Study R-100 July 14, 2016

Memorandum 2016-34

Fish and Game Law: Tentative Recommendation (Outstanding Issues)

The Commission[1] has been studying a proposed recodification of the Fish and Game Code. In conjunction with that process, the staff has been presenting the Commission with preliminary staff drafts, each proposing revision of discrete subject matter addressed by the existing code. At its last meeting, the Commission directed the staff to prepare and present a draft tentative recommendation that includes all staff drafts presented to the Commission through its meeting on June 1, 2016.[2]

Before that draft tentative recommendation can be prepared, the Commission will need to revisit several issues that were raised in those staff drafts, but have not yet been resolved. This memorandum presents further analysis of some of those issues. The remainder of the issues will be discussed in other memoranda to be presented, including the memorandum that presents the draft tentative recommendation.

If public comment is received on the issues presented in this memorandum sufficiently in advance of the presentation of the draft tentative recommendation, analysis of that comment will be presented in a future memorandum preceding presentation of the draft tentative recommendation. Otherwise, received public comment will be treated as comment on the circulated tentative recommendation, and analyzed with all other comment received on that recommendation.

Unless otherwise indicated, all statutory references in this memorandum are to the existing Fish and Game Code, or to proposed provisions of the contemplated new Fish and Wildlife Code.

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Memorandum 2016-26; Minutes (June 2006), p. 6.

Existing Section 15003 requires a payment from persons seeking to grow aquaculture products on public land or in public waters. However, the existing text of the section refers to the payment as both a "fee" (the label typically given to a statutory payment that is *not* considered to be a tax), *and* a "tax":

> 15003. (a) The department may assess a *fee* on persons growing aquaculture products on public lands and in public waters based on the price per pound of the products sold. The *fees*, if imposed, shall be set at amounts necessary to defray the costs of the commission and the department in administering this division. However, the *fees* if any, may not exceed the tax rates as provided in Section 8051.
>
> (b) The price per pound *for these taxation purposes* shall be based on the whole product weight or its equivalent as taken by the lessee.
>
> (c) The privilege *tax* imposed by this section shall be paid monthly to the department within 30 days after the close of each month. If not paid within 60 days after the close of the month in which it is due, a 10 percent penalty shall be paid.

(Emphasis added.)

Noting this ambiguous labeling, the Commission directed the staff to consult with the Office of Legislative Counsel, to clarify the nature of the payment required by the existing section.[3]

Background

Each year, the Office of Legislative Counsel analyzes all bills that would impose a monetary payment, and classifies the required payment as either a "tax" or a "fee." The distinction between a tax and a non-tax fee is important, because Article XIII A, Section 3 of the California Constitution imposes a supermajority approval requirement on legislation that increases a "tax." Consequently, it is potentially confusing for Section 15003 to describe the same charge as both a tax and a fee.

When Section 15003 was proposed for enactment in 1982,[4] the Office of Legislative Counsel analyzed the payment required by the section (which read substantively the same as it does today), and determined that the payment did *not* constitute a "tax" for purposes of Article XIII A, Section 3. However, it is

3. See Minutes (Feb. 2016), p. 5.
4. See 1982 Cal. Stat. ch. 1486.

possible that a subsequent amendment of that article by a 2010 citizen initiative (commonly referred to as "Prop. 26") might affect that classification.

Prior to that amendment, Article XIII A, Section 3 did not define the term "tax." Therefore, whether a required payment constituted a "tax" for purposes of the constitutional provision had been determined solely by applying a developing body of case law on that issue.[5] The amendment of the provision by Prop. 26 added a definition of the term. Further, according to the analysis of the proposition by the Legislative Analyst,[6] Prop. 26 "broadens the definition of a state or local tax to include many payments currently considered to be fees or charges."

Article XIII, Section 3 now provides:

> (a) Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature....
>
> (b) As used in this section, "tax" means any levy, charge, or exaction of any kind imposed by the State, except the following:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of providing the service or product to the payor.
>
> (3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
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> (4) A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or the State, as a result of a violation of law.

5. See, generally, California Farm Bureau Federation v. State Water Resources Control Bd., 51 Cal. 4th 421, 437, 247 P.3d 112, 121 Cal. Rptr. 3d 37 (2011); Sinclair Paint Co. v. State Bd. of Equalization, 15 Cal. 4th 866, 874, 937 P.2d 13, 64 Cal. Rptr. 2d 447 (1997).

