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July 11, 2014

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VIA EMAIL & U.S. POST
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California Fish & Game Commission
P.O. Box 944209
Sacramento, CA 94244-2090

Re: Request Wildlife Resources Committee Procedure and Meeting Protocols Be Put In Place *Before* That Committee Makes Any Recommendations to the Fish & Game Commission

Honorable Commissioners:

We write on behalf of our client the National Rifle Association.

Recently while conducting meetings, the Commission and the WRC have blurred the lines between a true Commission hearing, where policy decisions can legally be made and official actions can be taken, and WRC meetings where apparently the only action possible is the WRC making a recommendation for the Commission to consider. This letter is a formal request that the Fish & Game Commission (Commission) require the Wildlife Resources Committee (WRC) to establish and publicize rules and procedures under which it will operate before the WRC takes any further substantive action, and that such procedural rules be vetted through the normal regulatory approval process before they become effective.

1. The Commission is Sending Mixed Signals About the Authority of the WRC

There is confusion about the role and authority of the WRC because at Commission and WRC meetings, the Executive Director, as well as Commissioners Sutton and Baylis, have inaccurately stated that WRC meetings are a form of, or can operate as, official Commission meetings. The Commissioners and Commission staff have also made numerous other confusing and conflicting comments about the role, limitations, and procedural rules of the WRC. Commissioner Sutton said that the WRC meetings are of an "informal nature." But there has been no clarification about whether

the WRC is going to be the only opportunity for public comment on issues raised at WRC meetings, or if the public will have opportunity to comment on all issues agendized for Commission meetings, even if that issue was already discussed (or not) at a WRC meeting. This is compounded by the fact that WRC meeting videos are not available online, notwithstanding multiple requests from various segments of the stakeholder community for that type of access.

If the WRC meeting will provide for a longer format pre-discussion of a discussion that will take place again before the full Commission, then no binding action (other than perhaps a recommendation to the Commission action) takes place at a WRC meeting. If that is the case, then the Commission should say so unequivocally. This clarification would drastically reduce the amount of confusion being created by the uncertain state of the WRC's procedures and its authority.

2. *The Commission Must Establish Procedural Rules for the WRC Before It Allows the WRC to Address Substantive Issues*

Based on the recently released agenda for the July 28, 2014, WRC meeting, it appears that the Commission is moving forward with potentially substantive decision making at the upcoming next WRC meeting, even though the procedures for how the WRC will operate, and significantly, how the public can participate in WRC meetings, have not been publicized and apparently do not exist. Because there is no system or procedures in place, our clients, other stakeholders, and the interested public are unable to effectively participate in the rule and policy making process.

This office sent the Executive Director of the Commission a letter on April 14, 2014, raising concerns that the previously proposed WRC rules would be improper as "underground regulations." That letter also outlined nine other specific issues that are confusing or otherwise unclear as to plans for the future operation of the WRC. A copy of the letter is attached.

Our office recently followed up with the Executive Director about that letter. We were informed that the Commission has addressed the concerns raised our letter of April 14, 2014. We respectfully disagree. No new proposed procedural rules have been published, nor have we received a response letter addressing the issues noted in the letter of April 14, 2014.

So we now ask the Commission to please tell us; how have our client's concerns as recited in our April 14, 2014 letter, been addressed?

3. *The Commission Seems Biased, Favoring Participation by Anti-Hunting Groups Over Pro-Hunting Groups*

Holding WRC meetings without established procedures facilitates the impression that different rules apply to different stakeholders. Certain stakeholders appear to have more access and to information about WRC activities and plans. This not only creates an appearance of impropriety and fosters an antagonistic situation, it will result in increased investigations by watchdog associations suspecting bias in the way the Department and Commission are conducting their affairs.

If published rules are put in place, it would not only provide some clarity, it would also help limit unfair treatment, reduce the appearance of bias or conflicts of interest, alleviate concerns of bias,

and facilitate a more productive regulatory process.

