

California Fish and Wildlife Strategic Vision Project

Statutes and Regulations Notes for January 18 Discussion Topic Meeting

January 18, 2012

On January 11, 2012 the California Fish and Wildlife Strategic Vision (CFWSV) Blue Ribbon Citizen Commission (BRCC) and Stakeholder Advisory Group (SAG) met for a statutes and regulations discussion topic meeting. Individual BRCC and SAG members, as well as participating California Department of Fish and Game (DFG) and California Fish and Game Commission (F&GC) employees, volunteered to develop text for potential recommendations to be considered by the BRCC/SAG; this document captures the discussion that took place on January 18, 2012 regarding the potential recommendations.

General Notes

Potential recommendation #1 is also included in the governance homework and should probably be combined at some point. Perhaps a statement on Friday that two groups made similar recommendation. Details of “how” need to be worked out, but at a strategic level have a strong recommendation (clean up code and Title 14).

Law Revision Commission question. Who can make the request? If it is only the legislature, then we don't currently say that in the text. Is this the pre-work portion of the work that needs to take place and add a bullet about making request to the legislature?

Potential Statutes and Regulations Recommendations

Regulations unit: Create a unit with DFG and F&GC staff to develop regulations. (This was inadvertently left in the document and should be removed.)

Discussion: Note that DFG strongly recommends establishing this unit; some participants were not comfortable with the specificity and would like additional discussion. DFG staff clarified that this is intended to be a separate, small group with expertise in regulatory process to allow for robustness and quality control, rather than relying on scientific staff who are experts on other issues. Suggest this be discussed in greater detail after Feb. 3.

Permit communication: A-9, G-14, H-4, H-6 (this was inadvertently left in the document and should be removed)

Discussion: Participants in the statutes and regulations discussion desire to use this language and take it to the participants of the governance discussion to request potential combination with potential mandates recommendation #1. The text below is slightly revised and notes are added from the subsequent governance discussion.

Potential Statutes and Regulations (and Governance) 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; (5) restructure codes to group similar statutes and regulations; and (6) pursue other opportunities for amendment, repeal, consolidation, and simplification of sections of the code.

Discussion: Participants in the governance homework discussion desire to remove item #6 from the recommendation as it appears to be too general and broad; may be more appropriate for the mandates recommendations.

Implementation recommendations include:

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

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 consist of a representative each from the DFG Legislative Office, the DFG Office of General Counsel, and the DFG Law Enforcement Division, as well as several (4-6) individuals from different programs within DFG (e.g., wildlife, fisheries, marine, habitat conservation, etc.) to review the DFG/F&GC portions of Title 14 of the California Code of Regulations and, subsequently, the California Fish and Game Code.

Because there are numerous regulations within Title 14 that address matters more appropriately dealt with in the Fish and Game Code, it may be advisable to review Title 14 first and, in so doing, prepare a list of sections to delete from Title 14 and add to the Fish and Game Code. Proceeding in this manner may also reduce the scope of substantive amendments to Title 14, which, unlike revising the Fish and Game Code, requires costly and time-consuming compliance with the California Environmental Quality Act.

At the outset of this process and periodically throughout, the work group would meet with stakeholders to ascertain their opinions and suggestions for amending, repealing, consolidating, and simplifying the codes. For particularly complicated or controversial areas, it may be useful to establish ad hoc groups comprised of both DFG staff and stakeholders to work through possible revisions. The work group would also consult with and utilize other DFG staff as needed and, where appropriate, with representatives of state and federal agencies with parallel or overlapping jurisdiction to identify opportunities to coordinate different statutory schemes. Coordination with other agencies should also look at eliminating duplicative mandates (8E:2).

The work group would ultimately prepare a proposed plan for revising the codes. Although the subject-

matter expertise of DFG staff and stakeholders would be critical at the earlier phases, it is advisable to consult the California Law Revision Commission (CLRC) early in the process to ensure the approach followed is appropriately structured to facilitate a large-scale code revision. At a minimum, once the plan is prepared and approved by DFG management the work group would consult and work with CLRC to determine the best approach to and to draft the actual code revision to follow.

