

## First Supplement to Memorandum 2015-41

### **Fish and Game Law: Fishing**

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Memorandum 2015-41 presents a partial draft of recodified provisions relating to commercial fishing, for public review and comment.<sup>1</sup>

The Commission has received comment on the draft from Mr. Hal Thomas, writing on behalf of the Butte County District Attorney's office. Those comments are discussed in this supplement.

Unless otherwise indicated, all statutory references in this memorandum are to the Fish and Game Code.

#### GENERAL CONCURRENCE

Most of Mr. Thomas's comments are generally supportive of the draft. Those comments are not discussed here, but will be retained by the staff for consideration later in the process.

A few of Mr. Thomas's comments raise questions about the draft. They are discussed below.

#### LICENSES LIMITED TO NATURAL PERSONS

Existing Section 7850 (which would be continued by proposed Section 10100))<sup>2</sup> prohibits any "person" from engaging in various commercial fishing activities, without a commercial fishing license. Existing Section 7850(c) exempts "persons who are less than 16 years of age, a partnership, corporation, or association."

However, the Fish and Game Code generally defines "person" as "any natural person or any partnership, corporation, limited liability company, trust,

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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 Staff Draft, attached to Memorandum 2015-41 (hereafter, "Staff Draft"), p. 14.

or other type of association.”<sup>3</sup> If that definition is read together with the exemption in Section 7850(c), it would appear that the commercial fishing license requirements apply to limited liability companies and trusts, but not partnerships, corporations, and associations.

In the Staff Note following proposed Section 10100, the staff suggests that this was probably not the intended scope of Section 7850. Several other provisions strongly suggest that only a natural person can obtain a commercial fishing license.<sup>4</sup> Moreover, the staff sees no policy reason to require some types of commercial entities to obtain licenses (trusts and LLCs), while exempting other types of legal entities (partnerships, corporations, and associations).

Proposed Section 10100 would correct that apparent error by explicitly providing that it only applies to “a natural person 16 years of age or greater.”<sup>5</sup> Thus, it would not apply to a trust or LLC.

Mr. Thomas indicates that this revision “is a logical clarification as enforcement is facilitated by personal liability.”<sup>6</sup> However, he cautions that “[O]wnership liability for acts of persons (including on board staff) needs to be clarified ... (Analogy to truck drivers and haz material violations)”

### *Analysis*

Proposed Section 10100 is intended to recodify existing Section 7850, with some added clarification as to its scope.

While it might be helpful to clarify the liability of commercial fishing entities for the acts of their employees, that issue is not raised in existing Section 7850. To add language to Section 7850 on that topic would likely be a significant substantive change.

The staff will keep the employer liability issue in mind in reviewing the remainder of the code, but **recommends against trying to address the issue in proposed Section 10100.**

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3. See existing Section 67.

4. For example, Section 7851 requires the application for a commercial fishing license to contain a statement of “the applicant’s sex, age, height, weight, the color of eyes and hair.”

5. Proposed Section 10100(c).

6. Exhibit, p. 1.

## REVOCATION OF LICENSE, PERMIT, OR OTHER ENTITLEMENT

Proposed Section 10250 would continue existing Section 7857(b) without substantive change.<sup>7</sup> That provision addresses the suspension or revocation of a commercial fishing license, permit, or other entitlement.<sup>8</sup>

Mr. Thomas questions how the revocation provision would affect a commercial entity whose agent's license is suspended or revoked:

The statute provides revocation for acts of individual licensee but what about when the licensee is agent of an entity? Does the entity escape the revocation remedy? If entitlements are to be vested in a natural person we need to clarify liability of the entity that employs the natural person.<sup>9</sup>

### *Analysis*

Proposed Section is intended to recodify existing Section 7857(b), without substantive change. That provision does not address the liability of a commercial entity for the acts of its employees.

As noted above, it might be helpful to clarify the liability of commercial fishing entities for the acts of their employees, and the staff will keep that issue in mind. But adding such a provision would be a significant substantive change. **The staff recommends against trying to address the issue in proposed Section 10250.**

### "FAR OFFSHORE FISHERY"

Proposed Section 10600 continues existing Section 8111 without substantive change:<sup>10</sup>

"Far offshore fishery" means a fishery that lies outside the United States 200-mile exclusive economic zone, as that term is defined by paragraph (11) of Section 1802 of Title 16 of the United States Code.

