

First Supplement to Memorandum 2014-8

Fish and Game Law: Proposed Division 5 (Hunting, Fishing, and Other Public Use)

This supplement¹ discusses further issues encountered by the staff in preparing a draft of the first part of Division 5, Part 1 (“General Provisions”).

REPTILES AND AMPHIBIANS

Many provisions in the Fish and Game Code apply to fish, mammals, birds, amphibians and reptiles. That would seem to encompass all types of vertebrates.

Other provisions regulate all birds, mammals, and fish, but omit both reptiles and amphibians.² There may be good reasons for this collective exclusion. While birds, mammals, and fish are routinely taken for sport, the staff is not aware of sport hunting of amphibians and reptiles. That distinction may well justify different treatment in some provisions.

However, the staff has noticed that some broad regulatory provisions omit either reptiles or amphibians, but not both.³ It is not clear why a general regulatory provision would apply to amphibians but not reptiles, or vice versa.⁴ If either is to be included, why not the other?

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, e.g., Sections 1007 (authorizing the Department to import, propagate, and distribute “birds, mammals, or fish”), 1525 (authorizing the Department to accept donations of “birds, mammals, and fish”), 4153 (authorizing the Department to take any mammal that is unduly preying on any “bird, mammal, or fish”).

3. See Section 307 (proposed Section 5505) (amphibians only), Section 2000 (proposed Section 5000) (regulated taking of both reptiles *and* amphibians, but regulated possession of reptile only), Section 2005(c) (proposed Section 5125(c)) (amphibian only), Section 2015 (proposed Section 5140) (amphibian only).

4. Technically, amphibians may be included in any provision that applies to fish, as the statutory definition of the term “fish” includes amphibian. See Section 45 (proposed Section 195). However, as noted in Memorandum 2014-8, p. 4, it isn’t clear that the term “fish” is consistently intended to have that meaning.

The staff invites general comment on whether there are policy reasons to omit either reptiles or amphibians from a provision that otherwise regulates all vertebrates. Information on this issue will help the staff evaluate whether such omissions are inadvertent.

HARMONIZATION OF LICENSE SUSPENSION PROVISIONS

Three provisions in proposed Division 5, Part 1 address a suspension or revocation of a hunting or sport fishing license.⁵ The sections, which were all enacted at different times, differ in important ways. The staff wonders whether those differences still make sense, or whether they are accidents of historical development. If the latter, it might be possible to consolidate and harmonize the provisions, to provide a single set of rules. That possibility is explored below.

Scope of Suspension Provisions

Two of the provisions discussed here authorize suspension or revocation of a hunting or sport fishing license. They are based on conviction for different (and overlapping) sets of offenses:

- Section 12158 (proposed Section 5350), which was enacted in 1957 and has not since been amended, applies to a conviction for *any* hunting or sport fishing provision of the Fish and Game Code, or regulation adopted pursuant to the code.
- Section 12154 (proposed Section 5355), which was enacted in 2009 and last amended in 2012, applies only to a specified list of hunting and fishing offenses.

As can be seen, the scope of Section 12154 appears to be entirely contained within the scope of Section 12158. As the more specific and later-enacted provision, Section 12154 would probably control to the extent of that overlap.

Penalty for Obtaining New License During Suspension Period

The three sections discussed here differ on whether it is a crime to obtain a new hunting or sport fishing license during the period in which a former license is suspended. They also differ on the severity of punishment for such an offense.

- Section 12158 makes it a misdemeanor to obtain a new license during a period in which a prior license is suspended.

5. Sections 12154 (proposed Section 5355), 12155.5 (proposed Section 5365), and 12158 (proposed Section 5350).

- Section 12154 does not address this subject.
- Section 12155.5 (proposed Section 5365) provides that it is unlawful for any person to obtain, attempt to obtain, or possess a new license (or a permit or tag) during a period in which a prior license is suspended. Violation of that prohibition can be punished as either an infraction or misdemeanor, with specified penalties.

Sections 12155.5 and 12158 are both phrased in very broad terms, and could be construed to apply to all hunting or sport fishing license suspensions. Alternatively, Section 12155.5 could be construed more narrowly, because other provisions of the same section are expressly limited to certain offenses.

Sections 12155.5 and 12158 both overlap with Section 12154.

