

STAFF SUMMARY FOR AUGUST 16, 2017

14A. OTHER INFORMATIONAL ITEMS – STAFF REPORT**Today's Item****Information** ☒**Action** ☐

Receive the staff report, including staffing updates, staff time allocations, and previous meeting outcomes.

Summary of Previous/Future Actions (N/A)**Background**

California Law Revision Commission (CLRC): Consistent with the authority FGC granted in Jun 2017 to Executive Director Termini, comments were submitted on “Part 1” of CLRC’s tentative recommendation for reorganizing the Fish and Game Code into a new Fish and Wildlife Code (Exhibit 1). FGC staff has a number of concerns with the tentative recommendation, which appear to be mirrored by DFW. Staff will have additional information to report during today’s meeting.

Staffing update: One position will become vacant at the end of Aug, a vacant position has been filled beginning Aug 16, 2017, and two other positions remain vacant.

- Mary Brittain, our administrative assistant, has accepted a promotional position with the California Energy Commission; while we are excited about this great opportunity for her, Mary will be sorely missed at the FGC office, where she has played a key coordination role. Mary’s last day in the office will be Aug 25. Staff will seek to fill this important position as quickly as possible.
- The vacant associate governmental program analyst position is now filled, beginning today! Rick Pimentel comes to FGC from the California Department of Social Services where he worked for almost seven years in different positions. Over the next couple of months he will complete various trainings and learn how the FGC office operates, with a goal of being fully on-boarded by mid-Nov.
- The program manager position remains vacant. Funding for the position has now been identified and staff received authorization to advertise the position; this position is expected to remain vacant for at least several more months during the recruitment process. In the meantime, some of the program manager’s responsibilities have been distributed among FGC staff to the extent possible.
- Recent legislation has created the need to amend Title 14, CCR with new Fish and Game Code citations; as this project will generate significant workload, a retired annuitant with a legal or regulatory background is needed to provide project support. Having now completed the hiring process for the regulatory analyst and securing approval to advertise the program manager position, staff will now be able to focus on filling this need. In the meantime, FGC staff is addressing updates to Title 14 with individual rulemaking files.

Staff time allocations: To help keep FGC current on where its staff is expending time, Exhibit 2 reports the allocation of time in general categories for the previous two months, as well as highlights some specific activities during that time. Note that, not including the retired

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annuitant, *unfilled positions and leave represented 25% and 31% of staff's Jun and Jul hours, respectively*, which has significantly impacted capacity.

Previous meeting outcomes: Due to staffing constraints, previous meeting outcomes have not been completed; official meeting minutes for FGC meetings are the video files, which are available through the FGC website at www.fgc.ca.gov/meetings.

Significant Public Comments (N/A)**Recommendation (N/A)****Exhibits**

1. [Letter from Valerie Termini to the California Law Revision Commission, dated Aug 9, 2017](#)
2. [Staff Report on Time Allocation and Accomplishments, dated Aug 8, 2017](#)

Motion/Direction (N/A)

Commissioners
Eric Sklar, President
Saint Helena
Jacque Hostler-Carmesin, Vice President
McKinleyville
Anthony C. Williams, Member
Huntington Beach
Russell E. Burns, Member
Napa
Peter S. Silva, Member
El Cajon

STATE OF CALIFORNIA
Edmund G. Brown Jr., Governor

Valerie Termini, Executive Director
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Sacramento, CA 95814
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Fish and Game Commission



Wildlife Heritage and Conservation
Since 1870

August 9, 2017

Susan Duncan Lee, Chairperson
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Via email to commission@clrc.ca.gov

Re: Comments on the Tentative Recommendation for Part I (Divisions 1-4) of the Proposed Fish and Wildlife Code

Dear Chairperson Lee:

Thank you for the opportunity to provide comments on the California Law Revision Commission (CLRC) tentative recommendation for Fish and Wildlife Code Part 1 (Divisions 1-4).

Conducting a comprehensive review of the existing Fish and Game Code to identify obsolete, inconsistent or duplicative sections and then recommending changes to improve its organization, clarify meaning, standardize terminology, and clarify program authority and funding sources without making any significant substantive changes to the effect of the law is a formidable task. We applaud CLRC and its staff's effort to conduct this study in a timely and transparent fashion.

