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OPINION	:	No. 84-404
	:	
of	:	<u>AUGUST 1, 1984</u>
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THE HONORABLE JACK PARNELL, DIRECTOR OF THE DEPARTMENT OF FISH AND GAME, has requested an opinion on the following question:

If a state agency, county, city or public utility proceeds with a project which will affect stream flow without notice to the Department of Fish and Game are the state agency, county, city, public utility, or the officers, employees, or contractors thereof who proceed with such project subject to criminal prosecution therefor?

CONCLUSION

Any officer, employee, contractor or other person who proceeds with a project which will affect stream flow on behalf of a state agency, county, city or public utility when the required notice to the Department of Fish and Game has not been provided

is subject to criminal prosecution therefor, but the state agency, county or city, as public entities, are not subject to criminal prosecution.

ANALYSIS

Section 1601 of the Fish and Game Code¹ requires notice to the Department of Fish and Game ("department" herein) whenever a state or local governmental agency or a public utility plans a project which will divert, obstruct or change the natural flow or bed, channel or bank of any river, stream or lake. Provisions for the protection of fish and wildlife is also required either by agreement with the department or by arbitration.²

¹ Section references are to the Fish and Game Code unless otherwise indicated.

² Section 1601 provides:

"Except as hereinafter provided, general plans sufficient to indicate the nature of a project for construction by, or on behalf of, any governmental agency, state or local, and any public utility, of any project which will divert, obstruct or change the natural flow or bed, channel or bank of any river, stream or lake designated by the department in which there is at any time an existing fish or wildlife resource or from which these resources derive benefit, or will use material from the streambeds designated by the department, shall be submitted to the department. When an existing fish or wildlife resource may be substantially adversely affected by such construction, the department shall notify the governmental agency or public utility of the existence of such fish or wildlife resource together with a description thereof and will propose reasonable modifications in the proposed construction as would allow for the protection and continuance of the fish or wildlife resource, including procedures to review the operation of such protective measures. Such proposals shall be submitted within 30 days of receipt of such plans, with the provision that this time may be extended by mutual agreement. Upon a determination by the department and after notice to the affected parties of the necessity for an onsite investigation or upon the request for an onsite investigation by the affected parties, the department shall make an onsite investigation of the proposed construction and shall make such investigation before it proposes any modifications.

"Within 14 days of receipt of the department's proposals, the affected agency or public utility shall notify the department in writing as to the acceptability of the proposals, except that this time may be extended by mutual agreement. If such proposals are not acceptable to the affected agency or public utility, then that agency or public utility shall so notify the department. Upon request the department shall meet with the affected agency or public utility within seven days of receipt of such notification or such time as may be mutually agreed upon for the purpose of developing proposals which are acceptable to the department and the affected agency or public utility. If mutual agreement is not reached at such meeting a panel of arbitrators shall be established; provided, however, that the appointment of such panel may be deferred by mutual consent of the parties. The panel shall be

Section 1603 makes it unlawful for "any person" to substantially divert or obstruct the natural flow or change the bed, channel or bank of any river, stream or lake without notice to the department.³

established within seven days of such meeting and shall be composed of one representative of the department, one representative of the affected agency or public utility, and a third person mutually agreed upon, or if no agreement can be reached, the third person shall be appointed in the manner provided by Section 1281.6 of the Code of Civil Procedure. The third person shall act as panel chairman. The panel shall have power to settle disagreements and make binding decisions regarding such fish and wildlife modifications. Such arbitration shall be completed within 14 days from the day that the composition of the panel is established, unless the time is extended by mutual agreement. Expenses of the department representative are to be borne by the department; expenses of the representative of the governmental agency, state or local, or the public utility are to be borne by the governmental agency, state or local, or the public utility; expenses of the chairman are to be paid one-half by each party.

