

July 21, 2009

**MEMORANDUM**

**To:** Donald Koch  
Director, California Department of Fish and Game

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Deputy Assistant Director, California Department of Fish and Game

**From:** Richard Roos-Collins  
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**Subject:** Administrative Orders under California Fish and Game Code sections 5900 - 6100

The California Hydropower Reform Coalition asked us to provide an opinion whether the California Department of Fish and Game, or the California Fish and Game Commission, may issue administrative orders to enforce the obligations for fishways, screening, and flow releases at dams and other diversions as set forth in Fish and Game Code sections 5900 – 6100 (Division 6, Chapter 3). Our answer is yes.

This issue arises because neither the Department nor Commission has rules, policies, or standard practices to that effect.<sup>1</sup> We have not located any case, or opinion of the California Attorney General, squarely on point.

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<sup>1</sup> We believe that such orders under FGC Division 6, Chapter 3 may have been common practice until several decades ago. For example, we have located a copy of a written order issued by the Commission under FGC section 5931 in 1989 requiring a fishway at Healdsburg Dam on the Russian River. Several cases suggest that the Department once issued orders under other sections in this FGC chapter, as described in this memo. *See, e.g., California v. San Luis Obispo Sportsman's Association*, 22 Cal. 3d 440, 444 n.1 (1978) (referring to Department's order, apparently under FGC section 5942, to stock fish in Whale Rock Reservoir in San Luis Obispo). And there is the famous anecdote that Elden Vestal, then a Department biologist in the Mono Basin, issued an order under FGC section 525 (predecessor to current section 5937) in the mid-1940s, purporting to limit Los Angeles' diversion from the tributaries to Mono Lake. We are following up with retired wardens and others to obtain documentary examples.

I.  
**PROCEDURES FOR FISHWAYS, SCREENING, AND FLOW RELEASES**  
**AT DAMS AND OTHER DIVERSIONS**

A. **Fishways**

The Commission shall, by “notice,” require a fishway at any dam proposed for construction or enlargement, after a hearing and finding that such fishway is both practicable and necessary for the preservation and protection of fish. FGC § 5933. It shall issue “written approval” of the design. *Id.*

In addition to that procedure,<sup>2</sup> the Department shall, from time to time, examine *all* dams in all rivers and streams frequented by fish. FGC § 5930.<sup>3</sup> The Department “shall cause plans to be furnished for a suitable fishway,” if the Commission finds that “...there is not free passage for fish over or around any dam.” FGC § 5931. Such plans shall specify a “...durable and efficient fishway, of such form and capacity and in such location as shall be determined by the [D]epartment.” *Id.* Indeed, they shall be detailed enough to show the dam owner exactly what to build. 34 *Ops. Cal. Atty. Gen.* 279 (1959).

The Commission may “order” a hatchery in lieu of a fishway, whenever it finds that “it is impracticable, because of the height of the dam, or other conditions, to construct a fishway....” FGC § 5938. Such hatchery shall be constructed “according to plans and specifications furnished by the [D]epartment.” *Id.* The Commission may also “order” the planting of fish in lieu of a hatchery. FGC § 5942.

The Commission may “determine..., subject to review by courts,” that an artificial barrier (other than a dam or other permitted facility) exists in a form deleterious to fish. Such barrier is prohibited. FGC § 5948.

In sum, FGC Division 6, Chapter 3, Article 2 (FGC §§ 5930-5948) provides for fish passage or functional equivalent at all dams, defined to “...include all artificial obstructions” (FGC § 5900(a)). The Commission and Department enforce this obligation by orders, notices, findings, opinions, determinations, and approvals. Although the article does not consistently

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<sup>2</sup> This procedure presumably applies to any dam proposed after 1933. FGC 5933, enacted in its current form in 1957, derives from FGC section 520.5, enacted in 1933. “Historical and Statutory Notes,” Westlaw.