Recently the California Fish and Game Commission (FGC) was made aware by its staff that there are some concerns with elements of the tentative recommendation. At its June 2017 meeting, FGC delegated to me, as its executive director, authority to submit comments on the tentative recommendation, which are identified through this memo.

Concerns with the tentative recommendation come from multiple sources, including our sister agency, the California Department of Fish and Wildlife (CDFW). FGC sets policy and adopts regulations for the state's fish and wildlife resources, while CDFW has substantial management authority and day-to-day responsibility over those resources, much of which is set out not only through Fish and Game Code but also in Title 14 of the California Code of Regulations. A number of concerns with the tentative recommendation identified by CDFW also give pause to FGC. However, even if there were complete agreement with the

tentative recommendation, the subsequent adoption of that recommendation would lead to a complete overhaul of the Fish and Game Code, subsequently creating significant workload for both FGC and CDFW staff in reviewing and completely revising Title 14 for consistency with the new Fish and Wildlife Code. Neither agency is in a position at this time to assume additional workload to ensure that Title 14 regulations conform to statutory revisions.

Specific FGC concerns with the tentative recommendation fall into five general categories: (1) Ability to interpret without sufficient context, (2) significant substantive changes, (3) changes with potential unintended consequences, (4) changes without clear benefit, (5) additional necessary research, and (6) more appropriate placement and incorrect references.

1. *Inability to Interpret without Sufficient Context*

Elements of the tentative recommendation have been moved from within the context of specific chapters to new sections that may have applicability in a broader context that has not yet been revealed through tentative recommendations for the remaining chapters of the new Fish and Wildlife Code. Examples include:

- *Section 205 definition of adaptive management.* The proposed definition of "adaptive management" uses the definition in Fish and Game Code Section 13.5 without change, and omits the definition used in the context of fishery management in current Section 90.1. The Section 13.5 definition may not be appropriate in the context of other chapters, which cannot be fully understood without the remaining chapters of the new Fish and Wildlife Code.
- *Section 375 definition of finfish.* The new sections replacing 9001.6, 9001.7 and 9006 are not included in this tentative recommendation, so it is not possible to understand the context for application of the definition.
- *Section 1300 regarding authority to compel testimony and production of evidence.* There is no explanation for where the remainder of existing Fish and Game Code Section 309(a) is proposed to move and, if that language stricken, the rationale for its exclusion.

2. *Significant Substantive Changes*

Page 1 of the tentative recommendation states that the new Fish and Wildlife Code, proposed to replace the existing Fish and Game Code "...would continue the substance of the former code in a more user-friendly form, without making any significant substantive change to the effect of existing law." However, it is our belief that some of the recommendations are, in fact, significant substantive changes. Examples include:

- *Section 90 regarding possession of animals taken out of state.* Removing the language, "Unless otherwise provided..." appears to be a substantive change as it leaves no room for appropriate exceptions (i.e., commercial importation).

