

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 556

SPONSOR: Judiciary and Natural Resources Committees and Senator Smith

SUBJECT: The Fish and Wildlife Conservation Commission

DATE: March 3, 2002                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gee	Voigt	NR	Favorable/CS
2.	Matthews	Johnson	JU	Favorable/CS
3.	_____	_____	APJ	_____
4.	_____	_____	AP	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This bill amends various provisions of chapters 370 and 372, F.S., relating to saltwater fisheries, marine life and wildlife, to enhance civil, administrative and criminal penalties for violations and offenses committed under these chapters, and substantially revises the applicable seizure and forfeiture provisions. Specifically, the bill provides the following:

- Prohibits a saltwater products licensee from boarding any vessel with a commercial quantity of saltwater products during the period of his or her license suspension or revocation, which creates an offense punishable as a 1<sup>st</sup> degree misdemeanor offense;
- Elevates to a 1<sup>st</sup> degree misdemeanor offense violations involving the taking, harvesting or attempt thereof of saltwater products, or engaging in any other activity requiring a license, permit, or certificate, when the licensee’s license is revoked or suspended;
- Authorizes the Florida Fish and Wildlife Conservation Commission (Commission) to impose civil monetary penalties for the purchase or sale by a commercial wholesale dealer, retail dealer or restaurant facility of any illegally harvested marine life in violation of s. 16, art.X of the Florida Constitution or upon the conviction of a person, firm, or corporation for violations committed under chapter 370, F.S.;
- Defines “conviction” as any disposition other than an acquittal or dismissal;
- Provides a presumption that saltwater products are purchased when received by a wholesale dealer, retail dealer or restaurant for purposes of proving a violation of an offense under ch. 370, F.S.;
- Permits the Commission to suspend or revoke someone’s license or permit for a second major violation committed by anyone under a saltwater products license;
- Allows a disability notice to be signed and issued by a licensed physician for purposes of allowing a disabled person to obtain a restricted species endorsement on a saltwater product license without having to satisfy income requirements;

- Replaces current provisions relating to civil and criminal forfeiture proceedings, and creates the exclusive process to be used for seizure and forfeiture of property used in offenses committed under chapters 370 and 372, F.S., relating to saltwater products, marine life and wildlife;
- Creates a third degree felony offense for any person, firm or corporation to willfully molest or remove contents from freshwater fishing gear, without the written consent of the gear's owner.

This bill amends the following sections of the Florida Statutes: 370.021, 370.06, 370.061, 370.07, 372.9901, and 372.9902. It creates s. 372.635, F.S., and repeals ss. 372.311, 372.312, 372.313, 372.314, 372.315, 372.317, and 372.318 of the Florida Statutes.

## II. Present Situation:

In 1994, a constitutional ballot initiative was adopted imposing limits on the use of gill and other entangling nets for catching or taking saltwater fish and other marine animals. *See* art. X, s. 16, *Fla. Const.* Since its effective date of July 1, 1995, the Legislature has enacted a number of statutory provisions designed to enhance the enforcements of these net limitations. The statutory provisions have focused variously on net materials; penalties; the sale, purchase, and transportation of illegal saltwater products; confiscation of property used for or part of the civil violations or criminal offenses; and other enforcement methods.

Chapter 370, F.S., governs the regulation, management and promotion of commercial and recreational activities associated with saltwater<sup>1</sup> fisheries. The Department of Environmental Protection and the Florida Fish and Wildlife Conservation Commission<sup>2</sup> have regulatory and executive responsibilities and oversight of marine life. Nevertheless, the Fish and Wildlife Conservation Commission (FWCC) reports continued difficulties in effective enforcement under the current provisions. FWCC recommends further statutory changes to enhance prohibitions and increase penalties. The FWCC also reports a need to address situations in which a licensee hires others to fish under his or her license. The FWCC would like the discretion to proceed against either the fisher or the license holder in those cases in which the FWCC believes it can show that the license holder had knowledge that a fisher was fishing illegally under the license.

### Offenses and Penalties

Existing law imposes a number of penalties derived from the constitutional violation of the marine net limit and other statutory violations associated with marine life, including but not limited to:

- A saltwater products licensee whose privileges have been suspended for the violation of the constitutional ban against netting, is prohibited from taking or harvesting or attempting the taking or harvesting of saltwater products from any vessel within the waters of the state, or any other activity requiring a license, permit, or certificate issued under ch. 370, F.S. *See* s. 370.021(3), F.S. The first conviction is punishable by

<sup>1</sup> Salt water primarily refers to all of Florida's territorial waters excluding lakes, rivers, canals and other waterways. *See* s. 370.01(22), F.S.

