

Memorandum 2022-15

Fish and Game Law: Phase Two 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 technical improvements to that law, without making any significant substantive change to the effect of the law.²

In December 2018, the Commission approved a tentative recommendation that would recodify the existing Fish and Game Code in a proposed new Fish and Wildlife Code.³

After releasing the tentative recommendation, the Commission agreed to extend the public comment period and divide it into two phases. Phase One would consist of comments on certain changes to the text of existing law. Phase Two would address the proposed organizational changes.

Work on Phase One began in February 2021 and is likely to continue through the remainder of this calendar year.

The deadline for public comment on “Phase Two” was January 1, 2022. We have received two letters commenting on organizational issues. The first was submitted by Director Charlton H. Bonham of the Department of Fish and Wildlife (“DFW”). It was received in June of last year and was held for consideration after passage of the comment deadline. The second letter is from Mark Hennelly, on behalf of the organization California Waterfowl. Those letters are attached as Exhibits.

This memorandum discusses those letters and possible next steps regarding the reorganization of the Fish and Game Code. Because most of the current membership of the Commission was not present during the development of the

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.

Commission's tentative recommendation to recodify the Fish and Wildlife Code, the memorandum begins with some relevant history.

BACKGROUND

This study originated in a 2012 recommendation of the Resources Agency (DFW's parent agency), as part of its statutorily-mandated⁴ "Strategic Vision" review.⁵

Among many other things, the *Strategic Vision* report recommended a clean-up of the Fish and Game Code, to be prepared by the Commission, with input from a DFW-led working group:

Statutes and Regulations Recommendation #1: Review the California Fish and Game Code and Title 14 of the California Code of Regulations to identify and make recommendations to: (1) resolve inconsistencies; (2) eliminate redundancies; (3) eliminate unused and outdated code sections; (4) consolidate sections creating parallel systems and processes; and (5) restructure codes to group similar statutes and regulations.

Description: The California Fish and Game Code and Title 14 of the California Code of Regulations both need to be reviewed to reduce redundancy and improve consistency and clarity. The director of DFG should create a work group to review the DFG/F&GC portions of Title 14 of the California Code of Regulations and the California Fish and Game Code.

At the outset of this process and periodically throughout, the work group would meet with stakeholders to ascertain their opinions and suggestions for "clean-up" of the Fish and Game Code and Title 14 pursuant to this recommendation amending, repealing, consolidating, and simplifying the codes. The work group would also consult, where appropriate, with representatives of state and federal agencies with parallel or overlapping jurisdiction. The work group would work with the California Law Revision Commission (CLRC) to inform its efforts and determine the best approach to clean-up the Fish and Game Code pursuant to this recommendation.

Finally this recommendation only addresses review of existing code and regulations. Because this recommendation is limited to clean-up of the code and regulations, and does not address the prioritization, consolidation or elimination of mandates, whether funded, underfunded, or unfunded, it

4. See Govt' Code § 12805.3(c)

5. See *California Fish and Wildlife Strategic Vision, Recommendations for Enhancing the State's Fish and Wildlife Agencies* (April 2012) (hereafter "*Strategic Vision*") (attached to Memorandum 2012-41).

may be necessary to create a future complementary process to address the tougher issues of substantively reforming the codes and regulations.

Implementation steps include:

- Make legislative request to the California Law Revision Commission to review and recommend, in cooperation with the work group, “clean-up” of the Fish and Game Code.
- Establish a work group made up of DFG staff, which will work with stakeholders.
- Obtain priorities for regulatory and statutory review from stakeholders.
- Review California Fish and Game Code.
- Review Title 14 of California Code of Regulations.⁶

The recommended “legislative request to the California Law Revision Commission” came in the form of a joint letter from Senator Fran Pavley and Assembly Member Jared Huffman (then Chairs of the Senate Natural Resources and Water Committee and the Assembly Water, Parks, and Wildlife Committee, respectively).⁷

The Commission agreed to seek the necessary authority to conduct the study. That authority was granted by concurrent resolution in 2012.⁸ The resolution authorized the Commission to study:

Whether the Fish and Game Code and related statutory law should be revised to improve its organization, clarify its meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law.⁹

The first memorandum in the study provided a broad introduction.¹⁰ The second laid out a plan for conducting the work.¹¹ The staff proposed the following approach:

[I]t would be best to start by developing an improved organization for the code. We would use an incremental approach, starting by establishing the top-level organization

6. *Strategic Vision* at A13 (emphasis added).

7. See Memorandum 2012-5, pp. 22-23, Exhibit pp. 32-33.

8. 2012 Cal. Stat. res. ch. 108.

