



Tracking Number: [2017-001](#)

To request a change to regulations under the authority of the California Fish and Game Commission (Commission), you are required to submit this completed form to: California Fish and Game Commission, 1416 Ninth Street, Suite 1320, Sacramento, CA 95814 or via email to FGC@fgc.ca.gov. Note: This form is not intended for listing petitions for threatened or endangered species (see Section 670.1 of Title 14).

Incomplete forms will not be accepted. A petition is incomplete if it is not submitted on this form or fails to contain necessary information in each of the required categories listed on this form (Section I). A petition will be rejected if it does not pertain to issues under the Commission's authority. A petition may be denied if any petition requesting a functionally equivalent regulation change was considered within the previous 12 months and no information or data is being submitted beyond what was previously submitted. If you need help with this form, please contact Commission staff at (916) 653-4899 or FGC@fgc.ca.gov.

SECTION I: Required Information.

Please be succinct. Responses for Section I should not exceed five pages

1. Person or organization requesting the change (Required)

Name of primary contact person: Sean A. Brady
Address: 180 E. Ocean Blvd., Suite 200, Long Beach, CA 90802
Telephone number: (562) 216-4444
Email address: sbrady@michellawyers.com

2. Rulemaking Authority (Required) - Reference to the statutory or constitutional authority of the Commission to take the action requested: The authority cited by the Commission for the regulatory provision sought to be amended includes: Fish & Game Code §§ 200, 202, 203, & 240. However, as explained below, it is unclear whether those cited statutes in fact confer on the Commission authority to adopt the provision in question in the first place, meaning it may be invalid per se.

3. Overview (Required) - Summarize the proposed changes to regulations: Subsection (h) of Section 354, of Title 14, Division 1, Subdivision 2, Chapter 3, of the California Code of Regulations ("Section 354(h)") provides that for big game "archers may not possess a firearm while hunting in the field during any archery season, or while hunting during a general season under the provisions of an archery only tag." The only exceptions to this restriction are for: (1) the possession of a crossbow by a person issued a Disabled Archer Permit (Section 354(g),(j)); and (2) current and honorably retired peace officers who are hunting deer during an archery season (California Fish & Game Code section 4370).

Petitioners seek to have Section 354(h) amended to limit its general restriction on firearm possession to apply only to firearm "use" so that mere possession is not prohibited or, alternatively, to at least add language specifically exempting those with a valid carry concealed weapon license from its restriction, as is already the case for archery hunting for small game (see Section 311(k).)

4. Rationale (Required) - Describe the problem and the reason for the proposed change: Section 354(h) should be amended as petitioners request because its current blanket restriction on possessing a firearm while archery hunting for big game is not only bad (and potentially life-threatening) policy, but is also likely illegal.



Improper Regulation

The Administrative Procedures Act (“APA”) governs the rule-making processes of the Commission. Under the APA, the validity of a regulation is evaluated by: necessity, authority, clarity, consistency, reference, and non-duplication. (Cal. Gov’t. Code § 11349.1). A key purpose of the APA is to limit an agency to adopting only regulations “within the scope of the authority conferred” that are necessary and “consistent and not in conflict with [any] statute . . .” (Cal. Gov’t. Code §§ 11342.1–11342.2).

In applying the APA’s criteria, Section 354(h) suffers three deficiencies: (1) there is no authority for it; (2) it lacks consistency with general law; and (3) it is not necessary.

Lack of Authority

Under the APA, “authority” is defined as “the provision of law which permits or obligates the agency to adopt, amend, or repeal regulation.” Cal. Gov’t Code § 11349(b). The only provision cited by the Commission as its basis for authority to adopt Section 354 that is potentially relevant here is subsection (d) of Fish & Game Code § 203, which permits the Commission to prescribe “the manner and the means of taking” animals. “Taking,” in this context, is defined as “hunt, pursue, catch, capture or kill game or attempt to hunt, pursue, catch, capture or kill game.” Cal. Fish & Game Code § 86.