- *Section 95 definition for animal parts.* Removing the language "Unless the provision or context otherwise requires..." appears to be a substantive change as it leaves no room for appropriate exceptions.
- *Section 205 definition for adaptive management.* This definition omits the definition used in the context of fishery management currently found in Section 90.1 of Fish and Game Code; while not specifically used in Title 14 regulations, the Section 90.1 definition is memorialized in the master plan for marine protected areas and the Marine Life Management Act master plan; both important elements of ecosystem-based management programs. The Section 90.1 definition contains an important statement about designing management actions to provide useful information for future actions, even in the case of failure, which is absent from the Section 13.5 definition proposed to apply code-wide. The omission is problematic.
- *Section 280 definition for commercial fisherman.* A commercial fisherman is not someone who is simply engaged in fishing activities for commercial purposes; a license is required to be a commercial fisherman, otherwise the activity is currently interpreted to be *recreational* fishing and there are significantly different repercussions for selling recreationally-caught fish. The current Fish and Game Code Section 7850 language is more direct and accurate in the overall context of how commercial and recreational fishing laws are applied.
- *Section 410 definition for fishery.* Generalizing the definition for fishery as found in Fish and Game Code Section 94 is problematic since the definition, as written, excludes non-marine fish and plants. In addition, attempting to apply the same definition to inland freshwater environments may be problematic since management considerations are different for inland, freshwater environments than for marine and estuarine environments.
- *Section 445 definition for game amphibian.* Game amphibian is new and seems to be an attempt to satisfy the desire for "non-commercial" consistency. However, the term "game amphibian" is not currently used in Fish and Game Code, as amphibians are included in the definition of fish. Game is generically defined as any animal hunted/fished for sport or for food; so technically, this proposed definition fits under 'non-commercial purposes'. However, in the broader context, "noncommercial" purposes also includes take for scientific purposes (under SCPs); there are a number of species (amphibians, reptiles, and fish) that are collected for scientific purposes that are not taken for recreational purposes. Would species collected under an SCP now be considered 'game' species and would it change how they are regulated? Creating a new definition not currently in use is a significant change to the Fish and Game Code. Will the public now expect that amphibians can be "hunted" or "fished" with the appropriate permit? Finally, current Fish and Game Code and Title 14 language essentially define "game" as any species that are actively managed to maintain sustainable populations in order to provide recreational opportunities (i.e., waterfowl, upland game, bass, salmon, deer); these species are regularly monitored, with season and bag limits often changing based on monitoring data. Amphibians and reptiles are not actively monitored and managed but, rather, are treated more like

furbearers and nongame mammals. Applying "game" to amphibians and reptiles sets a different tone for how they would be managed.

3. *Changes with Potential Unintended Consequences*

Page 2 of the tentative recommendation states that the primary purpose of the study leading to the recommendation "...is to simplify and improve the organization and expression of the Fish and Game Code, to make it more understandable and useable..." While the effort to simplify is well-intentioned, there are some proposed changes that appear to have potential unintended consequences which, in some cases, are significant. Examples include:

- *Section 90 regarding possession of animals taken out of state.* The source language for this change is housed in Fish and Game Code Division 3 (Fish and Game Generally), Chapter 1 (Taking and Possessing in General), but the proposed location applies to the new code in its entirety. Moving the language suggests that it now applies to commercial importation, which was likely not the intent nor is it the current interpretation of Section 2013 of Fish and Game Code.
- *Section 280 definition of commercial fisherman.* The current Fish and Game Code Section 7850 language is more direct and accurate in the overall context of how commercial and recreational fishing laws are applied, while the proposed definition may have unintended consequences for licensing and permitting, landing taxes, and other laws and regulations currently applicable to commercial and recreational fishing.
- *Section 445 definition for game amphibian.* There are a number of potential unintended consequences from creating a new, distinct definition for "game amphibian." See comments under "Significant Substantive Changes."
- *Section 450 definition for game bird.* This definition is not consistent with the new sections 445, 455 and 465, which are not consistent with the existing "game mammal" definition in Section 460. The method for identifying game used in sections 3500(a), 3500(b) and 3950(a) is to specify which species are included in the term "game bird"; this method works for defining game birds and game mammals since there are nongame species (coyote, crows, starlings) identified in Fish and Game Code that can be taken for non-commercial purposes but are not managed as game species. By creating a new definition that is more broadly applied, there are significant unintended consequences.
- *Section 455 definition for game fish.* While game fish is used several times in Fish and Game Code, it does not have a distinctly different meaning from "fish." Statutory changes in recent years have focused on the importance of all marine species to the health of marine and estuarine environments, while creating a new definition for "game fish" could imply that some species are more important than others; we have learned on the terrestrial side that such a distinction can be problematic. See similar and related comments for proposed Section 445 under "Significant Substantive Changes."

