

## STAFF SUMMARY FOR OCTOBER 7-8, 2015

**26. MEETING PROCEDURES****Today's Item**Information Action 

Authorization to publish notice of intent to change FGC meeting procedure regulations.

**Summary of Previous/Future Actions**

- |                                 |                                   |
|---------------------------------|-----------------------------------|
| • <b>Today's notice hearing</b> | <b>Oct 7-8, 2015; Los Angeles</b> |
| • Discussion hearing            | Dec 9-10, 2015; San Diego         |
| • Adoption hearing              | Feb 10-11, 2016, Sacramento       |

**Background**

Per direction received at the Feb and Aug 2015 FGC meetings, staff has prepared proposed regulations related to meeting procedures, which will do the following:

- Define the number of members constituting a quorum to conduct Commission and committee meetings;
- Allow commissioners who are not appointed members of a committee to attend committee meetings only as observers;
- Establish a deadline for public requests for meeting agenda items;
- Specify that agendas items will be approved by majority vote of the Commission;
- Specify that committee agenda items may not include items scheduled for action by the Commission, unless otherwise directed by majority vote of the Commission;
- Specify that the Commission president, vice president or their designee may amend meeting agendas;
- Establish a deadline, consistent with the Bagley-Keene Open Meeting Act, for public distribution of agendas;
- Outline the process and timeline for receipt of and action on WRC and MRC recommendations; and
- Specify the process for public participation in Commission and committee meetings including:
  - when public testimony will be taken;
  - appropriate public forum topics;
  - time limits for public comment at Commission meetings and methods the public may use to receive additional time;
  - when and how to submit written comments;
  - when and how to submit audio and visual presentations;
  - when and how to receive approval of audio and visual presentations by the executive director; and
  - disruptive behavior.

Staff requests feedback on any items of potential concern or additional items to include in the proposed regulations.

**Significant Public Comments**

1. Several comments recommending procedures for WRC meetings (Exhibits 3-7, 12)

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2. One comment recommending voting requirements in cases where only three commissioners are present, and requesting public forum be included as the first and last agenda items for each day of each meeting (Exhibit 8)
3. Two comments requesting that all FGC communications be made on government issued devices/servers (Exhibits 9-10)

**Recommendation**

Authorize publication of the notice.

**Exhibits**

1. Proposed regulatory text
2. Summary of public recommendations
3. Letter from Scott Franklin, Michel & Associates, P.C., representing the National Rifle Association of America (NRA), received Apr 14, 2014
4. Letter from C.D. Michel, Michel & Associates, P.C, representing NRA, received Jul 11, 2014
5. Letter from Ashlee Titus, Bell, McAndrews & Hiltachk, LLP, representing the National Shooting Sports Foundation (NSSF), received Jul 21, 2014
6. Letter from Dennis Anderson, Safari Club International, received Jul 14, 2014
7. Letter from C.D. Michel, Michel & Associates, P.C, representing NRA, received Jul 31, 2014
8. Email from Eric Mills, Action for Animals, received Jun 30, 2015 (also under item 23A)
9. Letter from C.D. Michel, Michel & Associates, P.C., representing NRA and California Rifle and Pistol Association, received Jun 5, 2015 (also under item 23A)
10. Letter from Trevor Santos, NSSF, received Jul 9, 2015 (also under item 23A)
11. FGC staff presentation
12. Letter from Sean Brady, Michel & Associates, P.S., representing NRA received Sep 24, 2015 (also under 23A)

**Motion/Direction**

Moved by \_\_\_\_\_ and seconded by \_\_\_\_\_ that the Commission authorizes publication of a notice of its intent to amend Section 665, Title 14, California Code of Regulations, regarding meeting procedures as recommended by Commission staff.

OR

Moved by \_\_\_\_\_ and seconded by \_\_\_\_\_ that the Commission authorizes publication of a notice of its intent to amend Section 665, Title 14, California Code of Regulations, regarding meeting procedures as recommended by Commission staff and adding/deleting the following: (Enumerate deletions and/or additions.)

Draft Regulatory Language

September 25, 2015

Section 665, Title 14, CCR, is amended to read:

665. Meeting Procedures

~~(a) Time limits for speakers at commission meetings.~~

~~(1) The time allotted for each speaker wishing to address an agenda item shall be set by the presiding commissioner.~~

**(a) Commission quorum, agendas, and meeting procedures.**

- (1) Quorum. Commission and committee meetings may not be conducted without a quorum present.
  - (A) Commission meetings require a quorum of at least three commissioners be present to conduct a meeting. A commission meeting must be immediately adjourned if at least three commissioners are no longer present.
  - (B) Committee meetings require a quorum of at least one of the appointed members be present to conduct a meeting. A committee meeting must be immediately adjourned if at least one appointed member is no longer present.
    1. Commissioners who are not appointed to the committee may attend only as observers.
- (2) Meeting agendas.
  - (A) Public requests for items to be added to an agenda must be received no later than the commission meeting immediately prior to the desired meeting.
  - (B) Contents of meeting agendas.
    1. Contents of commission and committee meeting agendas are established by a majority vote of the commission.
    2. Committee agendas may not contain items that have been placed on commission meeting agendas, unless otherwise directed by a majority vote of the commission.
    3. Notwithstanding subsection (2)(B)1., the president, vice president, or designee of the president or vice president may amend an agenda.
  - (C) Commission and committee meeting agendas shall be distributed and posted to the commission website at least 10 days prior to the first day of the meeting.
- (3) Committee recommendations. Pursuant to Sections 105 and 106 of the Fish and Game Code, the marine resources committee and wildlife resources committee shall report and make recommendations on resource matters before the commission.
  - (A) Committees may meet to make recommendations no later than 15 days prior to the first day of the commission meeting at which the commission may consider taking action on the subject of the recommendation.

- (B) Committee recommendations shall be posted to the commission website at least five days prior to the first day of the meeting.
- (b) **Public participation.** Except for the department, every person or agency participating in commission and/or committee meetings is subject to the provisions in this subsection.
  - (1) Public comment on agenda items. The public may comment on an agenda item at the time the commission members discuss that item, but before any decision is made regarding the agenda topic.
    - (A) Public requests to provide comments on an agenda item must be submitted to commission staff prior to when the agenda item is announced.
      - 1. A person may voluntarily complete a speaker card furnished by commission staff.
      - 2. A person not completing a speaker card must inform commission staff, orally or in writing, of their desire to comment on the item
  - (2) Public forum. During the public forum agenda item, any member of the public may address the commission regarding its policies or any other matter within its jurisdiction so long as the subject is not related to any other item on the current agenda.
  - (3) Allotted time for comments and presentations at commission meetings.
    - (A) The time allotted for each person wishing to address an agenda item shall be set by the presiding commissioner at between one and three minutes per person per agenda item, except as provided in subsections (b)(3)(A)1. and (b)(3)(A)2.
      - 1. Ceding time. The presiding commissioner may allot up to five minutes for a person to comment on an agenda item if at least three other persons are present when the agenda item is called and forgo their opportunity to speak to that agenda item.
      - 2. Advanced approval for extended time. The public may request extended time to comment longer than three minutes. The president or designee of the president shall approve or deny the requested time based on relevance to the agenda topic and time available.
        - a. Requests for extended time must be received in writing no later than 12:00 noon five days prior to the first day of the meeting and must be sent by email to [fgc@fgc.ca.gov](mailto:fgc@fgc.ca.gov) or by mail/courier to California Fish and Game Commission, 1416 Ninth Street, Suite 1320, Sacramento, CA 95814. Only one method of delivery is necessary.
        - b. The president or designee shall approve or deny the request no later than 5:00 p.m. two days prior to the first day of the meeting.

- (B) The total amount of time allocated for public comments on a particular issue may be limited by publishing the time limit on the meeting agenda.
- (4) Allotted time for comments at committee meetings. The time allotted for each person wishing to address an agenda item shall be at the discretion of the committee chair(s).
- (5) Written comments. All written comments are available to commissioners upon request.
  - (A) Written comments intended for a commission or committee meeting must be delivered to the commission office via email or mail/courier no later than 12:00 noon five days prior to the first day of the meeting, or in person at the meeting.
    1. Written comments received by 5:00 p.m. 13 days prior to the first day of the meeting may be posted to the commission website and may be included in the meeting materials provided to commissioners prior to the first day of the meeting.
    2. Written comments received after 5:00 p.m. 13 days prior to the first day of the meeting and before 12:00 noon 5 days prior to the first day of the meeting may be made available to commissioners at the meeting, but are not posted to the commission's website for that meeting.
    3. Written comments received in the commission office after 12:00 noon five days prior to the first day of the meeting are only delivered to the meeting if required by the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and are not posted to the commission's website for that meeting.
    4. Written comments received in the commission office after 12:00 noon five days prior to the first day of the meeting that are not required to be delivered to the meeting pursuant to the Administrative Procedure Act are held for a future meeting if related to a future agenda item.
    5. Ten copies of written comments are requested if delivered in person at the commission or committee meeting.
    6. Any writings, when distributed to all, or a majority of all, commissioners in connection with a matter subject to discussion or consideration at a meeting shall be made available to the public upon request without delay. However, this subsection shall not include any writing exempt from public disclosure under Section 6253.5, 6254, or 6254.7 of the Government Code.
    7. Writings that are public records under subsection (b)(5)(A)6, and that are distributed to members of the commission prior to or during a meeting, pertaining to any item to be

considered during the meeting, shall be made available for public inspection at the meeting.

- (B) In the event multiple written comments expressing similar views are received, an example or a summary of the comments may be posted to the commission website and/or included in the meeting materials for commissioners.
- (C) Written comments delivered to the commission office must be submitted via email to [fgc@fgc.ca.gov](mailto:fgc@fgc.ca.gov) or mail/courier to California Fish and Game Commission, 1416 Ninth Street, Suite 1320, Sacramento, CA 95814. Only one method of delivery is necessary.
- (D) Written comments are not accepted if sent to the meeting facility.
- (6) Audio or visual materials for commission and committee presentations must be approved by the executive director. Consideration for approval requires that materials be submitted no later than 12:00 noon five days prior to the first day of the meeting.
  - (A) A request for an audio or visual presentation for a commission or committee meeting may be denied if the material is deemed not relevant to the agenda item, contains inappropriate material, or contains unauthorized copyrighted materials.
  - (B) A request for an audio or visual presentation for Commission meetings may be denied if the material cannot be presented in three minutes or less.
  - (C) Audio or visual materials for presentations must be submitted via email to [fgc@fgc.ca.gov](mailto:fgc@fgc.ca.gov) or on a USB flash drive via mail/courier to California Fish and Game Commission, 1416 Ninth Street, Suite 1320, Sacramento, CA 95814. Only one method of delivery is necessary.
  - (D) All electronic formats must be Windows PC compatible.
- (7) Prohibited behavior. The effective conduct of commission business requires civil participation by the public. Disruptive behavior will not be tolerated and eviction from the meeting may result.
- (c) Concurrence with Government Code Sections 6707 and 6800. The deadlines and due dates in this Section shall conform to Sections 6707 and 6708 of the Government Code pertaining to deadlines that fall on Saturdays or holidays.

Note: Authority cited: Section 108, Fish and Game Code. Reference: Section 108, Fish and Game Code; Section 11125.7 Government Code.