6. See <http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2304&context=ca_ballot_props>, p. 58.

Analysis

Notwithstanding the adoption of Prop. 26, it is the staff's view that the monetary payment required by Section 15003 still does not constitute a "tax" under Article XIII A, Section 3. While under the new definition the payment clearly constitutes "a levy, charge, or exaction ... imposed by the State,"[7] it seems likely the payment would fall within either of two exceptions to the definition of "tax":

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.
>
> ....
>
> (3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.[8]

With regard to the first exception, it appears clear that Section 15003 imposes a charge for a specific benefit or privilege, i.e., the privilege of growing aquaculture products on public land or in public waters, that is granted directly to the person paying the charge, and is *not* granted to those who do not pay the charge. And, as Section 15003 mandates that the required payments be set at only amounts necessary to defray the costs of administering the division Section 15003 is in (a division limited only to aquaculture), there appears to be no basis for concluding that the total charges imposed by Section 15003 would "exceed the reasonable costs to the State of ... granting the privilege to the payor."

Similarly, with regard to the second exception listed above, Section 15003 could also be understood as imposing a charge "for the reasonable regulatory costs to the State," incident to regulating aquaculture on public lands or in public waters.

Proposed Revision

If the Commission concurs that the payment mandated by Section 15003 appears to be a charge other than a "tax," the staff suggests the revisions that follow be included in the draft Tentative Recommendation.

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7. Cal. Const., Art. XIII A, §3(a).
8. Cal. Const., Art. XIII A, §3(b)(1), (b)(3).

Continuation of Section 15003

The staff first suggests the following revisions to the section that would continue Section 15003:

> 15770. (a) The department may assess a fee on persons growing aquaculture products on public lands and in public waters, based on the price per pound of the products sold. The fees, if imposed, shall be set at amounts necessary to defray the costs of the commission and the department in administering this division. However, the fees if any, may not exceed the tax rates ~~as~~ provided in Section 8051.
>
> (b) The price per pound ~~for these taxation purposes~~ of the products sold shall be based on the whole product weight, or its equivalent as taken by the lessee.
>
> (c) The ~~privilege tax~~ fee imposed by this section shall be paid monthly to the department within 30 days after the close of each month. If not paid within 60 days after the close of the month in which it is due, a 10 percent penalty shall be paid.

Does the Commission wish to make these revisions in the draft tentative recommendation?

Related Provision

If the Commission decides to revise Section 15003 as indicated above, the staff suggests that the Commission also consider similar revisions to another aquaculture provision, based on the same rationale underlying the revision of Section 15003.

Existing Section 15406.7, which was enacted in 1990,[9] requires a monetary payment very similar to the type of payment required by Section 15003, for permission to cultivate a specific aquaculture product (oysters) on a water bottom leased from the state. For the same reasons that the payment mandated by Section 15003 for growing aquaculture products in general does not appear to be a "tax," the payment mandated by Section 15406.7 does not appear to be a tax. In fact, subdivision (c) of Section 15406.7 expressly refers to and suggests correspondence with the payment required by Section 15003.

The staff therefore suggests the following revisions to the section that would continue existing Section 15406.7:

> 16020. (a) In addition to the rent provided in Section 15406.5, every person operating under an oyster lease shall pay a ~~privilege~~

9. See 1990 Cal. Stat. ch. 1703.

~~tax~~ fee of four cents ($0.04) per packed gallon, or fraction thereof, of shucked oysters harvested by the lessee.

(b) If the oysters are marketed in the shell, the ~~tax~~ fee shall be based on the equivalent yield of shucked oyster meat. In determining the yield of oysters, it shall be deemed that 100 oysters are equivalent to one packed gallon of shucked oyster meat.

(c) The ~~tax~~ fee imposed by this section is the exclusive ~~privilege tax~~ fee that shall be imposed on lessees of state water bottoms for oyster cultivation, notwithstanding subdivision (a) of Section 15003.

Does the Commission wish to make these revisions in the draft tentative recommendation?

PROPERTY FORFEITURE

Some provisions of the Fish and Game Code provide for forfeiture of property used in a violation of the code. Two issues relating to such forfeiture are discussed below.