<sup>2</sup> The constitutionally established Florida Fish and Wildlife Conservation Commission consists of 7 members who are appointed by the Governor and serve 5-year terms. *See* art. IV, s. 9, *Fla. Const.*; *see* s. 372.01, F.S.

imprisonment up to 60 days or a fine between \$100 and \$500, or both. The second conviction is punishable by imprisonment up to six months or a fine between \$250 and \$1000, or both.

- Under s. 370.021(5), F.S., the illegal purchase of saltwater products by a commercial wholesale dealer, retail dealer, or restaurant facility for public consumption from an unlicensed person, firm, or corporation, or the sale of saltwater products by an unlicensed person, firm, or corporation constitutes a major violation. As such, upon the first violation, the FWCC may assess a civil penalty of up to \$2,500, and may suspend the wholesale or retail dealer's license privileges for up to 90 calendar days. For the second violation occurring within 12 months of the first violation, the FWCC may assess a civil penalty of up to \$5,000 and may suspend the wholesale or retail dealer's license privileges for up to 180 calendar days. For a third or subsequent violation occurring within a 24-month period, the FWCC must assess a civil penalty of \$5,000 and must suspend the wholesale or retail dealer's license privileges for up to 24 months.
- Section 370.07, F.S., requires that appropriate invoices, bills of lading, or other similar instruments accompany saltwater products in the course of transportation, sale, delivery or other commerce of saltwater products. It is unlawful for a licensed retail seafood dealer or any licensed restaurant to buy saltwater products from anyone other than a licensed wholesale or retail dealer. However, no specific provisions exist in this section to ensure that illegally-obtained products are not purchased or sold. The FWCC reports that it has experienced difficulty in proving that dealers or restaurants purchased illegally obtained seafood products.
- Under ss. 370.13(2) (b), 370.135(1), and 370.142(2)(c) 3., F.S., it is unlawful for any person to remove the contents (i.e., stone crab, blue crab, and crawfish fish) of another harvester's trap without the express written consent of the trap owner available for immediate inspection. Such unauthorized removal constitutes theft. In addition to penalties provided elsewhere in ch. 370, F.S, a convicted person may permanently lose all of his or her saltwater fishing privileges, including SPLs, and all trap certificates. In such cases, trap certificates and endorsements are nontransferable. In addition to other penalties, any person, firm, or corporation convicted of violating these prohibitions will also be assessed an administrative penalty of up to \$5,000 and is guilty of a third degree felony. There is no equivalent provision prohibiting the molestation of freshwater traps and fishing gear.

### **Confiscation and Forfeiture**

A primary law enforcement tool is the statutory procedure for the confiscation and disposition of property used in the commission of a crime. This is a nationwide practice, provided for under federal and state law. In Florida, forfeitures may be pursued under the "Florida Contraband Forfeiture Act," ss. 932.701-932.707, F.S., by any law enforcement agency. Enacted in 1992, the Act sets forth a detailed process including findings of probable cause, seizure, adversarial hearings, claimants' remedy, judgments, civil forfeiture action, and disposition of property associated with violations under the Act. *See* ch. 92-54, L.O.F. Contraband is defined to include any controlled substance, gambling paraphernalia, illegally used beverage or tobacco product, unpaid taxed motor fuel, any personal or real property used in the commission of a felony

offense, illegally taken aquaculture products, or illegal use of a specified motor vehicle. Agencies authorized to seize property may avail themselves of this Act. *See* s. 932.701, F.S. If the seizing agency is the Florida Fish and Wildlife Conservation Commission, proceeds from the dispositions of liens and forfeited property are required to be deposited into the State Game Trust Fund, the Marine Resources Conservation Trust Fund or the FWCC's Federal Law Enforcement Trust Fund. *See* s. 932.70555(5)(e), F.S. Although the FWCC may proceed under the Florida Contraband Forfeiture Act for property subject to the Act, the FWCC alternatively proceeds (and prefers) seizure and forfeiture procedures under chapters 370 and 372, F.S., as applicable for confiscation and forfeiture of all property.

