State of California
Office of Administrative Law

In re: **Fish and Game Commission**	**DECISION OF DISAPPROVAL OF REGULATORY ACTION**
Regulatory Action: Title 14 **California Code of Regulations**	**Government Code Section 11349.3**
Adopt sections: 703 **Amend sections: 671, 671.1, 671.7**	**OAL File No. 2010-0423-04 S**

SUMMARY OF REGULATORY ACTION

In this regulatory action, the Fish and Game Commission (Commission) proposed amendments and additions to its body of regulations pertaining to "restricted species." The regulatory action included proposed amendments to an existing regulation entitled "Importation, Transportation and Possession of Live Restricted Animals" which identifies those species of animals which are considered to be "restricted species." The regulatory action also included substantial amendments to an existing regulation entitled "Permits for Restricted Species" which sets forth types of authorized restricted species permits and the process and requirements for obtaining those permits. Substantial amendments were further proposed for an existing regulation entitled "Permits for Aquaculture Purposes" to add detailed requirements applicable to the importation, possession, transportation, and sale of aquatic species listed as restricted species. Finally, this regulatory action included a new "fees and forms" regulation which sets forth 20 specific fees applicable to permits for restricted species and which incorporates by reference seven specific forms utilized as part of the permit application and amendment process.

DECISION

On June 7, 2010, the Office of Administrative Law (OAL) notified the Commission of the disapproval of this regulatory action. The reasons for the disapproval were the following: (1) failure to comply with the "Clarity" standard of Government Code section 11349.1, (2) failure to comply with the "Necessity" standard of Government Code section 11349.1, (3) failure to comply with the "Authority" standard of Government Code section 11349.1, (4) failure to comply with the "Reference" standard of Government Code section 11349.1, (5) failure to adequately summarize and respond to all of the public comments made regarding the proposed action, (6) failure to meet all of the requirements for incorporation by reference, (7) documents in the rulemaking file which are defective and failure to include all required documents in the

rulemaking file, and (8) failure to comply with all required Administrative Procedure Act procedures.

DISCUSSION

Regulations adopted by the Commission must generally be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act (APA), Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code (Gov. Code, secs. 11340 through 11365). Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA (Gov. Code, sec. 11346). No exemption or exclusion applies to the regulatory action here under review. Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

A. CLARITY

OAL must review regulations for compliance with the "Clarity" standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines "Clarity" as meaning "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

The "Clarity" standard is further defined in section 16 of title 1 of the California Code of Regulations (CCR), OAL's regulation on "Clarity," which provides the following:

> In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:
>
> (a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:
> (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
> (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
> (3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
> (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
> (5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or
> (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

(b) Persons shall be presumed to be "directly affected" if they:
(1) are legally required to comply with the regulation; or
(2) are legally required to enforce the regulation; or
(3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
(4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this restricted species rulemaking, numerous provisions of the proposed regulations fail to meet the "Clarity" standard. Clarity problems include incomplete and missing information, ambiguous and confusing wording, incorrect citations, regulation text and forms which are not in agreement, and other problems which could result in the meaning of the regulations not being "easily understood" by the directly affected public. Specific examples of problems with the clarity of the regulations are set forth below.

Example #1 – Permits for Aquatic Restricted Species: Proposed regulation section 671.7, entitled "Permit Requirements for Aquaculture, Wholesale, or Importation Purposes," sets forth requirements applicable to the importation, possession, transportation and sale of aquatic species listed as restricted species. The regulation also serves to provide detail regarding requirements applicable to the new "Aquaculture" and "Wholesale/Importation" permits authorized under amended regulation section 671.1. Proposed regulation section 671.7 in its final form, read in conjunction with regulation sections 671 and 671.1, essentially requires restricted species permits for all persons who import, possess, transport, or sell aquatic species listed as restricted species.

