

**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**

**Amend section: 632**

**OAL File No. 2011-0722-04S**

In this rulemaking action, the Fish and Game Commission (Commission) proposed to amend section 632, title 14 of the California Code of Regulations (CCR), to implement the Marine Life Protection Act (MLPA) (Statutes of 1999, Chapter 1015) in the south coast region, which is from Point Conception in Santa Barbara County to the California-Mexico border. This proposed action would eliminate several marine protected areas (MPAs), establish several new MPAs, revise the borders of some MPAs and rename others, resulting in a total of 36 MPAs in the south coast region. This would be the third of five regions to be implemented through the MLPA. The central and north central coast regional regulations were approved and became effective in September 2007 and May 2010 respectively.

On September 2, 2011, the Office of Administrative Law (OAL) disapproved this proposed regulatory action. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

**DECISION**

OAL disapproved the above-referenced regulatory action for the following reasons: failure to comply with notice requirements for modification of the regulatory text; failure to comply with the "Necessity" standard of Government Code section 11349; failure to include all relied upon documents in the rulemaking file; failure to provide the reasons for rejecting alternatives that were considered; and failure to adequately respond to all of the public comments made regarding the proposed action.

**DISCUSSION**

The amendment of regulations by the Commission must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA compliance (Gov. Code, sec. 11346). No statute exempts the Commission's rulemaking from APA compliance.

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

#### **A. NOTICE REQUIREMENTS**

1) Section 11346.8(c) of the Government Code requires that if an agency makes a substantive, sufficiently related modification to the text of a regulation that was originally made available to the public for comment, the agency must make the modified text available to the public for at least 15 days and respond to any written comments received during that period. Section 44, title 1 of the California Code of Regulations (CCR), specifies the procedures an agency must follow to make the modified text available to the public. Subdivision (a) of section 44 requires that notice of the proposed changes and the text be mailed out to specified categories of persons:

(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
- (2) all persons who submitted written comments at the public hearing; and
- (3) all persons whose comments were received by the agency during the public comment period; and
- (4) all persons who requested notification from the agency of the availability of such changes.

In this proposed rulemaking, the Commission provided a public comment period after publication of the notice as required by Government Code section 11346.4(a). This period must be at least 45 days in length, which it was, but the Commission actually provided an extended comment period – September 17, 2010, to December 15, 2010. During the original comment period, the Commission provided an additional public comment period for modified, sufficiently related text as required by Government Code section 11346.8(c). This period met the minimum 15 days in length and the Commission again provided an extended period – November 22, 2010 to December 15, 2010. A public hearing was held on December 15, 2010, to receive oral or written comments. The difficulty in overlapping these comment periods is that an agency cannot ascertain in advance with certainty who will testify or submit written comments at the public

hearing or who might submit written comments on the original proposed text during the 45 day comment period, but after the notice for the 15 day period is sent. Given the thousands of comments received in this rulemaking during the original comment period and at the hearing, it is uncertain whether the Commission complied with section 44 when sending out the notice of modifications to the original proposed text.

The rulemaking record provides no indication that the Commission complied with section 44. Subsection (b) of section 44 provides:

(b) The rulemaking record shall contain a statement *confirming that the agency complied with the requirements of this section* and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period. [Emphasis added.]

The confirming statement of mailing provided with this rulemaking for the November 22, 2010, through December 15, 2010, availability period did not conform to these requirements. It stated the date that the notice and modified text were mailed and the beginning and ending dates of the period, but did not state compliance with requirements regarding to whom the notice was mailed. Thus, the evidence in the rulemaking record provides no indication that the Commission complied with the mailing requirements of section 44.

Additionally, in both the originally proposed text and the modified text, the Commission did not include the phrase “the mean high tide line and” for the description of boundaries for Long Point State Marine Reserve (SMR). The final text includes this phrase. If the Commission has determined that this phrase is applicable for this SMR and they want to add it, it is a substantive change which requires a new 15 day public comment period.

A new 15 day notice with text that includes all of the modifications approved by the Commission must be provided to all of those who are required to receive it pursuant to section 44(a), title 1 of the CCR. The confirming statement of mailing must be corrected to indicate compliance with the whole of section 44, title 1 of the CCR, specifically including that it was mailed to the categories of persons described in subdivision (a) of section 44.

