

## Memorandum 2019-19

**California Salmon Marketing and Development Act**

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Last year, while preparing cross-reference corrections to conform with the proposed Fish and Wildlife Code, Commission<sup>1</sup> staff discovered that Food and Agricultural Code Sections 76501-76981 contained what appeared to be a number of obsolete provisions.<sup>2</sup> These sections of the code, collectively known as the California Salmon Marketing and Development Act (“Act”), establish the California Salmon Council (“Council”).<sup>3</sup> This memo will provide background on the Act and the Council, then explain which provisions might be obsolete.

## BACKGROUND

The Food and Agricultural Code establishes various agricultural councils and commissions to research, advertise, and promote sales of agricultural commodities.<sup>4</sup> These entities were created to assist the Department of Food and Agriculture (“Department”) in effectively regulating and marketing commodities deemed important to California’s economy and consumers.<sup>5</sup> Further, their purpose is to facilitate interaction between producers and handlers of commodities and provide uniformity in how the industry operates.<sup>6</sup>

**Creation**

It is in this context that the Legislature enacted the California Salmon Marketing and Development Act.<sup>7</sup> Signed into law in 1988, the Act created the California Salmon Council. In doing so, the Legislature declared salmon fishery

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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](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Memorandum 2019-6, pp. 34-40.

3. Food & Agric. Code § 76501.

4. Food & Agric. Code §§ 64001-79902.

5. See <[https://www.cdffa.ca.gov/mkt/mkt/pdf/ABOUT\\_MARKETING\\_PROGRAMS.pdf](https://www.cdffa.ca.gov/mkt/mkt/pdf/ABOUT_MARKETING_PROGRAMS.pdf)> for a more detailed overview of California Agricultural Marketing Programs See <<https://www.cdffa.ca.gov/mkt/mkt/pdf/DetailedOverviewBranchPrograms.pdf>>.

6. *Id.*

7. Food & Agric. Code §§ 76501-76981.

in California a paramount industry that provides substantial revenue, employment, and food.<sup>8</sup> The purpose of the Council is to (1) expand the market for and increase the consumption of salmon, (2) facilitate the allocation of rights to harvest salmon, (3) assist the Department in sales stimulation and formulating educational programs to increase the use and consumption of salmon, and (4) generate revenue to administer and enforce the Council's duties.<sup>9</sup> According to their website, the Council's mission is to "actively pursue efforts to develop, maintain and expand domestic and international markets at profitable levels, for California King Salmon and salmon products."<sup>10</sup>

### **Composition**

Currently, the Council is composed of nine voting members and three nonvoting members.<sup>11</sup> Appointed by the Secretary of the Department, the nine voting members include: (1) five commercial salmon vessel operators, (2) two handlers who are receivers or processors, (3) one representative of a handler who is an exporter or a wholesaler, and (4) one public member.<sup>12</sup> All voting members may have representatives or alternates.<sup>13</sup> The three nonvoting members, selected by the Secretary, serve as representatives of (1) the Department, (2) the Department of Fish and Wildlife, and (3) the California Sea Grant Program.<sup>14</sup>

### **Funding**

To fund the Council's various operations, the Act levies an assessment fee on fisherman. Specifically, every fisherman who sells salmon to a licensed fish receiver or the consumer is required to pay a fee to the Department for each pound of salmon sold by the fisherman.<sup>15</sup> The Council's annual expenditures average around \$107,000 a year with \$30,500 going towards marketing activities.<sup>16</sup>

### **Continuation**

Under the original version of the Act, the Department was mandated to conduct a hearing every five years to determine whether or not the operations of the program shall continue. Since its inception in 1989, the Council has been

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8. Food & Agric. Code § 76601(a).

9. Food & Agric. Code § 76602.

10. Available at <<https://calkingsalmon.org/california-salmon-council/>>.

11. Food & Agric. Code § 76700(a).

12. Food & Agric. Code § 76701.

13. *Id.*

14. Food & Agric. Code § 76709.

15. Food & Agric. Code § 76900.

16. Available at <[http://it.cdffa.ca.gov/igov/docs/hearingdocs/SalmonRprtofindings\\_Mar25\\_2014.pdf](http://it.cdffa.ca.gov/igov/docs/hearingdocs/SalmonRprtofindings_Mar25_2014.pdf)>.

continuously reapproved four times through the continuation hearing process.<sup>17</sup> The last continuation hearing was held on February 25, 2014. At the hearing, the Department concluded that there was not a substantial question as to whether the Council has been fulfilling its purposes and issued an order continuing the Council for up to five years, not extending beyond March 21, 2019.<sup>18</sup>

## 2015 Legislation Regarding Handlers

In 2015, the Act was amended by Assembly Bill 958.<sup>19</sup> The main thrust of the bill was to add language that would require salmon “handlers”<sup>20</sup> to pay assessments at the same rate as commercial salmon vessel operators.<sup>21</sup> In addition, the new language would change the Council’s composition to give handlers the same number of seats as commercial salmon vessel operators (five each).<sup>22</sup>

However, in order for these changes to take effect, salmon handlers would need to vote to approve the new rules.<sup>23</sup> That referendum failed because the Department did not receive sufficient handler participation.<sup>24</sup> As a result, the handler-specific amendments made to the Act became inoperable.<sup>25</sup>

The amendments also made a change that was not related to handlers specifically. It established a new time frame for continuation hearings. The Department is now required to conduct a continuation hearing between January 1, 2019 and February 28, 2019 and every five years thereafter.<sup>26</sup> This provision was not contingent on a successful handler referendum and is therefore operable.