In chapter 370, F.S., relating to saltwater fisheries, seizure and forfeiture of specified property is governed by s. 370.061, F.S. This is a civil forfeiture process applicable whether there is an underlying criminal case or not. In all cases of arrest and conviction for the illegal taking or attempted taking, sale, possession, or transportation of saltwater fish or other products, seines, nets, boats, motors, other fishing devices, or equipment, vehicles or other means of transportation may be seized and brought before the court. These properties are deemed nuisances and may be ordered forfeited to the FWCC after the trial and conviction. *See* s. 370.061, F.S. The FWCC has expressed the preference to proceed under ch. 370, F.S., rather than 932, F.S. in forfeiture actions. However, in response to a recent appellate decision in which the forfeiture statute was cited as procedurally inadequate although upheld as constitutional, the FWCC has proposed additional changes to ch. 370.61, F.S.<sup>3</sup> *See State v. Valdes*, 788 So.2d 300 (Fla. 3<sup>rd</sup> DCA 2001)(the case was dismissed for the FWCC's failure to adhere to existing procedures). In *Valdes*, the Third District Court of Appeal expressed due process concerns and urged the legislature to revisit this statute to assure that it operates fairly with respect to citizens and the agency to improve notice and opportunity to be heard for persons with interests in personal property subject to forfeiture. *Id.* at 304.

Seizure and forfeiture procedures are also contained in chapter 372, F.S., over which the FWCC also exercises oversight. Chapter 372, F.S., governs the regulation, management and promotion of commercial and recreational activities associated with wildlife including freshwater fish. Section 372.9901, F.S., authorizes the FWCC to seize any vehicle, vessel, animal, gun, light, or other hunting device used in the illegal taking or possession of deer and wild turkey. However, these vehicles, vessels and animals can not be seized and forfeited if owned by, or titled in the name of innocent parties. *See* s. 372.9902, F.S. It has been suggested that these provisions do not provide sufficient guidance to comply with current case law regarding confiscation of property in such circumstances. The FWCC recommends using similar language proposed for s. 370.061, F.S., relating to seizure and forfeiture.

Currently, ss. 372.311, 372.312, 372.313, 372.314, 372.315, 372.316, 372.317, 372.318, 372.319, and 372.321, F.S., set forth forfeiture proceedings, claims process, and disposition for forfeited illegally used property under chapter 372, F.S. Originally enacted together in one act and

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<sup>3</sup> FWCC proposed changes include designating property used as an instrumentality of or aiding or abetting in illegal activity as subject to confiscation and clarifying that jurisdictional limitations on the amount in controversy do not limit a court's authority to find that the property was used in connection with a saltwater violation. Other requested changes include clarifying that confiscation may only result from a conviction and adding specific procedural language to conform to case law regarding the need for notification of the rightful owner of seized property, as well as including provisions providing a hearing for a person holding title to seized property who asserts that he or she is an innocent owner

substantially unchanged since 1959, these provisions applied to the illegal use of nets, traps or fishing devices which are undefined. *See* ch. 59-81, L.O.F. The FWCC reports that these provisions are outdated, and inapplicable for the purposes and scope of property for which they seek to seize and forfeit.

### **Licenses**

Section 370.06, F.S., governs issuances of licenses for purse seines, saltwater products, nets, special activity, and Apalachicola Bay oyster harvesting. In order to sell "restricted species" under a saltwater products license to a licensed wholesale dealer, the license must have a restricted species endorsement. *See* s. 370.06(2)(a), F.S. A restricted specie is a specie of saltwater products designated within a geographical area or during a particular time of year. In order to secure the endorsement, a person must be at least 16 years old, or a firm certifying that over 25% or \$5,000 of its income is attributable to the sale of saltwater products.

Several categories of persons or entities may be exempted from this income requirement. Specifically, a disabled resident can secure a permanent restricted species endorsement on a saltwater products license. *See* s. 370.06(2), F.S. In order to be eligible, such disabled persons must be certified as totally and permanently disabled by the Railroad Retirement Board, the United States Department of Veterans Affairs or its predecessor, any branch of the United States Armed Forces. Alternatively, the disabled person may be eligible if he or she holds a valid identification card issued by the Department of Veterans' Affairs pursuant to s. 295.17, F.S., or is certified by the United States Social Security Administration. The disabled person, however, must have held a saltwater products license for at least 3 of the last 5 license years prior to the date of disability. Currently, there is no exemption for persons certified as disabled by a licensed physician.

