

Memorandum 2021-11

**Fish and Game Law: Phase One Public Comment**

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In this study, the Commission<sup>1</sup> is charged with studying the Fish and Game Code and making recommendations “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.”<sup>2</sup>

At the end of 2018, the Commission released a tentative recommendation that would replace the existing code with a reorganized Fish and Wildlife Code. In addition to the proposed organizational overhaul, the tentative recommendation also included numerous minor improvements of the types requested by the Legislature.

At the request of the Department of Fish and Wildlife (“DFW”), the Commission agreed to bifurcate public comment on the tentative recommendation into two distinct phases.<sup>3</sup> The first phase would focus on questions posed by the Commission in “Notes” interspersed in the proposed legislation. Those Notes mostly addressed issues like clarity of expression and obsolescence. The second phase comments would focus on the proposed organizational changes.

The effective deadline for receipt of Phase One comments was January 1, 2021. The Commission has received voluminous Phase One submissions from DFW and the Fish and Game Commission (“FGC”).

Portions of those submissions are attached as follows:

	<i>Exhibit p.</i>
• Wendy Bogdan, Department of Fish and Wildlife (12/22/20) . . . . .	1
• Melissa Miller-Henson, Fish and Game Commission (2/5/21) . . . . .	6

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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 2020 Cal. Stat. res. ch. 46.

3. See Memorandum 2019-44, pp. 8-10; Minutes (Sept. 2019), p. 4.

Each of the submissions is divided into two parts: (1) A relatively brief letter.  
(2) A lengthy spreadsheet presenting numerous note-specific comments.

Only the letters are attached to this memorandum. The detailed spreadsheets will be held by staff and referenced in relevant part as analysis of the Phase One comments proceeds.

The staff drew four main points from the attached letters:

- (1) The work required to conduct a careful legal review of the tentative recommendations was quite substantial. For example, DFW hired former general counsel Ann Malcolm, as a retired annuitant, to lead the department's Phase One review. She coordinated a team of attorneys for that effort, as well as working with other subject matter experts throughout the department.
- (2) In conducting their review, both DFW and FGC embraced the Commission's "pragmatic approach" to conducting a mostly nonsubstantive recodification project. Specifically, the Commission decided that a substantive change should not be made unless it is plainly beneficial, does not pose a significant risk of unintended consequences, and is not likely to be controversial.<sup>4</sup>
- (3) Both DFW and FGC continue to be concerned about the costs of conforming their regulations to any renumbering that would result from organizational changes.
- (4) DFW renews a suggestion that it made when it first proposed bifurcating comment on the tentative recommendation — any improvements that come out of the Phase One comment review should be considered for immediate inclusion in a recommendation, without waiting for the Phase Two process to be completed. That would allow for quicker enactment of those improvements.

**The staff greatly appreciates the enormous contributions that DFW and FGC have made to advance this study. We look forward to continuing our productive collaboration with them.**

Respectfully submitted,

Brian Hebert  
Executive Director

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4. See Memorandum 2016-57.



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**GAVIN NEWSOM, Governor**  
**CHARLTON H. BONHAM, Director**



December 22, 2020

Crystal Miller-O'Brien, Chairperson  
California Law Revision Commission  
c/o Brian Hebert, Executive Director  
Via e-mail only to [bhebert@clrc.ca.gov](mailto:bhebert@clrc.ca.gov)

Re: Comments on Fish and Game Law Tentative Recommendation, December 2019 ("report")

Dear Ms. Miller-O'Brien:

The California Department of Fish and Wildlife ("CDFW") is pleased to submit to the California Law Revision Commission ("CLRC") comments on the above-referenced report, consistent with the CLRC's direction at its September 26, 2019 meeting. Per that direction, CDFW's comments look at the almost 500 "Notes" whereby CLRC asked the public for input on certain changes proposed by CLRC regarding the Fish and Game Code ("Code").

As you will see in the enclosed comments, CDFW agrees with almost 300 of those proposed changes. Once enacted by the Legislature, these changes will constitute the largest body of changes in recent history to be made to the Code at one time.

1. **These changes are the most recent of several significant collections of changes enacted through the CLRC's and CDFW's effort to modernize the Code.**

While any one of the CLRC's and CDFW's collections of changes to the Code has been significant, cumulatively they are an unprecedented modernization of the Code. In addition to the changes that are the specific subject of this letter, examples of other significant CLRC accomplishments relating to the Code include:

- *AB 1527 (2015) – This CLRC-sponsored legislation made numerous improvements to the Code by making sections clearer and helping*

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*readers better understand the legislative intent of each affected section. In addition to these changes, the bill included many other small but helpful changes such as deleting clearly erroneous cross-references, amending sections to use consistent articles (e.g. a, any, that), correcting misspelled words, fixing grammatical errors, and updating CDFW's name.*