During the initial 45-day public notice and comment period which commenced June 12, 2009, the regulation text set forth a proposed exemption from the permit requirements for "terminal market sales" (generally, sales from retail sale locations holding live restricted species aquaculture product for human consumption). That "terminal market sales" exemption, which was initially included in section 671.7(g), read: "Terminal markets who purchase live restricted species from an Aquaculture or Wholesale/Importation permittee are not required to hold a Section 671.1 permit provided the live restricted species product is maintained in a closed-water system." However, this exemption for "terminal market sales" was subsequently deleted from the regulation text during the public notice and comment period which commenced January 29, 2010. Consequently, persons holding live restricted species for sale at the retail level at terminal markets ended up being subject to restricted species permit requirements in the final regulation text.

The "Clarity" standard issue which arises relates to an ambiguity in the regulations regarding the type of permit a retail seller of aquatic restricted species at a terminal market would need to apply for and obtain. Proposed regulation section 671.1(b) as amended would provide for two new types of permits applicable to persons engaged in activities involving aquatic restricted species. First, section 671.1(b)(2) would provide for an "Aquaculture" permit which may be issued to "any person who is a registered aquaculturist, pursuant to Section 235." Second, section 671.1(b)(12) would provide for a "Wholesale/Importation" permit which may be issued to "any person who is a resident and is in the wholesale or importation business of selling fish or

aquaculture product." Since a retail seller of aquatic restricted species at a terminal market may not be a registered aquaculturist or in the wholesale or importation business of selling fish or aquaculture product, it is not easy to understand from the proposed regulations which type of permit a retail seller of aquatic restricted species at a terminal market would need to apply for and obtain. This ambiguity in the regulatory scheme needs to be resolved to satisfy the "Clarity" standard.

Example #2 – Permit Application Requirements in Regulation Sections 671.1(c)(2)(A) through (N): Regulation section 671.1(c)(2) sets forth a list of fourteen permit "application" requirements, lettered (A) through (N). In general, these permit requirements have as their scope of coverage all types of restricted species permits, except for Aquaculture and Wholesale/Importation permits which are specifically exempted from these requirements and which are instead subject to proposed regulation section 671.7.

Prior to setting forth the fourteen specific permit "application" requirements, section 671.1(c)(2) as proposed uses this introductory language: "The following information and documents shall accompany an application for each permit, amendment, renewal, or upon change or expiration and if applicable to the permit type and/or species:". (Emphasis added.) This introductory language, particularly the phrase "and if applicable to the permit type and/or species," raises concerns regarding when the regulatory provisions which follow will and will not apply.

The "rules" regarding the applicability of each of these particular "application" requirements need to be clearly and fully set forth in the regulation text and cannot be subject to determination outside the scope of the regulations. Expressed another way, members of the "directly affected public" (such as potential permit applicants) need to be able to read the regulation text and easily determine which of the "application" requirements apply to them for their particular type of permit or situation.

The ambiguity or lack of specificity of regulation sections 671.1(c)(2)(A) through (N) as currently written becomes more apparent upon an examination of the permit application forms incorporated by reference in regulation section 703(a)(1). For example, the instructions for the "New Restricted Species Permit Application" form (Form FG 1312) provide that applications for AZA, Broker/Dealer, and Research permits are exempt from the "resume," "letter of recommendation," and" breeding plan" requirements. However, these exemptions are not clearly stated in the detailing of the "application" requirements in section 671.1(c)(2)(C), (E) and (F).

Regulation section 671.1(c)(2) contains the primary listing of the 14 permit "application" requirements. That regulation section needs to clearly state when requirements apply or do not apply (including exemptions), so that potential applicants, applicants, and permittees can "easily understand" the requirements that apply to their permit situations.

Example #3 -- Form and Renewal Requirements: Proposed regulation section 703, subsections (a)(1)(B) through (a)(1)(H), list and incorporate by reference seven forms which are utilized in connection with restricted species permit applications. Section 703 lists the seven forms by name and date but does not specifically state which forms are used under which circumstances. Regulation section 671.1(c)(2), which sets forth the basic statement of the permit

application process and which references the form (and fee) requirements in section 703, merely states: "The applicant for a permit, amendment to an existing permit, or renewal shall submit the completed application and the appropriate fees, as specified in Section 703, to the address listed on the application." In other words, there is no specificity or explanation in either section 703 or in section 671.1 regarding the circumstances under which particular forms apply.