### **III. Effect of Proposed Changes:**

**Section 1** amends s. 370.021, F.S., to enhance the penalties for use of illegal nets under a saltwater license. During the period of suspension or revocation of a saltwater products license based on a constitutional violation of the net limits, such licensee is prohibited from boarding any vessel on which a commercial quantity of saltwater products is possessed through an activity requiring a license pursuant to ch. 370, F.S. A first or second conviction resulting from this violation is punishable as a 1<sup>st</sup> degree misdemeanor. Additionally, the penalty for the taking or harvesting of saltwater products or other activity requiring a license, permit or certificate is elevated to an offense punishable as a first degree misdemeanor.

Provisions relating to the application of the administrative hearing process under chapter 120, F.S., to rescission and revocation proceedings, arising from violations under this section are deleted.

This section also adds to the list of activities that constitute major violations for purposes of specified penalties, i.e., a major violation now includes the purchase or sale by a commercial wholesale dealer, retail dealer, or restaurant facility of illegally harvested products in violation s. 16, art. X of the Florida constitution and any rule or statute implementing its provisions.

Subsection (10) is revised to substitute the word “department” with “commission” as relates to the requirement for an employee to post bond for the performance of his or her duties under the commission.

Subsection (12) is created to specify that the person, firm, or corporation cited and receiving a judicial disposition, may also be assessed civil monetary penalties by the FWCC as authorized by chapter 370, F.S. For purposes of this section, a judicial disposition is one other than dismissal or acquittal. The FWCC may also suspend or revoke the license or permit under which a major violation was committed regardless of whom committed the violation under the license or permit. However such suspension or revocation can only occur after notice and upon a second or subsequent major violation.

**Section 2** amends s. 370.06(2), F.S., relating to the income exemption for a restricted species endorsement on a saltwater products license. A disabled resident may now be certified as disabled by a licensed physician for purposes of the income exemption, provided the resident has held also a saltwater products license for at least 3 of the last 5 license years prior to the disability. This section also provides that a restricted-species endorsement issued based on disability may be issued only in the name of an individual saltwater products licensee. Additionally, it is specified that any saltwater product received by a wholesale dealer is presumed to have been purchased by such wholesale dealer for purposes of determining whether there has been a violation. In addition, a number of stylistic changes are made.

**Section 3** amends s. 370.061, F.S., to create an exclusive seizure and forfeiture process for property used in connection with a violation involving saltwater products. The seizure and forfeiture provisions of chapter 932, F.S., are not to be applied. It is stated that such property is subject to forfeiture as part of the FWCC’s efforts to protect the state’s marine life. This section is not to be construed to affect the FWCC’s authority to confiscate illegally taken saltwater products under subsection (5) or illegal fishing gear under this subsection.

Existing provisions allowing for seizure and forfeiture of specified property or products upon arrest or conviction are removed. The remaining provision then applies to cases resulting in conviction. A seizure and forfeiture process is recreated to add that confiscated property used in connection with the illegal taking or attempted taking are property (presumably for purposes of seizure and forfeiture). Upon a first conviction, the court with jurisdiction over the criminal offense, may make a finding that the property was used in connection with a saltwater violation and may order the property forfeited to the FWCC after a conviction has been secured. Upon a second or subsequent conviction, the court must order the property forfeited to the commission. There is no similar requirement to find that the property was used in connection with a violation.

For purposes of this section, the term “conviction” is defined to be any disposition other than acquittal or dismissal. Although saltwater products is defined in s. 370.01(25), F.S., this term does not include saltwater products harvested under the authority of a recreational license unless the harvested amounts exceeds three times the legal bag limit for trout, snook, or redfish.

Subsection (2) of this section is created to provide the seizure and notice of seized products or property for subsequent forfeiture. Before an order for forfeiture is issued, the FWCC must seize the product or property and notify the registered owner, if any, of the seizure. The notice must be

sent within 14 days of the seizure. If after diligent inquiry, a registered owner can not be ascertained, then no further notice is required.

