

Memorandum 2021-16

Fish and Game Law: Discussion of Public Comment

In this study, the Commission¹ has been directed by the Legislature to consider revision of the Fish and Game Code in order to make specified kinds of improvements to that code and related statutory law, without making any significant substantive change to the effect of the law.²

In December 2018 the Commission approved the circulation for public comment of a tentative recommendation that would recodify the existing Fish and Game Code in a proposed new Fish and Wildlife Code.³ The proposed recodification would reorganize the existing code, as well as make numerous improvements to the text of existing law.

After releasing the tentative recommendation, the Commission decided to divide public comment into two phases. Phase One would consist of comments on changes to the text of existing law. Phase Two comments would address the tentative recommendation's proposed organizational changes. **As part of the Phase One process, the Commission will prepare a draft recommendation to make textual revisions in the existing code, without significant organizational changes being made.** That would precede consideration of the Phase Two comment on organizational issues.

This memorandum is the first in a series of memoranda that will analyze the Phase One public comment. The Commission received such comments from the two state agencies charged with implementation of the Fish and Game Code, the Fish and Game Commission ("FGC") and the Department of Fish and Wildlife

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

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

2. See 2012 Cal. Stat. res. ch.108 (ACR 98 (Wagner)).

3. See Memorandum 2018-67 and its First Supplement; Minutes (Dec. 2018), p. 10.

("DFW").⁴ The cover letters from those entities were attached to Memorandum 2021-11. Those letters presented lengthy attachments. Taken together, they offer approximately 850 comments. Relevant excerpts from the attachments will be reproduced in the memoranda that discuss the comments.

Unless otherwise indicated, all statutory references in this memorandum are to the existing Fish and Game Code or to the proposed Fish and Wildlife Code that is set out in the tentative recommendation.

METHODOLOGY OF ANALYSIS

To facilitate analysis of the voluminous public comment, the staff intends to organize discussion of the proposed changes by their apparent decisional posture, as follows:

- (1) *Changes that should be made.* If one or both of the entities affirm that the change proposed by the Commission would be beneficial, and neither opposes it, the change should be made. Comments in this posture will be aggregated and presented as presumed consent items. Unless an objection is raised at the meeting, those proposed changes will be deemed *approved* for inclusion in a draft recommendation.
- (2) *Changes that should not be made.* If one or both of the entities object to a change and neither supports it, the staff recommends that the change not be made. Again, these proposed changes would be presented as presumed consent and would be deemed *disapproved* unless an issue is raised at the meeting.
- (3) *Changes that should presumptively be made.* If neither entity offers any comment on a proposed change, the staff will presume that it should be made. More specifically, the staff would propose that such changes be listed as consent items in the next comment review memorandum that is prepared for consideration at a future meeting. If objections are not received before or at the future meeting where those matters are considered, the proposed changes would be deemed *approved*.
- (4) *Further input required.* There will likely be instances where the staff concludes that further information is needed before the Commission can make a final decision on whether to make a proposed change. For these items, the staff will explain the need for further information in the memorandum that presents them. The matter will be revisited after a reasonable time has passed for a response from the entities.

4. The two agencies have together submitted approximately 850 individual comments on the proposed textual changes, in charts that are attached to this memorandum and will be attached to all future memoranda in this series, as Exhibits.

Important examples of this category, which the staff expects might come up, include the following:

- The staff does not understand a comment.
 - There is reason to believe that a comment is based on a misunderstanding of the Commission’s proposal or question.
 - Commenters disagree on whether a change should be made.
- (5) *Purely informational matters.* In some cases, the Commission included notes in the tentative recommendation that were purely informational or that asked for information. Where there was no substantive answer given in response to these notes, or where the answer does not show any need for further action, the matter will not be discussed further. For the sake of completeness these items will be listed. Any Commissioner may request that the staff present such issues for discussion.

Within each of those categories, the staff intends to present the comments in the order in which they were presented in the tentative recommendation.

If the tentative recommendation would make more than one revision to a code section, those revisions will be discussed separately, in the appropriate categories. The memorandum will not necessarily point out when it happens, unless the changes are so interconnected that the full context needs to be explained.

In analyzing the comments, the Commission should keep two limiting principles in mind:

- The resolution that authorized this study directed the Commission to avoid “making any significant substantive change” to existing law.
- The Commission previously decided that it would only include a change in the proposed law if it meets all 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.⁵

In other words, the Commission should be prepared to exclude a proposed change from the draft recommendation if the commenters show that the change would be significantly substantive, would not be plainly beneficial, would create a significant risk of unintended consequences, or would be controversial.

Is the approach described above acceptable?

5. See First Supplement to Memorandum 2016-47; Minutes (Sept. 2016), p. 6.

CHANGES THAT SHOULD BE MADE

The following proposed changes were supported by one or both of the commenting entities, with neither opposing the change.