Summary of Public Recommendations for Commission and Committee Procedures

09/25/2015

| Source   | Recommendation  | Staff Response   | Notes   |
|--|---|--|---|
| <b>Commission Votes</b>  |   |  |   |
| 6/30/15 Eric Mills   | If only three of the five commissioners are present, any issue on the agenda should be required to receive a 3:0 vote for passage. [Majority of the entire membership]  | Reject: Unnecessarily restrictive. The Bagley-Keene Open Meeting Act only requires that a majority of the members of a state body meet to establish a quorum for a meeting; it does not require a majority vote of the membership for a vote to pass.                                  |   |
| <b>Public Forum</b>  |   |  |   |
| 6/30/15 Eric Mills   | There should be public forum at the beginning and end of each day of each meeting.  | Reject: The Commission has already determined that it will include public forum at the beginning or end of each meeting day, but not both; to date public comment has supported public forum at the beginning of the day and the Commission has chosen to accommodate that preference. | The Bagley-Keene Open Meeting Act provides that at any meeting the body can elect to consider comments from the public on any matter under the body's jurisdiction. (§11125.7, Government Code) |
| <b>Committees are Subject to the Bagley-Keene Open Meeting Act</b> |   |  |   |
| 4/14/14 Michel & Associates  | Because the Wildlife Resources Committee (WRC) was created by statute and because it includes more than one member, it is subject to the Bagley-Keene Open Meeting Act. | Accept: The proposed regulation recognizes that Commission committees are subject to the Bagley-Keene Open Meeting Act.  |   |

| <b>Source</b>                      | <b>Recommendation</b>   | <b>Staff Response</b>   | <b>Notes</b>  |
|------------------------------------|---|---|---|
| 7/18/14 Bell, McAndrews & Hiltachk | The WRC is created by statute, and therefore is subject to the Bagley-Keene Open Meeting Act, regardless of whether it is a decision-making or advisory body. | Accept: The proposed regulation recognizes that Commission committees are subject to the Bagley-Keene Open Meeting Act.   |   |
| 7/14/14 Safari Club International  | The WRC must publish its plan to meet.  | Accept: The proposed regulation provides that committee meeting agendas are published at least 10 days prior to the meeting.  | The Commission must announce its meetings for the year by January 1 of that year, or sixty days prior to the first meeting, whichever is sooner. (§206, Fish and Game Code) |
| 7/14/14 Safari Club International  | Upon obtaining suggested presentations from the public, the WRC should publish its proposed agenda.   | Reject: The proposed regulation provides that committee meeting agendas will be approved at the Commission meeting immediately prior to the committee meeting and may be amended by the president or vice president, or their designee. Consistent with the Bagley-Keene Open Meeting Act, the proposed regulation provides that Commission and committee meeting agendas will be distributed and posted to the Commission website at least ten days prior to the first day of a meeting. |   |

| <b>Source</b>                     | <b>Recommendation</b>  | <b>Staff Response</b>   | <b>Notes</b>   |
|-----------------------------------|--|---|--|
| 7/14/14 Safari Club International | The WRC should give the public adequate opportunity to prepare responses to agenda items and to submit requests to be heard on agenda items.   | Accept: Consistent with current practice, the proposed regulation provides rules for submitting written comments and presentations on an agenda item, and rules for making oral comments or presentations at a meeting. | The Bagley-Keene Open Meeting Act provides that a member of the public must be expressly afforded an opportunity to speak at meetings of a body either before or during the consideration of any agenda item (§11125.7, Government Code).  |
| 7/28/14 Michel & Associates       | A committee meeting is subject to the Bagley-Keene Open Meeting Act if (a) any portion of the meeting relates to one or more matters within the Commission's jurisdiction, and (b) the meeting is attended (whether in person or otherwise) by all of the following: at least one WRC member, and least one Department employee, and at least one person who is neither a member of the Department nor affiliated with the Commission (e.g., non-committee member Commissioners or Commission staff) | Reject  | The Bagley-Keene Open Meeting Act defines a meeting as any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains. (§11122.5, Government Code) |
| <b>Appointments to WRC</b>        |  |   |  |
| 4/14/14 Michel & Associates       | The WRC should have at least two members.  | Reject  | WRC is required to have only one member (§106, Fish and Game Code)   |
| 7/14/14 Safari Club International | The membership of the WRC should be two Commissioners  | Reject  | IBID   |
| 4/14/14 Michel & Associates       | When the Commission makes its yearly appointment to the WRC, it should, to the extent practicable, appoint two WRC members who   | Reject: Committee appointments are dependent upon the background and interest of commissioners.   | Commissioners are appointed by the Governor (Article 4, Section 20, California Constitution) and IBID.   |

| Source  | Recommendation   | Staff Response  | Notes  |
|---|--|---|--|
|   | have different backgrounds (e.g., a hunter and a member with non-hunting interests).   |   |  |
| 7/28/14 Michel & Associates                                       | To the extent feasible, the Commission shall place at least one Commissioner with substantial hunting experience on the WRC.                               | Reject: Committee appointments are dependent upon the background and interest of commissioners.   | Commissioners are appointed by the Governor (Article 4, Section 20, California Constitution)   |
| 7/28/14 Michel & Associates                                       | If the WRC has a designee, the name of that designee should be announced at a Commission meeting prior to that designee acting as the designee of the WRC. | Reject: It is impracticable to have a regulation requiring that the name of a designee be announced at a Commission meeting prior to a meeting that may not yet have been scheduled. Generally, the designee would be the wildlife advisor or executive director. | The WRC or its designee shall, to the extent practicable, 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. (§106, Fish and Game Code) |
| <b>Committee Quorum</b>   |  |   |  |
| 7/11/14 Michel & Associates                                       | By law, the WRC is only required to have one member, so the claim that two members are needed for WRC meetings is inaccurate.                              | Accept: The proposed regulation provides that a committee quorum is one appointed member.   |  |
| 7/28/14 Michel & Associates                                       | WRC meetings will be run by at least one of the WRC members or the designee  | Accept in part: The proposed regulation provides that a quorum is one appointed member.   | Statute does not provide that a designee may run a WRC meeting (§106, Fish and Game Code).   |
| <b>Non-committee Members' Participation in Committee Meetings</b> |  |   |  |
| 4/14/14 Michel & Associates                                       | Three Commissioners should never participate in any WRC meeting.   | Accept in Part: The proposed regulation provides that Commissioners who are not members of a Committee may attend Committee meetings only as observers.   | The prohibitions of the Bagley-Keene Open Meeting Act do not apply to the attendance of a majority of the members of a state body at an open and noticed meeting of a standing committee   |

| Source                            | Recommendation  | Staff Response  | Notes  |
|-----------------------------------|---|---|--|
| 7/14/14 Safari Club International | Non-committee Commissioners should resist the temptation of attending WRC meetings in any capacity.   | Reject: The proposed regulation provides that Commissioners who are not members of a Committee may attend Committee meetings only as observers.   | of that body, provided that the members of the state body who are not members of the standing committee attend only as observers. (§11122.5 (c)(6), Government Code) |
| 7/28/14 Michel & Associates       | Non-committee Commissioners may attend a WRC meeting but should be expressly prohibited from participating in anything other than an observational capacity. Non-member commissioners should not make any comment, either directly or indirectly, during a WRC meeting.   | Accept: The proposed regulation provides that Commissioners who are not members of a Committee may attend Committee meetings only as observers.   |  |
| <b>Committee Recommendations</b>  |   |   |  |
| 4/14/14 Michel & Associates       | Because WRC is required to make recommendations, 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 regulations should address how any disputes between WRC members shall be resolved. | Reject: Committees are not decision making bodies. They are required to make recommendations on matters before the Commission. In addition, the public has an opportunity per the Bagley-Keene Open Meeting Act to request that the Commission consider actions not recommended by a Committee. |  |
| 7/28/14 Michel & Associates       | If the WRC has two members, any finding or recommendation it makes must be unanimous.   | Reject: Committees are not required to have agreement between the members and may forward to the Commission differing recommendations.  |  |

| <b>Source</b>  | <b>Recommendation</b>   | <b>Staff Response</b>  | <b>Notes</b>  |
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| 7/18/14 Bell, McAndrews & Hiltachk   | If the WRC members are to operate within their statutory authority as a strictly advisory body, the Commission must provide significant intervening substantive review for all recommendations made by the WRC, and must do so where the deliberations and determinations are open to the public – the Commission cannot simply rubberstamp a recommendation made by WRC. Furthermore, in considering recommendations from the WRC, the Commission must adhere to the Administrative Procedure Act and Bagley-Keene Open Meeting Act. | Accept: The proposed regulation provides that the Marine Resources Committee (MRC) and WRC may meet to make recommendations no later than 15 days prior to the Commission meeting at which the Commission may consider taking action on the subject of the recommendation; Committee recommendations shall be posted to the Commission website at least five days prior to the first day of the meeting; and the public may comment on an agenda item at the time the Commissioners discuss that item, but before any decision is made regarding the agenda topic. |   |
| <b>Public Participation in Committee Meetings – Written Comments and Presentations</b> |   |  |   |
| 7/11/14 Michel & Associates  | If the purpose of the WRC is to have the most enlightened discussion possible...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. If the Executive Director receives a copy of presentation materials a few weeks prior to the WRC meeting, why can't that information be circulated publicly beforehand?  | <p>Accept in Part: The proposed regulation provides that written comments received at least 13 days prior to the meeting may be posted to the Commission's website at the same time Commissioners receive them.</p> <p>All writings are made available to the public when distributed to all or a majority of Commissioners.</p> <p>Members of the public who plan to submit information at a meeting are not required to share that</p>   | The Bagley-Keene Open Meeting Act provides that "...writings, when distributed to all, or a majority of all, of the members of a state body...shall be made available upon request without delay" (§11125.1, Government Code). The act also provides that a member of the public must be expressly afforded an opportunity to speak at meetings of a body either before or during the consideration of any agenda item (§11125.7, Government Code), which necessarily suggests that |

| Source                            | Recommendation  | Staff Response  | Notes  |
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|                                   |   | information prior to a meeting; the exception in this regulation is for audio or visual presentations, which must be submitted to the executive director by noon five days prior to the day of the meeting.   | new information may be provided at a meeting without advance notice. |
| 7/11/14 Michel & Associates       | If a deadline is applicable to all, it should be publicized.  | Accept: The proposed regulation includes deadlines for receipt of written comments and audio/visual presentations.  |  |
| 7/14/14 Safari Club International | The WRC must solicit proposed presentations for a meeting from the public generally, and not just from a limited group. | <p>Reject: The proposed regulation provides rules for submitting written comments and presentations on Commission and committee meeting agenda items, with no limitations on who may submit such materials. However, the Commission and committees may ask a certain individual(s) or group(s) to provide information relevant to an agenda item or to work together to develop a collaborative proposal; this would not preclude others from participating in Commission and committee processes.</p> <p>The proposed regulation also provides that members of the public may comment on an agenda item at the time Commissioners discuss that item, but before any decision is made regarding the agenda topic.</p> |  |

| Source  | Recommendation   | Staff Response   | Notes  |
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| 7/14/14 Safari Club International   | The WRC should require presentations to be submitted well in advance of the meeting and should share those presentation materials with the public to give the public the opportunity to prepare comments on those presentations.   | Accept in Part: The proposed regulation includes a deadline of noon five days prior to the first day of a meeting for receipt of written comments and audio/visual presentations. All writings and presentations are available to the public when distributed to all, or a majority of all, Commissioners. |  |
| 7/18/14 Bell, McAndrews & Hiltachk  | All members of the public must be given the opportunity to comment and participate in meetings of the WRC.   | Accept: The proposed regulation provides that Commission committees are subject to the Bagley-Keene Open Meeting Act and provides rules for written and verbal participation.  |  |
| <b>Public Participation in Committee Meetings Should not Preclude Public Participation during Commission Meetings</b> |  |  |  |
| 7/11/14 Michel & Associates   | Clarification is needed 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 an opportunity to comment on all issues agendized for Commission meetings, even if that issue was already discussed (or not) at a WRC meeting. | Accept: The proposed regulation provides that the public may comment on an agenda item at the time Commissioners discuss that item, but before any decision is made regarding the agenda topic.  | The Bagley-Keene Open Meeting Act includes an allowance to not take testimony on items discussed in committee, but it is not included in our proposed regulation.<br><br>“...the state body shall provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body’s discussion or consideration of the item. This section is not applicable if the agenda item has already been considered by a committee composed exclusively of members of the state body at a public meeting where interested |
| 7/14/14 Safari Club International   | Need to clarify how the Commission and WRC will work together and, in particular, whether a discussion on the WRC agenda will provide the only opportunity for the public to comment on matters that result in WRC recommendations to the  | Accept: The proposed regulation provides that the public may comment on an agenda item at the time Commissioners discuss that item, but before any decision is made regarding the agenda topic.  |  |

