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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

**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~~^f 106 of the Fish and Game Code require the commission to establish ~~a minimum of two committees, the Marine Resources Committee and~~^[2] 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

¹ ~~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.

² 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 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.

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.”³

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).

³ See the Draft, available at 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.

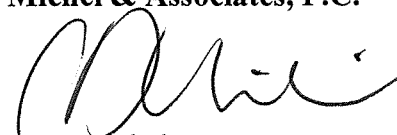
IV. THE COMMISSION HAS THE LEGAL AUTHORITY TO ADOPT THE REQUESTED REGULATORY CHANGES

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)

enc:
Letter of April 14, 2014

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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

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

Dear Mr. Mastrup:

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

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

The Draft, as written, is a "regulation¹" under state law. So the Commission appears to be

¹ Government Code section 11342.600 states, in its entirety,

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

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

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

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

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

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

Gov’t Code § 11340.5(a).

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

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

II. Substantive Comments Regarding the Proposed Regulations

1. Based on the lack of notice regarding the formation and dissolution of the Predatory Policy subcommittee, it is clear the WRC needs rules to explain exactly how and when subcommittees will be formed. The Draft should be revised accordingly.
2. Fish & Game Code section 106 does not actually authorize or suggest the WRC is to perform its *own* meetings; the Commission should explain to the public why the Commission is going beyond its statutory mandate.
3. The WRC should have at least two members; there appears to be no difference between

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,

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

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

Mr. Sonke Mastrup
April 14, 2014
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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

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