

## Memorandum 2016-57

**Fish and Game Law (Tentative Recommendation)**

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The Commission<sup>1</sup> is developing a proposed recodification of the Fish and Game Code. As a step in that process, the staff is preparing a draft tentative recommendation, which will include the subject matter of the preliminary staff drafts that have been presented to date.

The staff had hoped to have the draft tentative recommendation ready in time for presentation at the Commission's December 2016 meeting, but the work involved in finalizing the approximately 800-page document (which included significant organizational changes, updating to reflect 2015 and 2016 legislative changes, and thorough proof-reading) was not completed in time for review at that meeting. The draft should be ready for consideration at the Commission's February 2017 meeting.

One issue relating to the possible content of the tentative recommendation is discussed briefly below.

**Forfeiture of Property Used to Violate Fish and Game Code**

Existing law provides for the forfeiture of property used in a criminal violation of the Fish and Game Code.<sup>2</sup>

At the July meeting, the Commission considered whether that law should be revised to better address the forfeiture of property that is owned by a person other than the criminal defendant.

The staff raised the possibility of expressly requiring, in such cases, that a third party property owner be given notice and an opportunity to be heard

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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](http://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, e.g., Fish & Game Code § 12157.

before the court decides whether to forfeit the property.<sup>3</sup> The Commission directed the staff to solicit comment from the public on that issue.<sup>4</sup>

On August 19, 2016, the staff sent an email to affected groups, soliciting comment on whether there should be any changes to the law on forfeiture of property as a consequence for a criminal violation of the Fish and Game Code. The Commission received two responses, both supporting reforms of the type discussed above. Those responses are attached as an Exhibit. The staff greatly appreciates that input.

**However, at its September meeting, the Commission took a step back and reevaluated the extent to which this study should propose reforms that would substantively change the effect of existing law.**<sup>5</sup> That discussion was prompted by concern that some substantive reforms that the Commission was contemplating might be beyond the legal authority granted by the Legislature for this study.

The resolution authorizing this study provides that the Commission's recommendations shall not include any "significant substantive change to the effect of the law[.]"<sup>6</sup> To ensure compliance with that limitation, the Commission considered whether to establish parameters for determining whether the effect of a proposed substantive revision would be "significant." Ultimately, the Commission did not adopt any bright-line standard for addressing that issue.

However, the Commission did adopt a pragmatic test for deciding whether a substantive change should be included in the study. The test that the Commission adopted was one that had been applied in another large statutory clean-up project, the Commission's recodification of the Davis-Stirling Common Interest Development Act. Under that test:

A proposed change should only be considered for inclusion in the proposed law if it meets all three of the following criteria:

- (1) It is plainly beneficial.
- (2) It does not present a significant risk of unintended consequences (i.e., its effects seem straightforward and circumscribed).
- (3) It is not likely to be controversial.

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3. See Memorandum 2016-34, pp. 7-9.

4. Minutes (July 2016), p. 5.

5. See First Supplement to Memorandum 2016-47.

6. 2016 Cal. Stat. res. ch. 150.

Those criteria reflect the Commission's past practice in developing the proposed law. They are grounded in pragmatic concerns about the difficulty of achieving enactment of the proposed law. With a proposal of this type and size, the Legislature needs to receive a noncontroversial bill, so that it can focus its analytical resources on the primary purpose of the bill: to make the [law] easier to use and understand.<sup>7</sup>

It is important to note that the pragmatic test set out above *supplements, but does not replace*, the legislative limitation on the Commission's authority. Even if a possible reform would pass the pragmatic test, it could still exceed the Commission's authority in this study (i.e., a significant substantive change in the effect of the law would still exceed the express limit on the Commission's authority).

**Based on those considerations, the staff recommends that the proposed reforms to the criminal forfeiture provisions be set aside as inappropriate for inclusion in this study.**

The reforms discussed above would clearly have a substantive (as opposed to technical) effect on existing law. Prosecutors who are seeking the forfeiture of property used in a violation of the Fish and Game Code would be required to take an additional step, which is not currently required by statute. And it seems likely that the effect of the proposed reforms would be "significant." They would create new rights and duties, impose new costs on prosecutors and the courts, and could affect the outcome of property forfeiture decisions (which would directly affect both private property rights and a source of state revenue). Thus, there is a very good argument that the proposed reforms are beyond the scope of the Commission's authority in this study.

The staff's recommendation is not based on the policy merits of the proposed reforms. It is based solely on the conservative approach that the Commission recently adopted for construing the legal and pragmatic scope of this study.

**How would the Commission like to proceed on this point?**

Respectfully submitted,

Brian Hebert  
Executive Director

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7. Minutes (Sept. 2016), p. 6.

**EMAIL FROM DIANE PLESCHNER-STEELE,  
CALIFORNIA WETFISH PRODUCERS ASSOCIATION]  
(AUGUST 19, 2016)**

Thank you for your memo and request for comments.

As noted in the Memorandum

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.

The opinion cites a decision of the California Supreme Court, *People v. Broad*,<sup>2</sup> ...

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

Our view is that a third party who has an ownership interest in the forfeited property must be notified to ensure the due process rights of the owner. i.e.

the existing provisions could be revised to require that a prosecutor give notice of a potential forfeiture

This should occur in all cases, regardless of value. Re: the example given comparing the (high) value of a car to the (lower) value of fishing gear, it should be noted that the value of some fishing nets exceeds the value of a standard automobile.

Thank you for your consideration of these comments.