| Source   | Recommendation   | Staff Response   | Notes   |
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| 7/28/14 Michel & Associates                              | <p>Commission.</p> <p>The ability to speak at a WRC meeting on a particular item should not preclude a member of the public from attending a later Commission meeting and commenting on that item, or a related item, during the Commission meeting but prior to the Commission taking action.</p> | <p>Accept: The proposed regulation provides that the public may comment on an agenda item at the time Commissioners discuss that item, but before any decision is made regarding the agenda topic.</p> | <p>members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the state body." (§11125.7, Government Code)</p> |
| <b>Subcommittees</b>                                     |  |  |   |
| 4/14/14 Michel & Associates                              | <p>WRC needs rules to explain exactly how and when subcommittees will be formed.</p>   | <p>Reject: If the Commission desires to move forward with this proposal, staff recommends doing so in a separate rulemaking.</p>   |   |
| 7/28/14 Michel & Associates                              | <p>WRC should not create any subcommittee or other entity without express approval by the full Commission after the Commission has taken public comment on the issue.</p>  | <p>Reject: If the Commission desires to move forward with this proposal, staff recommends doing so in a separate rulemaking.</p>   |   |
| 7/28/14 Michel & Associates                              | <p>Any subcommittee or other entity created by the WRC should only meet as part of a WRC meeting.</p>  | <p>Reject: It is impracticable to have a regulation requiring that meetings of a subcommittee only take place as part of a committee meeting, which defeats the purpose of creating such a group.</p>  |   |
| 7/28/14 Michel & Associates                              | <p>All communications between members of any subcommittee or other entity created by WRC should be treated as public records.</p>  | <p>Reject: The Public Records Act dictates the extent to which communications between members of any entity created by WRC are treated as public records.</p>  |   |
| <b>Webcasting and Video Recording Committee Meetings</b> |  |  |   |

| <b>Source</b>                                 | <b>Recommendation</b>   | <b>Staff Response</b>   | <b>Notes</b>   |
|---|---|---|--|
| 4/14/14 Michel & Associates                   | WRC meetings should be video recorded and posted on the internet.   | Reject: Though it may be desirable to video record and/or webcast committee meetings, for the foreseeable future the Commission does not have the necessary resources, making a regulation impracticable. WRC meetings are currently audio-recorded and posted on the Commission website. | This recommendation exceeds the requirements of the Bagley-Keene Open Meeting Act.   |
| 7/28/14 Michel & Associates                   | WRC meetings should be audio recorded. WRC meetings should be video recorded and broadcast on the internet unless the Commission makes a finding that as to a specific year, funding is not reasonably available for video recording.   |   |  |
| <b>Purpose/Function of Committee Meetings</b> |   |   |  |
| 7/11/14 Michel & Associates                   | 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. | Reject: WRC is established by statute that does not authorize WRC to take binding action on behalf of the Commission.   | “The commission shall form a wildlife resources committee from its membership consisting of at least one commissioner. The committee shall report to the commission from time to time on its activities and shall make recommendations on all nonmarine resource matters considered by the commission. The committee or its designee shall, to the extent practicable, 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.” (§106, Fish and Game Code) |
| 7/14/14 Safari Club International             | Asks for clarification regarding statements made that suggested   | Reject: Membership and meetings of committees and the   |  |

| Source  | Recommendation  | Staff Response  | Notes |
|---|---|---|-------|
|   | that WRC meetings can operate as official Commission meetings.  | Commission are not interchangeable pursuant to the various requirements of the Bagley-Keene Open Meeting Act.   |       |
| 7/28/14 Michel & Associates                   | Unless specific situations dictate otherwise, WRC meetings should be structured to provide participants opportunities to engage in detailed discussions with Commission staff, Department staff, the presenter (if applicable), and stakeholders. The WRC should strive to provide an informal setting at its meetings where all participants will have an opportunity to provide input into the conversation. However, if required, WRC should retain the option to apply a more structured setting. | Reject: It is not necessary to codify this in regulation. The proposed regulation requires sufficiently less structure and rules for committee meetings than Commission meetings to allow for greater flexibility and less formality.   |       |
| <b>Miscellaneous WRC Procedures/Practices</b> |   |   |       |
| 4/14/14 Michel & Associates                   | Fish and Game Code §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.  | Reject: It is not necessary to codify this in regulation. WRC is required to report from time to time on its activities and shall make recommendations on all non-marine resource matters before the Commission (§106, Fish and Game Code); the only logical mechanism for these to occur, per the Bagley-Keene Open Meeting Act, is through public meetings. |       |
| 4/14/14 Michel &                              | The WRC is, to the extent   | Reject: The recommendation  |       |

| <b>Source</b>               | <b>Recommendation</b>   | <b>Staff Response</b>  | <b>Notes</b> |
|-----------------------------|---|--|--------------|
| Associates                  | practicable, to attend meetings of DFW staff, including meetings of DFW staff with interested parties, in which significant wildlife resource management documents are being developed. 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? | would be duplicative. The Bagley-Keene Open Meeting Act defines public meetings.   |              |
| 7/28/14 Michel & Associates | The WRC should strive to adhere to an "equal time" model to the extent practicable, to prevent an unreasonable disparity of non-public WRC meetings being granted to specific parties holding disparate viewpoints.   | Reject: This recommendation does not pertain to meeting procedures but to one-on-one meetings between a WRC member and a member of the public.                         |              |
| 7/28/14 Michel & Associates | A log should be kept of all WRC-related meetings attended by WRC members or the WRC-designee.   | Reject: This recommendation is excessive. If questions arise about a specific meeting or document, members of the public have recourse through the Public Records Act. |              |

| Source   | Recommendation  | Staff Response   | Notes |
|--|---|--|-------|
| <b>Communication Should be Made on Government-Issued Devices</b> |   |  |       |
| 6/5/15 Michel & Associates                                       | <p>The Commission should mandate that all electronic correspondence concerning official Commission matters be conducted through government issued e-mail accounts that are stored on government owned servers or other electronic data storage mechanism.</p> <p>The use of personal email accounts for transmitting communications relating to any government business should be prohibited.</p> <p>The use of text messaging and other technologies that don't create a record should be prohibited or discouraged.</p> | Reject: Inappropriate for meeting procedures. If the Commission desires to move forward with a regulation regarding communication methods, staff recommends doing so in a separate rulemaking. |       |
| 7/8/15 National Shooting Sports Foundation                       | <p>The use of personal email, personal cell phones, or any other personal device used for sending or receiving official government communications or business should be strictly prohibited or highly discouraged.</p> <p>The Commission should require all business communications be conducted via government issued technology and stored on government servers/databases,</p>   | Reject: Inappropriate for meeting procedures. If the Commission desires to move forward with a regulation regarding communication methods, staff recommends doing so in a separate rulemaking. |       |

| <b>Source</b> | <b>Recommendation</b> | <b>Staff Response</b> | <b>Notes</b> |
|---------------|-----------------------|-----------------------|--------------|
|               | etc.                  |                       |              |

SENIOR COUNSEL  
C. D. MICHEL\*

SPECIAL COUNSEL  
JOSHUA R. DALE  
W. LEE SMITH

ASSOCIATES  
ANNA M. BARVIR  
SEAN A. BRADY  
SCOTT M. FRANKLIN  
THOMAS E. MACIEJEWSKI  
CLINT B. MONFORT  
TAMARA M. RIDER  
JOSEPH A. SILVOSO, III  
LOS ANGELES, CA

\* ALSO ADMITTED IN TEXAS AND  
THE DISTRICT OF COLUMBIA

WRITER'S DIRECT CONTACT:  
562-216-4474  
SFRANKLIN@MICHELLAWYERS.COM



OF COUNSEL  
DON B. KATES  
BATTLEGROUND, WA

RUTH P. HARING  
MATTHEW M. HORECZKO  
LOS ANGELES, CA

GLENN S. MCROBERTS  
SAN DIEGO, CA

AFFILIATE COUNSEL  
JOHN F. MACTINGER  
JEFFREY M. COHON  
LOS ANGELES, CA

DAVID T. HARDY  
TUCSON, AZ

April 14, 2014

**VIA EMAIL, U.S. POST  
& HAND DELIVERY**

Sonke Mastrup  
Executive Director  
CALIFORNIA FISH & GAME COMMISSION  
P.O. Box 944209, Sacramento, CA  
[smastrup@dfg.ca.gov](mailto:smastrup@dfg.ca.gov)

**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](http://www.fgc.ca.gov/meetings/2014/feb/proposed_committee_procedures.pdf).

The Draft, as written, is a "regulation<sup>1</sup>" under state law. So the Commission appears to be

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<sup>1</sup> 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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<sup>2</sup> <http://www.fgc.ca.gov/meetings/committees/MRCrulesandprocedures052213.pdf>.

<sup>3</sup> [http://www.fgc.ca.gov/meetings/2014/feb/proposed\\_committee\\_procedures.pdf](http://www.fgc.ca.gov/meetings/2014/feb/proposed_committee_procedures.pdf).

Mr. Sonke Mastrup  
April 14, 2014  
Page 5 of 5

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.**



Scott M. Franklin

cc'd by Email and U.S. Post:  
Thomas Gibson, General Counsel  
Office of the General Counsel  
Department of Fish and Wildlife  
([thomas.gibson@wildlife.ca.gov](mailto:thomas.gibson@wildlife.ca.gov))  
Charlton H. Bonahm, Director  
Department of Fish and Wildlife  
([director@wildlife.ca.gov](mailto:director@wildlife.ca.gov))

SENIOR COUNSEL  
C. D. MICHEL\*

SPECIAL COUNSEL  
JOSHUA R. DALE  
W. LEE SMITH

ASSOCIATES  
ANNA M. BARVIR  
SEAN A. BRADY  
HANNAH G. ELISHA  
SCOTT M. FRANKLIN  
BEN A. MACHIDA  
THOMAS E. MACIEJEWSKI  
CLINT B. MONFORT  
JOSEPH A. SILVOSO, III  
LOS ANGELES, CA

\* ALSO ADMITTED IN TEXAS AND  
THE DISTRICT OF COLUMBIA

WRITER'S DIRECT CONTACT:  
562-216-4444  
CMICHEL@MICHELLAWYERS.COM



OF COUNSEL  
DON B. KATES  
BATTLEGROUND, WA

RUTH P. HARING  
MATTHEW M. HORECZKO  
LOS ANGELES, CA

GLENN S. MCROBERTS  
SAN DIEGO, CA

AFFILIATE COUNSEL  
JOHN F. MACTINGER  
JEFFREY M. COHON  
LOS ANGELES, CA

DAVID T. HARDY  
TUCSON, AZ

July 11, 2014

**VIA EMAIL & U.S. POST**

President G. Michael Sutton  
Vice President Jack Baylis  
Commissioner Jim Kellogg  
Commissioner Richard B. Rogers  
Commissioner Jacque Hostler-Carmesin  
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 agendaized 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

Honorable Commissioners  
July 11, 2014  
Page 4 of 4

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.

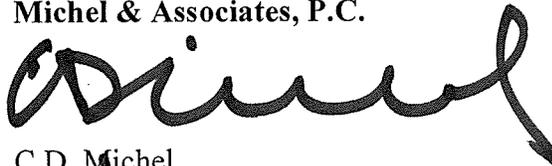
**6. *Reservation of Rights***

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  
Executive Director  
CALIFORNIA FISH & GAME COMMISSION  
P.O. Box 944209, Sacramento, CA  
[smastrup@dfg.ca.gov](mailto:smastrup@dfg.ca.gov)

BELL, MCANDREWS & HILTACHK, LLP  
ATTORNEYS AND COUNSELORS AT LAW  
455 CAPITOL MALL, SUITE 600  
SACRAMENTO, CALIFORNIA 95814

RECEIVED  
CALIFORNIA  
FISH AND GAME  
COMMISSION

2014 JUL 21 AM 6:51

(916) 442-7757  
FAX (916) 442-7759  
www.bmhlaw.com

July 18, 2014

**VIA HAND DELIVERY**

Commissioner Michael Sutton, President,  
Commissioner Jack Baylis, Vice President.  
Commissioner Jim Kellogg  
Commissioner Richard B. Rogers  
Commissioner Jacque Hostler-Carmesin  
Executive Director Sonke Mastrup

Fish and Game Commission  
1416 Ninth Street, Room 1320  
Sacramento, CA 95814

RE: Wildlife Resources Committee

Dear Commissioners and Mr. Mastrup:

Our firm represents the National Shooting Sports Foundation ("NSSF"). NSSF is the trade association for America's firearms, ammunition, hunting and recreational shooting sports industry. NSSF's more than 10,000 members are comprised of manufacturers, distributors, retailers, shooting ranges, sportsmen's organizations and publishers, including many based in California. NSSF's mission is to promote, protect and preserve hunting and shooting sports.