4. Stakeholder Presentation Materials Should Be Made Publicly Available Well Before WRC Meetings

Furthermore, it was only because this office asked the Executive Director that we found out that the deadline for making a request to make a presentation at the July 28, 2014, WRC meeting was July 7, 2014. Assuming this was a deadline that was applicable to all who wanted to make a presentation to the WRC, shouldn't it have been publicized? And if that deadline did not apply to every group that wanted to make a presentation, our clients object to any content-based scheduling advantage that is being granted to other stakeholders.

If the purpose of the WRC is to have the most enlightened discussion possible concerning issues headed to the full Commission for consideration, then stakeholders and the public should not be surprised by new information presented for the first time at WRC meetings when there is no opportunity to prepare a rebuttal.

It is our understanding that there is a currently unwritten rule that presenters at WRC meetings are required to give the Executive Director a copy of presentation materials a few weeks prior to the WRC meeting. Though our clients don't necessarily agree with such a rule, if it is going to be enforced, why couldn't that information be circulated publicly beforehand?

5. The Commission's Attempt to Create an "Alternate" WRC Member Is Disconcerting

Another unsettled and troubling issue related to the WRC is the attempt (foiled by a loss of quorum at the June 4, 2014, meeting of the Commission) to create an "alternate" WRC "member" position. By law, the WRC is only required to have one member, so the claim that two members are need for meetings is inaccurate. Fish & Game Code § 106 ("The commission shall form a wildlife resources committee from its membership consisting of at least one commissioner.").

The WRC has *two* committee "members," Commissioners Kellogg and Baylis. If only one of committee "members" is unable to attend a WRC meeting, there is still no quorum or other procedural limitation that prevents a single WRC committee member from going forward with a WRC meeting.

The fact that some Commissioners are pushing very hard to have a third Commissioner appointed as a "member" to the WRC, even though there is no need to do so, raises concerns that by having three Commissioners at WRC meetings, those Commissioners would then attempt to act as the Commission and take a binding vote on Commission business.

At the January 15, 2014, WRC meeting, both the Executive Director and Commissioner Baylis indicated that had the three Commissioners present at that meeting wanted to, they could have acted as the Commission (an assertion we vigorously disagree with). Though the January 15, 2014, meeting was technically a Commission meeting, it was also an illegal meeting because it was not properly noticed as a Commission meeting.

If the Commission tries to use a noticed WRC meeting as an opportunity to take a Commission

vote on a controversial topic, that will result in litigation.

The Commission should consider the implications of the WRC's current methods of operation, and should draft a new set of proposed procedures for the WRC. In doing so, the "alternate" issue should be resolved.

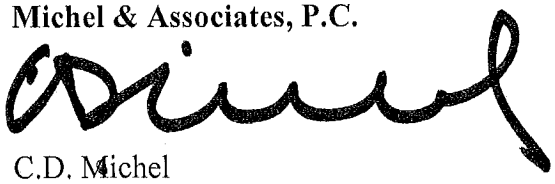
6. Reservation of Rights

Because it is not clear to us what the limitations are about making comments at the upcoming WRC and at later, related Commission meetings, our clients expressly reserve all rights to make a comment/presentation and at the July 28, 2014, WRC meeting and the August 6, 2014 Commission meeting, regardless of whether our client participates in one or both of these meetings.

7. Conclusion

The next WRC meeting should be used to formalize a set of proposed procedural rules that can be reviewed and approved by the Commission through its normal regulatory process. Otherwise the WRC's actions will continue to cause stakeholders and the public to believe that the Commission has lost its objectivity, and that it is now a biased politicized body. This directly conflicts with the reason the Commission was created in the first place. See *Young v. Dep't of Fish & Game*, 124 Cal. App. 3d 257, 273 (1981) (noting that the constitutional amendment that resulted in the Commission being a constitutional body "was to remove the old Fish and Game Commission from political influence").

Sincerely,
Michel & Associates, P.C.