2) Section 11347.1 of the Government Code requires that if an agency adds a document to the file which was relied upon in proposing the action, then that document shall be identified in a notice that is sent to the public. Subdivision (b) of this section specifies the requirement for the notice and who must receive it:

- (b) At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available to the public for inspection:
- (1) Persons who testified at the public hearing.
  - (2) Persons who submitted written comments at the public hearing.
  - (3) Persons whose comments were received by the agency during the public comment period.

- (4) Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.

In this proposed rulemaking, the Commission created an “Amended Initial Statement of Reasons,” dated November 3, 2010, which added an additional document to the list of documents relied upon under the heading “Identification of Reports or Documents Supporting Regulation Change.” This new document is referred to as “Attachment 17” and the title given to it is “California Department of Fish and Game Memo to the Commission regarding outstanding issues identified in the proposed Initial Statement of Reasons to Amend Section 632 Title 14, CCR (October 11, 2010).” The document in the rulemaking record that most closely approximates this title is identified in the “File Index” as the “Director’s Memorandum dated October 11, 2010, Summary of Outstanding Issues Identified Subsequent to the April 2010 Commission Meeting and Potential Actions to Address These Issues Within Proposed Regulations for the MLPA SCSR.” Assuming that these two documents are the same document, this document is referred to, but not clearly identified, in the “Updated Information Digest” that was mailed with the modified text for the 15 day period that overlapped the 45 day period as discussed above. Consequently, as evidenced by the 15 day confirmation of mailing statement discussed above, it is uncertain whether the notice of availability was sent to all persons required pursuant to Government Code section 11347.1(b).

A new 15 day notice of availability for “Attachment 17,” accurately identified by its proper title, must be provided to all of those who are required to receive it pursuant to section 11347.1(b) of the Government Code. A confirming statement of this mailing must be included in the record pursuant to subdivision (e) of this section. (Generally, a notice of availability of documents added to the record under Government Code section 11347.1 can be combined with a notice of modified regulation text under section 44, title 1 of the CCR.)

## **B. NECESSITY**

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “Necessity” standard. Government Code section 11349(a) defines “Necessity” to mean

- (a) ... 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 purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

To further explain the meaning of substantial evidence in the context of the “Necessity” standard, subdivision (b) of section 10, title 1 of the CCR provides:

- (b) In order to meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) a statement of the specific purpose of each adoption, amendment, or repeal;  
and
- (2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An ‘expert’ within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons (ISR) (Gov. Code, sec. 11346.2(b)). The ISR must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need (Gov. Code, sec. 11346.2(b)(1)). The ISR must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b)). In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

1) In connection with the initial 45-day notice published September 17, 2010, for this proposed rulemaking, the Commission provided an “Initial Statement of Reasons,” dated April 21, 2010, with sixteen attachments that are listed as documents relied upon by the Commission in promulgating these regulations. In addition, this rulemaking includes an “Amended Initial Statement of Reasons,” dated November 3, 2010, which added a seventeenth attachment as a document relied upon. In reviewing all of these documents, the rationale for elimination of two currently existing MPAs is not sufficient.

For the elimination of Buena Vista Lagoon State Marine Park (SMP), the rationale provided is “Per Department of Fish and Game Guidance.” The record includes no description of this guidance in regards to the elimination of this MPA. In addition, a footnote states that this MPA is “outside the MLPA South Coast Study Region,” but gives no indication as to why it was not included in the study region and thereby proposed for elimination.

For the elimination of San Dieguito Lagoon SMP, the rationale provided is “Managers do not want an MPA here. Request to match designation at San Dieguito to Carpenteria Salt Marsh and Tijuana Estuary for monitoring purposes.” The record includes no further information or rationale as to why this MPA is proposed to be eliminated.

2) The final text for the Gull Island State Marine Reserve (SMR) adds the phrase “and straight lines connecting” to a description of the boundary lines. No necessity for this amendment is provided in the initial statement of reasons.

3) As discussed under the “Notice Requirements” issue above, the Commission included this language as part of the final text without providing notice to the public. If the Commission wishes to include the phrase “the mean high tide line and” for the description of boundaries for Long Point SMR, the Commission must provide necessity for this modification.