Civil Forfeiture of Net

Existing Sections 8630 to 8635 provide for seizure and possible civil forfeiture of a fishing net or trap being used for commercial fishing[10] in violation of the code. Under that procedure, a law enforcement officer is authorized to immediately seize a net or trap.[11] After seizure, the Department of Fish and Wildlife (hereafter, "Department") *may* initiate a civil court proceeding seeking forfeiture of a seized net.[12] However, it is not mandatory that the Department commence such a proceeding.

In a Staff Note in a previously submitted staff draft, [13] the staff asked whether this procedure could lead to a situation in which the owner of a seized net never has an opportunity to contest the grounds for the seizure and recover an improperly seized net. If the Department never commences a judicial forfeiture proceeding, what would the owner's recourse be? The Staff Note invited comment on that issue.[14]

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10. See existing Section 7600 ("The provisions of [Part 3 of Division 6] apply to the taking and possession of fish for any commercial purpose.").
11. Section 8630 (first paragraph).
12. Section 8630 (second paragraph). If forfeited, the section provides the net shall be either sold or destroyed.
13. See Staff Note following proposed Section 10770, in staff draft attached to Memorandum 2015-41.
14. *Id.*

In response, Harold Thomas, representing the Butte County District Attorney's Office, noted that "Civil motion practice will provide owners of seized nets the remedy of title adjudication in the form of a claim to the seized property."[15]

The staff indicated that it would conduct further research on that issue.[16]

After doing that research, it appears that Mr. Thomas is correct. If the Department retains a seized net without commencing a timely forfeiture proceeding, the owner of the net should be able to seek return of the net by applying for a civil writ of possession.[17] Further, it appears that a forfeiture proceeding is subject to a one-year statute of limitation.[18] If a seized net is held for longer than one year, without the Department commencing a civil forfeiture proceeding, the owner of the net should be able to recover possession (with exceptions for a net that is "contraband" because its construction violates law prohibiting certain types of nets,[19] or a net that is being held as evidence in a criminal prosecution[20]).

The staff does not believe that existing law requires any revision on this point. The corresponding Staff Note should not be included in a tentative recommendation.

Forfeiture of Property for Criminal Conviction

In researching the issue discussed above, the staff found an opinion of the Attorney General that closely examined certain statutory procedures for forfeiture of property used in violating the Fish and Game Code.[21] Among the analyzed provisions was Section 12157, which authorizes a court, following a criminal prosecution for and conviction of a violation of the Fish and Game Code, to order the forfeiture of any "device" used in the violation. The Attorney General opinion concluded that the procedure set out in Section 12157 does not provide adequate due process, because it does not require that notice be given to the owner of the property at issue, if the owner is a person other than the criminal defendant.

15. First Supplement to Memorandum 2015-41, p. 4.
16. First Supplement to Memorandum 2015-41, p. 5.
17. See Code Civ. Proc. § 512.010.
18. See Code Civ. Proc. § 340(b), 63 Ops. Cal. Atty. Gen. 346 (1980).
19. See existing Section 8635(a).
20. See existing Section 8635(b).
21. 63 Ops. Cal. Atty. Gen. 346 (1980).

The opinion cites a decision of the California Supreme Court, *People v. Broad*,[22] which addressed a similar procedure for forfeiture of a vehicle used for transportation of narcotics. The Court held that procedure violated the due process rights of a third party who had an ownership interest in the forfeited property, because the applicable forfeiture procedure did not require that notice be given to a third party who held an interest in the property to be forfeited. The Court emphasized that this was true, even if in a particular case it could be shown that the third party had no right to return of the property.[23]

This authority casts some doubt on the adequacy of the Fish and Game Code's provisions for forfeiture of property in a criminal case. While in two limited scenarios, existing law permits a court to consider whether a third party has an ownership interest in property that would be forfeited,[24] there is no express requirement even in those scenarios that third party owners be given notice of the prospective forfeiture. Section 12157 is also not the only section that has this apparent gap in the forfeiture procedure. Third party notice is also not mentioned in Section 12157.5 (providing for forfeiture of a motor vehicle or snowmobile used in committing specified offenses), nor is it a component of forfeiture pursuant to Section 8576(e)(2) (forfeiture of shark or swordfish gill net), or Sections 12006 and 12009 (forfeiture of vessel, diving or fishing gear, or vehicle used in the commission of specified offenses relating to abalone), the last three of which provide for forfeiture pursuant to Section 12157.