"Agencies or public utilities proposing projects affected by this section shall not commence such operations until the department has found that such project will not substantially adversely affect an existing fish or wildlife resource or until the department's proposals, or the decisions of a panel of arbitrators, have been incorporated into such projects.

"The department shall determine and specify types of work, methods of performance or remedial measures which shall be exempt from the operation of this section.

"With regard to any project which involves routine maintenance and operation of water supply, drainage, flood control, or waste treatment and disposal facilities, notice to and agreement with the department shall not be required subsequent to the initial notification and agreement unless the work as described in the agreement is substantially changed, or conditions affecting fish and wildlife resources substantially change, and such resources are adversely affected by the activity conducted under the agreement. This provision shall be applicable in any instance where notice to and agreement with the department has been attained prior to the effective date of this act.

"The provisions of this section shall not be applicable to emergency work necessary to protect life or property; however, notification by the agency or public utility performing such emergency work shall be made to the department within 14 days of the commencement of such emergency work."

³ Section 1603 provides:

"It is unlawful for any person to substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream or lake designated by the department, or use any material from the streambeds, *without first notifying the department of such activity, except when the department has been*

notified pursuant to Section 1601. The department within 30 days of receipt of such notice, or within the time determined by mutual written agreement, shall, when an existing fish or wildlife resource may be substantially adversely affected by such activity, notify the person of the existence of such fish and wildlife resource together with the description thereof, and shall submit to the person its proposals as to measures necessary to protect fish and wildlife. Upon a determination by the department of the necessity for onsite investigation or upon the request for an onsite investigation by the affected parties, the department shall notify the affected parties that it shall make onsite investigation of the activity and shall make such investigation before it shall propose any measure necessary to protect the fish and wildlife.

"Within 14 days of receipt of the department's proposals, the affected person shall notify the department in writing as to the acceptability of the proposals, except that this time may be extended by mutual agreement. If such proposals are not acceptable to the affected person, then that person shall so notify the department. Upon request the department shall meet with the affected person within seven days of receipt of such notification or such time as may be mutually agreed upon for the purpose of developing proposals which are acceptable to the department and the affected person. If mutual agreement is not reached at such meeting a panel of arbitrators shall be established; provided, however, that the appointment of such panel may be deferred by mutual consent of the parties. The panel shall be established within seven days of such meeting and shall be composed of one representative of the department, one representative of the affected person, and a third person mutually agreed upon, or if no agreement can be reached, the third person shall be appointed in the manner provided by Section 1281.6 of the Code of Civil Procedure. The third person shall act as panel chairman. The panel shall have power to settle disagreements and make binding decisions regarding fish and wildlife modifications. Such arbitration shall be completed within 14 days from the day that the composition of the panel is established, unless the time is extended by mutual agreement. Expenses of the department representative are to be borne by the department, expenses of the representative of the person who diverts or obstructs the natural flow or changes the bed of any river, stream or lake, or uses any material from the streambeds shall be borne by such person; expenses of the chairman are to be paid one-half by each party.

"It is unlawful for any person to commence any activity affected by this section until the department has found it will not substantially adversely affect an existing fish or wildlife resource or until the department's proposals, or the decisions of a panel of arbitrators, have been incorporated into such projects. If the department fails to act within 30 days of the receipt of the notice, the person may commence such activity.

Sections 1601 and 1603 are the principal operative sections of chapter 603, Statutes of 1976, which was designed to conserve the fish and wildlife resources of California. (§ 1600.) While the focus of section 1601 is on public agencies and utilities and section 1603 is directed at "any person"⁴ it does not follow that the two sections are mutually exclusive in their application. The first sentence of section 1603 makes it unlawful for any person to divert certain waters without first notifying the department "except when the department has been notified pursuant to section 1601." This exception clearly contemplates that those persons who are involved in the water projects of governmental agencies and public utilities which affect fish and wildlife are subject to the prohibitions of section 1603 as well as the requirements of section 1601.