Within 21 days after the receipt of the notice of seizure, a registered owner asserting innocence and entitlement to recover the property must submit a notice for a hearing to the commission's Division of Law Enforcement. On a first time conviction for the property, it is the commission's burden to prove (to the court having criminal jurisdiction) by a preponderance of the evidence that the registered owner aided in, abetted in, participated in, gave consent to, knew, or had reason to know of the violation. Otherwise, the property must be returned to the registered owner or owners. On a second or subsequent conviction, it is the registered owner's burden to prove by a preponderance of the evidence that he or she in no way aided in, abetted in, participated in, consented to, knew, or had reason to know of the second or subsequent violation that resulted in the seized property. If the registered owner is successful, the property must be returned to him or her.

If a request for a hearing is not timely made within the 21 days, the court must automatically forfeit the right to, the title to, and the interest in the property to the commission, subject only to the rights and interests of bona fide lienholders.

As is current law, in those cases where the owner can not be ascertained, the officer finding the property in question must obtain a court order for forfeiture from the county court judge of the county where the property was found. The existing provision relating to the disposition of such forfeited property is unchanged by the bill. The one dollar buy-back provision for innocent owners of specified forfeited property (i.e., boats, motors, and legal fishing devices) is eliminated.

Subsection (5) of this section revises the provision regarding confiscation and sale of perishable saltwater products. It clarifies that moneys received from the sale of such products by the defendant or from the sale of such products through a court order when the defendant fails to post a bond or cash deposit, are to be deposited into a special escrow account and held in trust by the State Treasury pending the outcome of the defendant's trial. Similarly, if a bond is posted, such moneys is to be similarly deposited and held.

A number of stylistic and wording changes are also made.

**Section 4** amends subsections (4) and (8) of section 370.07, F.S., to create a criminal offense. It is a first degree misdemeanor offense for a wholesale dealer, retail dealer, or restaurant facility for public consumption to purchase or sell any marine life known to be taken illegally, or known to be taken in violation of Section 16, Article X of the State Constitution, or any rule or statute implementing its provisions. For purposes of subsection (8) any saltwater product received by a retail dealer or a restaurant is presumed to be purchased for purposes of proving offenses.

**Sections 5, 6, and 7** re-enact s. 370.092, F.S., relating to carriage of proscribed nets across Florida waters, s. 370.093, F.S., relating to illegal use of nets, and s. 370.142, F.S., relating to spiny lobster trap certificate programs, respectively, to incorporate the amendments to s. 370.021, F.S., in the bill.

**Section 8** amends s. 372.70, F.S., relating to prosecutions of violations of law under chapter 372, F.S., to direct the state attorney to represent the state in any forfeiture proceeding under this chapter. The Department of Legal Affairs must represent the state in all appeals from judgments of forfeiture to the Supreme Court. The state may appeal any adverse judgment denying forfeiture. The appellate representation is already required in existing law under s. 16.01, F.S., relating to the duties of the Attorney General.

**Section 9** amends s. 372.9901, F.S., to create the exclusive seizure and forfeiture provisions for property used in connection with a violation involving freshwater fish, marine life and wildlife. The same procedural process relating to the seizure and forfeiture and recovery by innocent registered owners contained in s. 370.061, F.S., is included into this section with the exception that it refers to violations committed under s. 372.99, F.S., and the seized property particular to these violations. Two other exceptions are that there are no provisions for the entry of a court order of forfeiture and for the disposition of the property through sale or destruction although it presumes disposition of the property because it provides for the amounts received from the sale or other disposition of the property to be deposited into the State Game Trust Fund or the commission's Federal Law Enforcement Trust Fund.

**Section 10** transfers and renumbers s. 372.31, F.S., as s. 372.99021, F.S., relating to the disposition of illegal use of nets, traps and fishing devices, and further amends it to add provisions contained in another section repealed by this bill. It adds that the state has police powers to enforce the law of the state as relates to illegal use of nets, traps, and other fishing devices.

**Section 11** creates s. 372.99022, F.S. This section creates a third degree felony offense for any person, firm or corporation to willfully molest or remove contents from freshwater fishing gear, without the written consent of the gear's owner. The written consent must be available for immediate inspection. Any person, firm, or corporation convicted of removing the contents of freshwater fishing gear shall permanently lose all of his or her freshwater and saltwater fishing privileges, including his or her recreational and commercial licenses and endorsements. Such person, firm, or corporation shall also be assessed an administrative penalty of up to \$5,000. In such cases, endorsements are nontransferable. Immediately upon receiving a citation for a violation of removing the contents of freshwater fishing gear and until adjudicated for such a violation, or if convicted of such a violation, the person, firm, or corporation committing the violation is prohibited from transferring any endorsements.