The rationale for elimination of the two currently existing MPAs, Buena Vista Lagoon SMP and San Dieguito Lagoon SMP, and for the text language noted above, fails to satisfy the “Necessity” standard because the rulemaking record fails to provide an explanation of “why” and “how” it effectuates the purpose of the MLPA.

Before resubmitting this rulemaking action to OAL, the Commission will have to prepare a supplement to its statement of reasons that includes substantial evidence of the necessity for the changes described above, and provide notice of availability and an opportunity for public comment in accordance with Government Code section 11347.1. Any sufficiently related changes made to the regulations to address the above “Necessity” concerns or for any other reason must be made available to the public pursuant to Government Code section 11346.8(c) and section 44, title 1 of the CCR.

### **C. DOCUMENTS RELIED UPON**

Section 11347.3(b)(7) of the Government Code requires that the rulemaking file include:

- (7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation....

As mentioned above, the “Initial Statement of Reasons” for this proposed rulemaking, dated April 21, 2010, included sixteen attachments as documents relied upon. Attachment 4 of this set, entitled “Detailed Description, Objectives and Rationale, and Maps of Marine Protected Areas (MPAs in the MLPA South Coast Region Integrated Preferred Alternative (IPA),” is incomplete because it does not include 33 pages of tables regarding the MPAs that are part of Attachment 4. Consequently, the missing tables of Attachment 4 are required to be included in the rulemaking file pursuant to section 11347.3(b)(7) of the Government Code. The Commission will need to add the missing tables of Attachment 4 to the rulemaking file upon resubmitting the rulemaking action to OAL.

Government Code section 11347.1 establishes specific procedural requirements for notifying the public when documents relied upon are added to the rulemaking file after the initial publication of a notice of proposed action and for making the documents available for public inspection and comment. It is unclear from the rulemaking record whether the missing 33 pages of Attachment 4 were made available during the public comment period. If not, then the 33 pages will need to be “noticed” in accordance with the requirements of Government Code section 11347.1. (Generally, a notice of availability of documents added to the record under Government Code section 11347.1 can be combined with a notice of modified regulation text under section 44, title 1 of the CCR.)

#### **D. REASONS FOR REJECTING ALTERNATIVES**

Government Code section 11346.2(b)(3)(A) requires that an ISR include:

(A) A description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives.

Pursuant to subdivision (b)(3)(C) of that section:

(C) ...an agency is not required to artificially construct alternatives, describe unreasonable alternatives, or justify why it has not described alternatives.

In this proposed rulemaking, both the "Initial Statement of Reasons" and the "Amended Initial Statement of Reasons" include a description of four alternatives: a no-change alternative and three other alternatives which are variations on the set of MPAs in this proposed rulemaking and which had been developed as proposals by the MLPA South Coast Regional Stakeholder's Group (SCRSG). The Commission provided a reason for rejecting the no-change alternative in stating that it "does not address the goals and requirements of the Marine Life Protection Act." However, the Commission did not provide reasons for rejecting the other three alternatives. In fact, on page 4 of the "Amended Initial Statement of Reasons," the Commission stated:

The BRTF [*Blue Ribbon Task Force*] noted that all three SCRSG proposals achieved the requirements of the MLPA in different ways: they generally met science guidelines of the draft master plan, generally met Department [*of Fish and Game*] feasibility criteria, and to the extent possible minimized socioeconomic impacts. [Emphasis added for clarification.]

And on page 63 of that document, the Commission stated:

Each alternative, with the exception of the no-change alternative, meets the goals and guidelines of the MLPA to varying degrees, and attempts to adhere to the SAT [*MLPA Master Plan Science Advisory Team*] guidelines in the draft master plan to the extent possible. [Emphasis added for clarification.]

Since the Commission did consider these alternatives, it must include, in the supplement to the statement of reasons, a statement of its reasons for rejecting these alternatives.

#### **E. RESPONSE TO PUBLIC COMMENTS**

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a forty-five day comment period prior to adoption of a proposed regulatory action (Gov. Code, secs. 11346.4 and 11346.5). By requiring the state agency to summarize and respond in the record to comments received during the comment period, the Legislature has clearly indicated its intent that an agency account for all

relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input.

