a) It is unlawful to submit, or conspire to submit, any false, inaccurate, or otherwise misleading information on any application or other document offered or otherwise presented to the department for any purpose, including, but not limited to, obtaining a license, tag, permit, or other privilege or entitlement pursuant to this code or regulations adopted pursuant to this code.
>
> (b) For purposes of this section, "department" includes any department employee, license agent, or any person performing the duties of a department employee or license agent.

DFW objects to the name used in proposed Title 7:

> The 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.[31]

Title 7 was not intended to contain *all* provisions that describe unlawful acts. By placing the title within proposed Part 2 of Division 2, it was intended to serve as a location for provisions that establish unlawful acts relating to the

30. See Exhibit comment 82.
31. See Exhibit comment 92.

administration of *DFW*. Only one such provision was found, but more could be added in the future.

The staff spent time thinking about the best placement of proposed Section 2300, which does not fit cleanly anywhere else in the organization of the proposed Fish and Wildlife Code. Moreover, the names of headings "do not in any manner affect the scope, meaning, or intent of the provisions of [the Fish and Game Code]."[32] In other words, choosing a heading is just an issue of user-friendliness, not a question of legal effect. **The staff recommends leaving the heading as drafted in the tentative recommendation.**

Erroneous District References

Sections 11000 to 11039 establish "districts" for the administration of fish and game law. DFW correctly notes that Section 5901 refers to districts that are not established in those provisions (or elsewhere in the code).[33] They encourage the Commission to correct those problems when addressing Section 5901.

A draft of recodified Section 5901 (proposed Section 68105) was presented in Memorandum 2017-38. A Note following that provision acknowledged the erroneous references to nonexistent districts and asked for public comment on how to resolve the problem. The staff had hoped that FGC or DFW might have an institutional recollection of what went wrong with those references. That would be a more efficient way to resolve the matter than trying to reconstruct an historical record of the error's origin.

The staff intends to take the same approach in the upcoming tentative recommendation — a Note will ask for public comment on the issue. If that request doesn't produce an answer, the staff will visit the State Archives in search of one.

Restatement of Language and Substantive Change

In a number of instances, the proposed law would restate language that is hard to read and understand. Each time that is done, a Note following the restated provision asks whether the revisions would cause any problems.

For several of those provisions, DFW has indicated that the revisions would not cause any substantive change in the meaning of the provision.[34] **No action is required regarding those provisions.**

32. Section 4; proposed Section 30.
33. See Exhibit comment 93.
34. See Exhibit comments 96-97, 99-101.

However, there is one provision that DFW believes would be substantively changed by the proposed restatement. It is discussed below.

Section 1050 provides as follows:

> The commission shall determine the form of all licenses, permits, tags, reservations, and other entitlements and the method of carrying and displaying all licenses, and may require and prescribe the form of applications therefor and the form of any contrivance to be used in connection therewith, except for those programs where the department has fee-setting authority, in which case the department shall retain that authority.

Proposed Section 2805 would restate that very long sentence as follows:

> 2805. (a) Except as provided in subdivision (b), the commission shall determine all of the following:
> (1) The form of a license.
> (2) The method of carrying and displaying a license.
> (3) The application for a license.
> (4) Any contrivance to be used in connection with a license.
> (b) For programs where the department has fee-setting authority, the department has the authority described in subdivision (a).

DFW points out that proposed Section 2805(a)(4) would not continue the words "the form of" in connection with a contrivance. They describe that as a substantive change that is not acknowledged in the Comment to proposed Section 2805.[35] Although DFW does not mention it, the same might be said of proposed Section 2805(a)(3), which does not refer to "the form of" an application.

The staff does not see those omissions as substantive. If FGC or DFW are given blanket authority to determine the "application for a license" or "[a]ny contrivance to be used in connection with a license," that authority would seem to necessarily include the authority to determine the *form* of those objects.

However, the possibility of argument on that point makes it even more important that the Comment state that no substantive change was made. That would be evidence of legislative intent, which could be used to avoid or defeat an argument that the provision somehow grants authority to determine the application and any contrivance without granting authority to determine their form. **The staff recommends against making any change on this point.**

35. See Exhibit comment 95.

NEXT STEPS

This supplement does not complete the process of discussing the comments received from FGC and DFW. That process will be completed in a future memorandum, which should be presented for consideration at the Commission's June meeting.

Respectfully submitted,

Brian Hebert
Executive Director