According to an analysis by the Assembly Committee on Agriculture, which authored the 2015 bill, the amendments arose from an expressed desire by

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17. Available at [https://it.cdffa.ca.gov/igov/docs/hearingdocs/SalmonNoticeofContinuation\\_Apr4\\_2014.pdf](https://it.cdffa.ca.gov/igov/docs/hearingdocs/SalmonNoticeofContinuation_Apr4_2014.pdf)

18. *Id.*

19. 2015 Cal. Stat. ch. 307.

20. Section 76530 (“Handler” means any of the following:

(a) A processor.

(b) A receiver.

(c) A wholesaler.

(d) An exporter.

(e) An individual licensed or working for a partnership, corporation, or any other business unit or organization licensed pursuant to subdivision (a) of Section 8032 of the Fish and Game Code and engaged in the California commercial salmon fishery).

21. Food & Agric. Code §§ 76900(b).

22. Food & Agric. Code §§ 76700(b), 76701(c).

23. Food & Agric. Code §§ 76961-76967.

24. Available at

<https://it.cdffa.ca.gov/igov/docs/2016%200329%20Notice%20of%20Referendum%20Results%20-%20Signed.pdf>.

25. Food & Agric. Code § 76967(b).

26. Food & Agric. Code § 76971.

handlers to pay a fee like that of fisherman, to double the Council's budget.<sup>27</sup> The Committee analysis goes on to state that handlers have benefited from the Council, and now they wish to fully join to help assist and further its objectives.<sup>28</sup> The Senate Committee on Agriculture bill analysis mentions that increased revenue was particularly important due to a four-year drought and its effect on salmon populations.<sup>29</sup> It is apparent that the 2015 amendments were aimed at generating more revenue for the Council to better fulfill its purpose.

#### POSSIBLY OBSOLETE MATERIAL

There are three potentially obsolete pieces of the Act:

- (1) The article that governed the initial 1989 referendum that established the Council.
- (2) The article that governed the failed handler referendum.
- (3) The handler expansion changes that were threaded through the remainder of the Act as part of the 2015 legislation.

Those pieces are discussed separately below.

#### **Initial Implementation**

Article 9 of the Act, titled "Implementation and Voting Procedure for Fisherman" governs the initial referendum that established the Council.<sup>30</sup> It provides that commercial salmon vessel operators were required, through a referendum, to approve the Act before it becomes operable.<sup>31</sup> On or before August 15, 1989, the Secretary was required to establish a list of commercial salmon vessel operators eligible to vote on implementation of the Act.<sup>32</sup> The provisions of the Act would not become operative until the Secretary finds that there was a specified level of participation and approval in a referendum of commercial salmon vessel operators.<sup>33</sup>

Pursuant to Article 9, the Department conducted the referendum and commercial salmon vessel operators voted and approved the Act's provisions.

Because it governs an already-completed process, most of the article appears to be obsolete. However, there are parts that may need to be kept, with minor modifications. For example, the sections relating to establishing a list of

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27. Assembly Agriculture Committee Analysis of Assembly Bill 958 (April 22, 2015), p. 3.

28. *Id.*

29. Senate Committee on Agriculture Analysis of Assembly Bill 958 (June 29, 2015), p. 4.

30. Food & Agric. Code §§ 76950-76955.

31. *Id.*

32. Food & Agric. Code § 76950.

33. Food & Agric. Code § 76952.

commercial salmon vessel operators may need to be adjusted and retained for use in future continuation votes.<sup>34</sup> If the Commission decides to proceed with elimination of obsolete material in the Act, the staff will develop a proposal for the deletion or revision of the initial referendum provisions.

