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March 11, 2009

Mr. Vern Goehring
California Fisheries Coalition
1621 13th Street
Sacramento, CA 95814

Re: Authorities and Responsibilities of the California Fish and Game Commission and the California Department of Fish and Game under the Marine Life Protection Act and the Marine Managed Areas Improvement Act

Dear Vern:

You have asked for guidance on the legal authorities and responsibilities of the California Fish and Game Commission (“Commission”) and the California Department of Fish and Game (“Department”) provided to these agencies by the State Legislature pursuant to the Marine Life Protection Act (“MLPA”), Fish & Game C. §§ 2850-2863. In particular, it appears that both the Commission and the Department have focused exclusively on implementing the MLPA through issuance of regulations that ban or limit fishing in specific areas of offshore waters within the State’s three mile state boundaries.¹ These areas are generically referred to as marine protected areas, or “MPAs,” as defined in the MLPA, § 2852(c), and the Marine Managed Area Improvement Act (“MMAIA”), Pub.Res.C. § 36602(e). MPAs are a subset of Marine Managed Areas as defined under the MMAIA.

Based on past implementation and pending proposals for Southern California, it appears that the Commission and the Department do not plan to regulate (or even address) any threats to the health of marine habitat or biological diversity in coastal waters of California except by banning, or limiting to some degree, fishing by recreational or commercial fishers within the boundaries of MPAs created pursuant to the MLPA.

¹ For example, California’s Central Coast Marine Protected Areas now in place include: (1) 15 State Marine Conservation Areas (SMCA), wherein recreational and commercial fishing is limited; (2) 13 “no-take” State Marine Reserves (SMR), within which no fishing is allowed; and (3) one State Marine Recreational Managed Area (SMRMA), where recreational fishing is limited or restricted.



You also asked whether the Commission and Department have, under the MLPA, authority and responsibility to evaluate and to regulate directly, or indirectly by active cooperation with other agencies, “coastal development, water pollution, or other human activities”, which were specifically mentioned by the State Legislature in the MLPA as “threatening the health of marine habitat and the biological diversity” found in California’s Ocean Waters. MLPA, § 2851(c). As you know, in the MMAIA, the Legislature was even more explicit and said that California’s marine managed areas “create the illusion of a comprehensive system” but fail to meet the full potential for protection and conservation. The Legislature recognized that, without a system of coordinated actions, presumably by all responsible agencies, “it is difficult for agencies to meet management objectives, such as maintaining biodiversity . . . and protecting marine resources.” MMAIA, Pub.Res.C. 36601(a)(7).

Thus, by implementing the MLPA in a manner that restricts only commercial and recreational fishing activities and without regard to any other protective action, by direct regulation or by coordination with other regulatory agencies, it would appear that the Commission and the Department are not implementing the MLPA as intended by the Legislature, as plainly expressed in the MLPA and the MMAIA. Limiting MLPA implementation to restrictive regulations on commercial or recreational fishing conflicts with the coordinated management mandate in the MMAIA and is contrary to the “best readily available science” mandate in the MLPA. In fact, the Legislature was very aware that narrow, piecemeal implementation of coastal management actions (fishery management, pollution control, etc.) would result only in the “illusion” of a comprehensive system and adopted policy and program directives to avoid this kind of result.

The Commission and the Department appear to be ignoring the Legislature’s mandate in both the MLPA and the MMAIA, as well as the emerging broad scientific consensus for integrated marine ecosystem management in limiting their actions to just issuing restrictive fishing regulations in MPAs.² The single-minded focus on only restricting fishing in MPAs will “create the illusion” of marine areas protected from all threats, when that is not the case at all. The narrow approach of regulating only fishing activity is also contrary to the mandate of preparing a plan based on “the best readily available science.”

² The imperative that coastal conservation and protection actions should be integrated using principles of eco-system management, especially at the local level, was recently highlighted by the Joint Ocean Commission Initiative in a report entitled *One Coast, One Future: Securing the Health of the West Coast Ecosystems and Economies (January 2009)* (“Joint Commission Report”). In addition, the Department MLPA website contains an abstract of a scientific paper co-authored by the recently nominated NOAA Administrator, Dr. Jane Lubchenko, stating that marine reserves are vulnerable to other important threats, such as chemical contamination, because the marine resources in reserves “are strongly influenced by the highly variable condition of the water masses that continuously flow through them.” Alison, G.W.; J. Lubchenko and M.H. Carr. 1998 “Marine Reserves are Necessary but not Sufficient for Marine Conservation.” *Ecological Applications*. 8:S79-S92.