The purpose of this letter is to address concerns of the NSSF regarding the transparency of the Wildlife Resources Committee ("WRC"). The policies and decisions of the California Fish and Game Commission ("Commission"), and the actions of the WRC have a direct and substantial, material impact on businesses of a significant number of our members, including those based in California.

Effective January 1, 2014, the California Fish and Game Code was amended by the Legislature to require the Commission to form a wildlife resources committee to make recommendations on all nonmarine resource matters considered by the Commission. (Fish and Game Code §106.) However, the Commission has not adopted rules of order and procedures for the WRC, and does not appear to adhere to existing statutory requirements.

Although the Commission apparently views the WRC as an “informal” committee, the Bagley-Keene Open Meeting Act (“the Bagley-Keene Act”) covers all state bodies. (Gov. Code §§ 11120-111321.) If a body is created by statute, such as by a statute added to the Fish and Game Code, it is subject to the Bagley-Keene Act regardless of whether it is decision-making or advisory. (Gov. Code §11121(a); see also subdivision (c) which explicitly applies to certain advisory committees.) This requires the WRC to adhere to basic requirements involving notice, access to records, and the opportunity for public comment. This is to ensure transparency and accountability in the governmental process.

Pursuant to the Bagley-Keene Act, at least ten days prior to the WRC meetings, the WRC must prepare an agenda of all items to be discussed or acted upon at the meeting. (Gov. Code § 11125(b).) The notice must also state the time and the place of the meeting and give the name, phone number and address of a contact person who can answer questions about the meeting and the agenda. (Gov. Code § 11125(a).) Not only agendas, but also all other materials distributed to a majority of the WRC members, must be made available to the public without delay. (Gov. Code § 11125.1.) This includes all members of the public, and not just those that support the WRC’s views on a recommendation. Further, all members of the public must be given the opportunity to comment and participate in the meetings of the WRC. (Gov. Code §11125.7.) NSSF respectfully requests that these requirements be strictly followed by the WRC.

As a separate issue, the WRC must ensure that it is working within the confines of its statutory authority. The Fish and Game Code provides that the WRC is only to make recommendations to the Commission. (Fish and Game Code §106.) A committee does not possess decision-making authority and is considered strictly advisory in nature if it is formed for the sole purpose of researching a topic and preparing a recommendation for submission to another governmental body that has final decision-making authority. (2 CCR § 18701.)

However, a committee is no longer considered to be strictly advisory if the committee members advise or make recommendations to the decionmaker either directly or without significant intervening substantive review by: (1) conducting research or making any investigation which requires the exercise of judgment on the part of the committee member for the purpose of influencing a governmental decision; or, (2) preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the committee member for the purpose of influencing a governmental decision. (2 CCR § 18702.2.) If the WRC members are to operate within their statutory authority as a strictly advisory body, the Commission must provide significant intervening substantive review for all recommendations made by the WRC, and must do so where the deliberations and determinations are open to the public – the Commission cannot simply rubberstamp a recommendation made by the WRC. Furthermore, in considering recommendations from the WRC, the Commission must adhere to the Administrative Procedures Act and Bagley-Keene Act.

NSSF has recently raised a series of concerns related to the impartiality and transparency of the Commission. The operation of the Wildlife Resources Committee reinforces NSSF's concerns about the ability of the current Commission to fairly and openly manage California's treasured wildlife. NSSF exhorts the Commission to examine its operational policies and its accessibility to all stakeholders.

Very truly yours,



Ashlee Titus  
Attorney for National Shooting Sports Foundation

ANT/cfd

cc: Governor Jerry Brown, via Hand Delivery  
Christopher Ames, Senior Assistant Attorney General (Ret.)  
via email Christopher.Ames@doj.ca.gov



# Safari Club International

A NON-PROFIT ORGANIZATION • DEDICATED TO CONSERVING WILDLIFE AND PRESERVING HUNTING

July 14, 2014

**VIA E-Mail, FAX and U.S. Post**

Mr. Michael Sutton, President,  
Mr. Jack Baylis, Vice President.  
Mr. Jim Kellogg  
Mr. Richard B. Rogers  
Ms. Jacque Hostler-Carmesin  
Mr. Sonke Mastrup, Executive Director  
California Fish and Game Commission  
P.O. Box 944209  
Sacramento, CA 94244-2090

**Re: Request for Transparency, Structure and Fairness in the Operations of the California Wildlife Resources Committee**

Dear Sirs and Madam:

On behalf of the California chapters of Safari Club International (SCI California), we are submitting this letter to request major changes in the manner in which the California Wildlife Resources Committee (WRC) conducts its business. In the past several months and continuing into the present, the WRC has operated without formal procedural constraints. As a result, the WRC and by implication the entire Fish and Game Commission (Commission) have created the appearance that they are bodies that make decisions without fairness and based on the agendas of certain interest groups who have special access to the WRC and the Commission. Without procedural rules that require that all interest groups be given equal access to the WRC's decision-making processes, all recommendations made by the WRC and all determinations that the Commission makes based on WRC recommendations violate the law and potentially harm the resources that the Commission is obligated to protect.

**Safari Club International Chapters in California**

There are thirteen California Chapters of Safari Club International, collectively representing over 5,000 members and 30,000 California affiliates who hunt and participate in sustainable wildlife conservation. SCI chapters and their members participate in numerous conservation projects throughout the state. SCI California Chapters attend WRC and Commission meetings and make every effort to play active roles in the state's decision-making concerning

wildlife conservation and management. The activities of the WRC have deprived SCI California Chapters and their members of fair and equal access to these important decisions.

**The WRC and Commission Have Created the Impression That Only Certain Interest Groups Have Access to Their Decision-Making Processes**

The July 28, 2014 meeting agenda for the WRC includes “Discussion of Options to Implement Non-lead Ammunition Requirements” and identifies a presentation on this topic by Audubon California, Defenders of California and the Humane Society of the United States. To SCI California’s knowledge, no organization or individual representing the hunting community was offered the opportunity to make a presentation on this issue. Similarly, on the agenda for the January 15, 2014 meeting included a “Discussion and Update of Predator Management Subcommittee’s Recommendations for Changes to Predator Management Policies/Regulations.” The recommendations reviewed by the WRC for this discussion were submitted by only two entities, HSUS and Project Coyote. To SCI California’s knowledge, no organization or individual representing the hunting community was asked to participate on the Predator Management Subcommittee or to engage in the development of the recommendations for changes to the Predator Management Policies/Regulations.

The WRC is patently offering access to only certain interest groups for development of its recommendations and presentations. If the WRC, and by implication the Commission, wants to avoid the appearance, taint and potential invalidity of its decisions due to inappropriate bias, it should take immediate action to create procedures and regulations that impose measures to prevent such bias.

**The Commission Must Establish and Publish Procedural Rules for the WRC Before the WRC Makes Any Further Recommendations or Takes Any Further Actions**

Currently, the WRC is operating without formally adopted or publicized procedures for its decision-making process. Nevertheless, the WRC has already held a meeting on January 15, 2014 and plans another meeting for July 28, 2014. Without such established procedures, all WRC recommendations are potentially invalid and will have a similar impact on the decisions that the Commission makes that are based upon these recommendations. In the absence of such procedures, the public, and in particular members of SCI California Chapters, cannot actively participate in the WRC meetings and recommendations in a meaningful and significant way.

In a July 8, 2014 e-mail from Executive Director Sonke Mastrup to Kathy Lynch, Mr. Mastrup admitted that the WRC has no formal procedures established for their meetings and referred to the WRC meeting scheduled for July 28, 2014 as a “workshop.” Unfortunately, the labeling of the meeting as a “workshop” offers little to the public in terms of how to offer meaningful participation in the WRC’s work. The “workshop” label does nothing to remedy the imbalances in the access gained by certain interest groups and does not appear to have any impact on the Commission’s use of and reaction to the WRC’s recommendations. Informality does not excuse bias or illegality. Consequently, SCI California Chapters strongly recommend that the WRC July 28, 2014 “workshop” be cancelled (as was the May

2014 WRC meeting) and that no future meetings be scheduled until fair and predictable procedures can be adopted. In addition, the public should be permitted to play a role in establishing such procedures, to make certain that the WRC's agenda and its subcommittees are fairly represented by all or at least a balanced share of the constituencies interested in the WRC's and Commission's responsibilities.

### **The Commission Must Clarify Its Relationship With the WRC As Well as The Extent of the WRC's Authority**

SCI California Chapters are very concerned that the lines between the WRC and the Commission have been blurred. According to the information on the Commission's own website, the WRC cannot operate instead or on behalf of the Commission. "It is important to note that the committee chairs cannot take action independent of the full Commission. Instead, the chairs make recommendations to the full Commission at regularly scheduled meetings." Consequently, SCI California Chapters are concerned about statements made by Executive Director Mastrup and Commissioners Sutton and Baylis that have suggested that WRC meetings can operate as official Commission meetings. SCI California Chapters need better clarification about how the Commission and WRC will work together, and in particular whether a discussion on the WRC agenda will provide the only opportunity for the public to comment on matters that result in WRC recommendations to the Commission.

### **The WRC's Membership Should Not Be Increased With an "Alternate" WRC Member**

SCI California Chapters are aware of recommendations that the Commission appoint a third "alternate" Commissioner to the WRC. If a third Commissioner was added to the WRC's Membership as an alternate, the WRC would run the risk of turning all of its meetings into unpublicized Commission meetings. Such attempt to bypass the statutory limitations and requirements for Commission meetings could taint the recommendations of the WRC meetings, as well as the decisions made by the Commission at such meetings, or based on the recommendations made at these meetings. SCI strongly recommends that the membership of the WRC remain at two Commissioners only and that the remaining Commissioners resist the temptation of attending WRC meetings in any capacity.

### **WRC Meeting Must Give the Public a Meaningful Opportunity to Participate**

As indicated above, the actions of the WRC up until this date have given the appearance that only certain interest groups have access to the WRC agenda, to offer presentations at WRC meetings and to influence the WRC decision-making processes. These practices must be immediately reversed. At the outset, the WRC must publish notice of its plan to meet and must solicit proposed presentations for the meeting from the public generally, and not just from a limited group. Upon obtaining suggested presentations, the WRC should publish its proposed agenda and give the public adequate opportunity to prepare responses and to submit requests to be heard on agenda items. The WRC should require presentations to be submitted well in advance of the meeting and should share those presentation materials with the public to give the public the opportunity to prepare comments on those presentations.

The only way that the WRC can make meaningful recommendations to the Commission is to make certain that it solicits data from all perspectives. Unless the WRC immediately develops a process to give the public an opportunity to participate in its decision-making, the

WRC's recommendations will be useless and will make the Commission's decisions vulnerable to challenge.

**Participation in the July 28, 2014 WRC Meeting**

In the absence of any established procedures for the upcoming WRC meeting, and future meetings, SCI California Chapters expressly reserve all rights to make comments/presentations at these meetings and at the August 6, 2014 Commission meeting.

Thank you for the opportunity to present these concerns. Should you have any question concerning this letter or concerning the intent of the SCI California Chapters to participate in the July 28, 2014 WRC Meeting and/or the August 6, 2014 Commission meeting, please contact Anna M. Seidman, Director of Litigation, Safari Club International, 202-543-8733 or [aseidman@safariclub.org](mailto:aseidman@safariclub.org).

Sincerely yours,

A handwritten signature in black ink, appearing to read "Dennis Anderson". The signature is fluid and cursive, with a large initial "D" and "A".