While sometimes the names of forms might provide sufficient clarity for the directly affected public to easily understand which forms in a listing of forms are to be used under particular circumstances, this is not always the case. In the case of this restricted species rulemaking, OAL found it difficult to easily determine from the regulation text exactly when some of the specified forms apply (i.e., to easily determine the scope of use of particular forms).

Specifically, we were uncertain regarding when "New Restricted Species Permit Application" form (Form FG 1312) was applicable (and not applicable) to new restricted species permit applications. We ultimately determined that the Form FG 1312 applied to applications for all types of new restricted species permits except for applications for new Native Species Exhibiting Permits. Applicants for new Native Species Exhibiting Permits are to instead use the "New Native Species Exhibiting Permit Application" form (Form FG 1312b).

We were also uncertain regarding when the "Restricted Species Permit Amendment Request" form (Form FG 1313b) was applicable (and not applicable) to requests for amendment of existing permits. We ultimately determined that the Form FG 1313b applied to requests for amendment of existing permits for all types of permits except for requests for amendment of Native Species Exhibiting Permits. Instead, requests for amendment of existing new Native Species Exhibiting Permits would utilize the "Native Species Exhibiting Permit Amendment Request" form (Form FG 1312a).

Since the "Clarity" standard requires that the meaning of regulations be "easily understood" by the directly affected public, we do not think that this standard has been satisfied in connection with the listing of forms (without additional explanation) in proposed regulation section 703. At a minimum, the regulation text needs to clarify the scope of use of the "New Restricted Species Permit Application" form (Form FG 1312) and the scope of use of the "Restricted Species Permit Amendment Request" form (Form FG 1313b).

There is also an ambiguity in the regulation text regarding how the permit renewal process will function. Regulation section 671.1(c)(2) does not provide detail regarding the permit renewal process and refers over to the applications and fees in regulation section 703 in connection with renewal applications. However, it is not clear from the listing of forms in section 703 whether the forms are to be utilized in connection with the permit renewal applications, or alternatively, how the permit renewal application process would otherwise operate. The Commission needs to provide additional detail so that the requirements and process for permit renewal applications will be easily understood by the directly affected public.

Example #4 -- Veterinarian Inspections and Certifications: In general, the proposed regulations provide that an applicant for a restricted species permit must submit a veterinarian's certification regarding inspections of the restricted species animals and/or the restricted species

animal housing or, alternatively, submit an inspection fee to the Department of Fish and Game (Department) in order for the Department to inspect the restricted species animals and/or the restricted species animal housing. However, as discussed below, the specific veterinarian inspection and certification provisions in proposed regulation section 671.1 and in several of the permit application forms are not fully in agreement and are confusing when read together, and for that reason there is a lack of clarity regarding the exact requirements for veterinarian inspections and certifications.

Regulation section 671.1(c)(2)(B) provides that one of the restricted species permit application requirements is the following: "Written certification from a veterinarian accredited by the USDA, that he/she has observed each of the permittee's animals at least twice during the prior year, that the animals have been appropriately immunized and are being housed and cared for as required by law. The certification must be signed by the veterinarian and must include the veterinarian's printed name, address and license number. In the case of animals to be acquired by the permittee, the certification shall include the future dates the animals will be inspected by the veterinarian." Regulation section 671.1(c)(7)(B), which requires that an applicant pay an inspection fee for two Department inspections each year, provides that the inspection fee shall be waived "if an applicant submits an annual statement from a veterinarian accredited by the USDA certifying that the animals have been inspected at least twice during the year, at six month intervals, and that the animals are being cared for and housed in accordance with the applicable requirements in sections 671.2 through 671.4." Section 671.1(c)(7)(B) further provides that, in the case of animals to be acquired, the inspection fee shall be waived "if a veterinarian accredited by the USDA will certify that the facilities meet the minimum requirements of Section 671.2 and that the animals will be inspected at least twice during the next year at six month intervals."