For purposes of this section, the term "freshwater fishing gear" means haul seines, slat baskets, wire traps, hoop nets, or pound nets, and includes the lines or buoys attached thereto.

**Section 12** amends s. 372.9904, F.S., relating to the seizure, disposition, notice and forfeiture of illegal transportation devices, to conform cross-references to the new provisions governing seizure and forfeiture in ss. 370.061 and 370.07, F.S.

**Section 13** amends s. 372.9905, F.S., relating to the inapplicability of specified provisions to seizure and forfeiture, to conform cross-references and to include a reference to seizure and forfeiture of animals.

**Section 14** amends s. 323.001, F.S., relating to vehicles held by wrecker operator storage facilities subject to a seizure and forfeiture proceedings, to conform cross-references to these processes in chapters 370 and 372, F.S., as amended by the bill.

**Section 15** repeals sections 372.311 (disposition and appraisal of specified seized property), 372.312 (forfeiture proceedings including form of petition), 372.313 (delivery of property to claimant), 372.314 (proceeding when no claim filed), 372.315 (proceeding when claim filed), 372.316 (representation of the state by the state attorney), 372.317 (judgment of forfeiture), 372.318 (service charges of sheriffs and clerks), 372.319 (disposition of proceeds from forfeiture), 372.321 (exercise of police power), and 372.9902, F.S. (inapplicability of specified provisions).

**Section 16** provides that this act shall take effect on July 1, 2002.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

- This bill prohibits a saltwater products licensee from boarding a specified commercial vessel during the period of his or her license suspension or revocation. This ban applies regardless of the legality of the activity on the commercial vessel and regardless of the suspended or revoked licensee's legal activities while on the boat. This may present a constitutional concern about whether this penalty is disproportionately excessive given the nature of the offense. *See* s.17, art. I, *Fla. Const.*
- To the extent that this bill is construed to create an irrebuttable presumption, it presents a constitutional issue in which there may be a denial of due process. This bill provides that any saltwater product received by a wholesale dealer, retail dealer or a restaurant facility is presumed to have been purchased by such dealer or restaurant. Under current law, section 370.021(2)(a)g., F.S., states that it is unlawful for any licensed wholesale dealer to buy saltwater products from any unlicensed saltwater product person or to buy restricted species from any person, firm, or corporation without a restricted species endorsement on a saltwater products license. When a wholesale dealer buys saltwater products, he or she must be presented with the license and keep a record of the transaction of which a copy must be given to the license

holder. Under s. 370.07(8), F.S., it is unlawful for any licensed retail dealer or any restaurant to buy saltwater products from any person other than a licensed wholesale or retail dealer. Since violation under either of these sections constitute a major violation subject to criminal penalties as a first degree misdemeanor for the first conviction or a third degree felony for the second or subsequent conviction, the activity of “purchase” is an element of the criminal offenses. Accordingly this presumption may be construed to relieve the state of its affirmative duty and burden to prove each and every element of the offense beyond a reasonable doubt.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

Violators will be subject to enhanced civil monetary penalties and criminal punishment. Innocent registered owners of property subject to seizure and forfeiture will be given better notice and opportunity to be heard regarding the recovery of their property.

### C. Government Sector Impact:

This bill will facilitate the Florida Fish and Wildlife Conservation Commission’s enforcement of civil violations and criminal offenses under chapters 370 and 372, F.S., and art. X, s. 16 of the *Florida Constitution*.

It is indeterminate what amount of revenue that may be generated by the enhanced civil monetary penalties and the amount of proceeds from the sale of forfeited property.

The bill creates a number of 1<sup>st</sup> degree misdemeanor and 3d degree felony offenses. There is no available review regarding this bill’s impact from the Criminal Justice Revenue Estimating Conference.

## VI. Technical Deficiencies:

On page 27, line3, reference is made to property subject to forfeiture under section 370.061, F.S. It may be further clarified that the property is subject also to seizure as part of the FWCC’s efforts to protect the state’s marine life and as this entire section deals with such seizure and forfeiture subsequent to a conviction for an offense.

## VII. Related Issues:

The bill creates a number of 1<sup>st</sup> degree misdemeanor and 3d degree felony offenses. It has not been determined to what extent existing sentencing guidelines may have to be revised to reflect these changes.