Dennis Anderson  
Safari Club International, California Legislative Coordinator

cc: Governor Edmund G. Brown  
Safari Club International California Chapters  
Ms. Kathryn Lynch, Legislative Advocate

SENIOR COUNSEL  
C. D. MICHEL\*

SPECIAL COUNSEL  
JOSHUA R. DALE  
W. LEE SMITH

ASSOCIATES  
ANNA M. BARVIR  
SEAN A. BRADY  
HANNAH G. ELISHA  
SCOTT M. FRANKLIN  
BEN A. MACHIDA  
THOMAS E. MACIEJEWSKI  
CLINT B. MONFORT  
JOSEPH A. SILVOSO, III  
LOS ANGELES, CA

\* ALSO ADMITTED IN TEXAS AND THE  
DISTRICT OF COLUMBIA

WRITER'S DIRECT CONTACT:  
562-216-4441  
CMICHEL@MICHELLAWYERS.COM



OF COUNSEL  
DON B. KATES  
BATTLEGROUND, WA

RUTH P. HARING  
MATTHEW M. HORECZKO  
LOS ANGELES, CA

GLENN S. MCROBERTS  
SAN DIEGO, CA

AFFILIATE COUNSEL  
JOHN F. MACHTINGER  
JEFFREY M. COHON  
LOS ANGELES, CA

DAVID T. HARDY  
TUCSON, AZ

July 28, 2014

**SENT VIA E-MAIL**  
**& HAND DELIVERED**

California Fish and Game Commission  
c/o Executive Director Sonke Mastrup  
P.O. Box 944209  
Sacramento, CA 94244-2090

[sonke.mastrup@fgc.ca.gov](mailto:sonke.mastrup@fgc.ca.gov)

RECEIVED  
CALIFORNIA  
FISH AND GAME  
COMMISSION  
2014 JUL 31 PM 4:51

**Re: Petition for Rule Making by the Fish & Game Commission Regarding the  
Need for Formal Procedures and Rules for the Proper and Fair Operation  
of the Wildlife Resources Committee**

Dear Mr. Mastrup:

This Petition, submitted by the National Rifle Association of America ("NRA") pursuant to Government Code sections 11340.6 and 11340.7, requests that the California Fish & Game Commission (the "Commission") enact regulations to ensure public participation and fair debate vis-à-vis the Wildlife Resource Committee (the "WRC").

**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, and hundreds of thousands of members 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."

NRA has been a party to or supported multiple lawsuits throughout the nation supporting and

defending the right to keep and bear firearms for hunting, sport shooting, and self-defense. Indeed, one of NRA's key functions is to preserve the tradition of hunting, by protecting it from unreasonable and unnecessary restrictions.

NRA has an established record of advocating against restrictions on hunting based on scientifically unsupported claims of alleged environmental harm.

Petitioner David Halbrook resides in Victorville, California, and has been a hunter for basically his entire life. Mr. Halbrook has hunted various big and small game in California in the past, and he intends to hunt in California in the future. Mr. Halbrook is a member of NRA and is the executive director of the Hunt For Truth Association.

Based on the foregoing, the petitioners have standing to make the requested regulatory changes.

## II. REQUESTED REGULATORY CHANGES

Petitioners hereby seek the amendment of California Code of Regulations ("CCR"), title 14, via the addition of a new section dedicated to the procedural aspects of the operation of the WRC, including, but not limited to, public meetings held by the WRC.

The following provisions, based on draft language created by the Commission, should be included in the new section.

- (A) Section 108 of the Fish and Game Code requires the commission to adopt rules to govern the business practices and processes of the Commission. Sections ~~105 and~~<sup>1</sup> 106 of the Fish and Game Code require the commission to establish ~~a minimum of two committees, the Marine Resources Committee and~~<sup>2</sup> the Wildlife Resources Committee; ~~respectively.~~
- (B) A minimum of one, but no more than two members of the Commission will be appointed to the Wildlife Resources Committees at the first Commission meeting of each calendar year. To the extent feasible, the Commission shall place at least one Commissioner with substantial hunting experience on the Wildlife Resources Committee.
- (C) All public are welcome to attend and participate meetings as defined in subsection (a).
- (D) The Commission will establish the meeting schedule for the WRC committees each year

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<sup>1</sup> ~~Strikeout~~ and underline are used herein to reflect deletions and additions, respectively, that Petitioner proposes be made regarding language previously put forth by the Commission in the Draft.

<sup>2</sup> Petitioner is not taking any position on what regulations should or should not be adopted for the operation of the Marine Resources Committee, but reference thereto is omitted herein because this Petition does not concern the operation of the Marine Resources Committee.

as part of the annual rulemaking calendar the prior November and may schedule additional meetings as needed.

- (E) Agenda will be approved at the Commission meeting before the committee meeting. Agendas will be developed by staff and will be comprised of standing items and topics requested by: ~~referred by the Commission, topics requested by the Department, and/or state agencies, and federal agencies, and standing items.~~ Public requests for agenda items must be made to the Commission and subsequently referred to the ~~appropriate committee~~ Wildlife Resources Committee.

Agenda items to be considered for the year will be adjusted based on urgency, need, and interest as determined by the Commission. Findings and recommendations will be made to the Commission for possible action by the ~~two chairs~~ Wildlife Resources Committee. If the Wildlife Resources Committee has two members, any finding or recommendation it makes must be unanimous.

- (F) All Wildlife Resources Committee meetings ~~of committees~~ shall be noticed at least 10 days prior to the meetings. Meeting agendas will be noticed on the Commission's website and distributed electronically.
- (G) Commission staff will secure appropriate meeting venues for Wildlife Resources Committee meetings with preference given to those that are provided free of charge. Meetings will be run by at least one of the Wildlife Resources Committee members or the designee, ~~two chairs~~ and facilitated by Commission staff.
- (H) ~~In general~~ Unless specific conditions dictate otherwise, meetings will be structured to provide participants opportunities to engage in detailed discussions with Commission staff, Department staff, the presenter (if applicable), and stakeholders. ~~Meetings~~ The Wildlife Resources Committee will strive to provide an informal setting at its meetings, where all participants will have an opportunity to provide input into the conversation. However, if required, the ~~chairs~~ Wildlife Resource Committee retains the option to apply a more structured setting where by discussion and public comment are governed by speaker cards and time limits.
- (I) ~~Non-chair member~~ Commissioners may attend Wildlife Resource Committee meetings, however, they are expressly prohibited from participating in anything other than an observational capacity. Non-member Commissioners shall not make any comment, either directly or indirectly, during a Wildlife Resources Committee meeting.
- (J) Commission staff shall prepare a ~~M~~meeting Ssummary following each Wildlife Resources Committee meeting that summarizes the main discussion points and any recommendations developed by the Wildlife Resources Committee ~~committee chairs.~~ Draft meeting summaries shall be provided to the Department and Wildlife Resources Committee ~~committee chairs~~ prior to finalization for review and comment. The final meeting summary shall be posted on the Commission's website and serve as the formal record of the meeting. Any recommendations developed by a committee shall be clearly

identified in the meeting summary and presented to the Commission for consideration at a future Commission meeting.

- (K) Wildlife Resources Committee meetings shall be audio recorded. Wildlife Resource Commission meetings may shall be taped video recorded and broadcast on the internet at the discretion of unless the Commission and available makes a specific finding that, as to a specific fiscal year, funding is not reasonably available for video recording. This provision does not in any way inhibit any right that members of the public have concerning the use of a recording device to record public meetings of a state body.

Furthermore, the following provisions, drafted by the Petitioner, should also be included in the new section requested hereby.

- (L) A meeting is subject to the Bagley-Keene Act if (a) any portion of the meeting relates to one or more matter within the Commission's jurisdiction, and (b) the meeting is attended (whether in person or otherwise) by all of the following: at least one Wildlife Resources Committee member (or a Wildlife Resources Committee designee), at least one Department of Fish & Wildlife (the "Department") employee, and at least one person who is neither a member of the Department nor affiliated with the Commission (e.g., non-committee member Commissioners or Commission Staff). This provision only applies to meetings that concern, at least in part, nonmarine wildlife resource issues.
- (M) The ability of the public to speak at a Wildlife Resources Committee meeting on a particular item does not preclude a member of the public from attending a later Commission meeting and commenting on that item, or a related item, during the Commission meeting but prior to the Commission taking action on the relevant item.
- (N) If the Wildlife Resources Committee has a designee, the name of that designee shall be announced at a Commission meeting prior to that designee acting as the designee of the Wildlife Resources Committee.
- (O) The WRC shall strive to adhere to an "equal time" model to the extent practicable, to prevent an unreasonable disparity of non-public Wildlife Resources Committee meetings being granted to specific parties holding disparate viewpoints.
- (P) The Wildlife Resources Committee shall not create any sub-committee or other entity without express approval by the full Commission after the Commission has taken public comment on the issue. All subcommittees or similar entities created by Wildlife Resources Committee with Commission approval shall meet only as a part of Wildlife Resources Committee meetings, and all communications between members of these entities shall be treated as public records.
- (Q) A log should be kept of all Wildlife Resources Committee-related meetings attended by Wildlife Resources Committee members or the Wildlife Resources Committee designee.

### III. JUSTIFICATION FOR THE REQUESTED REGULATORY CHANGES

#### A. Any Rules Used by and for the WRC Are Regulations, Thus They Must Be Approved through the Proper Regulatory Process

The agenda for the Fish & Game Commission (“Commission”) meeting of February 5, 2014, included 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](http://www.fgc.ca.gov/meetings/2014/feb/proposed_committee_procedures.pdf).

The Draft, as written, is a “regulation” under state law. 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.

As used in section 11342.600, the term “state agency” includes every state commission. Gov’t Code § 11000. Thus, the Commission is clearly a state agency for the purposes of section 11342.600. Section 11342.600 is in accord with Fish & Game Code section 108, which “requires the commission to adopt rules to govern the business practices and processes of the Commission.”<sup>3</sup>

Should the Commission attempt to utilize any rules regarding the operation of the Wildlife Resources Committee without having them adopted via proper regulatory rulemaking, that would violate Government Code section 11340.5(a). That section states:

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.

Case law confirms that the Wildlife Resources Committee would be using illegal “underground regulations” if the Commission allowed the Wildlife Resources Committee to operate by a set of rules that were not properly enacted. *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 guidelines and manuals for a multi-level review process used for selecting textbooks that could be used in public schools).

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<sup>3</sup> See the Draft, available at [http://www.fgc.ca.gov/meetings/2014/feb/proposed\\_committee\\_procedures.pdf](http://www.fgc.ca.gov/meetings/2014/feb/proposed_committee_procedures.pdf)

Executive Director Sonke Mastrup  
July 28, 2014  
Page 6 of 6

**B. Equal Access and Transparency Interests Will Be Served if the Petition Is Granted**

The Petitioner sent a letter to the Commission on April 14, 2014, outlining why the Wildlife Resources Committee needed rules adopted pursuant to the proper regulatory process. A copy of that letter is attached and incorporated by reference. Put simply, that letter outlined the various potential pitfalls related to the draft rules that the Commission circulated earlier this year, rules that, it seemed, the Commission wanted to adopt without adhering to the proper regulatory process. Because three months have passed since that letter and the July 28, 2014, meeting of the Wildlife Resources Committee is being held without any binding rules or regulations, the Petitioner is now forced to make this formal demand that the lack of regulations be addressed.

Indeed, to prevent any possible argument that a Commission decision was made as the result of a fault in the undefined Wildlife Resources Committee public comment process in place as of July 28, 2014, the Petitioner strongly suggests that the Wildlife Resources Committee not make any final decisions or recommendations at that meeting.

**IV. THE COMMISSION HAS THE LEGAL AUTHORITY TO ADOPT THE REQUESTED REGULATORY CHANGES**

Section 108 of the Fish and Game Code requires the commission to adopt rules to govern the business practices and processes of the Commission. Thus, the regulations sought hereby are clearly within the Commission's regulatory authority. *See also* Gov't Code § 11340.6 ("any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation").

**V. CONCLUSION**

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

Sincerely,  
**Michel & Associates, P.C.**



C.D. Michel

cc:  
cc: Senior Assistant Attorney General Christopher Ames  
([Christopher.ames@doj.ca.gov](mailto:Christopher.ames@doj.ca.gov))

enc:  
Letter of April 14, 2014

## FGC

---

**From:** afa@mcn.org  
**Sent:** Tuesday, June 30, 2015 5:41 PM  
**To:** Mastrup Sonke@  
**Cc:** FGC; Miller-Henson Melissa@; Fonbuena Sherrie@  
**Subject:** Re: Commission Bylaws

June 30, 2015

Dear Sonke:

So am I to understand that there are NO official bylaws for the Commission?

Specific recommendations, you ask?

Indeed. See my original inquiry. Here are two:

I'm of the opinion that, if only three of the five commissioners are present, any issue on the agenda should be required to receive a 3:0 vote for passage. A 2:1 or 2:0 margin shouldn't be allowed to decide such issues. (Case in point: the recent failure of Endangered Status for the tri-colored blackbird.)

And this: As you know, the Commission recently put Public Forum back first-thing on the agenda, where it belongs. You might consider adding a Public Forum to the tail-end of each day's meeting, too, as a "public friendly" service.

Thoughts?