9. *Id.*

10. See Memorandum 2012-41.

11. See Memorandum 2012-41.

of the code and then turning to lower levels of organization. ... [that approach] will allow the Commission to proceed incrementally, taking on one subject area at a time. It will also allow the Commission to “break ground” right away, making progress on the organizational aspect of the study while it gradually uncovers the other types of defects that the Commission has been charged with correcting.¹²

The memorandum went on to discuss some threshold matters that would need to be decided before beginning the reorganization work: the new code’s name, the organizational headings to be used, section numbering conventions, etc.¹³ The Commission approved that approach.¹⁴ DFW offered helpful input on how the proposed new code should be structured.¹⁵

At the next meeting, the staff began the six-year process of preparing and presenting a series of sequential drafts of pieces of the proposed new Fish and Wildlife Code. That work wrapped up in 2018, with the release of a tentative recommendation proposing the new code.¹⁶ It was a massive proposal, with a length of over 1,200 pages.

Because of the magnitude of the proposal, and the intervention of COVID, the Commission agreed to extend the public comment deadline and divide the comment into two phases.

This memorandum begins the discussion of Phase Two, consideration of the proposed organizational changes to the Fish and Game Code.

PUBLIC COMMENT

In its letter, DFW raises four concerns about the proposed recodification of the Fish and Game Code.

- (1) DFW asserts that the proposed reorganization exceeds the Commission’s statutory authority for this study. The argument is that because the reorganization would have a significant practical effect on DFW’s operations, it therefore violates the prohibition on “making any significant substantive change to the effect of the law.”¹⁷

12. *Id.* at 2.

13. *Id.* at 3-6.

14. *Id.* at 3-6.

15. See, e.g., Second Supplement to Memorandum 2013-11.

16. See Tentative Recommendation on *Fish and Wildlife Code* (Dec. 2018). See also Tentative Recommendation on *Fish and Wildlife Code: Conforming Revisions* (Feb. 2019).

17. See Exhibit pp. 1-2.

- (2) DFW asserts that the proposed reorganization would violate the “pragmatic test” that the Commission adopted for this study.¹⁸
- (3) DFW asserts that reorganization would cause confusion and make the law hard to use.¹⁹
- (4) DFW suggests that the proposed reorganization would result in a “Code that is ... not supported by the department that is charged with its administration and enforcement.”²⁰

DISCUSSION

Concerns About the Proposed Recodification

The staff does not agree that recodification of the Fish and Game Code would exceed the Commission’s statutory authority. The legislative grant of authority specifically includes improvement of the organization of the Fish and Game Code, as the first item in a list of authorized objectives. Purely organizational changes are technical, in that they only affect the expression of the law. They are not substantive, because they do not change the legal meaning or effect of the law. It was clear from the inception of this study that the Commission would propose organizational improvements, without making changes to the substance of the law.

Nor does the staff agree that organizational changes would violate the “pragmatic test” that the Commission adopted to guide its work in this study. The express purpose of that test was to facilitate large-scale reorganization, by providing a rule of thumb for exclusion of controversial *substantive* changes that would complicate enactment of a large *technical* clean-up proposal.²¹ As explained:

The recodification of an entire code is a massive undertaking. It will require a major investment of the Commission’s resources and the resources of those assisting the Commission by reviewing and commenting on its work. When the Commission has approved a final recommendation, and implementing legislation has been introduced, that burden will mostly shift to the Legislature and Governor. Both will need to review a huge body of proposed legislation to determine whether it should be enacted, with or without amendments.

...[I]f controversial substantive revisions are not included in the Commission’s recommendation and implementing

18. See Exhibit p. 2.

19. Id.

20. See Exhibit p. 2.

21. See First Supplement to Memorandum 2016-47, pp. 5-7; Minutes (Sept. 2016), pp. 6-7.

legislation, the Legislature and Governor will have a “clean” bill to consider, rather than one that is weighed down by a list of tricky substantive objections that need to be analyzed and resolved. With a bill of this magnitude, that could make the difference between enactment and nonenactment.²²

The pragmatic test was intended to improve the prospects of the proposed recodification. It was not a way to justify derailing the effort entirely.

As to whether the proposed law would create confusion and make the law more difficult to use — to a certain extent it would, at least in the short-term. Every reorganization of an existing statute creates transitional costs. New section numbers must be learned. Secondary materials must be revised. Legal research into the former law is made more difficult. Those kinds of costs are real, but they are transitory. The benefits of reorganization are permanent.

