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February 6, 2015

California Fish and Game Commission
P.O. Box 944209
Sacramento, CA 94244-2090
VIA FAX (916) 653-5040 & E-MAIL

**Re: Petition for the Fish and Game Commission to Amend Section 311 of Title 14,
Division 1, Subdivision 2, Chapter 2, of the California Code of Regulations**

Dear Honorable Commissioners:

This petition, submitted by the National Rifle Association (“NRA”) and the California Rifle and Pistol Association (“CRPA”) pursuant to Government Code sections 11340.6 and 11340.7, requests that the California Fish & Game Commission (the “Commission”) amend section 311 of Title 14, Division 1, Subdivision 2, Chapter 2, of the California Code of Regulations (“CCR”) as described below.

I. STANDING OF PETITIONERS

Petitioner NRA is an Internal Revenue Code § 501(c)(4) nonprofit corporation, incorporated in the State of New York in 1871, with principal offices and place of business in Fairfax, Virginia. NRA has approximately five million members, including hundreds of thousands of members who reside in California.

The founders of NRA desired to create an organization dedicated to marksmanship, or, in the parlance of the time, to “promote and encourage rifle shooting on a scientific basis.” NRA’s bylaws, at Article II, Section 5, state that one of the purposes of NRA is “[t]o promote hunter safety, and to promote and to defend hunting as a shooting sport and as a viable and necessary method of fostering the propagation, growth, conservation, and wise use of our renewable wildlife resources.”

Petitioner CRPA is a nonprofit membership organization classified under section 501(c)(4) of the Internal Revenue Code and incorporated under the laws of California, with headquarters in Fullerton, California. Founded in 1875, the CRPA seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA regularly participates as a party or amicus in litigation challenging unconstitutional or illegal gun-control laws on behalf of its tens of thousands of California resident members. The CRPA works to preserve the constitutional and

statutory rights of gun ownership for its members, including the right to self-defense, the right to hunt, and the right to keep and bear arms.

Both Petitioners have been a party to or supported multiple lawsuits throughout the nation supporting and defending the Second Amendment and statutory rights to keep and bear firearms. *See Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014); *McKay v. Hutchens* (9th Cir., Case No. 12-57049). Indeed, preservation of the hunting, sport-shooting, and self-defense traditions protected by those rights is a key function for both NRA and CRPA.

Because Petitioners have an established record of advocating on behalf of their members against improper restrictions on hunting and self-defense, they have standing to make the requested regulatory changes.

II. REQUESTED ACTION

Petitioners hereby request the Commission amend section 311 of Title 14, Division 1, Subdivision 2, Chapter 2, of the CCR, as follows:

- (1) Strike subsection (k) of section 311 in its entirety;
- (2) Insert the language of CCR, Title 14, Division 1, Subdivision 2, Chapter 8, section 550(cc)(l) as a new subsection of section 311;¹ and
- (3) Remove each of the two appearances of the word “possessed” from subsection (b) of section 311.

III. JUSTIFICATION FOR THE REQUESTED ACTIONS

A. Subsection (k) of Section 311 Must Be Struck in its Entirety Because it Exceeds the Commission’s Scope of Regulatory Authority and Conflicts with California Laws Authorizing the Possession of Firearms

The Administrative Procedure Act (“APA”) governs the rulemaking processes of government agencies, including the Commission. Under the APA, the validity of an agency’s proposed regulations is evaluated by: necessity, authority, clarity, consistency, reference, and nonduplication. Cal. Gov’t Code § 11349.1. Thus, a key purpose of the APA is to limit an agency’s authority to adopt only those regulations “within the scope of the authority conferred” and “consistent and not in conflict with [any] statute . . .” Cal. Gov’t Code §§ 11342.1-11342.2.

The provision Petitioners seek to have stricken provides that “[a]rchers hunting during any archery season may not possess a firearm while in the field engaged in archery hunting during an archery season.” Cal. Code Regs. tit. 14, § 311(k).

This section constitutes a total ban on the carrying of arms by archery hunters, without providing any exception. As explained below, the Commission does not have the authority to regulate

¹ Assuming subsection (k) is stricken and all other subsequent subsections would slide up one section letter, then this new subsection would be subsection (o).

the possession of firearms unrelated to the “taking” of animals and such a restriction prohibits the carrying of arms where state law permits doing so and is thus not consistent with general state laws.

1. Subsection (k) of Section 311 Exceeds the Scope of Regulatory Authority Delegated to the California Fish and Game Commission

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). California Fish & Game Code section 200 confers on the Commission the authority to adopt regulations. And the scope of the Commission’s authority to adopt such regulations is outlined in California Fish and Game Code section 203.² In relevant part, section 203 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.

Although the Commission likely has authority to regulate possession of things that by their presence alone affect the “taking” of game (e.g., attracting scents), this is not such a situation. California Code of Regulations section 311(k) categorically prohibits firearm *possession* while archery hunting—a context unrelated to the “manner” or “means” of “taking” game. The mere presence of a firearm while engaged in archery hunting alone has no effect on game. Firearm possession while archery hunting does not give a hunter any type of unfair advantage, for example, by attracting game to the hunter. Further, no harm to game is caused 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 (prohibiting shot size larger than No. BB for taking of resident upland game birds); Cal. Code Regs. tit. 14, § 507 (prohibiting shot size larger than No. BB for taking of migratory game birds).