The issue discussed above could be addressed in the draft tentative recommendation. For example, the existing provisions could be revised to require that a prosecutor give notice of a potential forfeiture. This could perhaps be constructive notice, through publication, as the provision on civil forfeiture of nets provides. Or the law could require that actual notice be given to third parties who are known to own property that is subject to forfeiture in a criminal case. This latter approach could be implemented without creating any duty of inquiry. Alternatively, where the property is subject to public registration of ownership (e.g., a car) the prosecutor could be required to check the public ownership records.

It might also be appropriate to expressly provide standing for a third party owner to be heard when a judge is considering whether to forfeit property.

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22. 216 Cal. 1, 12 P.2d 941 (1932).
23. *People v. Broad*, *supra* at 8-9.
24. See Sections 12157(c)(2), 12157(d).

In considering whether to make such changes, it might be worth drawing a distinction between vehicles (which can have a high value) and other property, such as a gun or fishing gear (which is likely to have a lower value). There is case law suggesting that forfeiture without notice may be constitutional, when property of low value is seized to abate a public nuisance.[25]

The staff believes it would be helpful to receive public comment on these issues before making any decision. If the Commission agrees, the staff will revisit this matter in a later memorandum, with further analysis informed by any public comment that we have received.

FAR OFFSHORE FISHERY

At its October 2015 meeting, in response to another comment offered by Mr. Thomas,[26] the Commission directed the staff to further research whether the definition of "far offshore fishery" in existing Section 8111 should be revised, to eliminate possible ambiguity in the definition.[27]

Section 8111 defines the term "far offshore fishery" as follows:

> 8111. "Far offshore fishery" means a fishery that lies outside the United States 200-mile exclusive economic zone, as defined by paragraph (6) of Section 1802 of Title 16 of the United States Code.

The staff has further examined this definition, and found only one source of possible ambiguity, which is discussed below.[28] Of course, to the extent there remains some concern about this provision that has not been adequately addressed, any interested party will have an extended opportunity to comment on the provision in the tentative recommendation.

Use of the Term "Outside"

Section 8111 defines a far offshore fishery as a fishery lying "outside" the United States 200-mile exclusive economic zone, a geographic area identified in a

25. See Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894).
26. See First Supplement to Memorandum 2015-41, pp. 3-4.
27. Minutes (Oct. 2015), pp. 7-8. The Commission also directed the staff to solicit public comment on the issue in a Staff Note, and report on whatever was learned. Following the Commission's direction, that Staff Note was added to the cumulative draft the staff has maintained, but the portion of the cumulative draft including Section 8111 has not yet been circulated. However, interested stakeholders will have an opportunity to comment on the provision, and any approved Commission Note, in the tentative recommendation.
28. Unrelated to the discussed ambiguity, the referenced exclusive economic zone is now defined in paragraph (11) of the referenced section of the United States Code, rather that paragraph (6). The draft tentative recommendation will reflect that change.

federal statute. However, that statute provides that the specified zone has both an outer boundary (generally, 200 miles from the coast of the United States) as well as an *inner* boundary (generally, 12 miles from the coast).[29]

In light of the zone having both an outer and *inner* boundary, defining a far offshore fishery as an area "outside" that zone could be confusing. The term "outside" could be interpreted as meaning "not inside," meaning that any fishery *within* 12 miles of the coast of California also constitutes a "far offshore fishery." As that is almost certainly not the intended meaning of the section, it could eliminate some possible confusion if the word "outside" in Section 8111 was revised to read "beyond the outer boundary of":

> 8111. "Far offshore fishery" means a fishery that lies ~~outside~~ beyond the outer boundary of the United States 200-mile exclusive economic zone, as defined by paragraph (6) of Section 1802 of Title 16 of the United States Code.

Does the Commission want to include that revision in the Tentative Recommendation, with an accompanying Note inquiring as to whether the revision is consistent with the intended meaning of the existing section?

Respectfully submitted,

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29. See <http://oceanservice.noaa.gov/facts/eez.html>.