The question presented concerns the criminal liability for violation of sections 1601 and 1603. Since those sections do not mention criminal liability or penalties we turn to section 12000 which provides:

"The violation of any provision of this Code, other than Sections 3009 and 12001 [felonies], or of any rule, regulation, or order made or adopted under this code, is a misdemeanor."

Sections 12002-12010 provide fine and jail penalties for such misdemeanors.

With this statutory background we examine three aspects of the criminal liability question. First, what provisions of sections 1601 and 1603, when violated, are made crimes by section 12000? Second, what artificial entities, such as public entities,

"It is unlawful for any person to engage in a project or activity affected by this section, unless such project or activity is conducted in accordance with the department's proposals or the decisions of the panel of arbitrators.

"With regard to any project which involves routine maintenance and operation of water supply, drainage, flood control, or waste treatment and disposal facilities, notice to and agreement with the department shall not be required subsequent to the initial notification and agreement unless the work as described in the agreement is substantially changed, or conditions affecting fish and wildlife resources substantially change, and such resources are adversely affected by the activity conducted under the agreement. This provision shall be applicable in any instance where notice to and agreement with the department have been attained prior to the effective date of this chapter.

"The provisions of this section shall not be applicable to emergency work necessary to protect life or property. Notification by the person performing such emergency work shall be made to the department within 14 days of commencement of such emergency work."

⁴ Section 67 provides: "'Person' includes partnership, corporation or other type of association."

corporations, partnerships, etc. are criminally liable for violations of sections 1601 and 1603. Third, what natural persons are criminally liable for violations of sections 1601 and 1603.

Section 12000 provides that the "violation of any provision" of the Fish and Game Code is a misdemeanor. We pointed out in 29 Ops.Cal.Atty.Gen. 28, 29 (1957) that such words in a general penalty section require construction and not every violation of the chapter, code or statute referred to in such a general penalty section is made a crime thereby. The reasoning of that opinion was found sound by the California Supreme Court in *People v. Superior Court (Douglass)* (1979) 24 Cal.3d 428, 433 and was applied by analogy in that case. In *Douglass* the court prohibited the prosecution of a doctor for prescribing drugs without a good faith prior examination in violation of Business and Professions Code section 2399.5 which declared such conduct to be unprofessional conduct. Another section of the same chapter provided that "any person, who violated any provision of this chapter is guilty of a misdemeanor." The court held that this section did not apply to provisions of the chapter making certain actions unprofessional conduct, concluding that the Legislature did not intend the general misdemeanor section to apply to provisions defining unprofessional conduct.

Sections 1601 and 1603 must therefore be examined to determine what provisions thereof the Legislature intended to come within the general criminal penalty language of section 12000. In examining section 1601 we note a number of acts which are required of state and local governmental agencies and public utilities which require responsive actions by the department. The syntax is more indicative of procedural direction than of defining crime. On the other hand section 1603 contains three sentences which commence with the words "[i]t is unlawful for any person to . . ." followed by a description of conduct which spells out the elements of a crime. We seriously doubt that the Legislature intended to make state and local governmental agencies, including the Department of Fish and Game, as public entities, guilty of crimes for violation of the requirements of section 1601 when it has deliberately refused to make public entities subject to the crimes defined in the Penal Code for over a century.⁵ Instead we think that

⁵ When the Penal Code was first enacted in 1872, section 7, subdivision 20, read "[t]he word 'person' includes bodies politic and corporate." In the 1873-74 session the Legislature amended Penal Code section 7 and changed the definition to its present form, i.e., "the word 'person' includes a corporation as well as a natural person." When an amendment to a statute consists of a deletion of an express provision it is presumed that a substantial change in the law was intended. (*People v. Valentine* (1946) 28 Cal.2d 121, 142; *Clements v. T.R. Bechtel Co.* (1954) 43 Cal.2d 227, 231; *People v. Schmel* (1975) 54 Cal.App.3d 46, 51.) Thus the deletion of the words "bodies politic" from the Penal Code definition of person in 1873-74 is presumed to have made a substantial change in the law by removing bodies politic from the meaning of the word "person" wherever it appears in the Penal Code. The term "body politic" is of ancient origin and generally connotes the

when the Legislature intended to define a new crime in chapter 603, Statutes of 1976, it used unequivocal language to that end. We conclude that the only crimes defined in sections 1601 and 1603 are those contained in the three sentences commencing with the words "[i]t is unlawful for any person to"