Cheers,

Eric Mills, coordinator  
ACTION FOR ANIMALS  
Oakland

----- Original Message -----

**From:**  
"Mastrup Sonke@FGC" <[Sonke.Mastrup@fgc.ca.gov](mailto:Sonke.Mastrup@fgc.ca.gov)>

**To:**  
"afa@mcn.org" <[afa@mcn.org](mailto:afa@mcn.org)>

**Cc:**  
"FGC" <[FGC@fgc.ca.gov](mailto:FGC@fgc.ca.gov)>, "Miller-Henson Melissa@FGC" <[Melissa.Miller-Henson@fgc.ca.gov](mailto:Melissa.Miller-Henson@fgc.ca.gov)>, "Fonbuena Sherrie@FGC" <[Sherrie.Fonbuena@fgc.ca.gov](mailto:Sherrie.Fonbuena@fgc.ca.gov)>

**Sent:**  
Tue, 30 Jun 2015 15:12:15 +0000

**Subject:**  
Commission Bylaws

Hi Eric,

The Commission generally follows Robert's Rules of Order and strictly adheres to the Bagley-Keene Open Meeting Act. As you know, we have been working on adopting additional regulations that will govern the operations of the Commission. If you have any specific recommendations, please don't hesitate to share them with us.

SENIOR COUNSEL  
C. D. MICHEL\*

SPECIAL COUNSEL  
JOSHUA R. DALE  
ERIC M. NAKASU  
W. LEE SMITH

ASSOCIATES  
ANNA M. BARVIR  
MICHELLE BIGLIARIAN  
SEAN A. BRADY  
SCOTT M. FRANKLIN  
BEN A. MACHIDA  
CLINT B. MONFORT  
JOSEPH A. SILVOSO, III  
LOS ANGELES, CA

\* ALSO ADMITTED IN TEXAS AND THE  
DISTRICT OF COLUMBIA

OF COUNSEL  
DON B. KATES  
BATTLEGROUND, WA

RUTH P. HARING  
MATTHEW M. HORECZKO  
LOS ANGELES, CA



WRITER'S DIRECT CONTACT:  
562-216-4464  
SBRADY@MICHELLAWYERS.COM

June 5, 2015

California Fish and Game Commission  
c/o Executive Director Sonke Mastrup  
P.O. Box 944209  
Sacramento, CA 94244-2090

VIA ELECTRONIC MAIL: [fgc@fgc.ca.gov](mailto:fgc@fgc.ca.gov)

**Re: Petition for the Adoption of a Regulation Requiring Correspondence About  
Official Fish & Game Commission Matters to Be Conducted Via  
Government Issued Means**

Mr. Mastrup:

This Petition is submitted on behalf of our clients, the National Rifle Association of America ("NRA") and California Rifle and Pistol Association ("CRPA") pursuant to Government Code sections 11340.6 and 11340.7.

## **I. REQUESTED ACTION**

The Petitioners hereby request that the California Fish and Game Commission ("FGC") propose and adopt regulations requiring Department of Fish & Wildlife ("FWD") personnel, FGC Commissioners, and the staffers, agents, employees, and others assisting them with official Commission business, to conduct all government business in a way that maximizes public transparency and discourages the exclusion of any stakeholder group from being fully informed about the regulatory process. Toward this end, the FGC should mandate that all electronic correspondence concerning official Commission matters be conducted through government issued electronic-mail (i.e., e-mail) accounts that are stored on government owned servers, cloud data networks, or other electronic data storage mechanisms.

Use of personal email accounts for transmitting communications relating to any government business should be prohibited. The use of text messaging and other technologies that don't create a record should also be prohibited or discouraged.

Alternatively, should the FGC not wish to adopt this measure as a regulation, Petitioners request that FGC nevertheless adopt it as official policy of the Commission.

## II. 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 works to preserve the constitutional and statutory rights of gun ownership for its members, including the right to hunt. CRPA regularly participates in Fish and Game Commission matters on behalf of its tens of thousands of California resident members.

Based on the foregoing, the petitioners have standing to make the requested regulatory changes.

## III. JUSTIFICATION FOR REQUESTED ACTION

### a. **The Commission Should Establish a Regulation Governing Communications of Official Matters that Promotes Government Transparency and Accountability**

The California Constitution provides that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and *the writings of public officials and agencies shall be open to public scrutiny.*" (Cal. Const., art. I, § 3(b)(1).)<sup>1</sup> Current law, however, does not specifically address the propriety of FGC Commissioners using their personal communications technologies means, such as e-mails, texts, and servers, to conduct public business.

A regulation prohibiting Commissioners and their employees and agents from conducting public business via private or secret or non-public means is necessary to optimally provide transparency, open-government access, and accountability to facilitate CPRA requests, and to promote public understanding, participation, and confidence in the FGC and in its practices and procedures in matters deserving of public review.

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<sup>1</sup>The California Public Records Act (Gov. Code, § 6250 et seq.) ("CPRA") provides that "public records" include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 6252(e).)

Such a regulation also furthers the principles articulated in Fish and Game Code section 107 that the FGC is legally obligated to adhere to. Relevant here are subdivisions: (b) stating "the commissioner shall conduct his or her affairs in the public's best interest;" (c) stating the "commissioner shall conduct his or her affairs in an open, objective, and impartial manner, free of undue influence, and the abuse of power and authority;" (d) stating FGC's programs "require public awareness, understanding, and support of, and participation and confidence in, the commission and its practices and procedures;" and (e) stating "the commissioner shall preserve the public's welfare and the integrity of the commission, and act to maintain the public's trust in the commission and the implementation of its regulations and policies."

With the public's increased and increasing skepticism of government officials who are using none traceable technologies and private e-mail accounts, the appearance of a conflict of interest that this creates, the distrust in government that these practices encourage, the diversity of views stakeholders the FGC should take all steps available to show by its actions and regulations that it is dedicated to being transparent beyond what current statutory law requires. This is especially critical for a body like the FGC whose actions directly and significantly impact stakeholders with a large diversity of views. Adoption of the proposed regulation is a small but significant step towards achieving just that.

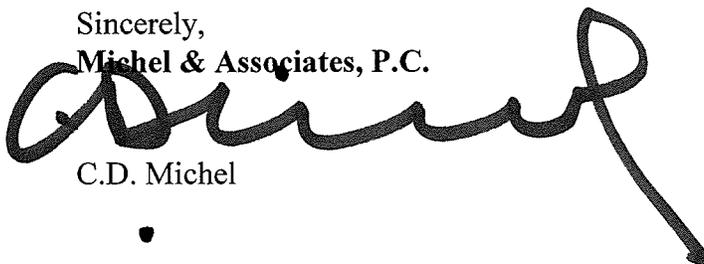
#### **IV. THE COMMISSION HAS THE LEGAL AUTHORITY TO TAKE THE REQUESTED ACTION**

Pursuant to section 108 of the California Fish and Game Code, the FGC must "adopt rules to govern the business practices and processes" of the FGC. Further, as discussed above, section 107 requires that the Commission maintain the public trust in implementing its regulations and policies. Thus, the regulation Petitioners propose is clearly within the FGC's regulatory authority.

#### **V. CONCLUSION**

For the above stated reasons, the FGC should accept this Petition and open the rulemaking process for a regulations that require electronic correspondence by Commissioners or their agents or employee about any official Commission matter to be conducted through government issued electronic-mail accounts that are hosted on government owned servers and that discourages the adoption or use of any technology or practice that serves to avoid creating a record that can be viewed by the public. Alternatively, the FGC should adopt this as an official policy, if not a regulation. Either way, this should be the standard operating procedure for the FGC.

Sincerely,  
Michel & Associates, P.C.

A large, stylized handwritten signature in black ink, appearing to read 'C.D. Michel', is written over the typed name. The signature is fluid and cursive, with a long tail extending downwards and to the right.

C.D. Michel

CDM/sab



## NATIONAL SHOOTING SPORTS FOUNDATION, INC.

400 N. Capitol Street NW, Suite 490 • Washington, D.C. 20001 • Tel (202) 220-1340 x205 • Fax (202) 220-1349  
Headquarters: 11 Mile Hill Road • Newtown, CT 06470-2359 • Tel (203) 426-1320 • Fax (203) 426-1087  
E-mail [tsantos@nssf.org](mailto:tsantos@nssf.org) • [nssf.org](http://nssf.org)

**TREVOR SANTOS**  
MANAGER, GOVERNMENT  
RELATIONS/STATE AFFAIRS

July 8, 2015

California Fish and Game Commission  
c/o Executive Director Sonke Mastrup  
P.O. Box 944209  
Sacramento, CA 94244-2090

**Re: Petitions for the Adoption of a Regulation Requiring Correspondence About Official Fish & Game Commission Matters to be Conducted Via Government Issued Means**

Dear Mr. Mastrup:

On behalf of the National Shooting Sports Foundation, I write to you today to express our support for the petition submitted on behalf of the National Rifle Association (“NRA”) and California Rifle and Pistol Association (“CRPA”) on June 5, 2015. The petition submitted on behalf of the NRA and CRPA “request(s) that the California Fish and Game Commission (“FGC”) propose and adopt regulations requiring Department of Fish & Wildlife (“DFW”) personnel, FGC Commissioners, and staffers, agents, employees, and others assisting them with official Commission business, to conduct all government business in a way that maximizes public transparency and discourages the exclusion of any stakeholder group from being fully informed about the regulatory process.”

As the trade association for America's firearms, ammunition, hunting, and recreational shooting sports industry, the National Shooting Sports Foundation (“NSSF”) seeks to promote, protect, and preserve hunting and the shooting sports. NSSF has a membership of nearly 13,000 manufacturers, distributors, firearms retailers, shooting ranges, and sportsmen's organizations. Our manufacturer members make the firearms used by law-abiding California sportsmen, the U.S. military and law enforcement agencies throughout the state.

The view of the NSSF follows that of the NRA and CRPA in that the use of personal email, personal cell phones, or any other personal device used for sending or receiving official government communications or business should be strictly prohibited or highly discouraged. When conducting business funded by tax-payers, the ultimate goal of the FGC and FWD should be complete transparency. Like the NRA and CRPA, the NSSF would respectfully request the FGC and DFW adopt a regulation, or official policy, requiring all business communications be conducted via government issued technology and stored on government servers, cloud-based databases, etc.

In closing, the National Shooting Sports Foundation strongly supports and would respectfully request that you move forward with the petition submitted on behalf of the NRA and the CRPA, and adopt regulations, or official policy, requiring all correspondence regarding official Fish & Game Commission matters be conducted through government issued means.