### **Handler Referendum**

As previously mentioned, the Act was amended in 2015 with the addition of Article 9.5 titled, "Implementation and Voting Procedure for Handlers."<sup>35</sup> The key effects of that article are as follows:

- The article requires the Department to conduct a referendum among salmon handlers to determine whether or not they should be subject to the Act.
- On or before January 31, 2016, the Secretary was required to establish a list of handlers eligible to vote on the issue.<sup>36</sup>
- In order for handlers to be subject to the Act, the referendum must pass with the specified participation and approval percentages.<sup>37</sup>
- If the referendum fails, the article is deemed inoperative.<sup>38</sup>

On July 22, 2016, the Department initiated the handler referendum.<sup>39</sup> The Department mailed referendum ballots to handlers which were to be returned no later than February 22, 2016. On February 22, 2016, after not receiving a sufficient number of ballots, the Department extended the voting deadline to March 22, 2016.<sup>40</sup> On March 29, 2016, the Department issued a letter announcing that it had not received a sufficient number of ballots to meet the 40 percent participation level required by law.<sup>41</sup> Therefore, the referendum failed and the amendments regarding salmon handlers made to the Act were declared inoperative.<sup>42</sup>

Article 9.5 is now inoperative. As a matter of law, it appears to be wholly obsolete. The Act does not prescribe any procedures for a revote or any other mechanism to conduct another handler referendum that might justify leaving the article in place.

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34. Food & Agric. Code §§ 76950-76951.

35. Food & Agric. Code §§ 76961-76967.

36. Food & Agric. Code § 76761.

37. Food & Agric. Code § 76763.

38. Food & Agric. Code § 76767(b).

39. Available at <<https://it.cdfa.ca.gov/igov/docs/2016%200222%20Salmon%20Referendum%20Extension%20Notice%20-%20Signed.pdf>>.

40. Available at <<https://it.cdfa.ca.gov/igov/docs/2016%200222%20Salmon%20Referendum%20Extension%20Notice%20-%20Signed.pdf>>.

41. Available at <<https://it.cdfa.ca.gov/igov/docs/2016%200329%20Notice%20of%20Referendum%20Results%20-%20Signed.pdf>>.

42. *Id.*

However, there may be practical reasons to leave it alone. If in the future the legislature decides to attempt another handler referendum, having Article 9.5 still in the code would make that process easier. It would only be a matter of altering the dates to authorize a new vote, as opposed to recreating the entire body of procedural law.

### **Other Handler-Related Provisions**

As mentioned, the Act also includes handler-provisions that are threaded throughout the statute, to govern the effect of the handler reform if the handlers had approved the implementation of that law. For example, Section 76700(b) provides an alternate provision on the size of the Council, that would only go into effect if there were a successful handler referendum:

76700. (a) There is in the state government the California Salmon Council. The council shall be composed of nine voting members and their alternates, and three nonvoting members.

(b) *If handlers have become subject to this chapter pursuant to Article 9.5 (commencing with Section 76961), the council shall be composed of 11 voting members and their alternates, and three nonvoting members.*<sup>43</sup>

Most of the handler-related amendments follow that pattern using contingency language like “If handlers have become subject to this chapter pursuant to Article 9.5” or “if applicable.”

While those provisions remain operative, they appear to have no legal effect, because the specified contingency has not been satisfied. However, for the practical reason discussed earlier, it might make sense to leave them alone. If the Legislature decides to authorize another attempt at a handler approval referendum, it need only amend the referendum dates to reactivate the whole statutory scheme.

### PENDING REAUTHORIZATION

On February 18, 2019, the Department issued a Notice of Public Hearing to consider continuation of the California Salmon Council.<sup>44</sup> The hearing is scheduled for March 20, 2019 in Sacramento, California. At this hearing, the Department will have received testimony and evidence regarding whether the Council should be continued. The staff does not yet know what decision was reached at that meeting. If an answer becomes available in time, the staff will provide an update on the continuation hearing at the next Commission meeting.

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43. Emphasis added.

44. Available at <https://it.cdfa.ca.gov/igov/docs/2019%200218%20Notice%20of%20Hearing.pdf>.

## CONCLUSION

Within the Act, there are three potential areas that could be considered obsolete: (1) the article that governed the initial 1989 referendum that established the Council, (2) the article that governed the failed handler referendum, and (3) the handler expansion changes that were threaded through the remainder of the Act as part of the 2015 legislation. Removing these obsolete provisions would be a purely technical reform.

However, the obsolescence in the Act may not be causing any practical problems and there may be reasons why some would prefer that the obsolete provisions remain in place. As discussed, if the legislature decides that the handler referendum is worth trying again, it would be relatively simple to change the dates in the Act and then start the handler referendum process again. If all of the handler language were removed, it would be slightly more difficult to restart the process.

Given all of that, the staff sees two reasons why it would make sense to wait before proceeding with further consideration of this topic.

First, it is possible that the recent hearing on reauthorization of the Council might have found a significant question on whether the Council is serving its purposes, which would lead to a new vote on its continuation. That would leave things up in the air for the moment.

Second, it seems worthwhile to contact relevant administrative and legislative staff to assess whether there are practical reasons to leave the obsolete provisions in place.

Alternatively, the Commission could move ahead towards the preparation of a tentative recommendation to remove the obsolete material.

### **How would the Commission like to proceed?**

Respectfully submitted,

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