They should be included in the draft recommendation that the Commission will be preparing, as indicated below.

This entire section of the memorandum will be treated as a consent item. Unless a Commissioner or member of the public requests that an item be discussed, it will not be presented at the upcoming meeting. Instead, after an opportunity to raise any objections, the staff will ask the Commission to approve all of the changes in this section as a group.

Proposed Section 485 (Existing Section 70)

The Commission proposed to make a gendered reference gender neutral. Both agencies support the change.

The staff recommends that the change be included in the draft recommendation, as follows:

70. "Resident" means any person who has resided continuously in the State of California for six months or more immediately prior to the date of his application for a license or permit, any person on active military duty with the Armed Forces of the United States or auxiliary branch thereof, or any person enrolled in the Job Corps established pursuant to Section 2883 of Title 29 of the United States Code.

Comment. Section 70 is amended to make the section gender neutral.

Proposed Section 490 (Existing Section 3500(a))

In a Note following proposed Section 545, the Commission asked about an apparent inconsistency. Existing Section 3683 lists the white-tailed ptarmigan as a "resident game bird," but Section 3500(a), which defines "resident game bird" does not include that species.

Both FGC and DFW comment that the white-tailed ptarmigan should be classified as both an upland game bird and a "resident game bird." The staff therefore recommends that the species be added to Section 3500(a) as follows:

3500. (a) Resident game birds are as follows:
- (1) Doves of the genus *Streptopelia*, including, but not limited to, spotted doves, ringed turtledoves, and Eurasian collared-doves.
 - (2) California quail and varieties thereof.
 - (3) Gambel's or desert quail.
 - (4) Mountain quail and varieties thereof.

- (5) Sooty or blue grouse and varieties thereof.
- (6) Ruffed grouse.
- (7) Sage hens or sage grouse.
- (8) Hungarian partridges.
- (9) Red-legged partridges including the chukar and other varieties.
- (10) Ring-necked pheasants and varieties thereof.
- (11) Wild turkeys of the order Galliformes.
- (12) White-tailed ptarmigan.
- (b) Migratory game birds are as follows:
 - (1) Ducks and geese.
 - (2) Coots and gallinules.
 - (3) Jacksnipe.
 - (4) Western mourning doves.
 - (5) White-winged doves.
 - (6) Band-tailed pigeons.
- (c) References in this code to "game birds" means both resident game birds and migratory game birds.

Comment. Paragraph (12) of subdivision (a) of Section 3500 is added to include the white-tailed ptarmigan as a resident game bird. See Section 3683(a)(8) ("resident game bird" includes white tailed ptarmigan).

Proposed Section 2590 (Existing Section 11018)

The Commission has proposed to delete an obsolete provision. Both agencies support the change.

The staff recommends that the change be included in the draft recommendation, as follows:

11018. The following constitutes Fish and Game District 10:
 The ocean waters and the tidelands of the State to high-water mark lying between the southern boundary of Mendocino County and a line extending west from the Pigeon Point lighthouse in San Mateo County, including the waters of Tomales Bay to a line drawn from the mouth of the unnamed creek approximately 1500 feet north of Tomasini Point southwesterly 218° magnetic to the mouth of the unnamed creek at Shell Beach, and excluding Bodega Lagoon and all that portion of Bolinas Bay lying inside of Bolinas bar, that portion of San Francisco Bay lying east of a line drawn from Point Bonita to Point Lobos and all rivers, streams, and lagoons.

~~The amendment of this section by the Legislature at the 1963 Regular Session has no effect on the cultivation of oysters by persons licensed under Article 4 (commencing with Section 6480), Chapter 5, Part 1, Division 6.~~

Comment. Section 11018 is amended to delete the last paragraph as obsolete.

Proposed Section 3465 (Existing Section 711)

The Commission proposed to narrow a reference to better reflect its actual application. FGC did not comment on this change; DFW supports it.

The staff recommends that the change be included in the draft recommendation, as follows:

711. ...

- ...
- (c) For purposes of this ~~article~~ section, “substantial increase” means an increase in excess of 5 percent of the Fish and Game Preservation Fund portion of the department’s current year support budget, excluding cost-of-living increases provided for salaries, staff benefits, and operating expenses.

Comment. Subdivision (c) of Section 711 is amended to revise a reference to the article in which the section appears, to instead refer to the section itself, as Section 711 is the only section in the article that refers to the term “substantial increase” that the subdivision defines.

CHANGES THAT SHOULD NOT BE MADE

The following proposed changes were opposed by one or both of the commenting entities, with neither supporting the change. They should not be included in the proposed recommendation.