C.D. Michel

CDM/smf

Enc.: April 14, 2014 Letter

cc: Sonke Mastrup
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April 14, 2014

VIA EMAIL, U.S. POST & HAND DELIVERY

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Re: Comments on Proposed Regulations and Notice of Improper Wildlife Resources Committee Procedures

Dear Mr. Mastrup:

We write on behalf of our client, the National Rifle Association of America, to comment on proposed policies and to notify you of apparent improprieties in the proposed adoption of policy and procedures related to the Wildlife and Marine Resources Committee (respectively "WRC" and "MRC").

The agenda for the Fish & Game Commission ("Commission") meeting of February 5, 2014, includes the following agenda item: "DISCUSSION OF DRAFT POLICY AND PROCEDURES FOR WILDLIFE AND MARINE RESOURCES COMMITTEES" (the "Draft") A copy of the Draft is available at http://www.fgc.ca.gov/meetings/2014/feb/proposed_committee_procedures.pdf.

The Draft, as written, is a "regulation[1]" under state law. So the Commission appears to be

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[1] Government Code section 11342.600 states, in its entirety,

'[r]egulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

Further, as used in section 11342.600, the term "state agency" includes every state commission. Gov't

improperly attempting to create "underground regulations[,]" i.e., regulations that are not valid because they were not adopted in accordance with the proper procedural guidelines.

I. The Proposed Procedures Must Be Properly Enacted Before They Can Be Implemented

California law is clear about the prohibition on the issuance or use of underground regulations:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Gov't Code § 11340.5(a).

Case law confirms that the proposed rules in the Draft would be improper "underground regulations" if they arose as part of the implementation of the duties created by Fish and Game Code section 105 and 106, which, respectively, created the MRC and WRC. *See Engelmann v. State Bd. of Educ.*, 2 Cal. App. 4th 47, 62 (1991) (holding Board of Education was required to go through rule making process found in the Administrative Procedures Act when creating the guidelines and manuals for the mutli-level review process used for selecting the textbooks that could be used in public schools).

Accordingly, the Commission should follow normal regulatory standards (e.g., a series of three properly noticed Commission meetings used to introduce, discuss, and vote on a proposed regulation that was noticed via publication in the state's Regulatory Notice Register) to move forward with the creation of the proposed policies/regulations. Once the proper process has been complied with and the regulations have been filed with the Secretary of State, only then can the regulations be relied upon by the WRC.

II. Substantive Comments Regarding the Proposed Regulations

1. Based on the lack of notice regarding the formation and dissolution of the Predatory Policy subcommittee, it is clear the WRC needs rules to explain exactly how and when subcommittees will be formed. The Draft should be revised accordingly.

2. Fish & Game Code section 106 does not actually authorize or suggest the WRC is to perform its *own* meetings; the Commission should explain to the public why the Commission is going beyond its statutory mandate.

3. The WRC should have at least two members; there appears to be no difference between

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Code § 11000. Thus, the Commission is clearly a state agency for the purposes of section 11342.600.

a Commissioner's own abilities and a one-person WRC, and having two members will decrease the possibility of hasty or unfairly biased decision making.

4. The Draft should include a provision that, when the Commission makes its yearly appointment to the Committee, it should, to the extent practicable, appoint two WRC members who have differing backgrounds (e.g., a hunter and a member with non-hunting interests) to help ensure that recommendations have been "vetted" as much as possible before they get to the Commission.

5. Because the WRC is required to make recommendations (i.e., take "action[,]" as that term is defined in Government Code section 11122), that means final decisions will need to be made, which could be problematic if there are two Commissioners sitting on the WRC (e.g., a "tie"). The proposed regulations should address how any disputes between WRC members shall be resolved.