<sup>3</sup> FGC section 5930, enacted in 1957, derives from FGC section 521, enacted in 1933, which derives ultimately from Penal Code section 637, enacted in 1891. FGC section 5931 derives from Penal Code section 642, enacted in 1877. “Historical and Statutory Notes,” Westlaw. As a result, we believe that FGC sections 5930 – 5931 are enforceable at dams built before 1933, which might otherwise be grandfathered under FGC section 5933.

use the adjective “written” to describe such direction to dam owners and other entities, that is the only reasonable approach. As discussed in Section II.B below, the violation of such direction gives rise to criminal liability.

## **B. Fish Screens for Conduits**

Articles 3 – 5 set forth alternative provisions for screening of diversions to prevent fish entrainment. They differ primarily in the Department’s obligations to cover costs of such screening. Article 3 applies to conduits with a capacity over 250 cfs; Article 4, conduits with a capacity less than that amount; and Article 5, conduits for any new diversions after 1971 in salmon and steelhead waters. For this purpose, a conduit is any pipe, canal, or other structure to divert or receive water from a waterway. FGC § 5900(b).

Under Article 3, the Department shall examine all conduits with a capacity over 250 cubic feet per second. FGC § 5981. It shall “order” the owner to install a screen when, in the Department’s “opinion,” a screen is necessary to prevent fish entrainment. *Id.* Such order shall “be in writing,” and shall specify design, timing of construction, and cost. FGC § 5982. If the Department and owner do not agree to such terms, the Department of Water Resources shall make a “final and conclusive” decision. FGC § 5992. Following construction, the Department shall inspect the screen and, if in accordance with the terms, “... accept and approve the screen in writing.” FGC § 5988.

Under Article 4, the Department shall also examine all new and existing conduits with a capacity less than 250 cfs. It may construct and operate a screen to prevent fish entrainment, on the basis of its “opinion” that such a screen is practical and necessary. FGC § 6021. It shall provide “written notice” to the conduit owner of its intent to construct a screen. FGC § 6023. Such notice shall, when signed by the owner, function as an “agreement” between the Department and owner as to the terms, including the owner’s rendering of “... assistance ... necessary to keep the screen in satisfactory operating condition” (FGC § 6023) and provide for the bypass and return of any screened fish back to the waters of origin (FGC §§ 6021-6022). In the absence of such agreement, the Department of Water Resources shall make a “final and conclusive” decision. FGC § 6024.

In sum, FGC Division 6, Chapter 3, Article 3 (FGC §§ 5980-5993) and Article 4 (FGC §§ 6020-6028) provide that owners of conduits will undertake to screen conduits to prevent fish entrainment. These provisions expressly require that Department use written notices and agreements to enforce this obligation at individual conduits.

After 1971, the owner shall screen any new diversion which the Department “determine[s]...to be deleterious to salmon and steelhead” present in the stream. FGC § 6100 (FGC Div. 6, Part 1, Chapter 3, Article 5). The owner shall bear the cost of such screen (*id.*), notwithstanding Article 3, which provides that the Department shall pay half of the cost

for screening a conduit over 250 cfs (FGC §§ 5983, 5992) and Article 4, which provides that the Department shall pay the cost of screening any conduit under 250 cfs (FGC § 6021). Within 30 days or notice of such diversion, or such longer period set in written agreement, the Department shall submit “proposals as to measures necessary to protect salmon and steelhead.” FGC § 6100. The Department shall inspect the proposed diversion, following “notice,” and shall base its proposals on the results of such inspection. *Id.* The Department shall provide “information” necessary for the owner’s compliance with these provisions. *Id.* Diversion shall not commence until the Department has “determined” that the required measures have been incorporated into the plans for such diversion. *Id.* Although Article 5 does not consistently use the adjective “written” to describe such direction to the diversion owner, that is the only reasonable approach. As discussed in Section II.B below, the violation of such direction gives rise to criminal liability.