Right of Appeal

The three provisions also differ on whether they provide a right of appeal, and if so, the level of detail as to the appeal procedure.

- Section 12158 does not contain any appeal language.
- Section 12154 provides for appeal to the Fish and Game Commission, but only for the offenses governed by that section. There are no details as to the appeal process, but the Department may adopt regulations to implement the appeal right.
- Section 12155.5(b) and (c) provide a slightly more detailed appeal process, but its application is limited to a license that was revoked pursuant to three specified sections (including Section 12154, but not Section 12158).
- Section 12155.5(a) requires the Fish and Game Commission to adopt regulations governing the revocation or suspension of hunting or sport fishing privileges. The regulations must provide for notice and an opportunity to be heard.⁶ On its face, this provision appears to apply to the suspension or revocation of any hunting or sport fishing license, regardless of the underlying offense.

Although those provisions state slightly different rules, they appear to have substantially overlapping application. The process applicable to all three provisions appears to be standardized by regulation,⁷ but the varying statutory language could still create confusion.

6. See 14 Cal. Code Regs. §§ 745.5-746.

7. *Id.*

Discussion

As is apparent, there is a substantial amount of overlap and conflict between the three provisions discussed above, which could lead to legal uncertainty about the rights of a person whose license has been suspended or revoked.

The staff invites public comment on whether it would be worthwhile to consolidate and harmonize the three provisions into a single provision. For example, such a provision might include provisions along the following lines:

- (1) A unified statement of authority to suspend or revoke a hunting or fishing license for a violation of any hunting or fishing code section or related regulation.
- (2) A unified provision establishing a right of appeal of a suspension or revocation decision, based on procedures established by regulation.
- (3) A provision that makes it unlawful for any licensee to obtain a new license while a former license is suspended or revoked. The provision could clearly state the penalty for a violation of that prohibition.

If there are good reasons for treating suspensions and revocations differently based on the underlying offenses, that could be taken into account. Either way, it seems that the law on this topic could be restated in substantially simpler and clearer terms. **Is the Commission interested in pursuing this?** If so, the staff would also take a look at other provisions relating to suspension or revocation of licenses, to determine whether a broader harmonization is possible.⁸

HARMONIZATION OF FORFEITURE PROVISIONS

Five different provisions in Division 5, Part 1 authorize the forfeiture of personal property used in committing a specified offense, following a conviction.⁹ It is possible that the proposed law could be improved by harmonizing these five provisions.

Scope of Forfeiture Provisions

The five provisions apply to different (and overlapping) sets of offenses:

8. See e.g., Sections 2546 (proposed Section 5800), 12165 (proposed Section 5805) (guide license), 12153 (commercial fishing license), 12155 (hunting license), 12166 (trapping license).

9. Sections 12154(c) (proposed Section 5355(c)), 12157(a), 12157(b), 12157(c) (proposed Section 5430(a),(b),(c)), and 12157.5 (proposed Section 5435).

- Section 12154(c) (proposed Section 5355(c)) applies based on a conviction for a specified list of hunting and fishing offenses.
- Section 12157(a) (proposed Section 5430(a)) applies based on a conviction of *any* hunting or sport fishing provision of the Fish and Game Code, or regulation adopted pursuant to the code (other than the offenses specified in Section 12157(b)).
- Section 12157(b) (proposed Section 5430(b)) *mandates* forfeiture, based on a conviction for specified offenses that involve endangered or otherwise threatened species, or the maiming, mutilating, or torturing of animals.
- Section 12157(c) (proposed Section 5430(c)) applies based on a conviction for a specified list of hunting and fishing offenses that overlaps with, but does not coincide with, the list of offenses specified in Section 12154(c).
- Section 12157.5 (proposed Section 5435) applies only to a person convicted of three of four specified offenses in the same proceeding.

Community Property Interest in Forfeited Property

A court may not order the forfeiture of a vehicle under Sections 12154(c) or Section 12157(a)-(c), if there is a community property interest in the vehicle by a person other than the defendant, and the vehicle is the only vehicle generally available to the defendant's immediate family.

There is no such limitation on the forfeiture of a vehicle under Section 12157.5.