- *SB 1473 (2016) – This CLRC-proposed bill clarified the authority and procedures of the California Fish and Game Commission (Commission). The bill conformed certain Commission rulemaking procedures to the rulemaking procedures of the Administrative Procedure Act. It also deleted obsolete and superfluous provisions, made small but important organizational changes, deleted obsolete cross references, and made other conforming changes.*
- *Fish and Game Code: Funding Provisions (2018) - This CLRC memo addressed one of the most significant issues identified during CDFW's Strategic Vision process that launched CLRC's work with the Code by providing a detailed analysis of Code provisions related to funding and mandates. The analysis identified the specific funds and accounts established in the Code, designated sources of revenue to be deposited into the funds and accounts, and allowable expenditures. The analysis also identified revenue sources without specifically identified accounts or funds, programs for which a specific funding source is identified in the Code, and those programs for which there is no identified funding source.*

CDFW looks forward to working with CLRC to make the changes agreed to in the attached comments as soon as possible.

2. **To complete the attached review, CDFW undertook a large-scale effort that extended into the current pandemic.**

CDFW's commitment of resources to complete the attached spreadsheet exemplifies the extent of CDFW's commitment to the work of CLRC. The attached work product reflects hundreds of hours by dozens of staff within CDFW led by a subject matter expert retired annuitant retained for this project. In February of 2019, CDFW hired Ann Malcolm as a retired annuitant Attorney IV specifically to carry out the review required by CLRC's complex proposal. Ms. Malcolm has decades of service to the CDFW in the highest positions within the legal office, including Assistant Chief Counsel and General

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Counsel. Throughout her career at CDFW but particularly within those roles, she has overseen the Fish and Game Code's evolution and CDFW's operational adaptations to implement the Code. This familiarity with the current Code, its evolution, and CDFW was essential for review of the CLRC's proposal.

Ms. Malcolm coordinated a team of attorneys in CDFW's legal office who were assigned certain Notes based on their expertise. Each of these attorneys reviewed and commented on the assigned Notes. This attorney team then identified program and regional CDFW staff with whom to consult regarding each Note. While some Notes were simple to evaluate, others required multiple conversations. Once that staff input was finalized, responses were put into the attached Excel spreadsheet that was based on the table that CLRC provided listing both the existing and new sections. Ms. Malcolm then worked with the team to standardize and finalize the responses in the attached.

3. **While CDFW identified some comments that skewed beyond the scope of the Legislature's direction, CDFW supports a large majority.**

CDFW provides the following context to better understand the attached input.

- Like CLRC, CDFW hewed closely to the legislative direction given at the time this effort was launched. CDFW reviewed the Notes in the report asking:

*Whether the Fish and Game Code... 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 changes to the effect of the law. (ACR 98 Wagner.)*

When CDFW identified a potential substantive change to the Code, CDFW applied the "pragmatic test" CLRC adopted in Memorandum 2016-57 to determine if that substantive change was significant, thereby going beyond the scope of what the Legislature asked for in this review. Under that test, only changes that meet all three of the following criteria will be considered for adoption. The changes must be *plainly beneficial, not present a significant risk of unintended consequences, and not be likely to be controversial*. So, in the comments when a substantive

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change did not meet this test, CDFW noted which of these criteria was triggered by the change.

- CDFW may not have identified all the impacts of proposed changes and may need to revise its support for a change if other impacts are found. Generally, when CDFW examines legislation changing the Code it casts a very wide net among its staff to find all the impacts that might arise from the change. Because there were almost 500 Notes to consider, CDFW could not cast its net as wide as it does for typical legislation. If unanticipated impacts are later discovered, CDFW may change its support for a particular revision.
- For those changes that CDFW supports, CDFW completed a cursory review of the potential impacts on implementing regulations in Title 14, California Code of Regulations; that review was not exhaustive and there may be other Title 14 impacts that CDFW has not anticipated. If the workload to adopt regulations in response to those changes proves to be beyond what CDFW can absorb, CDFW may reconsider its support for those changes. For example, the above-referenced SB 1473 (2016) made 17 changes to the Code that resulted in the need for the Fish and Game Commission<sup>1</sup> to make over 2,253 changes to the Authority and Reference sections in Title 14. While CDFW does not expect a similar number of Title 14 amendments to be needed as a result of changes called out in the Notes (mainly because CDFW is not addressing renumbering/movement of sections at this time), it is still possible that the workload from Title 14 changes would be too much for CDFW to take on at this time.

#### 4. **Looking ahead toward completing CLRC's work on the Code.**

CDFW greatly appreciates all the work that CLRC has done over the years to make improvements in the Code both with prior legislation and this report. CDFW looks forward to working with CLRC to support legislation as soon as possible to implement the changes to the existing Code that are described in the attached comments.