Veterinarian inspection and certification provisions appear on four of the forms (and in form instructions) incorporated by reference in regulation section 703 – the "New Restricted Species Permit Application" form (Form FG 1312), the "Native Species Exhibiting Permit Amendment Request" form (Form FG 1312a), the "New Native Species Exhibiting Permit Application" form (Form FG 1312b), and the "Restricted Species Permit Amendment Request" form (Form FG 1313b). The veterinarian inspection and certification requirements on these forms are not always fully consistent with what is stated in regulation section 671.1, which is confusing and results in a lack of certainty regarding the exact requirements which apply.

For example, the "New Restricted Species Permit Application" form (Form FG 1312) sets forth the "veterinarian's certification for new permits" necessary in order to obtain an inspection fee waiver as follows: "I certify that I have inspected the housing for the animal(s) to be acquired, as listed on the Restricted Species Inventory of Animals, and the housing and transport caging if applicable meets the minimum requirements as set forth in Sections 671.3, 671.4(e) and/or 671.1(a)(9)(A-F), Title 14, of the [CCR]. I further certify that the animal(s) to be acquired and their housing will be inspected at least once more during the next year, and that I will notify the Department . . ., in writing, immediately upon inspection." Beneath the veterinarian's signature, the veterinarian is required to list the "animal facility inspection date" and a "future inspection date."

A comparison of the Form FG 1312 language with the regulation section 671.1(c)(2)(B) and (c)(7)(B) provisions shows that the requirements for veterinarian certifications for animals to be acquired are not fully consistent. While the form provision requires the veterinarian to certify that the housing and transport caging meet the minimum requirements of sections 671.3, 671.4(e) and/or 671.1(a)(9)(A-F), regulation section 671.1(c)(7)(B) refers (in the case of animals to be acquired) to requiring veterinarian certification that the facilities meet the minimum requirements of section 671.2. Furthermore, while the form asks for one completed animal facility inspection date and one future inspection date, regulation section 671.1(c)(2)(B) provides that in the case of animals to be acquired, the certification shall include the future dates the animals will be inspected by the veterinarian, and regulation section 671.1(c)(7)(B)2. provides for certification that "that the animals will be inspected at least twice during the next year at six month intervals." Again, the form does not appear to be "in sync" with the regulation text.

The three other forms with veterinarian inspection and certification provisions also have similar (but not identical) problems with not being fully consistent with the veterinarian inspection and certification provisions of regulation section 671.1.

We also note that regulation sections 671.1(c)(2)(B) and 671.1(c)(7)(B) both provide that the veterinarian who certifies must be "accredited by the USDA." The four forms with veterinarian inspection provisions do not reflect this USDA accreditation requirement.

The veterinarian inspection and certification provisions in regulation sections 671.1(c)(2)(B) and 671.1(c)(7)(B), and the veterinarian inspection and certification provisions on the four forms, all need to be reviewed and revised (where appropriate) so that there is internal consistency and clarity regarding exactly what requirements apply.

Conclusion: The examples of clarity problems discussed above and all other clarity problems with the regulations must be resolved before the regulations can be approved by OAL. OAL will discuss other specific clarity problems with Commission staff.

B. NECESSITY

OAL must review regulations for compliance with the "Necessity" standard of Government Code section 11349.1. Government Code section 11349, subdivision (a), defines "Necessity" as meaning: "the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion." The "Necessity" standard is further defined in OAL's regulation on "Necessity" in section 10 of title 1 of the CCR. The rulemaking record for these restricted species regulations does not present substantial evidence sufficient to meet the "Necessity" standard in relation to the fees discussed below.