Section 354(h) categorically prohibits firearm possession while archery hunting—a context unrelated to the “manner” or “means” of “taking” game. The mere presence of a firearm alone has no effect on game. It does not give a hunter any type of unfair advantage per se nor does it cause any harm to game, unless the firearm is improperly *used*, which conduct the Commission may, and already does, regulate because such qualifies as a “means” of “taking” game. *See*, e.g., Cal. Code Regs. tit. 14, §§ 311(k) (prohibiting use of firearm for hunting small game during archery season); and 507 (prohibiting use of shot size larger than No. BB for taking of migratory game birds).

Thus, Section 354(h) exceeds the scope of the Commission’s regulatory authority. But, even if the Commission has the authority to adopt such a regulation, Section 354(h) is nevertheless invalid because it negates provisions of statutes that preempt it and it is unnecessary.

Inconsistency

Under the APA, the term “consistency” is defined as “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” Cal. Gov’t Code § 11349(d). Agency regulations that conflict with statutory law (i.e., lack “consistency”) are void. *Assn. For Retarded Citizens v. Dept. of Developmental Services*, 38 Cal. 3d 384, 391 (1985); *accord Credit Ins. Gen. Agents Ass’n v. Payne*, 16 Cal. 3d 651, 656 (1976); *Agric. Labor Rels. Bd. V. Super Ct.*, 16 Cal. 3d 392, 419 (1976) (citing *Morris v. Williams*, 67 Cal. 2d 733, 737 (1967)). This doctrine has frequently been invoked to strike down administrative regulations in conflict with the statute creating the agency or a statute the agency is authorized to administer; however “the principle is equally applicable when the regulation contravenes a provision of a different statute.” *Agric. Lab Rel. Bd.*, 16 Cal. 3d at 420.

California Penal Code sections 26150 and 26155 exempt the holders of a concealed carry license (“CCW”) from California’s restrictions on carrying firearms in public. Those sections, along with Penal Code § 26200, confer on Sheriffs and Police Chiefs the exclusive authority to determine who is entitled to a CCW and with what restrictions. By adopting Section 354(h), the Commission has effectively



usurped the statutory authority of those Sheriffs and Police Chiefs by placing restrictions on CCWs that they did not authorize, thereby improperly conflicting with Penal Code sections 26150, 26155, & 26200.

Additionally, Penal Code section 25640 expressly exempts anyone engaged in hunting from section 25400's general prohibition on carrying a concealed firearm in public. Section 354(h) disallows such carrying and thus directly and improperly conflicts with section 25640. *See Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 911 [70 Cal.Rptr.3d 324, 335] (finding an ordinance preempted, in part, because it "would prohibit the possession of handguns by City residents even if those residents are expressly authorized by state law to possess handguns for self-defense or other lawful purposes").

Because Section 354(h) conflicts with general provisions of California law concerning the lawful possession of firearms, it is void and unenforceable and the Commission must amend it. Even if it was not in conflict, Section 354(h) is nevertheless unnecessary.

Lack of Necessity

Under the APA, the term "'Necessity' means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion." Cal. Gov't Code § 11349(a).

The obvious (and understandable) purpose of Section 354(h) is to prevent the illegal and unfair taking of big game with a firearm during archery season. While well-intentioned, however, it is not necessary. Prohibiting the *use* of a firearm, while allowing the lawful possession of one, as petitioners request, is sufficient to achieve that goal. There is no "need" to go the next, excessive step of restricting firearm possession by all archers, the vast majority of whom simply want a means to adequately defend themselves, solely based on the hope that doing so will prevent poaching. Nothing in the record of the rulemaking process for Section 354(h) suggests otherwise.

Ironically, a poacher walking around the woods with no license and a firearm (especially a sidearm) during archery season could escape liability under Section 354(h) more easily than a legitimate archery hunter because the poacher would probably not have a license or an archery tag in the first place, making it hard to prove he is pursuing game. Moreover, any warden talented enough to get the job can tell whether an animal has been shot by an arrow or bullet and, if the latter, whether the shot was made in self-defense or offensively.