4. *Changes without Clear Benefit*

Page 2 of the tentative recommendation states that the primary purpose of the study leading to the recommendation "...is to simplify and improve the organization and expression of the Fish and Game Code, to make it more understandable and useable..." While the effort is well-intentioned, there are some proposed changes that do not appear to have a clear benefit of simplification, improved organization, or more understandable and useable language. Examples include:

- *Section 445 definition for game amphibian.* Game amphibian is new and seems to be an attempt to satisfy the desire for "non-commercial" consistency. However, the term is not currently used in Fish and Game Code, as amphibians are included in the definition of fish. There is no clear benefit to creating a new, distinct definition for game amphibian.
- *Section 450 definition for game bird.* While the term "game bird" is not specifically defined in Fish and Game Code, the species included in that term are clearly articulated such that there is no confusion about which species are, or are not, affected by game bird laws and regulations. While a desire for consistency in how fish, bird and mammal "game" are defined is understandable, it shows a misunderstanding of how those species are managed; there is no clear benefit to the proposed new definition.

5. *Additional Necessary Research*

In some cases, elements of the tentative recommendation may not be appropriate for addition or change as currently written, necessitating additional research. Examples include:

- *Section 375 definition of finfish.* Finfish is not specifically defined in Fish and Game Code; however, the proposed definition is drawn from Section 1.46 of Title 14 of the California Code of Regulations, which was adopted by FGC in 2007. The Title 14 definition of finfish needs updating given recent scientific classification changes to fishes, such as hagfish and lamprey that are neither bony nor cartilaginous fish.
- *Section 445 definition for game amphibian.* Note also that F&G Code Section 8183(f) currently states that, "Any game fish caught incidentally in bait nets shall be released by use of a hand scoop net or by dipping the cork line." Are there any bait fish that are also defined as game fish?

6. *More Appropriate Placement and Incorrect References*

In some cases, elements of the tentative recommendation may more appropriately be placed elsewhere within the new Fish and Wildlife Code. In another case there appears to be an incorrect reference. Examples include:

- *Section 1200 regarding commission practices and processes.* This section seems more appropriate for Division 2 (Administration), Part 1 (Fish and Game

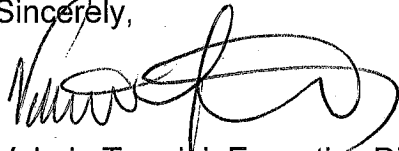
Commission), Title 1 (Organization) since it is specific to FGC organizational practices and processes rather than powers and duties.

- *Section 1205 regarding disposition of accidentally killed birds and mammals.* This section seems more appropriate for Division 2 (Administration), Part 1 (Fish and Game Commission), Title 2 (Powers and Duties), Chapter 1 (Regulation of Take and Possession Generally), Article 1 (Authority) since it grants authority to FGC to promulgate regulations related to the subject. We also believe that it would not be a significant substantive change to correct the sentence grammar by changing it to say "...or mammals that are accidentally killed."
- *Section 3210 regarding wildlife area passes and native species stamps.* The language references "this article," but there is no article in the proposed chapter.
- *Section 4300 regarding rewards.* This does not seem to be an appropriate location for this provision and would be better placed in proposed Division 2 (Administration), Part 6 (General Financial Provisions), Title 1 (State), Chapter 4 (Expenditures) since it governs how funds are to be expended for rewards.

Conclusion

Thank you again for the opportunity to provide our comments on the tentative recommendation for Fish and Wildlife Code, Part 1. While examples have been provided in this memo and by CDFW in a separate memo, it is our hope that additional conversations can be held among CLRC, FGC and CDFW staff to discuss and address in more detail our concerns with the tentative recommendation and future recommendations. I can be reached at Valerie.Termini@fgc.ca.gov or (916) 653-4899.

Sincerely,



Valerie Termini, Executive Director

cc: Members, California Fish and Game Commission
Wendy Bogdan, General Counsel, California Department of Fish and Wildlife
Stafford Lehr, Deputy Director, California Department of Fish and Wildlife
Brian Hebert, Executive Director, California Law Revision Commission

California Fish and Game Commission
Staff Report on Staff Time Allocation and Accomplishments
August 8, 2017

Commission staff time is a tangible and invaluable asset. Especially since the Commission's staff is so small, where and how staff members spend their time matters. This report identifies where Commission staff allocated time to general activity categories (see table) and specific activities (see activities lists) during June and July 2017.