### **C. Flow Releases**

FGC section 5937 requires the owner of any dam to release flow through a fishway or otherwise sufficient to maintain any fish below the dam in good condition. If, “...in its judgment,” release through the fishway is “impractical or detrimental to the owner during a period of “minimum flow,” the Department may “grant[...]permission” to release such sufficient flow through some means other than a fishway (e.g., over the dam). *Id.*

This provision does not specify whether the Department has authority to determine the flow release through a fishway or otherwise. We believe that authority exists. First, the dam owner has an obligation to “...keep the fishway in repair and open and free from obstructions to the passage of fish at all times.” FGC § 5935. Plainly, flow is necessary for such functionality. Second, as discussed in Section I.A above, the design of the fishway is specified in a written order issued by the Department. FGC section 5937 is in the same article as section 5931. Nothing in FGC section 5931 limits such order to the physical design of the fishway or excludes operational terms, such as a flow release. If the Department has authority to specify a flow release under FGC section 5937, the only reasonable approach to exercise that authority is a written order under FGC section 5931, since criminal and other liability attaches to such violation.

### **D. Streambed Alteration Agreements**

FGC sections 5900 – 6100 were enacted in various forms from 1877 (as Penal Code) through 1971. *See, e.g., 53 Ops. Cal. Atty. Gen. 332 (1970)* (attaching Penal Code provisions, as amended through 1917, which are predecessors to current Articles 1 – 4). FGC sections 1600 – 1605, as enacted in 1976, partly overlap these earlier provisions and could indeed be used to enforce FGC section 5937 and possibly other provisions in Division 6, Chapter 3. *See Department of Fish and Game, Administrative Report 92-1, A Field Guide to Lake and Streambed Alteration Agreements (1992), p. IX-3.*

An entity proposing to “substantially divert or obstruct the natural flow” of waterway, or use material from the bed, bank, or channels of such waterway, or dispose of any material into such waterway, shall notify the Department. FGC § 1602(a). If the Department determines that the proposal will not “... substantially adversely affect an existing fish or wildlife resource,” the Department shall issue notice which includes any measures to protect such resources. FGC § 1602(a)(2)(4)(A)(i). Otherwise, the Department and applicant shall reach a Streambed Alteration Agreement, either voluntarily or by arbitration, specifying the protection measures. FGC § 1603. Any such agreement shall remain in effect for a term not to exceed five years, subject to extension. FGC § 1605.

The Department has authority to require a flow release as a “... measure to protect fish and wildlife” in a written notice (FGC § 1602(a)(4)(A)(i)) or Streambed Alteration Agreement (FGC § 1603(a)) for any new or modified diversion. We believe that these provisions also could cover a fishway or screening.<sup>4</sup>

## **II.**

### **JUDICIAL REVIEW AND ENFORCEMENT OF ADMINISTRATIVE ORDERS**

#### **A. Judicial Review**

FGC sections 5900 – 6100 do not expressly provide for judicial review of the orders and other final actions by the Department and Commission that establish obligations for fish passage, screening, and flow releases.<sup>5</sup> We conclude that any such action is reviewable by petition for administrative mandamus under Code of Civil Procedure § 1094.5. As discussed in Section II.B, violation of these orders and other final actions gives rise to criminal liability as well as civil remedies. As required for mandamus jurisdiction, each such order is: (i) adjudicatory, determining the rights and obligations of a dam owner or other entity for conservation measures; (ii) based on a hearing;<sup>6</sup> and (iii) final, effective without further approval by any other agency.

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<sup>4</sup> As recommended in Section III, the Department should examine how best to harmonize these provisions, which will have different consequences for dam owners and other entities. Thus, a Streambed Alteration Agreement has a term of 5 years subject to renewal, while the orders under FGC sections 5900 – 6100 appear to have perpetual terms. Similarly, FGC section 1603 requires the owner to bear the cost of any protection measures, while FGC section 5981 (as one example) requires the Department to bear half of the cost of a screen on a conduit with a capacity over 250 cfs.

<sup>5</sup> The exception is FGC section 5948, providing for judicial review of certain orders of the Commission for barrier removal.