This process could also proceed in phases by focusing first on less controversial and complicated areas such as redundancies and regrouping code sections and then proceed to more difficult issues like merging parallel processes (e.g., consolidating the California Environmental Quality Act, the Native Plant Protection Act, and the fully protected statutes). Ultimately, simplified regulations will make it easier to communicate and improve compliance (8A:7).

Finally this recommendation only addresses review of existing regulations and code. Further discussion is necessary to improve the regulatory development process for DFG/F&GC and stakeholders.

Implementation Assessment

- Method: Administrative, regulatory, statutory
- Timeline: Medium-term/long-term
- Level of likely BRCC/SAG agreement: High / top 1-3

Ties to Strategic Vision: Goal 3, objectives 1 and 3

Potential Statutes and Regulations Recommendation #2a: Make statutory changes to the California Endangered Species Act (CESA) to improve the permitting process: Uniformity in permitting process, efficiency in permitting, consistency in the application of CESA standards, and opportunity for applicants to appeal DFG decisions

Discussion: Additional input received from DFG staff regarding Title 14, 783.8, which is the appeals section (internal). See:

14 CCR § 783.8

Cal. Admin. Code tit. 14, § 783.8

Title 14. Natural Resources

Division 1. Fish and Game Commission-Department of Fish and Game

Subdivision 3. General Regulations

Chapter 6. Regulations for Implementation of the California Endangered Species Act

[Article 1](#). Take Prohibition; Permits for Incidental Take of Endangered Species, Threatened Species and Candidate Species

§ 783.8. Reconsideration and Appeal Procedures.

Suggestion was made that this recommendation does not get to the heart of the problem, which was stated as species are not being listed and therefore resources not being protected. Concerns voiced about the specific implementation recommendations.

Implementation recommendations include:

- Provide the ability for DFG to allow incidental take for threatened species through regulations (as opposed to individual permits), similar to federal 4(d) rule and incidental take for candidates. (Discussion: Include with recommendation now)
- Create an internal appeals process that an applicant can invoke when unable to reach agreement on terms for an incidental take permit. (Discussion: Include with recommendation now)
- Allow arbitration similar to 1600 arbitration for incidental take permits issued under CESA (consistency of application of standards). (Discussion: Include as high priority for discussion after Feb. 3.)

Potential Statutes and Regulations Recommendation #2b: Make statutory changes to the California Endangered Species Act (CESA) to improve the listing process

Staff Note: This recommendation was not discussed in any detail during the discussion meeting.

Implementation recommendations include:

- Require peer review during DFG's petition evaluation and candidate status review. Allow time necessary for peer review in statutory timelines.
- Allow F&GC to consider a species' federal listing status when evaluating the need for listing.

Description: The intent of this action is to improve the listing process under CESA, coordination between DFG and U.S. Fish and Wildlife Service and National Marine Fisheries Service, permitting process for regulated entities, and reduce DFG staff workload.

Implementation Assessment

- Method: Regulatory, statutory
- Timeline: Medium-term
- Level of likely BRCC/SAG agreement:

Ties to Strategic Vision: Goal 2, Objective 7; Goal 3, objectives 1 and 3; Goal 4, objectives 1 and 2.

Potential Statutes and Regulations Recommendation #3: Allow the incidental take of fully protected species following review and under specified circumstances.

Implementation recommendations include:

- Reviewing status of fully protected species to determine the need for protection.
- Eliminate fully protected status or alternatively list under CESA depending on status review.

Description: The fully protected species statute is outdated and needs addressing. Until the statutory change made in 2011, there was no way to allow for take of fully protected species. This caused challenges for projects throughout California and deterred habitat improvement projects that could benefit fully protected species because of the risk of take during the restoration project. While some would support abolishing the fully protected species statutes completely, broader support could be gained by moving species needing protection to CESA and eliminating it for those that don't need protection. However, it would be much easier for DFG if the statutes were eliminated, rather than requiring the review and listing of current fully protected species.