Mr. Thomas states that this language is ambiguous, and suggests that it be revised:

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7. See Staff Draft, p. 20.

8. This term would be defined by proposed Section 153 to include commercial fishing licenses and other similar entitlements relating to commercial fishing.

9. Exhibit, p. 1.

10. See Staff Draft, p. 27.

Far-Offshore Fishery- the language “a fishery that lies outside the US 200 mile exclusive economic zone” is ambiguous. If the intention of the section is to regulate the take of fish outside the 200 mile limit, we would request the language “Far Offshore fishery means a fishery where the take of fish stocks occurs outside the exclusive economic zone”<sup>11</sup>

### *Analysis*

The staff does not see the ambiguity in the existing provision, which serves only to describe an area that is referenced in other regulatory provisions. **Absent further explanation from Mr. Thomas or others, the staff recommends against revising the provision.**

### FORFEITURE OF NET

Proposed Section 10770 continues part of existing Section 8630 without substantive change.<sup>12</sup> The provision discusses the commencement of a court proceeding by the Department of Fish and Wildlife (hereafter, “Department”) to forfeit a net that has been seized based on an allegation it was used unlawfully.

In a Staff Note following the provision, the staff noted that existing law does not appear to require the Department to commence a forfeiture proceeding within any particular time after the seizure. If such a proceeding is not commenced, it is not clear how the owner of a seized net could challenge the seizure. A Staff Note invited public comment on that issue.

Mr. Thomas writes:<sup>13</sup>

Staff responsible for this comment appears uncomfortable with the civil in rem nature of public nuisance net forfeitures. The declaration by the legislature in 10750 that a net used in violation is a “public nuisance” provides that the due process follows the governmental seizure of the instrument. This is a similar process to drug forfeiture law in that the seized net is legally contraband (similar to controlled substances) under the statute. Staff seems troubled by the historic order of due process in this area of natural resource law. Civil motion practice will provide owners of seized nets the remedy of title adjudication in the form of a claim to the seized property.<sup>14</sup>

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11. Exhibit, p. 1.

12. See Staff Draft, p. 31.

13. Exhibit, p. 2.

14. Exhibit, p. 2.

### *Analysis*

The staff is not troubled by the fact that the law allows summary seizure of an illegally used net. The only concern is whether there is a post-seizure opportunity to challenge the taking of the property (as due process requires). The Fish and Game Code provisions do not clearly guarantee such an opportunity, because there is nothing that requires the Department to commence a forfeiture proceeding (after seizing a net). Such a proceeding appears to provide the only opportunity for a net owner to seek judicial review of the propriety of the seizure (at least under the Fish and Game Code's procedural scheme).

Mr. Thomas is suggesting that other law takes care of the problem. He analogizes the situation to other cases involving the seizure of contraband and states that "[c]ivil motion practice will provide owners of seized nets the remedy of title adjudication in the form of a claim to the seized property."<sup>15</sup>

**That may be correct. The staff will research whether some other source of law, outside the Fish and Game Code, provides a sufficient opportunity to contest a net seizure.**

### PRIMA FACIE EVIDENCE OF UNLAWFUL ACT

Proposed Section 10995 continues existing Section 8664 without substantive change.<sup>16</sup> That section generally provides that a net found in certain described areas "is prima facie evidence that the owner or person in possession of the net is or has been using the net unlawfully."

A Staff Note following that provision asks whether such a rule presents a constitutional problem. The question was expressly based on case law holding that a presumption in a criminal statute may not relieve the prosecution of its burden of proving each element of a charged offense beyond a reasonable doubt.<sup>17</sup>

In response to the Staff Note, Mr. Thomas writes:

Staff can cite no judicial or administrative authority for the statement "that the prima facie evidence rule might be found unconstitutional" Fish and Wildlife law penalizes possession of certain species as evidence of illegal take on the same evidence theory criticized in this provision. We know of no authority to