Unconstitutionality

The Supreme Court has held that the Second Amendment right to keep and bear arms is a fundamental, individual right that includes at its core the right of law-abiding, competent adults to "possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). It is improper for the Commission to require archers to forfeit their right to armed self-defense solely as a precaution against the *potential* misuse of the firearm they wish to carry.



Bad Policy

Setting aside legal questions, it is simply dangerous and wrong to have people out hunting, often alone and isolated, without an adequate means to protect themselves from dangerous predators and criminals. This is an issue more so than ever, with the increase of illegal marijuana grows in popular hunting areas that are often patrolled by armed gang members willing to violently defend their crops, as well as the influx of apex predators like bears and mountain lions, and now wolves, due to legal restrictions on hunting them and managing their populations.

Conclusion

For the above stated reasons, NRA and CRPA urge the Commission to accept this Petition and open the rulemaking process for a regulation that amends Section 354(h) to replace the word “possess” therein with the word “use” and add the phrase on the end: “, unless to protect archer from an immediate threat of great bodily harm or death by a person or animal.”

Alternatively (or additionally), Petitioners urge that Section 354(h) should be amended to add the following provision:

“Nothing in this section shall prohibit the lawful possession of a concealed firearm by an active peace officer listed in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code or a retired peace officer in lawful possession of an identification certificate issued pursuant to Penal Code Section 25455 authorizing the retired officer to carry a concealed firearm. Nor shall this section prohibit the lawful possession of a concealed firearm pursuant to a concealed carry permit issued pursuant to Penal Code Section 26150 or 26155.”

(*See, e.g., Cal. Code Regs. tit. 14, §§ 311(k) & 550.*)

The addition of this provision makes clear that peace officers and anyone with a valid CCW are not subject to any restriction on the carrying of firearms in Section 354(h). While there is reason, both legal and practical, to allow all people to carry firearms in the situations Section 354(h) prohibits, this amendment would at least avoid the direct conflict with CCW holders.

SECTION II: Optional Information

5. Date of Petition: February 2, 2017

6. Category of Proposed Change

- Sport Fishing
- Commercial Fishing
- Hunting
- Other, please specify: [Click here to enter text.](#)



- 7. **The proposal is to:** (*To determine section number(s), see current year regulation booklet or <https://govt.westlaw.com/calregs>*)
 - Amend Title 14 Section(s): Section 354, subsection (h)
 - Add New Title 14 Section(s): *Click here to enter text.*
 - Repeal Title 14 Section(s):

- 8. **If the proposal is related to a previously submitted petition that was rejected, specify the tracking number of the previously submitted petition** *Click here to enter text.*
Or Not applicable.

- 9. **Effective date:** If applicable, identify the desired effective date of the regulation. If the proposed change requires immediate implementation, explain the nature of the emergency: This is not an emergency. But, the effective date of this regulatory change should be made at the Commission’s and Department’s earliest convenience to avoid any unnecessary episodes of archers being unable to defend themselves while hunting.

- 10. **Supporting documentation:** Identify and attach to the petition any information supporting the proposal including data, reports and other documents: *Click here to enter text.*

- 11. **Economic or Fiscal Impacts:** Identify any known impacts of the proposed regulation change on revenues to the California Department of Fish and Wildlife, individuals, businesses, jobs, other state agencies, local agencies, schools, or housing: None known.

- 12. **Forms:** If applicable, list any forms to be created, amended or repealed:
Click here to enter text.

SECTION 3: FGC Staff Only

Date received: *Click here to enter text.*

FGC staff action:

- Accept - complete
- Reject - incomplete
- Reject - outside scope of FGC authority

Tracking Number

Date petitioner was notified of receipt of petition and pending action: _____

Meeting date for FGC consideration: _____

FGC action:

- Denied by FGC
- Denied - same as petition _____

Tracking Number

- Granted for consideration of regulation change