1. The Provisions of the MLPA Mandate a Broader Effort of Protection for MPAs

The Legislative Findings in the MLPA begin by stating that California MPAs previously were established on a “piecemeal basis rather than according to a coherent plan and sound scientific guidelines.” Fish & Game C. § 2851(a). The Findings then state, among other things, that:

--coastal development, water pollution, and other human activities threaten the marine environment (§ 2851(c));

--marine life reserves are an essential element of an MPA system because they...provide a sanctuary for fish and other sea life (§ 2851(f)).

Later, in the Definition section, the Legislature stated its intent that MPAs be “maintained to the extent practicable in an undisturbed and unpolluted state.” § 2852(d). To this end, the Commission, within its authorities and discretion, has been directed to prohibit the taking of marine species and “other activities that upset the natural ecological functions of the area” How else could marine reserves serve as a true sanctuary for sea life?

That the Legislature expected a cooperative effort with other responsible regulatory agencies is highlighted in § 2855(b)(2), by directing creation of an implementation team that includes “water quality” and other special expertise. Staff from other regulatory agencies, such as the State Water Resources Control Board, must be on the team. This team helped develop a Master Plan for MPAs.³ The Plan was to include “recommendations for management and enforcement measures...that would apply system wide or to specific types of sites and that would achieve the goals of this [Act].” § 2856(a)(2)(I). The preferred alternative for MPAs, to be adopted by the Commission, may include either or both of two objectives: (1) “protection of habitat by prohibiting damaging fishing practices *or other activities that upset the natural ecological functions of the area*” (emphasis supplied); and (2) “enhancement of a particular species or group of species, by prohibiting or restricting fishing for that species or group within the MPA boundary.” § 2857(b).

³ Notably, the Master Plan, issued in Revised Draft form in January 2008, is filled with broad generalities and discussion of process, but includes no process or regulatory action to address mitigating water quality threats and is even devoid of any discussion of this issue. No discussion of how the Commission and the Department will address issues other than fishery management is contained in the Master Plan. In the Enforcement Section, the Plan concedes that the Department limits its enforcement responsibilities to commercial and sport fishing regulations, marine pollution incidents, homeland security, and general public safety. However, the Department is routinely involved in regulatory and permitting procedures led by other agencies.



Anticipating the need to address activities other than fishing, the Legislature gave the Commission authority to determine the activities that may upset the “natural ecological functions.” § 2852(d). Determining which activities may upset natural ecological functions within MPAs is therefore essential to the Department’s duty to recommend mitigation measures for any project “impacts that are inconsistent with the goals and guidelines” of the MLPA. Fish & Game C. § 2862.

In summary, the Legislature intended the MLPA to be more than another fishery management statute, but one dedicated to protecting all marine life within MPAs, if in fact such areas are established and real threats exist. Well-developed scientific authority supports the need to approach MPA management on an ecosystem, multi-disciplinary basis, of which the Legislature was well aware.

Consequently, the MLPA, to achieve its ambitious goals, can be fairly read to provide new regulatory authority to the Commission and the Department and, where such authority may be inadequate, to require the Commission and the Department to enlist other regulatory agencies in the development of a meaningful comprehensive protection plan, not just simply adopt MPAs that restrict fishing as the sole outcome.⁴ Otherwise, authorities existing prior to the MLPA would have sufficed to address any unintended, serious conservation issues created by fishing, which has long been a highly regulated activity.⁵ This interpretation of the MLPA is also reinforced by the separately enacted MMAIA.

2. The MMAIA Reinforces the Mandate for a Broad Protection Program

The Legislature also enacted the MMAIA, which serves as an exclamation point to the purposes and goals set forth in the MLPA. The second finding in the Act is unequivocal on the need for comprehensive protection: “The ocean ecosystem is inextricably connected to the land, with coastal development, water pollution, and other human activities threatening the health of marine habitat and the biological diversity found in California’s ocean waters.” Pub.Res.C. §

⁴ For example, there is a *Plan for California’s Nonpoint Source Pollution Control Program* for coastal waters led by the State Water Resources Control Board and the California Coastal Commission. The plan was approved in 2000 by the U.S. Environmental Protection Agency and the National Oceanic and Atmospheric Administration as satisfying federal regulatory and funding requirements. However, there is no discussion by the Commission or the Department as to how that Plan needs to be upgraded to meet the goals of the MLPA.

⁵ The Legislature also enacted the Marine Life Management Act (MLMA) in 1998, broadening the authority of the Department of Fish & Game regarding management of fishing practices. The MLPA Master Plan says “the MLMA reflects shifts in the goals of fishery management away from a single species focus on maximum yields toward sustainable yields and an ecosystem perspective.” Fish & Game C. § 7056. See, *Coastside Fishing Club v. California Resources Agency*, 158 Cal.App.4th 1183 (2008) (confirming the broad powers given the Department by the MLMA)



36601(a)(2). Marine managed areas, the Legislature said, offer the benefit of addressing these problems on a comprehensive basis.