Nonetheless, DFW is the entity charged with implementing the Fish and Game Code. It would bear almost all of the transitional costs and would be the principal recipient of the reform’s benefits. Their view on the relative burdens and benefits should be given serious consideration.

Of course, DFW is not the only intended beneficiary of recodification. Technical clean-up of the law would also benefit the Legislature, lawyers and judges who must work with the law, and members of the public who wish to understand their privileges and duties under the law.

The Legislature clearly sees a net benefit to reorganization of disordered law. In the past, the Commission was assigned and successfully implemented recodifications resulting in the Evidence Code, Family Code, and current version of the Probate Code. In addition, the Commission has recodified numerous smaller bodies of law, including the Government Claims Act (formerly known as the Tort Claims Act), the Enforcement of Judgments Law, the Trust Law, Mechanics Lien Law, Common Interest Development law, the Civil Discovery Act, the deadly weapons provisions of the Penal Code, and, just last year, the California Public Records Act. At the Legislature’s request, the Commission is currently engaged not only in this Fish and Game project, but also in preparing a nonsubstantive recodification of the statutes relating to toxic substances.

22. First Supplement to Memorandum 2016-47, pp. 5-6.

Aside from DFW, the only stakeholder input we received was from California Waterfowl. They echoed DFW's concern about the net benefit of the proposed reorganization.²³

The Commission's traditional approach is to seek consensus among those who would be affected by a proposed reform. It would go against the grain to proceed with the proposed reorganization despite the opposition. The discomfort with that approach would be partly principled and partly practical. As a matter of principle, we try to find solutions that work for everyone. We sometimes fall short, but we try. As a practical matter, opposition from DFW would have a good chance of defeating any implementing legislation. Even if the Legislature approved the proposal, the Governor might be convinced to veto. Proceeding without resolving the opposition would burn resources and good will and might well achieve nothing.

Possible Alternative Approach

Rather than simply abandon six years' worth of analysis, drafting, and public deliberations on organizational improvement, there might be an alternative approach that could salvage some part of that work. It might be feasible to prepare a series of narrower recodification proposals, that would improve the organization of distinct pieces of the existing code, without creating a new code.

With narrower proposals, it would probably be easier to get stakeholder input on the specifics of the proposal. Narrower proposals would also result in smaller transitional costs, spread out over time, which would be easier to absorb.

To better illustrate the alternative approach, the staff has provided an example, below, of a narrow reform of the type contemplated.

Example of Narrow Reorganization in Existing Code

The ideal organization of a code would divide the statutory sections into conceptually similar groups, by using hierarchical headings to create a nested structure.

Each "container" within the structure would only describe and contain provisions of a clearly-defined and similar nature. There are different descriptors that could be used to define and order the structure, but it is axiomatic that similar provisions should be grouped together, without including dissimilar provisions.

23. See Exhibit p. 3.

A nested structure follows naturally from the fact that anything can be sorted first by broad criteria and then, within those broad criteria, by increasingly narrow sub-criteria.

If a code is organized in that way, the table of contents will serve as a reliable and clear roadmap of the law. For example, if you need to find the law that governs the commercial use of traps to catch crab, a well-organized Fish and Game Code might have the following structure of organizational headings:

Division. Fishing
Part. Commercial Fishing
Chapter. Traps
Article. Crab

As noted above, there are other possible organizational schemes that might be equally sensible. A code organized around types of wildlife might use this ordering:

Division. Crab
Part. Fishing
Chapter. Commercial Fishing
Article. Traps

Selecting the best way to order the heading structure involves an assessment of the predominant content and purpose of the law.

It is important to note that sound organization does not only make a body of law easier to use. It also makes it easier to maintain. When a bill is prepared to add new law to a code, the drafter will look for an appropriate location to put it. If the law is well-organized, the appropriate location will be obvious, and the new law will be put in a location that maintains the existing organizational structure. If the existing law is disorganized, there will often be no obviously proper location and the placement of the new law will continue or increase the existing disorder. This kind of gradual increase in disorder is inevitable over time. That is why periodic clean-up is useful.

Division 2 of the Fish and Game Code is poorly organized. Its heading “Department of Fish and Wildlife” suggests that the division was meant to contain the foundational law of the department, governing its creation, personnel, general powers, broad responsibilities, and the like. Containers of this type are common in bodies of law that establish regulatory agencies.

In fact, Chapters 1, 2, and 3, of Division 2 appear to be designed to follow that organizational approach:

- Chapter 1. Organization and General Functions
- Chapter 2. Deputies, and Other Employees; County Wardens
- Chapter 3. Other Powers and Duties

Were that the entire content of Division 2, the organization of that division would appear to be sound, at least with respect to the headings.