Implementation Assessment

- Method: Statutory and possibly administrative
- Timeline: Mid-term / long-term
- Level of likely BRCC/SAG agreement: Moderate to high

Ties to Strategic Vision: Goal 3, Objective 3; Goal 4, Objective 2

Potential Statutes and Regulations Recommendation #4: All DFG policies are written and employees are trained in the proper implementation of policies.

Implementation recommendations include:

- Identify all unwritten policies
- Formalize all policies in writing.
- Make written policies accessible to the public, including posting to the Internet and allowing for public comment during policy development.

Description: Currently there seems to be significant differences between regions on permitting standards. There are also instances of policies changing seemingly overnight when employees change. This is concerning to stakeholders and diminishes trust in DFG and its decisions. Ensuring all policies are in writing will improve transparency and improve the permitting process by allowing regulated entities to understand what will be asked of them when they apply for a permit.

Implementation Assessment:

- Method: Administrative, statutory
- Timeline: Mid-term
- Level of likely BRCC/SAG agreement: High

Ties to Strategic Vision: Goal 2, Objective 7; Goal 4, Objective 2

Potential Statutes and Regulations Recommendation #5: Amend streambed alteration agreement statutes to allow for programmatic streambed alteration agreements and amend fee structure to incentivize habitat restoration projects.

Implementation recommendations include:

- Amend Section 1600 et seq. of the California Fish and Game Code to explicitly create a programmatic streambed alteration agreement.
- Amend regulatory fee schedule for streambed alteration agreements to incentivize habitat improvement projects.

Discussion: Potential recommendation #5 is already captured in potential compliance recommendation #3. No need to duplicate here; remove.

Description: Currently habitat improvement projects pay the same fees to obtain a streambed alteration agreement as all other projects, despite the fact that these projects help DFG achieve its mission. Often improvement projects in riparian areas are implemented by more than one landowner through the engagement of a resource conservation district. Creating a simple programmatic agreement, with a low fee, would simplify the permitting process for these beneficial projects and allow more to happen. The fee for programmatic agreements needs to be low and DFG needs to keep its costs low on these agreements because other agreement holders will be unsupportive of subsidizing the cost of programmatic agreements.

Discussion: The description language under potential permitting recommendation #3 should include new language: "The fee for programmatic agreements needs to be low and DFG needs to keep its costs low on these agreements. The costs of the programmatic agreements should not be passed onto other users."

Implementation Assessment

- Method: Regulatory, statutory
- Timeline: Mid-term
- Level of likely BRCC/SAG agreement: Mid to High

Ties to Strategic Vision: Goal 2, objectives 1 and 2; Goal 4, Objective 2

Potential Statutes and Regulations Recommendation #6: Create a statutory CEQA exemption for small scale habitat improvement projects and investigate other projects where a targeted CEQA exemption would be valuable.

Discussion: This should be combined with compliance potential permitting recommendation #3. Add a new bullet that says "Investigate other projects where a targeted CEQA exemption would be valuable."

In addition, the description language should be combined with the description language in potential permitting recommendation #3. Combine the goals and objectives for both.

Description: There is currently a categorical exclusion under CEQA for small scale habitat improvement projects. However the exclusion is not useable in areas in or near the habitat of listed species. Many of these improvement projects are designed to improve habitat for listed species rendering the categorical exclusion useless. The statutory exemption would need to include a much wider range of improvement projects to make it worthwhile. There are other projects permitted by DFG where discussion would be valuable regarding agreement on other targeted statutory CEQA exemptions.

Implementation Assessment

- Method: Statutory
- Timeline: Mid-term
- Level of likely BRCC/SAG agreement: Medium to High

Ties to Strategic Vision: Goal 2, objectives 1 and 2; Goal 4, Objective 2