Inspection Fees: Currently, the Commission's existing regulation section 671.1(c)(6)(B) provides for inspection fees applicable when the Department performs required inspections for restricted species permits, as follows: "The applicant shall pay $100.00 for two inspections each

year. If an inspection requires more than two hours, or additional inspections are required to verify corrections of facilities or for compliance with these regulations an additional $25 per hour shall be charged." In this regulatory action, the Commission proposes to move all the restricted species permit-related fees to a new regulation section 703. Proposed regulation section 703(a)(1)(A)19. would now provide for a "fee for two initial inspections" of $3,000.00. Proposed regulation section 703(a)(1)(A)20. would now provide for an "hourly fee for inspections longer than 2 hours" of $100.00.

The rulemaking file includes some factual information relating to the increase in the inspection fees. First, a chart showing inflation adjustment of the current fees (pursuant to CCR, title 14, section 699) indicates that the current $100 inspection fee for two inspections would increase to $170.50 in 2010 and indicates that the current $25 per hour additional inspection fee would increase to $42.25 in 2009, utilizing inflation adjustments under regulation section 699 alone. Second, the rulemaking record includes the statement: "The inspection fees are proposed to be increased to cover Department costs." Third, the rulemaking record includes a table entitled "Estimated Inspection Costs for Restricted Species Permits" which shows two calculations of estimated Department costs for inspections. The first calculation is for a "100 mile local round trip" inspection, showing a total cost of "$272.47" and a final "estimated cost for 100 mile roundtrip" of "$250." The second calculation is for an "850 mile round trip from Sacramento to Southern CA" inspection, showing a total cost of "$1566.11" and a final "estimated cost for 850 mile roundtrip" of "$1500."

What is not adequately supported in the rulemaking record is how the Commission, utilizing the information in the rulemaking record, concluded that the "fee for two initial inspections" should be set at $3,000. That $3,000 fee would be the logical conclusion if all permits involved two initial inspections costing an estimated $1,500 each under the "850 mile round trip from Sacramento to Southern CA" scenario. However, presumably a number of inspections might not involve that level of costs, as indicated by the $250 "estimated cost for 100 mile roundtrip" scenario (under which two initial inspections would have an estimated total cost of $500). The Commission needs to include additional information in the rulemaking record in support of this $3,000 fee in order to demonstrate by "substantial evidence" the need for a $3,000 fee and meet the "Necessity" standard.

The Commission also needs to provide additional information to support the $100 "hourly fee for inspections longer than 2 hours." The "Estimated Inspection Costs for Restricted Species Permits" table indicates that Department staff inspection time is $91.91 for two hours (or approximately $46 for one hour) and that there is a 21.91% Department overhead factor. It is not evident how this information or any other information provided in the rulemaking record supports the $100 "hourly fee for inspections longer than 2 hours." Again, the "Necessity" standard has not been satisfied.

In raising these concerns with the inspection fees, OAL is mindful of Fish and Game Code 2150.2 which provides: "The [Department] shall establish fees for permits, permit applications, and facility inspections in amounts sufficient to cover the costs of administering, implementing, and enforcing this chapter." OAL is also mindful of the California judicial decisions pursuant to Article 13A, Section 3 of the California Constitution which examine whether regulatory fees

collected by a State agency surpass the costs of the regulatory services or programs they are designed to support. (See, for example, California Association of Professional Scientists v. Department of Fish and Game (2000) 79 Cal.App.4th 935, 94 Cal.Rptr.2d 535.)

Nonresident Nuisance Bird Abatement Fee: In this restricted species rulemaking, the Commission establishes a new type of permit for "Nuisance Bird Abatement" which can be issued to either resident or nonresident persons. Regulation section 703(a)(1)(A)14. would establish the "nonresident nuisance bird abatement" permit fee" at an amount of $851.75. The chart in the rulemaking record which calculates all of the fees with adjustments under regulation section 699 shows a "2010 fee" of $426.00 for "Restricted Species Permit – Nonresident Nuisance Bird." Thus, the chart does not support the $851.75 fee amount in section 703(a)(1)(A)14. This discrepancy needs to be remedied in order to provide adequate support in the rulemaking file for the nonresident nuisance bird abatement permit fee.