Unfortunately, that is not the entire content of Division 2, which seems to have grown into a jumble of miscellaneous programs, united only by a general sense of “department responsibilities” (a concept that also describes numerous other programs located elsewhere in the code).

The current chapter-level organization of Division 2 is as follows:

- Chapter 1. Organization and General Functions
- Chapter 1.5. Wildlife Violator Compact
- Chapter 2. Deputies, and Other Employees; County Wardens
- Chapter 3. Other Powers and Duties
- Chapter 4. Wildlife Conservation Law of 1947
- Chapter 4.1. California Riparian Habitat Conservation Program
- Chapter 4.3. Inland Wetlands Conservation Program
- Chapter 4.4. California Desert Conservation Program
- Chapter 5. Fish and Game Management
- Chapter 6. Fish and Wildlife Protection and Conservation
- Chapter 6.5. Habitat Restoration and Enhancement Act
- Chapter 6.6. Voluntary Stream Restoration Property Owner Liability
- Chapter 7. Conservation of Aquatic Resources
- Chapter 7.2. Trout Management
- Chapter 7.3. Black Bass Conservation and Management
- Chapter 7.4. Department–Managed Lands
- Chapter 7.5. Native Species Conservation and Enhancement
- Chapter 7.8. Sacramento-San Joaquin Valley Wetlands Mitigation Bank Act of 1993
- Chapter 7.9. Conservation Bank and Mitigation Bank Applications and Fees
- Chapter 8. Conservation of Wildlife Resources
- Chapter 9. Advance Mitigation and Regional Conservation Investment Strategies

- Chapter 10. Native Plant Protection
- Chapter 11. California Desert Native Plants
- Chapter 12. Significant Natural Areas
- Chapter 13. Nonvehicular Wildlife Crossings
- Chapter 13.5. Wildlife Connectivity Actions

A person who is interested in what the Fish and Game Code has to say about “trout management” would likely look in “Division 6. Fish.” Burying that content as Chapter 7.2 in a long list of miscellaneous chapters in a division headed “Department of Fish and Wildlife” is not user-friendly.

There are a series of increasingly ambitious steps that could be taken to improve the organization of Division 2.

New Heading. At an absolute minimum, a new division heading could be inserted after Chapter 3, along the lines of “Division 2.5. Miscellaneous Programs,” with the subsequent chapters of the division renumbered accordingly. That would reestablish Division 2 as a container for the foundational law that governs the department as an entity. The new Division 2.5 would still be a hodgepodge, but at least a reader who consults the table of contents would realize that there is a hodgepodge container that must also be checked.

Chapter Relocation. A more ambitious reorganization would involve relocating the misplaced chapters (Chapters 1.5 and 4 - 13.5) to more appropriate locations in the code. The internal content and structure of those chapters would not be changed; they would move as intact units. For example, “Chapter 7.2. Trout Management” would be relocated as a new chapter in “Division 6. Fish.”

This would reestablish a distinct organizational purpose for Division 2 and would eliminate the existing jumble of misplaced chapters. This would significantly improve the organization of the content of Division 2.

Comprehensive Clean-Up. The most ambitious approach would be to relocate the misplaced chapters, while also examining the content of the relocated chapters, to see whether their internal organization also needs improvement. Perhaps article headings could be added to chapters that don’t have them, or dissimilar provisions within a chapter could be parceled out to more appropriate locations in the code, or over-long sections could be broken up into a series of shorter sections (and perhaps organized as an article).

Conclusion. The advantages of such improvements are obvious. The temporary disadvantages would be mitigated by using an incremental approach, making them easier to justify and absorb.

The work could proceed through the release of a series tentative recommendations, which would make stakeholder review more manageable.

The work would be informed by the Commission's prior efforts. For example, if the Commission were to decide to proceed with relocation of the misplaced chapters in Division 2, the Commission could look to its proposed recodification for guidance on where they should be placed. The constraints of working within an established code, rather than writing on a blank slate, might make some of the prior decisions unworkable. But it would be helpful to have them as an initial road map.

Smaller organizational reforms would probably also be better received in the Legislature and by the Governor. The proposal would be easier to review, and there would be less likelihood of opposition based on general aversion to change, rather than concrete issues that could be addressed through amendments.

It is the staff's judgment that trying to proceed with the proposed new code would be counter-productive. This is unfortunate, but it is where we wound up.