6. The WRC is, "to the extent practicable," to "attend meetings of the department staff, including meetings of the department staff with interested parties, in which significant wildlife resource management documents are being developed." Fish & Game Code § 106. Are these meetings all going to be open to the public and publicly noticed? Is there going to be a public record of these meetings occurring? If they are not, and further assuming the department has discretion as to who it meets with in private concerning the development of "significant wildlife resource management documents[,]" there are real transparency and equal access problems here.

7. Because the WRC was created by statute and because it includes more than one member, it is subject to the requirements of the Bagley-Keene Act. Gov't Code §§ 11121, 11123. Regardless, if it is the Commission's position is that the WRC, or any "subcommittees" it produces, will not be treated as if subject to the Bagley-Keene Act, the Commission should explain to the public the considerations that the Commission has found to outweigh the public's interest in open government.

8. Three Commissioners should never participate in any WRC meeting. The Draft obscures, at the least, the limits of Government Code section 11122.5(c)(2)(6). That section states:

> [a] majority of the members of a state body [e.g., the Commission] shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body . . . . The prohibitions of this article do not apply to . . . attendance of a majority of the members of a state body at an open and noticed meeting of a standing committee of that body, ***if*** the members of the state body who are not members of the standing committee attend only as observers.

(Emphasis added).

It seems, however, that someone within the Commission or related staff wants to blur the lines about non-committee member Commissioners attending committee meetings. This can be seen via a comparison of the Draft and the prior "approved" MRC rules previously posted on the Commission's website.

Compare the following.

- In the event that another Commissioner wishes to attend a meeting of the MRC, and there are two members of the MRC present at the meeting, that Commissioner may attend the meeting but must recuse himself or herself from any discussions related to Commission business. [2]

- Non-chair Commissioner [sic] may attend committee meetings.[3]

There is no legitimate reason to make this language *less* clear than it was in the prior draft. Further, it is debatable if the passage, as originally stated, is an accurate representation of the limitation stated in section 11122.5(c)(2)(6). Having three Commissioners on the dias during a committee meeting is inappropriate. If the Commission is going to have a meeting, it should be clearly noticed as a *Commission* meeting. History has show that non-committee Commissioners are likely going to speak at committee meetings even though doing so is patently inappropriate, and the rules should be absolutely clear to everyone, *including Commissioners and staff*, that non-committee Commissioners cannot legally speak at committee meetings.

9. WRC meetings should not be video recorded and posted on the internet. It was mentioned at the last WRC meeting that the cost of such service would be a problem. Though no actual cost information was provided, with the availability of YouTube and inexpensive digital cameras (perhaps even state-owned cellular phones), that statement is difficult to accept. Indeed, if the Commissioners and staff are all having travel costs reimbursed, it seems that the cost of video, which would *guarantee public access*, is likely much less than that which is already expended.

During the meeting of February 5, 2014, the Commission discussed the possibility of live-streaming WRC meetings. During that discussion, you mentioned that live-streaming meetings costs approximately six to eight thousand dollars per meeting, and the it was unclear if the Department of Fish and Wildlife had the money in its budget needed to live-stream the meetings. Because of the importance of public participation,

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[2] http://www.fgc.ca.gov/meetings/committees/MRCrulesandprocedures052213.pdf.

[3] http://www.fgc.ca.gov/meetings/2014/feb/proposed_committee_procedures.pdf.

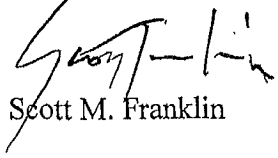
live streaming and later web access should be considered a priority.

10. To the extent that the Draft states committee meetings "may be taped and broadcast on the internet at the discretion of the Commission[,]" this provision should be clarified, as it can reasonably be interpreted as a prohibition on the public recording committee meetings, subject only to express permission of the Commission. *See* Gov't Code § 11124.1 (members of the public have the right to use a video recording device to record meetings of state bodies).

III. Conclusion

In summary, the Commission should incorporate all of the above comments into a new draft set of regulations that can be considered and adopted through the appropriate procedural mechanisms.

Sincerely,
Michel & Associates, P.C.



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