Sincerely,



Trevor W. Santos  
Manager of Government Relations – State Affairs  
National Shooting Sports Foundation

cc: California Fish and Game Commissioners  
Mr. Charlton Bonham, Director, California Department of Fish and Wildlife  
Governor Edmund G. Brown, Jr.  
National Shooting Sports Foundation

# **Commission Procedures**

## The Evolution

Presented to the California Fish and Game Commission by  
Commission Staff on October 8, 2015

# Evolutionary Forces

## Public expectations:

- Greater transparency
- More access
- Active engagement
- Effective outcomes

## Staff expectations:

- Efficient process
- Responsiveness
- Excellent service
- Procedures legal

# Proposed Adaptations

- Commission quorum
- Agendas
- Committee recommendations
- Public participation
  - Written
  - Verbal
  - Audio/visual presentations
  - Prohibited behavior

# Commission Quorum

Meetings may not be conducted without a quorum of members present:

- Commission meetings require three members
- Committee meetings require one appointed member
- Only the co-chairs assigned to a committee may actively participate in committee meetings

# Agendas

Establish agenda-setting procedures:

- Public requests for agenda items must be received no later than the meeting immediately prior to the desired meeting
- Commission meeting agendas will be established by majority vote of the Commission but may be amended by the president, vice president or designee

# Agendas

- Committee agendas are approved by a majority vote of the Commission
- Committee agendas may not contain items on Commission meeting agendas for action unless directed by majority vote of the Commission

# Committee Recommendations

Establish procedures for committee recommendations:

- Committees may meet to make recommendations no later than 15 days prior to the Commission meeting at which action on the subject of the recommendation may be taken
- Committee recommendations shall be posted to the Commission website at least five days prior to said meeting

# Public Participation - Written

- Establish procedures for submitting written comments and materials for Commission and committee meetings
- Establish procedures for what written comments and materials are posted to the Commission website and when

# Public Participation - Verbal

Establish procedures for speaking at Commission and Committee meetings:

- Public comment taken before the Commission makes a decision on an agenda topic
- During public forum, public may address Commission policies or other matter within its jurisdiction, so long as the subject is not related to items already on the agenda
- Time allotted for individuals wishing to speak to an agenda item shall be set by the presiding commissioner at between one and three minutes

# Public Participation – Verbal

- The public may be granted additional time to speak or make presentations, either through pre-approval by the president or designee of the president, or by having three people cede time.
- The Commission may limit the total amount of time for public comment on a particular issue by publishing the time limit on the meeting agenda

# Public Participation – Audio/Visual

Establish procedures and criteria for audio/visual presentations at meetings:

- Must be pre-approved by the executive director
- Disapproval only if irrelevant, inappropriate, contains unauthorized copyrighted material, or, for Commission meetings only, exceeds the allotted time

# **Public Participation Prohibited Behavior**

Identify behaviors that could result in eviction from a meeting:

- Behavior preventing orderly function of meeting

SENIOR COUNSEL  
C. D. Michel\*

SPECIAL COUNSEL  
JOSHUA R. DALE  
ERIC M. NAKASU  
W. LEE SMITH

ASSOCIATES  
ANNA M. BARVIR  
MICHELLE BIGLARIAN  
SEAN A. BRADY  
SCOTT M. FRANKLIN  
BEN A. MACHIDA  
CLINT B. MONFORT  
JOSEPH A. SILVOSO, III  
LOS ANGELES, CA

\* ALSO ADMITTED IN TEXAS AND THE  
DISTRICT OF COLUMBIA



OF COUNSEL  
DON B. KATES  
BATTLEGROUND, WA

RUTH P. HARING  
MATTHEW M. HORECZKO  
LOS ANGELES, CA

WRITER'S DIRECT CONTACT:  
562-216-4464  
SBRADY@MICHELLAWYERS.COM

September 24, 2015

**VIA ELECTRONIC MAIL & U.S. POST**

Sonke Mastrup  
Executive Director  
CALIFORNIA FISH & GAME COMMISSION  
P.O. Box 944209, Sacramento, CA  
[smastrup@dfg.ca.gov](mailto:smastrup@dfg.ca.gov)

**Re: Comments on Wildlife Resources Committee Procedures**

Dear Mr. Mastrup:

We again write on behalf of our client the National Rifle Association of America to comment on the Wildlife Resources Committee's lack of established procedure and governing rules. Our office sent the Commission's Executive Director a letter on April 14, 2014, raising concerns that the originally proposed rules for the WRC would be improper as "underground regulations" because they had not been adopted pursuant to the proper rulemaking process. That letter also outlined nine other specific issues that are confusing or otherwise unclear as to plans for the future operation of the WRC.<sup>1</sup>

Our office followed up with the Executive Director about that letter. We were informed that the Commission had since addressed our client's concerns. Not seeing any evidence of that, on July 11, 2014, we sent a formal request that this Commission require that rules and procedures be established for the WRC through the normal regulatory approval process before the WRC takes any further

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<sup>1</sup> A copy of the letter is attached as Exhibit 1.

Mr. Sonke Mastrup  
September 24, 2015  
Page 2 of 4

action.<sup>2</sup> Around the same time Safari Club International submitted a letter raising similar concerns, and NSSF attorneys also submitted a letter correctly explaining the legal shortcomings for how the WRC is operated. Due to a lack of response to these correspondence, our office then followed up with an official petition on July 28, 2014, which the Commission accepted and referred it to staff for evaluation and recommendation.<sup>3</sup>

Despite all these efforts, our client's concerns have not been addressed *over a year later*. To date no official procedures for the WRC have been adopted. To the contrary, it seems like how the WRC runs is ever-changing, leaving stakeholders cynical about the process and with many questions that need to be answered, including:

What is the process for arranging a WRC meeting? Who decides the date, location, and format?

Who dictates what items will be discussed at the WRC? How are issues decided to be placed on the agenda for any given meeting? Is there a process for the public to suggest items for consideration by the WRC?

Who decides (or what is the process for deciding) what actions the WRC will take, i.e., whether a recommendation will be made to the full Commission? What happens if one Commissioner disagrees with a recommendation? Is there a record kept of that? Is the Commission or the public informed of the disagreement?

What form does a recommendation take? Who prepared it?

Are any meeting minutes or notes of proposed actions prepared? If so, by whom? Are any meeting minutes or notes kept? If so, are they made available?

Does the WRC comply with the Bagley-Keene Act as it must? If so, does it have established procedures to maintain compliance? Who created those procedures?

Until these (and other) questions are answered and the lack of transparency for what the WRC is doing is addressed, it is inappropriate for the WRC to engage in any more activity related to the Commission's policy making. Yet, the exact opposite seems to be occurring.

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<sup>2</sup> A copy of the letter is attached as Exhibit 2.

<sup>3</sup> A copy of the petition is attached. as Exhibit 3

Mr. Sonke Mastrup  
September 24, 2015  
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Not only does the WRC continue to operate without any formal governing procedures in place, but it is *expanding* its operation. The October Commission meeting agenda includes, among other items, "Appointments to predator workgroup." While not entirely clear (which is an additional issue that needs to be addressed), it appears this item means the Commission will be discussing nominations and appointments to the WRC's so-called Predator Policy Workgroup ("PWG"). The propriety of such an expansion is dubious standing alone, but with so many questions remaining about the proper procedure and structure for the WRC itself, doing so is beyond the pale for a public entity.

Moreover, it is unclear whether it is even legal to form the PWG. Nothing in the statute creating the WRC provides for it.<sup>4</sup> Assuming it is legal, it remains unclear whether the Commission or the WRC would be the body responsible for creating it and regulating it. Accordingly, before the WRC expands with subcommittees like the PWG, the following questions should be answered:

What is the source of authority to create the PWG? Assuming there is such authority, why is its creation not subject to the official rulemaking process? Would the Commission be able to create a workgroup under itself without going through the formal rulemaking process?

Who has authority to dictate the criteria or process for nominating PWG members? Are such nominations subject to the official rulemaking process?

Assuming such authority exists in either case, does it reside in the Commission or the WRC?

Will the public have an opportunity to weigh in on the criteria for nominating PWG members?

Of course, the same queries regarding the lack of procedure for the WRC generally apply to the PWG, but addressing those now would be to put the cart before the horse. Our client is not alone in its concerns here. Even WRC staff recently recommended "[t]hat structure, function, and specific tasks for the predator workgroup be clearly identified."<sup>5</sup>

Needless to say, established rules and procedures are needed for the WRC now. Important matters are currently being addressed while many stakeholders remain uncertain about how to participate in the process because of the constantly changing process. The effect is to thwart the original purpose of the WRC, which was to facilitate input from stakeholders on matters of interest

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<sup>4</sup> See Fish and Game Code § 106.

<sup>5</sup> See Item 7 on Page 8 at:  
[http://www.fgc.ca.gov/meetings/2015/Sep/WRC\\_MeetingBinder\\_20150907.pdf](http://www.fgc.ca.gov/meetings/2015/Sep/WRC_MeetingBinder_20150907.pdf)

Mr. Sonke Mastrup  
September 24, 2015  
Page 4 of 4

regarding natural resources that the Commission may want to consider.

For these reasons, we respectfully request that the above questions be answered and that the WRC cease taking any actions until official rules and procedures governing it are adopted following a public comment period. If you have any questions, please feel to contact our office.

Sincerely,  
**Michel & Associates, P.C.**

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

Sean A. Brady

cc'd by Email and U.S. Post:  
Thomas Gibson, General Counsel  
Office of the General Counsel  
Department of Fish and Wildlife  
([thomas.gibson@wildlife.ca.gov](mailto:thomas.gibson@wildlife.ca.gov))  
Charlton H. Bonahm, Director  
Department of Fish and Wildlife  
([director@wildlife.ca.gov](mailto:director@wildlife.ca.gov))

# **EXHIBIT 1**

SENIOR COUNSEL  
C. D. MICHEL\*

SPECIAL COUNSEL  
JOSHUA R. DALE  
W. LEE SMITH

ASSOCIATES  
ANNA M. BARVIR  
SEAN A. BRADY  
SCOTT M. FRANKLIN  
THOMAS E. MACIEJEWSKI  
CLINT B. MONFORT  
TAMARA M. RIDER  
JOSEPH A. SILVOSO, III  
LOS ANGELES, CA

\* ALSO ADMITTED IN TEXAS AND  
THE DISTRICT OF COLUMBIA

WRITER'S DIRECT CONTACT:  
562-216-4474  
SFRANKLIN@MICHELLAWYERS.COM



OF COUNSEL  
DON B. KATES  
BATTLEGROUND, WA

RUTH P. HARING  
MATTHEW M. HORECZKO  
LOS ANGELES, CA

GLENN S. MCROBERTS  
SAN DIEGO, CA

AFFILIATE COUNSEL  
JOHN F. MACTINGER  
JEFFREY M. COHON  
LOS ANGELES, CA

DAVID T. HARDY  
TUCSON, AZ

April 14, 2014

**VIA EMAIL, U.S. POST  
& HAND DELIVERY**

Sonke Mastrup  
Executive Director  
CALIFORNIA FISH & GAME COMMISSION  
P.O. Box 944209, Sacramento, CA  
[smastrup@dfg.ca.gov](mailto:smastrup@dfg.ca.gov)

**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](http://www.fgc.ca.gov/meetings/2014/feb/proposed_committee_procedures.pdf).

The Draft, as written, is a "regulation"<sup>1</sup> under state law. So the Commission appears to be

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<sup>1</sup> 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 multi-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. [<sup>2</sup>]
- Non-chair Commissioner [sic] may attend committee meetings.[<sup>3</sup>]

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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<sup>2</sup> <http://www.fgc.ca.gov/meetings/committees/MRCrulesandprocedures052213.pdf>.

<sup>3</sup> [http://www.fgc.ca.gov/meetings/2014/feb/proposed\\_committee\\_procedures.pdf](http://www.fgc.ca.gov/meetings/2014/feb/proposed_committee_procedures.pdf).

Mr. Sonke Mastrup  
April 14, 2014  
Page 5 of 5

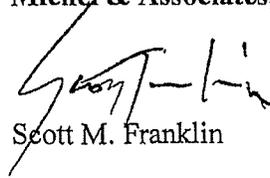
live streaming and later web access should be considered a priority.

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.**



Scott M. Franklin

cc'd by Email and U.S. Post:  
Thomas Gibson, General Counsel  
Office of the General Counsel  
Department of Fish and Wildlife  
([thomas.gibson@wildlife.ca.gov](mailto:thomas.gibson@wildlife.ca.gov))  
Charlton H. Bonahm, Director  
Department of Fish and Wildlife  
([director@wildlife.ca.gov](mailto:director@wildlife.ca.gov))

## **EXHIBIT 2**

SENIOR COUNSEL  
C. D. MICHEL\*

SPECIAL COUNSEL  
JOSHUA R. DALE  
W. LEE SMITH

ASSOCIATES  
ANNA M. BARVIR  
SEAN A. BRADY  
HANNAH G. ELISHA  
SCOTT M. FRANKLIN  
BEN A. MACHIDA  
THOMAS E. MACIEJEWSKI  
CLINT B. MONFORT  
JOSEPH A. SILVOSO, III  
LOS ANGELES, CA

\* ALSO ADMITTED IN TEXAS AND  
THE DISTRICT OF COLUMBIA

WRITER'S DIRECT CONTACT:  
562-216-4444  
CMICHEL@MICHELLAWYERS.COM



OF COUNSEL  
DON B. KATES  
BATTLEGROUND, WA

RUTH P. HARING  
MATTHEW M. HORECZKO  
LOS ANGELES, CA

GLENN S. McROBERTS  
SAN DIEGO, CA

AFFILIATE COUNSEL  
JOHN F. MACTINGER  
JEFFREY M. COHON  
LOS ANGELES, CA

DAVID T. HARDY  
TUCSON, AZ

July 11, 2014

**VIA EMAIL & U.S. POST**

President G. Michael Sutton  
Vice President Jack Baylis  
Commissioner Jim Kellogg  
Commissioner Richard B. Rogers  
Commissioner Jacque Hostler-Carmesin  
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

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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.