This entire section of the memorandum will be treated as a consent item. Unless a Commissioner or member of the public requests that an item be discussed, it will not be presented at the upcoming meeting. Instead, after an opportunity to raise any objections, the staff will ask the Commission to decide that none of the proposed revisions described in this section should be included in the draft recommendation.

Proposed Section 545 (Existing Section 3683)

Existing Section 3683 provides that the term “upland game bird” includes certain specified “resident game birds” and “migratory game birds.” The proposed section would have combined those subcategories into a single unlabeled list. The species identified as upland game birds would be the same, but they would not be differentiated by subcategory.

Both agencies object to the proposed revision, noting that a distinction is often drawn between the two subcategories in regulations as well as in federal law.

The staff recommends that this revision of Section 3683 not be included in the draft recommendation.

Proposed Section 2910 (Existing Section 1050(c))

Existing Section 1050(c) provides as follows:

1050. (a) ...

(c) Whenever this code provides for a permit, license, tag, reservation, application, or other entitlement, the commission, in accordance with the provision, shall prescribe the terms and conditions under which the permit, license, tag, reservation, application, or other entitlement shall be issued, except for those programs where the department has fee-setting authority, in which case the department shall retain that authority. The department shall issue the permit, license, tag, reservation, application, or other entitlement in accordance therewith and with the applicable provisions of law.

In the tentative recommendation, the Commission inquired in a Note following this section whether the last sentence of subdivision (c) could be deleted as superfluous, in light of other provisions in the code that appeared to have the same meaning.

FGC did not respond to this inquiry. However, DFW advises that the last sentence of Section 1050(c) is not superfluous, because the sentence “specifies how licenses will be issued (e.g. pursuant to terms and conditions specified by the Fish and Game Commission.)”

The staff recommends that the deletion of the last sentence of Section 1050(c) not be included in the draft recommendation.

Proposed Section 3465 (Existing Section 711)

A note following proposed Section 3465 asked whether certain language in existing Section 711(b), governing certain financial duties of DFW, could be deleted as duplicative of Section 13001.5.

DFW explains that the language should not be deleted, because it has requirements not present in Section 13001.5. FGC did not comment.

The staff recommends that the draft recommendation not delete language from Section 711(b).

CHANGES THAT SHOULD PRESUMPTIVELY BE MADE

The following proposed changes received no comment from FGC or DFW. **They will be carried over to the next memorandum as consent items for approval.** That memorandum will recommend that the changes be included in a draft recommendation, unless an objection is raised before or at the meeting where the memorandum is considered.

Proposed Section 545 (Existing Section 3683)

Proposed Section 545 would revise the language used in Section 3683, as follows:

3683. “Upland game bird” ~~species include both~~ means any of the following birds:

(a)....

The effect of that change would be to recast the provision as an exclusive definition, rather than an open-ended definition that merely “includes” the listed birds (but might include others).

Neither agency commented on this proposed revision.

FURTHER INPUT REQUIRED

The staff believes that further information is required before resolving the treatment of the proposed changes described below. The staff will work with the commenters informally to assess how much time is needed to provide the necessary information. Once that information has been received, the issue will be presented to the Commission for decision.

Proposed Section 600 (Existing Section 90)

Existing Section 90 prescribes the application of a set of “Marine Life Definitions.” Section 90 uses very broad references to large statutory containers, which encompass numerous provisions that do not use the defined terms.

In the tentative recommendation, those large statutory containers were broken up and reorganized. Because of that, it was prudent to adjust the references in Section 90 so that they would only refer to parts of the code that use the defined terms. That kind of narrowing was included in the proposed law.

FGC and DFW did not comment on whether the narrowing would be valuable, apparently because of the narrowing’s close connection to the proposed

organizational changes, which are not within the scope of the Phase One comments.

The staff will work informally with FGC and DFW to see if they have an opinion on whether it would be helpful to narrow the references or leave them broad, as in existing law.

Proposed Section 3250 (Existing Section 1055.1(c))

A note following proposed Section 3250, which would continue existing Section 1055.1(c), asked three questions about whether the provision makes practical sense when applied as part of the Automated License Data System (“ALDS”).

DFW responded that Section 1055.1(c) “is not pertinent” to sales under the ALDS system.

The staff would like to discuss this further with DFW, before presenting the issue for Commission decision. Existing Section 1055.1(h) expressly provides that “This section applies only to licenses, permits, reservations, tags, and other entitlements issued through the Automated License Data System.” By the terms of that provision, Section 1055.1(c) does apply to ALDS, which is what prompted the Commission’s questions about its appropriateness.

PURELY INFORMATIONAL MATTERS

The tentative recommendation included explanatory notes for or asked general questions about the provisions listed below. **Where there was no response to these notes, or the response does not show the need for reform, those issues will not be discussed further (unless a Commissioner raises an issue).** For completeness, sections that fall into this category are listed below.