Thus, subsection (k) of section 311 should be struck in its entirety because it exceeds the scope of the Commission’s regulatory authority.

2. Subsection (k) of Section 311 Conflicts with Various Provisions of California’s Intricate Firearm Possession Legal Regime

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”)

² California Fish and Game Code section 203 confers on the Commission the authority to adopt regulations relating to animals such that it may:

- (a) Establish, extend, shorten, or abolish open seasons and closed seasons.
- (b) Establish, change, or abolish bag limits and possession limits.
- (c) Establish and change areas or territorial limits for their taking.
- (d) Prescribe the manner and the means of *taking*.
- (e) Establish, change, or abolish restrictions based upon sex, maturity, or other physical distinctions.

Cal. Fish & Game Code § 203 (emphasis added).

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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; *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 which created the agency or which 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 (emphasis added).

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 exclusively confer on Sheriffs and Police Chiefs the authority to determine who is entitled to a CCW and with what restrictions. Cal. Penal Code § 26200. The Commission has effectively usurped the statutory authority of those Sheriffs and Police Chiefs by nullifying the CCWs they issue in this context, thereby conflicting with the statutory intent of sections 26150 and 26155. Statutory authority aside, it is improper for the Commission to nullify CCWs while their holders hunt, because a CCW is not merely a privilege conferred on individuals by their respective Sheriffs. The Ninth Circuit has made clear that people have the right to bear arms in public and that the core of that right is self-defense. *Peruta*, 742 F.3d at 115 (stating that the right “is, and has always been, oriented to the end of self-defense.”). The forfeiture of such a right cannot be mandated as a precaution against the potential misuse of the firearm.

Additionally, Penal Code section 25640 provides an express exemption for anyone engaged in hunting from section 25400’s general prohibition on carrying a concealed firearm in public. Subsection (k) of Section 311 disallows such carrying and thus directly conflicts with the letter and spirit of section 25640.

Finally, Penal Code section 25850 expressly prohibits the carrying of loaded firearms “in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.” Section 17030 defines “prohibited area” as “any place where it is unlawful to discharge a weapon.” In other words, section 25850 allows for the carrying of loaded firearms in any “unincorporated territory” where it is lawful to discharge a weapon. California Code of Regulations section 311(k) categorically prohibits firearm possession while archery hunting. It is likely that a significant amount of lawful hunting is taking place in areas where it is lawful to discharge a firearm. Thus, section 311 criminalizes conduct the legislature intentionally made lawful.

Because subsection (k) of section 311 conflicts with general provisions of California law concerning the lawful possession of firearm, it is void and unenforceable and the Commission should repeal it.

B. The Commission Should Insert the Language of California Code of Regulations Section 550(cc)(1) Into Section 311

California Code of Regulations section 550(cc)(1) provides:

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.

Cal. Code Regs. tit. 14, § 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 311. While there is reason, both legal and practical, to allow all people to carry firearms in the situations Section 311 prohibits, this would at least avoid the direct conflict with CCW holders.

C. Each Appearance of the Word “Possessed” Should Be Removed From Subsection (b) of Section 311 Because There Are Lawful Purposes for Possessing the Prohibited Types of Shotgun Shells

Subsection (b) of section 311 of Title 14, Division 1, Subdivision 2, Chapter 2, of the CCR, currently provides:

Shotgun shells may not be used or possessed that contain shot size larger than No. BB, except that shot size larger than No. 2 may not be used or possessed when taking wild turkey. All shot shall be loose in the shell.

Cal. Code Regs. tit. 14, § 311(b).

The word “possessed” should be completely removed from this subsection. The problem with this particular provision in its current form is not so much a legal one as it is a practical one. People in the field hunting upland game birds may be legally allowed to hunt different game or non-game animals, e.g., hogs (see Cal. Code Regs. tit. 14, § 353(b) (allowing slugs and size 0 and 00 shot for certain game)), that require a different shotgun-shell load—one that is prohibited under subsection (b) of 311 – at the same time. This provision thus precludes lawful hunting. It is therefore overbroad in its effect and should be limited to only restrict the unlawful “use” of shotgun loads on respective game, and not, as is currently the case, restrict mere “possession” of certain shotgun shells that can be lawfully used for taking.

IV. THE COMMISSION HAS THE LEGAL AUTHORITY TO TAKE THE REQUESTED ACTION

The procedures and parameters for the Commission to amend or repeal regulations are set forth in Fish and Game Code sections 202, 207, and 240. As long as the Commission adheres to those sections in making Petitioners’ proposed amendments to section 311, the Commission is acting within its statutory authority.

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V. CONCLUSION

For the reasons stated herein, this Petition should be granted.

Sincerely,
Michel & Associates, P.C.

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

Sean A. Brady