The espoused “mission” of the State’s marine managed area system “is to ensure the long-term ecological viability and biological productivity of marine and estuarine ecosystems.” Pub.Res.C. § 36620. Marine managed areas are to be established and managed to “conserve representative or outstanding examples of marine and estuarine habitats, biodiversity, ecosystems, and significant natural or culture features or sites.” To this end, a rather elaborate interagency process is created in the MMAIA. More significantly, the MMAIA contains a set of new prohibitions on unlawful activities within designated marine managed areas. Pub.Res.C. § 36710. “In a state marine reserve, it is unlawful to injure, damage, take, or possess any ... living marine resource.” Fish & Game C. § 36710. These prohibitions are not limited to fishing activity.

The Legislature also authorized agencies that create marine managed areas to regulate activities allowed within them. In this regard, the Legislature envisioned collaboration among agencies in meeting conservation goals. As an example, the Department is authorized to manage “water quality protection areas” when requested by the State Water Resources Control Board. Pub.Res.C. § 36725(e) and (f).

Despite the broad goals and intent set forth in the MMAIA, the Commission and the Department have truncated their actions in creating MPAs to only one activity (fishing) that is already strictly regulated by state and federal fishery management laws, including those relating to threatened and endangered species. It would be illogical to conclude that, after enacting the new directives set forth in the MMAIA and the MLPA, the Legislature expected the Commission and the Department to restrict themselves to what are really very traditional fishery management restrictions, particularly where there is no scientific evidence that fish harvest is in fact the critical “ecosystem problem” within the designated MPAs.

3. The Need for Integrated Ecosystem Management Is Well Recognized

Today’s policy debates about appropriate coastal and ocean management reflect a consensus about the need for integrated ecosystem management. Not only do the policies set forth in the MLPA and MMAIA recognize this consensus, but so also have national policy studies. The Joint Commission Report (at page 13) is quite succinct on the need for integrated management:

“An integrated, ecosystem-based approach is the most effective way for West Coast governments and citizens to restore, protect, and maintain the ecological and economic health of ocean and coastal areas. A key challenge to more effective integrated management is bridging administrative and political boundaries. This can be done without redrawing actual jurisdictional lines through effective coordination and complementary legislation between and among jurisdictions in an area.”



Consistent with this focus on integration, in 2004, the Legislature adopted the California Ocean Protection Act (COPA) which directed all public agencies carrying out laws that protect the ocean to do so while recognizing that “the ocean ecosystem is inextricably linked to activities on land” and that “improving the quality of coastal waters and the health of fish” should be a priority for the state. Pub.Res.C. § 35510. The first duty assigned to the Ocean Protection Council, created by the COPA, is to “coordinate activities of state agencies” related to protection and conservation of ocean ecosystems “to improve the effectiveness” of these conservation efforts. Pub.Res.C. § 35615.

In summary, despite consensus and unequivocal legislative directives in the MLPA, MMAIA, and COPA, the implementation of MPAs by the Commission and the Department has been handled in the same narrow, out-dated and parochial fashion, placing the burden for protecting the ocean on commercial and recreational fishers. This can hardly be what the State Legislature intended. One cannot conclude that these forward-looking statutes can merely be used to address one aspect of the marine environment that may not in fact be a major environmental problem. Given the significant recent expansion of precautionary regulations resulting in a major reduction in coastal fishing activity and fleet size that has occurred in California over the last decade, it makes no sense to ignore all other threats to marine ecosystems when creating MPAs.

4. Single Activity Regulation (Fishing) Violates the Spirit and Intent of the MLPA

In interpreting a statute, Courts generally also review the spirit and intent of the enacted law. The Court in the *Coastside Fishing Club* case noted that “[l]aws providing for the conservation of natural resources are of great remedial and public importance and thus should be construed liberally...” (citing *San Bernadino Valley Audubon Society v. City of Moreno Valley*, 44 Cal.App.4th 593, 601 (1996)). Statutes should also, the Court said, be construed to promote the general object sought to be accomplished (citing *Alford v. Pierno*, 27 Cal.App.3d 682, 688 (1972)). Despite these fundamental principles of statutory interpretation, the Commission and the Department have taken an overly narrow view of the MLPA, rendering the Legislature’s broader goals and objectives meaningless.

In conclusion, we believe a strong argument can be made that the Commission and the Department are violating the statutory provisions, and the intent and spirit, of the MLPA by creating MPAs that only regulate commercial and recreational fishing.

Very truly yours,

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James P. Walsh