Government Code section 11346.9(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(a)(3) requires that the final statement of reasons include:

(3) 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(c) that statutory provision specifically includes the requirement:

(c) Any written comments received regarding the change must be responded to in the final statement of reasons required by [*Government Code*] Section 11346.9. [Emphasis added for clarification.]

In this proposed rulemaking, the Commission received over 17,000 written and oral public comments. The Commission adequately summarized and responded to most of these comments. However, a limited number of the public comments did not receive adequate responses. These are identified below:

1) David D. Cooke of the law firm of Allen Matkins Leck Gamble Mallory & Natsis LLP, in a letter dated December 15, 2010, presented several comments, including: (a) failure to comply with MLPA requirements, and (b) failure to comply with Marine Managed Areas Improvement Act (MMAIA) requirements. The Commission summary of Mr. Cooke’s comments used Mr. Cooke’s own heading for his discussion of these issues and appears to be adequate. However, the Commission’s response to both of these objections, on page 97 of the Final Statement of Reasons, dated July 21, 2011, is:

These comments concern the roles and responsibilities of the Department of Fish and Game in preparing, or causing to be prepared, the Master Plan (Fish and Game Code section 2855(b)), and/or the Blue Ribbon Task Force, an advisory entity. As such, they are not specifically directed at the proposed action or to the procedures followed by the Fish and Game Commission in proposing the action.

(a) Failure to comply with the MLPA: Mr. Cooke’s comment cites Fish and Game Code section 2859(b) which includes requirements regarding the drafting, public review and adoption of a master plan. It requires the Department of Fish and Game (Department) to submit a draft and,



after public review, a final master plan to the Commission. It requires the Commission to adopt the master plan with regulations based on the plan and then to implement them if funds are available. Mr. Cooke's comments and objections in this regard are lack of compliance with the process for development of the master plan and that the Commission adopted the regulations without a final master plan in place.

(b) Failure to comply with the MMAIA: Mr. Cooke (citing Public Resources Code section 36800) comments that the State Interagency Coordinating Committee (SICC) is required "to take certain actions with respect to 'proposals for new or amended MMAs.'" (MPAs are a subset of MMAs, pursuant to Public Resources Code section 36602(e)). Mr. Cooke's objections in this regard are that the SICC "was required to perform its functions as a prerequisite to Commission action."

Regarding comment (a) above by Mr. Cooke, since the Commission does have a statutory role in relation to the master plan, the Commission's response is not sufficient with respect to this comment. Regarding comment (b) above by Mr. Cooke, even if the Commission has no responsibility in relation to the SICC, the response is incomplete in that it does not say why review by the SICC was not necessary.

The Commission must amend its final statement of reasons to include a response that addresses these comments regarding the procedures followed by the Commission in developing and adopting the regulations.

2) Several commenters supported each of the three alternatives/proposals mentioned above in the discussion of "Reasons for Rejecting Alternatives" and/or supported specific MPAs in various locales. Acceptance of each of these alternatives/proposals and/or of the comments regarding specific locales would have resulted in some variation from this proposed rulemaking as adopted by the Commission. On page 72 of the "Final Statement of Reasons," dated July 21, 2010, is the Commission's response, to each of these comments in support of the alternatives/proposals and specific locale comments:

Comment noted. After taking public testimony on all the alternatives, the Commission adopted the IPA, based on the reasons provided in the Amended Initial Statement of Reasons, and adopted specific sub-options identified in this Final Statement of Reasons for inclusion in the IPA.

Subsequent to this response to comments supporting Proposal 3, the Commission referred comments supporting the other two proposals/alternative and some comments on specific locales to this comment with the following: "Comment noted. See response to comment 5." Essentially, this response states that the reason for rejecting the comment is that the Commission adopted the IPA with a few sub-options instead.

These responses are incomplete and inadequate. The Final Statement of Reasons will need to accurately reflect the Commission's reasons for rejecting these comments.


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If any subsequent revisions to the regulation text are made in response to these comments, the changes must be made available for public comment for at least 15 days pursuant to Government Code section 11346.8, subdivision (c) and section 44, title 1 of the CCR as discussed above. Additionally, the Board must summarize and respond to any comments received during the new 15-day public comment period.

**CONCLUSION**

For the reasons set forth above, OAL has disapproved this regulatory action.

Date: September 9, 2011



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For: Debra M. Cornez  
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