Consideration of Other Relevant Factors

Two of the five provisions, Sections 12154(c) and 12157(c), require a court to consider a long list of relevant factors before ordering a forfeiture. The factors include the nature, circumstances, extent, and gravity of the act committed, the degree of culpability of the violator, the property proposed for forfeiture, other criminal or civil penalties that have been imposed on the violator, the impact of the committed offense on natural resources or property of other persons, whether the offender is the owner of any vehicle that would be forfeited, and if not whether the owner had knowledge of the violation.¹⁰

A statement of legislative intent makes clear that a judge is not to order a forfeiture for minor or inadvertent violations.¹¹

10. See Section 12157(c)(2).

11. See Section 12157(c)(3).

There is no such limitation in Section 12157(a)-(b) or in Section 12157.5.

Forfeiture of Lien Right of “Conspirator”

All five provisions provide that forfeited property may be sold or destroyed by the Department.¹² If the property is sold, the proceeds are first used to satisfy any valid lien on the property, with the remainder deposited into the Fish and Game Preservation Fund.¹³ However, the law does not require the payment of a lien held by a “conspirator.”¹⁴

The conspirator exception is stated differently in Sections 12157(f)(2) (which governs forfeiture under Sections 12154(c) and 12157) and Section 12157.5. Neither provision defines the term “conspirator” or specifies any process for determining whether a lien holder is a conspirator.

Special Procedural Rules

Section 12157 includes a small number of special procedural rules that are not included in Section 12157.5. These rules make the forfeiture provisions applicable in juvenile proceedings,¹⁵ state that a no contest plea or forfeiture of bail is to be treated as a conviction,¹⁶ and state the relationship between a decision under the section and the department’s authority under another forfeiture provision relating to the forfeiture of fish nets and traps.¹⁷

Discussion

There is overlap, inconsistency, and some ambiguity in the provisions relating to forfeiture. The staff invites public comment on whether it would be worthwhile to consolidate and harmonize these five provisions into a single provision relating to forfeiture of property. For example, such a provision might include provisions along the following lines:

- (1) A unified statement of general authority to order such forfeiture.
- (2) A unified provision establishing factors that must be considered before forfeiture is ordered.

12. See Sections 12154(c), 12157(e), 12157.5.

13. See Sections 12157(f)(1), 12157.5.

14. See Sections 12157(f)(2), 12157.5.

15. See Section 12157(g).

16. See Section 12157(h).

17. See Section 12157(i).

- (3) A unified provision on the forfeiture of vehicles owned as community property.
- (4) A unified provision clearly stating the rights of persons holding liens on forfeited property.

Is the Commission interested in pursuing this harmonization? If so, the staff would also examine other, more specific, provisions relating to forfeiture, to determine whether a broader harmonization is possible.¹⁸

In addition, after further review of these provisions, it appears to the staff that Section 12154(c) (proposed Section 5355(c)) could be more logically located. As the subdivision appears to be severable from the rest of Section 5355 (which otherwise addresses license suspensions), the staff recommends that **the subdivision be separated from the remainder of proposed Section 5355, and moved from Article 2 (License Suspension) of Chapter 3 to Article 3 (Seizure and Forfeiture) of that same chapter.**

CATEGORY QUESTION

The staff is not sure that it understands the overall character of Section 308 well enough to decide on its appropriate placement in the code. The section provides:

308. Notwithstanding any other provisions of this code, in District 22 the taking of birds, mammals, fish, amphibia, or reptiles shall be subject to regulations prescribed, from time to time, by the commission, except that it is unlawful to take birds or mammals within one-eighth mile of any gallinaceous guzzler, if the area surrounding it is posted in the manner prescribed by the commission. In the Colorado River, in District 22, the commission may prescribe such regulations in agreement with the proper authorities of the State of Arizona.

Is this a general hunting and fishing provision? Is it more about Fish and Game Commission rulemaking authority? Or is it really about protecting a certain type of habitat (area within the specified proximity to a gallinaceous guzzler -- a type of artificial animal watering device)?

18. See e.g., Sections 7891 (use of boat without specified permit), 8576(e) (unlawful use of shark or swordfish gill net), 8630 (unlawful use of net), 12006(b) (commission of specified offense), 12006.6(c) (commission of specified offense).

The staff invites comment on the history and purpose of this provision, so that we can better evaluate where it should go.

Respectfully submitted,

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