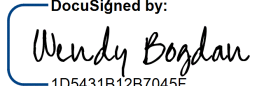
This effort also provided CDFW additional ideas about how to address the remaining work on the Code, particularly in a context that could not have been foreseen when CLRC or CDFW embarked on this modernization effort years and many legislative bills ago. As noticed above, CDFW's work on the comments required significant attorney and program staff time. In addition, the tenure of

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the subject matter expert that CDFW hired to complete this project's limited duration assignment is coming to a close, and CDFW, like CLRC, is operating in the midst of a public health pandemic. With the benefit of this experience, CDFW plans to engage with CLRC staff over the first few months of 2021 to propose alternative approaches to the remaining effort to bring it to a close.

Thank you for the opportunity to provide CLRC with CDFW's input on the report.

Sincerely

DocuSigned by:  
  
1D5431B12B7045F...  
Wendy Bogdan  
General Counsel

Enclosure

**Commissioners**  
**Eric Sklar**, President  
Saint Helena

**Samantha Murray**, Vice President  
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## Fish and Game Commission



*Celebrating 150 Years of  
Wildlife Heritage and Conservation!*

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February 5, 2021

Crystal Miller-O'Brien, Chairperson  
California Law Revision Commission  
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Sent via email to [feedback@clrc.ca.gov](mailto:feedback@clrc.ca.gov)

**Re: Comments on California Law Revision Commission Tentative Recommendation, Fish and Wildlife Code, dated December 2018 (tentative recommendation)**

Dear Ms. Miller-O'Brien:

The California Fish and Game Commission (FGC) thanks you for the opportunity to review and comment on the California Law Revision Commission (CLRC) tentative recommendation. Additionally, thank you for granting our request for additional time to comment due to staffing impacts from COVID-19.

FGC acknowledges and commends the extraordinary amount of time and thought CLRC and its staff have put into developing the tentative recommendation to improve the Fish and Game Code since the last recodification over 60 years ago. Collectively, CLRC, FGC, and the California Department of Fish and Wildlife have committed thousands of hours to developing, reviewing, and offering suggestions on the tentative recommendation. We appreciate the collaborative nature of the effort.

### **FGC Review Context**

FGC staff reviewed the tentative recommendation with two important mantras: (1) use the legislative direction that established this process to create the foundation for thinking about each note, and (2) apply CLRC's pragmatic test (adopted in 2016 during an earlier effort) to determine whether a potentially substantive change is significant.

- (1) As noted in the tentative recommendation, the legislature approved CLRC to conduct a study to determine "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” (Stats. 2012, Chap 108).

- (2) When determining whether a substantive change is significant, CLRC adopted a three-criteria test for whether such a proposed change is significant. The three criteria are that the changes must be plainly beneficial, the changes do not present a significant risk of unintended consequences, and the changes are not likely to be controversial.

### FGC Review Elements

- **Tentative recommendation notes:** Consistent with CLRC’s September 2019 direction to reviewers, FGC has focused its current review on the nearly 500 sections where CLRC included a “note” for public input about particular proposed changes. In general, FGC has not responded to notes that are tied to the overall reorganization of the code.
- **Tentative recommendation comments:** While reviewing comments in the tentative recommendation was not part of this review, FGC does note a number of comments in which CLRC described proposed changes as non-substantive; FGC believes some of those changes may, in fact, be substantive (e.g., new Fish and Wildlife Code sections 17000 and 41775). Due to the limited scope of its review, FGC cannot provide a comprehensive list of sections where the non-substantive description may be of concern.

### FGC Comments

FGC has reviewed each note and provided responses to approximately 200 in a spreadsheet format as an attachment to this letter. While most comments are unique, FGC noted several themes:

- **Scope and authority:** Some sections of Fish and Game Code are outside FGC’s scope and authority. FGC provided no comment on these sections unless they have an impact on its work.
- **Subsequent legislation:** FGC noted multiple sections of Fish and Game Code where legislation has been enacted subsequent to CLRC’s tentative recommendation. Each instance is noted in FGC’s comments. CLRC may want to revise its tentative recommendation based on those subsequent changes to code.
- **Substantive versus non-substantive changes:** Some proposed changes that were intended to be non-substantive could or would create significant substantive changes to the law and are noted in FGC’s comments.
- **Subsequent workload:** Most proposed changes will not require any regulatory follow-up by FGC; however, some will lead to the need for changes to Title 14 of the California Code of Regulations. Based on FGC’s experience with the 2016 code changes, the subsequent workload could be significant at a time when resources are even more limited than usual in the midst of the global pandemic.

Thank you again for this opportunity. As noted in our comments, there are many elements of the tentative recommendation that will continue advancing improvements to the Fish and Game Code and build on legislative changes championed by CLRC in 2015 and 2016. FGC looks forward to engaging further on the next steps in this process.

If you have any questions, please feel free to contact me at (916) 653-4899 or [Melissa.Miller-Henson@fgc.ca.gov](mailto:Melissa.Miller-Henson@fgc.ca.gov).

Sincerely,



Melissa Miller-Henson  
Executive Director

Enclosure

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