<sup>6</sup> FGC section 5933 expressly requires a “hearing” as the basis of a fishway order, which we believe includes the design as well as any minimum flow release. Although Articles 3 – 5 do not use the term “hearing” to describe a screening order, these provisions require exchange of information between the Department and

## **B. Enforcement**

The owner of a dam or other diversion violates the Fish and Game Code by failing to seek or obtain the approval of the Department or Commission, or to comply with the terms of any order, for fish passage, screening, or flow releases as provided in FGC §§ 5900 – 6100. Violation of any of these provisions, including any “order” thereunder, is a criminal misdemeanor. FGC § 12000(a); see *People v. Murrison*, 124 Cal.App.4<sup>th</sup> 349 (2002), 57 *Ops. Cal. Atty. Gen.* 475 (1974) (FGC §§ 1602 - 3); 53 *Ops. Cal. Atty. Gen.* 332 (1970) (FGC § 5943). The owner is also subject to injunction to prevent continuing violation (*Murrison, supra*), and civil damages for the unlawful taking of fish and wildlife (FGC § 2014(a)).

### **III. RECOMMENDED POLICY INITIATIVE**

In light of the continuing declines in salmon and steelhead fisheries, we recommend the following policy initiatives by the Department. None requires new legislation or rulemaking.

1. The Department should request an opinion of your General Counsel, or the California Attorney General, if you have any substantial concern about authority to issue administrative orders to enforce FGC sections 5900 – 6100. At the least, you should adopt a policy that clearly establishes applicability by provision,<sup>7</sup> compliance procedures (discussed below), and enforcement.<sup>8</sup>

2. Pursuant to FGC section 5930, the Department and the State Water Resources Control Board (SWRCB) should cooperatively inventory all dams and other diversions with water rights in watersheds which are critical salmon and steelhead waters. This inventory should include relevant information from the SWRCB’s eWRIMS (its water rights database)

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owner, as well as review and determination by the Department of Water Resources in the event of a dispute, to establish the screening order, thus creating the functional equivalent of a hearing.

<sup>7</sup> For example, FGC section 5981 derives from FGC section 535, enacted in 1933, which in turn derives from Penal Code section 629, enacted in 1895. See “Historical and Statutory Notes,” Westlaw. It presumably applies to any such conduit constructed subsequent to 1895, and it is silent whether it applies to conduits existing at that time. Other provisions in Division 6, Chapter 3 have different provenance and thus may have different applicability.

<sup>8</sup> FGC section 12000(b) provides for a penalty of not less than \$100 or \$1,000 per violation. Pursuant to general principle, this penalty presumably applies to each day of violation. Thus, for a violation which has continued for many years, this liability exposure could be very substantial. An enforcement policy should encourage owners to come into compliance with FGC sections 5900 – 6100 in consideration for reduced liability.

and CalFish's Passage Assessment database. A site examination may also be necessary.<sup>9</sup> The purpose of the inventory is to identify the measures (such as a fishway) which are known to be in place at each such dam or diversion.

3. On the basis of that inventory, the Department and Commission should compile their respective legal records whether each such dam or diversion has secured the authorizations provided by FGC sections 5900 – 6100, as well as sections 1600 - 1605.<sup>10</sup> For any which does not have an apparently applicable authorization, the Department should direct the owner to prove that it has obtained such authorization, or show cause why it has not.

4. The Department should then undertake compliance proceedings on a systematic basis. Options include:

- A. An approach (conceptually similar to the Department's initiative in the Shasta Basin) where dam owners and other diverters obtain a single authorization which effects compliance with FGC sections 1600-1605, 5900-6100, and the California Endangered Species Act; or
- B. Coordinated proceedings with the SWRCB, pursuant to a Memorandum of Understanding (MOU), to amend applicable water rights to incorporate (or otherwise conform to) authorizations for compliance with FGC sections 1600-1605 and 5900-6100. Such MOU could address funding and responsibilities for preparation of environmental documents under the California Environmental Quality Act.

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<sup>9</sup> We understand that, pursuant to FGC section 857(a) (1993), Department employees other than wardens (who are peace officers) must have the owner's permission or a court warrant to access private property to inspect a dam or other diversion.

<sup>10</sup> On July 21, 2009, Commission staff told us that its records more than 3 years old are in State Archives. We continue to search for such records related specifically to fishway and other orders.