The bill deletes provisions relating to the application of the administrative hearing process under chapter 120, F.S., to rescission and revocation proceedings presumably relating to penalties for use of illegal nets under s. 370.021, F.S. It is uncertain what the ramification, if any, is of this deleted provision and what process has or will take its place, assuming adequate due process will be provided. [See page 12, line 11-12]

Subsection (10) of s. 370.021, F.S., is revised to substitute the word “department” with “commission” as relates to the requirement for an employee to post bond for the performance of his or her duties under the commission. It is unclear when and whether an employee of the department would be required to post bond and may not even be relevant as this chapter is primarily enforced by the FWCC. [See page 17, lines 15-21]

In a number of places, the bill provides that conviction is deemed to be a disposition other than acquittal or dismissal. It could be further clarified that it is referring to a judicial disposition and not intended to be construed too broadly to encompass an administrative disposition. Moreover, how this definition would comport with administrative, monetary, and criminal penalties as applied to a second offense when the court may have suspended, deferred or withheld adjudication on guilt or on the sentence. Under current law, the court can suspend, defer or withhold a first-time offender’s violation of s. 16 of art. I of the *Florida Constitution* if there are mitigating circumstances. *See* 372.021(3)(b)3.

As is current law, in those cases under s. 370.061, where an owner can not be ascertained (and is not the charged offender), the officer finding the property in question must obtain a court order from the county court judge of the county where the property was found. It is not clear why an officer should not alternatively be able to go to the criminal court if the criminal court is already exercising jurisdiction over the criminal matter related to the property. [ See page 29, lines 18-27]. Notably the same seizure and forfeiture process which is amended into s. 372.9901, F.S., omits the provision requiring the entry of a court order of forfeiture in those cases in which an owner can not be ascertained.

The bill provides for the deposit of moneys received from a sale, bond or cash deposit from the defendant for confiscated perishable products or from the court based on a sale of the confiscated products into a special escrow account and held in trust by the State Treasury pending the outcome of the defendant’s trial. It does not clearly address what may happen if no trial is held because the charges are either dropped, the prosecution’s case is dismissed or the defendant pleads before trial. Additionally, this subsection does not address what is to be done with a cash deposit (which may be deposited in an amount determined by the judge to be the fair value of the confiscated products). [See subsection (5) of section 370.061, F.S., and s. 372.

This section creates a third degree felony offense for any person, firm or corporation to willfully molest or remove contents from freshwater fishing gear, without the written consent of the gear’s owner. The written consent must be available for immediate inspection. Any person, firm, or corporation convicted of removing the contents of freshwater fishing gear shall permanently lose all of his or her freshwater and saltwater fishing privileges, including his or her recreational and commercial licenses and endorsements. Such person, firm, or corporation shall also be assessed an administrative penalty of up to \$5,000. In such cases, endorsements are nontransferable. Immediately upon receiving a citation for a violation of removing the contents of freshwater

fishing gear and until adjudicated for such a violation, or if convicted of such a violation, the person, firm, or corporation committing the violation is prohibited from transferring any endorsements.

The provisions of this bill duplicate in some respects existing law governing seizure and forfeiture to the extent that the Florida Fish and Wildlife Conservation Commission can currently avail itself of seizure and forfeiture processes provided under the Florida Contraband Forfeiture Act which sets forth a detailed process including findings of probable cause, seizure, adversarial hearings, claimants' remedy, judgments, civil forfeiture action, and disposition of property associated with violations under the Act. *See* ch. 92-54, L.O.F. At this time, the FWCC could proceed for those properties subject to contraband as currently defined. Although this bill enhances provisions relating to seizure and forfeiture under chapters 370, and 372, F.S., these provisions are not as explicit or complete as the procedural components of the Florida Contraband Forfeiture Act.

The bill provides that upon a first conviction of a violation under s. 370.061, F.S., the court may make a finding that property used in connection with a saltwater violation. There is no similar discretion provided for the court upon a person's second or subsequent violation. [See page 27, lines 11-21, page 45, lines 14-24 as similarly applicable to s. 372.9901, F.S.]

The bill deletes the provision in which illegally used or taken saltwater products or property used in violation of s. 370.061, F.S., are deemed nuisances and simply states that they are property which does not have much meaning beyond the obvious. Removing the ability to deem such property a nuisance may have the unattended consequences of affecting the burden of moving forward with the seizure and forfeiture of such property. [See page 26, line 30-31 through page 29, line 7].

#### **VIII. Amendments:**

None.