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15. *Id.*

16. See Staff Draft, p. 34.

17. *People v. Roder*, 33 Cal. 3d 491, 658 P.2d 1302, 189 Cal. Rptr. 501 (1983).

support a weakening of the “possession as evidence” law in this area of jurisprudence.<sup>18</sup>

Note that Section 8664 is not the only section in the Fish and Game Code that makes this kind of use of prima facie evidence. The staff counts 10 similar provisions. All are penal in nature and indicate that proof of one specified fact “is” or “shall constitute” prima facie evidence of an element of a crime.<sup>19</sup>

*Analysis*

It is correct that the staff has not found any case directly discussing the constitutionality of the prima facie evidence rules used *in the Fish and Game Code provisions discussed above*. The California Supreme Court case cited by the staff does not involve a violation of the Fish and Game Code. Nonetheless, its holding might apply to a criminal violation of the Fish and Game Code. The staff saw that possibility as reason to raise the issue and request comment.

The staff appreciates Mr. Thomas’s input on the matter. **We will consider his comments again when the staff presents a memorandum discussing all of the public comment that we receive in response to the commercial fishing provisions. That memorandum will also include further staff research on the issue.**

Respectfully submitted,

Steve Cohen  
Staff Counsel

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18. Exhibit, p. 2.

19. See Sections 2000, 3005, 3217, 4155, 4600, 4758, 5521.5, 7370, 8254, and 8598.

**EMAIL FROM HAL THOMAS,  
BUTTE COUNTY DISTRICT ATTORNEY'S OFFICE  
(OCTOBER 6, 2015)**

Steve, Could you forward the comments below to your commissioners. We will attend the Thursday Oct 8, 2015 meeting in Davis.

**Comments California Law Review Commission Memo 2015-41**

Chapter 2 Prohibitions- Staff Issue Scope of 10050- We support extending the prohibition to both sport and commercial fishing and see it relocated to the general fishing section. This has been practice and should be made clear in statutory language.

S 10055- It is a useful clarification to extend the interference prohibition to both nets used in commercial and sport angling.

S10100- Licenses limited to natural persons- This is a logical clarification as enforcement is facilitated by personal liability. Note however ownership liability for acts of persons (including on board staff) needs to be clarified if the license authorization is limited to natural persons. (Analogy to truck drivers and haz material violations)

10215- It is not clear what entitlements the staff has in mind and thus hard to consider implications of a change.

10250- Suspension or revocation- The statute provides revocation for acts of individual licensee but what about when the licensee is agent of an entity? Does the entity escape the revocation remedy? If entitlements are to be vested in a natural person we need to clarify liability of the entity that employs the natural person.

10510- Annual fee adjustment- We support staff applying annual adjustment to this fee.

10550- Support staff proposal

10600 Far-Offshore Fishery- "the language "a fishery that lies outside the US 200 mile exclusive economic zone" is ambiguous. If the intention of the section is to regulate the take of fish outside the 200 mile limit, we would request the language "Far Offshore fishery means a fishery where the take of fish stocks occurs outside the exclusive economic zone"

10755- Notice - It is plain from the language of the statute that delivery to the nearest DFW office is an optional means of notice and not required.

10760- While we agree that the 3 day provision is impractical a change of the net forfeiture law is substantive and significant. This change may be outside the commission current scope of work. Given the economic value of a net it is highly unlikely that a captain of a commercial fishing boat will not inform the net owner of a seizure at sea or in harbor.

10770- Staff responsible for this comment appears uncomfortable with the civil in rem nature of public nuisance net forfeitures. The declaration by the legislature in 10750 that a net used in violation is a “public nuisance” provides that the due process follows the governmental seizure of the instrument. This is a similar process to drug forfeiture law in that the seized net is legally contraband ( similar to controlled substances) under the statute. Staff seems troubled by the historic order of due process in this area of natural resource law. Civil motion practice will provide owners of seized nets the remedy of title adjudication in the form of a claim to the seized property.

10905- Staff can cite no judicial or administrative authority for the statement “ that the prima facie evidence rule might be found unconstitutional” Fish and Wildlife law penalizes possession of certain species as evidence of illegal take on the same evidence theory criticized in this provision. We know of no authority to support a weakening of the "possession as evidence” law in this area of jurisprudence.