- Proposed Section 350 (Existing Section 5515) (“Fully protected fish”)
- Proposed Section 360 (Existing Section 5050) (“Fully protected reptile”)
- Proposed Section 375 (Existing Sections 3950.1) (“Game mammal”)
- Proposed Section 440 (Existing Section 57) (“Nonresident”)
- **Proposed Section 1675 (Existing Section 712.1)** (Department mission, core programs, service-based budget review)

- **Proposed Section 3205 (Existing Section 1055.1(g))** (Nonprofit as license agent for sale of lifetime licenses)

Respectfully submitted,

Steve Cohen
Staff Counsel

AGENCY COMMENT CHART

Proposed Section	FGC Comment	DFW Comment
350 (existing Section 5515)	No comment	Note is informational only. No comment.
360 (existing Section 5050)	No comment	Note is informational only. No comment.
375 (existing Section 3951)	No comment	Note is informational only. CDFW has no comment on the Commission's authority to recodify a statute enacted by initiative.
440 (existing Section 57)	(1) FGC believes that the revision has no problematic effect, though it is not clear what is meant by "...eliminate an overlap..." between the definition of "nonresident" in sec. 57 of Fish and Game Code and the definition of "resident" in sec. 70. There does not appear to be any overlap.	Assuming the reference in the Note to proposed sec. 660 should actually be proposed sec. 485, CDFW believes that sec. 57 does not need restatement. There is no overlap with the definition of "resident" in sec. 70.
485 (existing Section 70)	(2) FGC supports the text change that makes sec. 70 gender neutral.	CDFW agrees that sec. 70 should be made gender neutral.
490 (existing Section 3500(a))	FGC believes that white-tailed ptarmigan is properly classified as both upland game bird and resident game bird; it should be included in sec. 3683 and sec. 3500.	White-tailed ptarmigan should be listed in sec. 3500.

<p>545 (existing Section 3683)</p>	<p>FGC believes that Sec. 3683 should not be amended to remove the distinction between upland game birds that are resident or migratory. Regulations in Title 14 extensively use the resident and migratory distinction for upland... game birds and FGC believes it is important to retain the distinction.</p>	<p>Sec. 3683 should not be amended to remove the distinction between upland game birds that are resident or migratory. Title 14 extensively uses the resident/migratory distinction for game birds. Further, this distinction is important because resident game birds are not covered by the federal Migratory Bird Treaty Act, but migratory game birds are.</p>
<p>600 (existing Section 90)</p>	<p>No comment</p>	<p>Moving the definitions of the terms relating to marine resources is beyond the scope of CDFW's review at this time because it deals with the overall reorganization of the code.</p>
<p>1675 (existing Section 712.1)</p>	<p>No comment</p>	<p>Note is informational only. No comment.</p>
<p>2590 (existing Section 11018)</p>	<p>FGC believes the second paragraph of sec. 11018 is obsolete and can be deleted.</p>	<p>Sec. 11018 second paragraph can be deleted. Obsolete.</p>
<p>2910 (existing Section 1050(c))</p>	<p>No comment</p>	<p>Last sentence of sec. 1050(c) cannot be deleted as superfluous. It specifies how licenses will be issued (e.g. pursuant to terms and conditions specified by the Fish and Game Commission.)</p>
<p>3205 (existing Section 1055.1(g))</p>	<p>No comment</p>	<p>Two comments: 1) Pursuant to sec. 1055.1(g), nonprofit organizations are</p>

		<p>authorized only to sell lifetime licenses; they do not sell other licenses to which this exemption might apply. This exemption only applies to nonprofit organizations conducting lifetime license sales as authorized by this section. 2) Nonprofit organizations are not the only persons who can sell lifetime licenses.</p>
<p>3250 (existing Section 1055.1(c))</p>	<p>No comment</p>	<p>Sec. 1055.1(c) is not pertinent to ALDS-issued licenses, but is an authority to sell licenses that are preprinted and delivered to license agents as inventory to issue to customers. CDFW believes that this section does not require restatement for greater accuracy.</p> <p>The exemptions in sec. 1055.1(c) do not pertain to ALDS license sales. This is considered a separate authority from ALDS-style sales of licenses.</p> <p>The second sentence of sec. 1055.1(c) should not be deleted; it does not apply to ALDS license sales.</p>
<p>3465 (existing Section 711(c))</p>	<p>No comment</p>	<p>Two comments: (1) Sec. 711(b) should not be deleted. It does not duplicate sec. 13001.5. Sec. 711(b) specifies that the</p>

		Secretary must submit the report and requires an update of a cost allocation plan. Sec. 13001.5 does neither. (2) Sec. 711(c) can be amended to change "article" to "section".
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