Next we consider what artificial entities are subject to criminal prosecution for violation of section 1603. The three crimes defined in that section are defined in terms of the conduct of "any person." Section 67 of the Fish and Game Code provides: "Person' includes partnerships, corporation, or other type of association." Thus corporations⁶ and partnerships are subject to criminal prosecution for violations of section 1603. No cases have been found construing the words "other type of association" in section 67. Applying the rule of *ejusdem generis* we construe "other types of association" in section 67 to refer to associations like corporations and partnerships such as business trusts, etc. Because of the history of the Penal Code definition of person set forth in footnote 5 we do not believe the Legislature intended the words "other type of association" in section 67 to include state and local governmental entities.⁷ We conclude that corporations, partnerships and like associations are subject to criminal prosecution for violations of section 1603 but that state and local governmental entities, as such, are not. Public utilities may be organized as corporations, partnerships, sole proprietorships, or other associations (see art. XII, § 3 of the Cal. Const. and Pub. Util. Code, §§ 216, 204 & 205) and are subject to criminal prosecution for violations of section 1603 in such capacities.

Finally we consider what natural persons are subject to criminal prosecution for violation of section 1603. Penal Code section 31 provides:

collective body of citizens exercising political functions of the state. (*Kennelly v. Kent County Water Authority* (R.I.) 89 A.2d 188, 191.) The term has been held to include counties (*Uricich v. Kolesar* (Ohio) 5 N.E.2d 335, 337); cities (*Middle States Utilities Co. v. City of Osceola* (Iowa) 1 N.W.2d 643, 645); and school districts (*Patrick v. Maybank* (S.C.) 17 S.E.2d 530, 534). While no California cases have been found defining body politic we believe the Legislature used the term in the original 1872 Penal Code to refer to state and local governmental entities. Since the Penal Code defines most crimes in terms of the conduct of "persons" such crimes did not apply to the conduct of bodies politic after the 1873-74 amendment.

⁶ At common law a corporation was incapable of committing crime. In volume 1 at page 476 in his Commentaries on the Laws of England Blackstone states: "[a] corporation cannot commit treason, or felony, or other crime, in its corporate capacity; though its members may, in their distinct individual capacities.

⁷ In *People ex rel. Freitas v. City and County of San Francisco* (1979) 92 Cal.App.3d 913 the court held the Cartwright Act was not applicable to municipalities because municipalities were not included in the definition of "person" under that act. (See 62 Ops.Cal.Atty.Gen. 741 (1979).)

"WHO ARE PRINCIPALS. All persons concerned in the commission of a crime whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

All persons who participate in the commission of a crime as principals are equally guilty of the crime and may be prosecuted therefor. This applies as well to officers and employees of corporations and governmental entities as to other persons. Thus, the fact that a person is an officer or employee acting on behalf of or even on orders from his company or superiors is no defense to the crime. (See *U.S. v. Wise* (1962) 370 U.S. 405.) On the other hand an officer is not criminally responsible for the crimes of his employees or others unless he participates in the crimes. (*People v. International Steel Corp.* (1951) 102 Cal.App.2d Supp. 935, 942.)

It is concluded that any officer, employee, contractor or other person who proceeds with a project which will affect stream flow on behalf of a state agency, county, city or public utility when the required notice to the department has not been provided is subject to criminal prosecution therefor, but the state agency, county or city, as public entities, are not subject to criminal prosecution.