C. SUMMARY AND RESPONSE TO PUBLIC COMMENTS

Government Code section 11346.9, subdivision (a), provides that an agency proposing regulations shall prepare and submit to OAL a "final statement of reasons." One of the required contents of the final statement of reasons is a summary and response to public comments. Specifically, Government Code section 11346.9, subdivision (a)(3), requires that the final statement of reasons include:

> A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action . . . .

Furthermore, where an agency makes substantial but sufficiently-related changes to its original regulatory proposal and provides notice of the changes pursuant to Government Code section 11346.8, subdivision (c), that statutory provision specifically includes the requirement: "Any written comments received regarding the change must be responded to in the final statement of reasons required by [Government Code] Section 11346.9."

In this restricted species rulemaking, the Commission received several hundred pages of written public comments and held five public hearings subsequent to the initial June 12, 2009 public notice at which oral comments were received. The Commission adequately summarized and responded to most of these comments. However, a limited number of the public comments did not receive adequate summaries and responses, which are identified below:

1. Mike Huy Truong, President of Kingfisher Trading Co., in a letter dated June 18, 2009, presented comments, including: (a) asking for clarification of regulation section 671.7(b)(5)(B), and (b) making a specific recommendation regarding regulation section 671.7(d)(5). The Commission summarized some of Mr. Truong's comments as "Offered several language changes" with the response "The suggested language changes were appreciated, but the existing

language was left as proposed." The Commission also summarized some of Mr. Truong's comments as "Request clarification on proposed measures as they will apply to his business" with the response "Each permittee may have additional measures or instructions on their permit as needed that will apply to their specific conditions." These broad summaries and responses are not sufficient with respect to the two comments identified above, where specific objections or recommendations were made regarding the regulations.

2. The California Aquaculture Association, in a letter dated June 23, 2009, presented two comments which did not receive an adequate summary and response. One comment related to the procedures followed: "The basis for regulation must be supported and documented by the best available science and the process must be more transparent" and included a recommendation for a written biological opinion document for barramundi. A second comment expressed concerns with the lack of specificity in the regulation text regarding inspection requirements for the importation of aquaculture products, noted that there is no mandatory requirement for inspection and certification of fish or facilities, and made the concluding recommendation: "We recommend that the regulations clearly identify the key elements of the Department's risk management plan for barramundi and how they are being addressed in and out of state." The Commission included a general comment summary "Barramundi are an important aquaculture species and CA producers must be able to compete on a level playing field with out-of-state producers." The response to this summary was: "The five options were developed to address this comment while providing protection for native species." This general summary and response was not sufficient with respect to the two comments identified above.

3. Charlie Sammut, President of the International Animal Welfare Association, in a letter dated April 7, 2010, presented a number of general and specific objections to the "statement of purpose" provision of regulation section 671.1(c)(2)(H) and concluded with the recommendation that the "statement of purpose" subsection be removed from the regulations. These comments regarding the "statement of purpose" provision did not receive a summary and response. (Note: The Commission did summarize and respond to other comments from this commenter regarding the "breeding plan" requirements of regulation section 671.1(c)(2)(F), but it did not respond to comments regarding the "statement of purpose" requirements of regulation section 671.1(c)(2)(H).)

4. Greg and Carol Lille of Goin'Ape, in a letter dated June 22, 2009, made a recommendation regarding the "unique identification" requirement of regulation section 671.1(c)(2)(K) and raised concerns regarding the "breeding plan" requirement of regulation section 671.1(c)(2)(F). There was no summary and response to the recommendation regarding the unique identification requirement. The Commission's summary of the comment regarding the breeding plan requirement was: "Does not support the breeding plan requirement to provide a customer list." The Commission's response (by reference) was: "This requirement was dropped from the final action." This summary and response is inadequate because the commenter made no mention of the customer list aspect of the breeding plan requirement and was objecting to the breeding plan requirement generally, and most of the breeding plan provisions were not dropped.

5. Patrick Ciocca and nine other persons, in a letter dated February 21, 2010, made specific objections and recommendations pertaining to the breeding plan requirements of regulation