Best regards,  
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Diane Pleschner-Steele  
Executive Director  
California Wetfish  
Producers Association  
805.693.5430  
Fax: 805.686.9312  
PO Box 1951  
Buellton, CA 93427



# CALIFORNIA FARM BUREAU FEDERATION

GOVERNMENTAL AFFAIRS DIVISION

1127-11TH STREET, SUITE 626, SACRAMENTO, CA 95814 · PHONE (916) 446-4647

October 13, 2016

Mr. Steve Cohen  
Staff Counsel  
California Law Revision Commission  
c/o UC Davis School of Law  
400 Mrak Hall Drive  
Davis, CA 95616

RE: Fish and Game Law: Property Forfeiture

Dear Mr. Cohen:

I am writing on behalf of the California Farm Bureau Federation (Farm Bureau) to provide feedback regarding the California Law Revision Commission's (CLRC) consideration of changes to property forfeiture law included in the California Fish and Game Code. Farm Bureau appreciates the opportunity to voice its opinion on this matter. Farm Bureau represents more than 53,000 members as it strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Subdivision (b) of Fish and Game Code Section 12157 currently requires the Court to order the forfeiture of any property used in committing certain offenses. Offenses covered by this provision include the take of wildlife protected by the California Endangered Species Act (CESA) (Fish and Game Code Chapter 1.1 of Division 3). The requirement that individuals convicted of taking listed species must forfeit the property used in the commission of the crime was added to the Fish and Game Code in 1984. Prior to 1984, the courts had discretion to determine whether forfeiture of the property in question was proper. With the passage of SB 839 in September 2016, Section 12157 was expanded.

In Farm Bureau's opinion, the expansion of Section 12157 warrants review by the CLRC as it appears to add confusion to Section 12157. Prior to passage of SB 839, violations of CESA triggered a mandatory forfeiture of property used in the commission of the crime. Section 12008.1 of the Fish and Game Code, added by SB 839, increases monetary penalties associated with violations of CESA, it adds no additional sections of law subject to forfeiture not already covered by Section 12157. Yet Section 12157 was amended to include reference to this new section. It is unclear how a court would interpret this and seems worth considering if the addition was necessary.

Section 12157 as it currently reads creates a risk of property loss of significant value. Because of the inherent risk to property, the provision should be matched with concurrent due process protections, especially for situations where the person committing the crime does not own the property. Due process in these situations requires, at a minimum, notice to be given to the owner of property that stands to be forfeited under Section 12157. For example, an employee may

operate an owner's tractor or harvester and, in that operation, take a species protected under CESA. Currently, Section 12157 dictates mandatory forfeiture of the item used to commit the unlawful take, even if the owner of the property was never aware of the circumstances. As a further example, a farmer may rent or lease a tractor or harvester from a farm equipment dealer, and take a species protected under CESA while using the rented or leased equipment. If the farmer is convicted of the take, the court would require the forfeiture of that equipment, despite the fact that the equipment belonged to someone else. In the first example, it is likely in many, but not all, cases that the owner would be aware of the court proceedings, but may not be aware of the forfeiture. In the second example, it is unlikely that the equipment dealer would have any knowledge of the potential forfeiture. In both situations, due process should require the provision of notice to the property owner, to ensure that the owner knows what recourse is available to him or her.

Our country is founded upon the recognition that all citizens deserve due process before the government, and these protections are enshrined in our Constitution. As identified in the California Law Revision Commission's July 14, 2016 Staff Memorandum, the Attorney General examined the intersection of Section 12157 and due process in a 1980 published opinion, and concluded the procedures in Section 12157 do not provide adequate due process. In fact, the Attorney General went so far as to call the provision constitutionally problematic. In 1984, however, the Legislature ignored the published opinion of the Attorney General when it instead chose to amend the existing language to require mandatory forfeiture for certain violations.

The 2016 CLRC Staff Memorandum analogizes Section 12157 to various existing statutory provisions and cases, all of which indicate that revision of Section 12157 is critical at this juncture. First, the Staff Memorandum discusses Fish and Game Code Sections 8630-8635, which are similar to 12157 but specifically concern fishing nets and traps. Sections 8630-8635 state that an owner of forfeited property is permitted to apply for a civil writ of possession for the property—a civil procedure that is not given in similar circumstances to owners of property forfeited under Section 12157. In addition, the Staff Memorandum discusses the case of *People v. Broad*, which addressed a statutory procedure (similar to Section 12157) that is used to forfeit vehicles used for narcotics transportation. In *Broad*, the California Supreme Court held that due process concerns require that notice be given to any party with an ownership interest in the forfeited vehicle.

In light of these analogous and highly informative examples, it is apparent that the due process interests of property owners affected by Section 12157 are not adequately addressed currently. As a result, Farm Bureau advocates for the recommendation of revisions to Fish and Game Code Section 12157. In particular, going forward it is imperative that actual notice be given to any third party owner of the property to be forfeited. Giving actual notice to affected property owners will serve to address due process concerns, without sacrificing enforcement efficiency or rigor. In addition, the existing law already provides for significant monetary penalties for violations of CESA, and Farm Bureau does not believe that forfeiting valuable property without due process, on top of the monetary penalties, is appropriate.

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Again, Farm Bureau appreciates the opportunity to provide comment on this matter. Should you have questions or need further information, do not hesitate to contact me by phone (916/446-4647) or email ([ncremers@cfbf.com](mailto:ncremers@cfbf.com)).

Sincerely,

A handwritten signature in cursive script that reads "Noelle Cremers". The signature is written in a dark ink and is positioned above the typed name.

Noelle G. Cremers  
Director, Natural Resources and Commodities