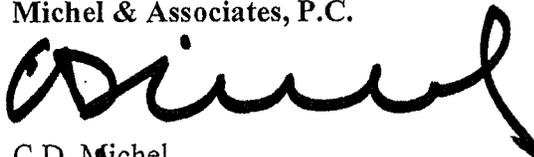
**6. *Reservation of Rights***

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  
Executive Director  
CALIFORNIA FISH & GAME COMMISSION  
P.O. Box 944209, Sacramento, CA  
[smastrup@dfg.ca.gov](mailto:smastrup@dfg.ca.gov)

## **EXHIBIT 3**

SENIOR COUNSEL  
C. D. MICHEL\*

SPECIAL COUNSEL  
JOSHUA R. DALE  
W. LEE SMITH

ASSOCIATES  
ANNA M. BARVIR  
SEAN A. BRADY  
HANNAH G. ELISHA  
SCOTT M. FRANKLIN  
BEN A. MACHIDA  
THOMAS E. MACIEJEWSKI  
CLINT B. MONFORT  
JOSEPH A. SILVOSO, III  
LOS ANGELES, CA

\* ALSO ADMITTED IN TEXAS AND THE  
DISTRICT OF COLUMBIA

WRITER'S DIRECT CONTACT:  
562-216-4441  
CMICHEL@MICHELLAWYERS.COM



OF COUNSEL  
DON B. KATES  
BATTLEGROUND, WA

RUTH P. HARING  
MATTHEW M. HORECZKO  
LOS ANGELES, CA

GLENN S. MCROBERTS  
SAN DIEGO, CA

AFFILIATE COUNSEL  
JOHN F. MACHTINGER  
JEFFREY M. COHON  
LOS ANGELES, CA

DAVID T. HARDY  
TUCSON, AZ

July 28, 2014

**SENT VIA E-MAIL**  
**& HAND DELIVERED**

California Fish and Game Commission  
c/o Executive Director Sonke Mastrup  
P.O. Box 944209  
Sacramento, CA 94244-2090

[sonke.mastrup@fgc.ca.gov](mailto:sonke.mastrup@fgc.ca.gov)

**Re: Petition for Rule Making by the Fish & Game Commission Regarding the  
Need for Formal Procedures and Rules for the Proper and Fair Operation  
of the Wildlife Resources Committee**

Dear Mr. Mastrup:

This Petition, submitted by the National Rifle Association of America ("NRA") pursuant to Government Code sections 11340.6 and 11340.7, requests that the California Fish & Game Commission (the "Commission") enact regulations to ensure public participation and fair debate vis-à-vis the Wildlife Resource Committee (the "WRC").

**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, and hundreds of thousands of members 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."

NRA has been a party to or supported multiple lawsuits throughout the nation supporting and

defending the right to keep and bear firearms for hunting, sport shooting, and self-defense. Indeed, one of NRA's key functions is to preserve the tradition of hunting, by protecting it from unreasonable and unnecessary restrictions.

NRA has an established record of advocating against restrictions on hunting based on scientifically unsupported claims of alleged environmental harm.

Petitioner David Halbrook resides in Victorville, California, and has been a hunter for basically his entire life. Mr. Halbrook has hunted various big and small game in California in the past, and he intends to hunt in California in the future. Mr. Halbrook is a member of NRA and is the executive director of the Hunt For Truth Association.

Based on the foregoing, the petitioners have standing to make the requested regulatory changes.

## II. REQUESTED REGULATORY CHANGES

Petitioners hereby seek the amendment of California Code of Regulations ("CCR"), title 14, via the addition of a new section dedicated to the procedural aspects of the operation of the WRC, including, but not limited to, public meetings held by the WRC.

The following provisions, based on draft language created by the Commission, should be included in the new section.

- (A) Section 108 of the Fish and Game Code requires the commission to adopt rules to govern the business practices and processes of the Commission. Sections ~~105 and~~<sup>106</sup> of the Fish and Game Code require the commission to establish ~~a minimum of two committees, the Marine Resources Committee and~~<sup>[2]</sup> the Wildlife Resources Committee; respectively.
- (B) A minimum of one, but no more than two members of the Commission will be appointed to the Wildlife Resources Committees at the first Commission meeting of each calendar year. To the extent feasible, the Commission shall place at least one Commissioner with substantial hunting experience on the Wildlife Resources Committee.
- (C) All public are welcome to attend and participate meetings as defined in subsection (a).
- (D) The Commission will establish the meeting schedule for the WRC committees each year

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<sup>1</sup> ~~Strikeout~~ and underline are used herein to reflect deletions and additions, respectively, that Petitioner proposes be made regarding language previously put forth by the Commission in the Draft.

<sup>2</sup> Petitioner is not taking any position on what regulations should or should not be adopted for the operation of the Marine Resources Committee, but reference thereto is omitted herein because this Petition does not concern the operation of the Marine Resources Committee.

as part of the annual rulemaking calendar the prior November and may schedule additional meetings as needed.

- (E) Agenda will be approved at the Commission meeting before the committee meeting. Agendas will be developed by staff and will be comprised of standing items and topics requested by: referred by the Commission, topics requested by the Department, and/or state agencies, and federal agencies, and standing items. Public requests for agenda items must be made to the Commission and subsequently referred to the appropriate committee Wildlife Resources Committee.

Agenda items to be considered for the year will be adjusted based on urgency, need, and interest as determined by the Commission. Findings and recommendations will be made to the Commission for possible action by the two chairs Wildlife Resources Committee. If the Wildlife Resources Committee has two members, any finding or recommendation it makes must be unanimous.

- (F) All Wildlife Resources Committee meetings of committees shall be noticed at least 10 days prior to the meetings. Meeting agendas will be noticed on the Commission's website and distributed electronically.
- (G) Commission staff will secure appropriate meeting venues for Wildlife Resources Committee meetings with preference given to those that are provided free of charge. Meetings will be run by at least one of the Wildlife Resources Committee members or the designee, two chairs and facilitated by Commission staff.
- (H) ~~In general~~ Unless specific conditions dictate otherwise, meetings will be structured to provide participants opportunities to engage in detailed discussions with Commission staff, Department staff, the presenter (if applicable), and stakeholders. Meetings The Wildlife Resources Committee will strive to provide an informal setting at its meetings, where all participants will have an opportunity to provide input into the conversation. However, if required, the chairs Wildlife Resource Committee retains the option to apply a more structured setting whereby discussion and public comment are governed by speaker cards and time limits.
- (I) ~~Non-chair member~~ Commissioners may attend Wildlife Resource Ccommittee meetings, however, they are expressly prohibited from participating in anything other than an observational capacity. Non-member Commissioners shall not make any comment, either directly or indirectly, during a Wildlife Resources Committee meeting.
- (J) Commission staff shall prepare a ~~Mmeeting~~ Ssummary following each Wildlife Resources Committee meeting that summarizes the main discussion points and any recommendations developed by the Wildlife Resources Committee ~~committee chairs.~~ Draft meeting summaries shall be provided to the Department and Wildlife Resources Committee ~~committee chairs~~ prior to finalization for review and comment. The final meeting summary shall be posted on the Commission's website and serve as the formal record of the meeting. Any recommendations developed by a committee shall be clearly

identified in the meeting summary and presented to the Commission for consideration at a future Commission meeting.

- (K) Wildlife Resources Committee meetings shall be audio recorded. Wildlife Resource Commission meetings may shall be taped video recorded and broadcast on the internet at the discretion of unless the Commission and available makes a specific finding that, as to a specific fiscal year, funding is not reasonably available for video recording. This provision does not in any way inhibit any right that members of the public have concerning the use of a recording device to record public meetings of a state body.

Furthermore, the following provisions, drafted by the Petitioner, should also be included in the new section requested hereby.

- (L) A meeting is subject to the Bagley-Keene Act if (a) any portion of the meeting relates to one or more matter within the Commission's jurisdiction, and (b) the meeting is attended (whether in person or otherwise) by all of the following: at least one Wildlife Resources Committee member (or a Wildlife Resources Committee designee), at least one Department of Fish & Wildlife (the "Department") employee, and at least one person who is neither a member of the Department nor affiliated with the Commission (e.g., non-committee member Commissioners or Commission Staff). This provision only applies to meetings that concern, at least in part, nonmarine wildlife resource issues.
- (M) The ability of the public to speak at a Wildlife Resources Committee meeting on a particular item does not preclude a member of the public from attending a later Commission meeting and commenting on that item, or a related item, during the Commission meeting but prior to the Commission taking action on the relevant item.
- (N) If the Wildlife Resources Committee has a designee, the name of that designee shall be announced at a Commission meeting prior to that designee acting as the designee of the Wildlife Resources Committee.
- (O) The WRC shall strive to adhere to an "equal time" model to the extent practicable, to prevent an unreasonable disparity of non-public Wildlife Resources Committee meetings being granted to specific parties holding disparate viewpoints.
- (P) The Wildlife Resources Committee shall not create any sub-committee or other entity without express approval by the full Commission after the Commission has taken public comment on the issue. All subcommittees or similar entities created by Wildlife Resources Committee with Commission approval shall meet only as a part of Wildlife Resources Committee meetings, and all communications between members of these entities shall be treated as public records.
- (Q) A log should be kept of all Wildlife Resources Committee-related meetings attended by Wildlife Resources Committee members or the Wildlife Resources Committee designee.

### III. JUSTIFICATION FOR THE REQUESTED REGULATORY CHANGES

#### A. Any Rules Used by and for the WRC Are Regulations, Thus They Must Be Approved through the Proper Regulatory Process

The agenda for the Fish & Game Commission (“Commission”) meeting of February 5, 2014, included 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](http://www.fgc.ca.gov/meetings/2014/feb/proposed_committee_procedures.pdf).

The Draft, as written, is a “regulation” under state law. 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.

As used in section 11342.600, the term “state agency” includes every state commission. Gov’t Code § 11000. Thus, the Commission is clearly a state agency for the purposes of section 11342.600. Section 11342.600 is in accord with Fish & Game Code section 108, which “requires the commission to adopt rules to govern the business practices and processes of the Commission.”<sup>3</sup>

Should the Commission attempt to utilize any rules regarding the operation of the Wildlife Resources Committee without having them adopted via proper regulatory rulemaking, that would violate Government Code section 11340.5(a). That section states:

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.

Case law confirms that the Wildlife Resources Committee would be using illegal “underground regulations” if the Commission allowed the Wildlife Resources Committee to operate by a set of rules that were not properly enacted. *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 guidelines and manuals for a mutli-level review process used for selecting textbooks that could be used in public schools).

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<sup>3</sup> See the Draft, available at [http://www.fgc.ca.gov/meetings/2014/feb/proposed\\_committee\\_procedures.pdf](http://www.fgc.ca.gov/meetings/2014/feb/proposed_committee_procedures.pdf)

**B. Equal Access and Transparency Interests Will Be Served if the Petition Is Granted**

The Petitioner sent a letter to the Commission on April 14, 2014, outlining why the Wildlife Resources Committee needed rules adopted pursuant to the proper regulatory process. A copy of that letter is attached and incorporated by reference. Put simply, that letter outlined the various potential pitfalls related to the draft rules that the Commission circulated earlier this year, rules that, it seemed, the Commission wanted to adopt without adhering to the proper regulatory process. Because three months have passed since that letter and the July 28, 2014, meeting of the Wildlife Resources Committee is being held without any binding rules or regulations, the Petitioner is now forced to make this formal demand that the lack of regulations be addressed.

Indeed, to prevent any possible argument that a Commission decision was made as the result of a fault in the undefined Wildlife Resources Committee public comment process in place as of July 28, 2014, the Petitioner strongly suggests that the Wildlife Resources Committee not make any final decisions or recommendations at that meeting.

**IV. THE COMMISSION HAS THE LEGAL AUTHORITY TO ADOPT THE REQUESTED REGULATORY CHANGES**

Section 108 of the Fish and Game Code requires the commission to adopt rules to govern the business practices and processes of the Commission. Thus, the regulations sought hereby are clearly within the Commission's regulatory authority. *See also* Gov't Code § 11340.6 ("any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation").

**V. CONCLUSION**

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

Sincerely,  
**Michel & Associates, P.C.**



C.D. Michel

cc:  
cc: Senior Assistant Attorney General Christopher Ames  
([Christopher.ames@doj.ca.gov](mailto:Christopher.ames@doj.ca.gov))

enc:  
Letter of April 14, 2014