The table below summarizes time allocation across all staff classifications, though some classifications require a greater emphasis on certain categories than others. For example, advisors spend up to 30% of their time on special projects due to committee project assignments, while regulatory analysts spend up to 70% of their time on regulatory program tasks.

General Allocation

Task Category*	June Staff Time	July Staff Time
Regulatory Program	11%	14%
Commission/Committee Meetings	35%	21%
Legal Matters	5%	5%
External Affairs	5%	6%
Special Projects	12%	16%
Administration	16%	14%
Leave Time	9%	16%
Unfilled Positions	16%	16%
Total Staff Time ¹	108%	108%

** Total staff time is greater than 100% due to overtime*

Activities for June 2017

- Finished preparations for and conducted three publically-noticed meetings (June 20 Tribal Committee, June 21 North Coast Fishing Communities, June 21-22 Commission)
- Conducted June 1 Fisheries Bycatch Workgroup meeting and began preparations for next meeting on August 1
- Continued preparations for two publically-noticed meetings (July 13 WRC Predator Policy Workgroup, July 20 Marine Resources Committee)
- Conducted interviews for the associate governmental program analyst position
- Participated in California Department of Finance economic assessment training
- Participated in MPA Statewide Leadership Team meeting
- Participated in planning team meetings for updates to the Marine Life Management Act master plan for fisheries

Activities for July 2017

- Finished preparations for and conducted two publically-noticed meetings (July 13 WRC Predator Policy Workgroup, July 20 Marine Resources Committee)
- Finished preparations for and conducted an aquaculture best management practices public meeting (jointly with the California Department of Fish and Wildlife)
- Began planning and preparations for August 16 Commission meeting
- Continued preparations for August 1 Fisheries Bycatch Workgroup meeting
- Completed interview and hiring processes for filling the associate governmental program analyst position
- Participated in annual meeting of the Western Association of Fish and Wildlife Agencies
- Participated in a stakeholder workshop to explore ecological risk assessments as a potential prioritization tool to support fisheries management
- Participated in the California Department of Fish and Wildlife's mission-based budgeting planning meetings and administrative coordination meetings
- Participated in the quarterly coordination meeting with the California Department of Fish and Wildlife's Regulations Unit
- Participated in Governor's Tribal Liaisons meeting
- Participated in planning team meetings for updates to the Marine Life Management Act master plan for fisheries

* General Allocation Categories with Sample Tasks

Regulatory Program

- Coordination meetings with DFW to develop timetables and notices
- Review and process CESA petitions
- Prepare and file notices, re-notices, ISORs and FSORs
- Prepare administrative records
- Track and respond to public comments
- Consult, research and respond to inquiries from OAL

Commission/Committee Meetings and Support

- Research and review practices and procedures for adaptive management
- Research and compile subject-specific information
- Review and develop policies
- Develop and distribute meeting agendas and materials
- Agenda and debrief meetings
- Prepare meeting summaries and audio files
- Maintain voting records
- Develop and distribute after-meeting memos/letters
- Make travel arrangements for staff and commissioners
- Conduct onsite meeting management
- Process submitted meeting materials
- Provide commissioner support (expense claims, office hours, etc.)
- Process and analyze regulatory petitions and non-regulatory requests

Legal Matters

- Respond to Public Records Act requests
- Process appeals and accusations
- Process requests for permit transfers
- Process kelp and state water bottom leases
- Litigation

External Affairs

- Engage and educate legislators, monitor legislation
- Maintain state, federal and tribal government relations
- DFW partnership, including joint development of management plans and concepts
- Website maintenance

Special Projects

- Predator Policy Workgroup
- Fishing from piers and jetties
- Coastal fishing communities
- Fisheries Bycatch Workgroup
- Streamline routine regulatory actions

Administration

- Correspondence
- Purchases and payments
- Contract management
- Personnel management
- Strategic planning
- Budget development and tracking
- Health and safety oversight
- Internal processes and procedures
- Staff training and professional development

Leave Time

- Holidays
- Sick leave
- Vacation or annual leave
- Jury duty
- Bereavement
- Professional development

Unfilled

- Program Manager
- Regulatory analyst (thru August 15)
- Legal/regulatory clerk