Narrower incremental reorganization within the existing code feels like it might be achievable. It would not require much new work to test the waters. The staff could readily prepare a proposed reorganization of Division 2, at whatever level of improvement the Commission would like to see. It could be finished this year, for introduction next year. Then we would learn whether any improvement to the Fish and Game Code's organization is feasible. If so, the work could continue. If not, we would have tried.

The staff recommends that the approach described above be attempted.

Respectfully submitted,

Brian Hebert
Executive Director



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GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director



June 8, 2021

Chrystal Miller-O'Brien, Chairperson
California Law Revision Commission
c/o Brian Hebert, Executive Director
Via e-mail only to bhebert@clrc.ca.gov

Re: Fish and Game Code Reorganization

Dear Ms. Miller-O'Brien:

I would like to express my appreciation on behalf of the California Department of Fish and Wildlife (CDFW) for the California Law Revision Commission's (CLRC) efforts to make improvements to the Fish and Game Code (Code). As you know, CDFW is currently working with the CLRC on a third bill to effectuate hundreds of additional changes to the Code. While each of CLRC's efforts on behalf of CDFW have been significant, cumulatively they represent an unprecedented modernization of the Code and contribution to our understanding of CDFW's funding and mandates.

Your work to date has made a real and lasting difference. However, after completing the third bill covering hundreds of additional changes to the Code, I request that the CLRC not move forward with the remaining reorganization of the Code.

As you know, in 2012, the Legislature directed the CLRC to study "whether the Fish and Game Code and related statutory law should be revised to improve its organization, clarify its meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law" (ACR 98 Wagner). Through past recommendations to the Legislature that ultimately became law and through numerous analyses related to each of the required categories, the CLRC has already responded to these legislative directives in a number of ways.

The Legislature specifically directed that the CLRC proposals do not make any significant substantive change to the effect of the law. This is the tipping point at which the disadvantages of proceeding with the 2018 Tentative Recommendation proposals for reorganization outweigh the benefits. While the proposed reorganization of the Code may not appear substantive on its face, the confusion that will result from wholesale reorganization will have a significant, substantive impact on CDFW's ability to enforce the Code.

Conserving California's Wildlife Since 1870

Chrystal Miller-O'Brien, Chairperson
California Law Revision Commission
c/o Brian Hebert, Executive Director
June 8, 2021
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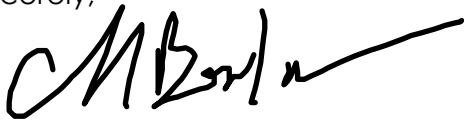
CDFW believes that going forward with the remaining reorganization of the Code risks confusion and error. As a result, the remaining CLRC proposals would extend beyond either the legislative limitation on the CLRC's work or application of the CLRC's own pragmatic test. Under that test, the CLRC would only propose changes that are plainly beneficial, would not present a significant risk of unintended consequences, and that are not likely to be controversial.

We have one more important task together to complete the third bill covering additional changes. This is a natural moment to conclude almost a decade of work, and by doing so, government will avoid a process that is likely to result in confusion at best, and at worst, a Code that is difficult to use and not supported by the department that is charged with its administration and enforcement. At the same time, CDFW will be able to benefit from CLRC's work product in the course of future bill analyses and will be able to integrate CLRC's remaining recommendations in a more incremental fashion.

The CLRC's work over the past nine years has contributed to significant improvements, including two clean-up bills already passed, a third in process, thousands of corresponding regulatory changes, and a series of reports on CDFW's funding and mandates. It is not an overstatement to say that CDFW will continue to reap benefits from the CLRC's work for many years.

We thank the CLRC for all the work it has accomplished on the department's behalf.

Sincerely,

A handwritten signature in black ink, appearing to read "CH Bonham", with a long horizontal flourish extending to the right.

Charlton H. Bonham
Director

Subject: Fish and Game Code Reform/Status
Date: Monday, January 3, 2022 at 11:22:06 AM Pacific Standard Time
From: Mark Hennelly
To: Brian Hebert
Attachments: image001.jpg

Hi Brian. I was hoping I could get an update on the Commission's effort to clean up the Fish and Game Code and any further work that the Commission may be planning on this subject.

Our Association's interests, as well as our members (who are hunters and private landowners), are directly affected by many of the provisions of the Fish and Game Code. I also personally have been involved with writing parts of the code over the last 22 years though my work as both a legislative staff person and lobbyist.

We generally agree with the input that the Department of Fish and Wildlife transmitted to the Commission last June, including that further reorganization risks confusion and error. Please see [CLRC Letter.pdf](#).

Thanks much in advance for any information and feedback.



Mark Hennelly

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