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From: Central Coast MLPA Initiative Final Statement of Regulatory Reasons for Regulatory Action... May 14, 2007 Excerpts in full, FOCUS: Regulatory Backdrop, Responses to interesting comments, Hearings and Regulatory Compliance, and Kelp Harvest Allowances

Point of fact, the BRTF was not created in statute but rather pursuant to the authority of the Resources Agency Secretary, and so does not constitute a "state body" for purposes of compliance with Bagley-Keene

STATE OF CALIFORNIA FISH AND GAME COMMISSION
FINAL STATEMENT OF REASONS FOR REGULATORY ACTION
Amend Sections 165 and 632 Title 14, California Code of Regulations
Re: Marine Protected Areas

- I. Date of Initial Statement of Reasons: January 15, 2007
- II. Date of Pre-adoption Statement of Reasons: March 19, 2007
- III. Date of Final Statement of Reasons: May 14, 2007
- IV. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: August 15, 2006 Location: Monterey, California
 - (b) Discussion Hearings:
 - Date: February 2, 2007 Location: Monterey, California
 - Date: March 2, 2007 Location: Arcata, California
 - (c) Adoption Hearing: Date: April 13, 2007
Location: Bodega Bay, California
- V. Update: **The Initial Statement of Reasons (ISOR) contained regulatory sub-options** within the Commission's preferred alternative for allowed take and (MPA) boundaries for several marine protected areas. These sub-options included the following choices:

Edward F. Ricketts -

- Option 1:** State Marine Conservation Area allowing limited kelp harvest and recreational hook and line fishing in the entire area at all times.
- Option 2:** State Marine Conservation Area allowing limited kelp harvest and recreational hook and line fishing from the Monterey Breakwater between the hours of 6 p.m. Sunday and 6 p.m. Friday
- Option 2a:** State Marine Conservation Area allowing limited kelp harvest and recreational hook and line fishing from the Monterey Breakwater between the hours of 6 p.m. Sunday and 6 p.m. Friday with special allowance for angling by people with disabilities
- Option 3:** State Marine Conservation Area allowing limited kelp harvest and recreational hook

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and line fishing in the entire MPA between the hours of 6 p.m. Sunday and 6 p.m. Friday

Option 4: State Marine Conservation Area allowing limited kelp harvest and recreational hook and line fishing from the Monterey Breakwater between the hours of 6 a.m. Sunday and 6 p.m. Friday

Option 4a: State Marine Conservation Area allowing limited kelp harvest and recreational hook and line fishing from the Monterey Breakwater between the hours of 6 a.m. Sunday and 6 p.m. Friday with special allowance for angling by people with disabilities

Option 5: State Marine Conservation Area allowing limited kelp harvest and recreational hook and line fishing in the entire MPA between the hours of 6 a.m. Sunday and 6 p.m. Friday

The Commission adopted the preferred alternative on April 13, 2007 with the following sub-option selections. Table 1 describes the allowed uses in each MPA:

Año Nuevo - Option 2 - Allow kelp harvest

Soquel Canyon - Option 1 - Prohibit spot prawn harvest

Portuguese Ledge - Option 1 - Prohibit spot prawn harvest

Edward F. Ricketts - Option 1 - Allow recreational hook and line fishing

Cambria (northern area) - Option 1 - Northerly boundaries

Cambria (southern area) - Option 3 - Northerly boundaries and allowing kelp harvest

Table 1.

Marine protected areas adopted as the preferred alternative and summary of allowed uses.

Greyhound Rock State Marine Conservation Area Allows take of: Recreational finfish by hook and line from shore only Allows take of: Commercial and recreational giant kelp by hand, Salmon, and Squid in entire MPA

Pacific Grove Marine Gardens State Marine Conservation Area Allows take of: Recreational finfish and commercial kelp by hand with limits on monthly take.

Carmel Bay State Marine Conservation Area Allows take of: Recreational finfish and commercial kelp by hand with limits on monthly take.

White Rock (Cambria) State Marine Conservation Area Allows commercial take of kelp with limits on monthly take

Summary of Primary Considerations Raised in Opposition and in Support: A total of 8,379 comments were received regarding the proposed regulations. Comments in support of the Commission's preferred alternative totaled 4,498 (approximately half of which supported the August 2006 version). Of these, 4,327 were electronic form letters in support of the Commission's preferred alternative (again approximately half supported the August 2006 version), 176 commenters supported alternative 2

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(143 of those were electronic form letters and 20 were postcards), 4 letters were submitted to Senator Maldonado expressing concern over a fishery study published in 2006 (see form letter H) and 2,585 signatures were gained on a petition to stop excessive regulation of fishermen (see form letter K). Of the total 8,379 comments received, 3,803 are included subsequent to the Pre-adoption Statement of Reasons. Table 2 provides a breakdown of the number of comments received that are included in the Pre-adoption Statement of Reasons and those received since the Pre-adoption Statement of Reasons and included in this Final Statement of Reasons. Responses to previous public comments received were included in the Pre-adoption Statement of Reasons (see attached Tables 12 and 13).

At the outset, **the MLPA is an environmental statute and remedial in nature**; remedial statutes are liberally construed so as to effectuate their object and purpose, and the remedial effect of provisions should not be impaired by construction [3 Sutherland Statutory Construction (6th ed.), Section 60:2, p. 199]. This construction of Fish and Game laws has been supported in published cases; conversely, statutory interpretations of Fish and Game statutes will be rejected when they lead to absurd results in light of the clear policy statement of legislative purpose [*In re Makings* (1927) 200 Cal. 474, 478-479; *Pennisi v. Department of Fish & Game* (1979) 97 Cal.App.3d 268, 272-273; *Young v. Department of Fish & Game* (1981) 124 Cal.App.3d 257, 271; *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1563].

In enacting the MLPA, the Legislature stated why it was necessary to modify the existing array of MPAs to ensure that they are designed and managed “to take full advantage of the multiple benefits that can be derived from the establishment of marine life reserves [now classified as state marine reserves]” [subsection 2851(h)]. The MLPA also directs the MLPA Program to have an “improved” SMR component, and contemplates that the process for the establishment, modification, or abolishment of existing MPAs includes the creation of new MPAs [subsections 2853(b)(6), 2853(c)(5), 2855(a), 2857(c)]. **The agenda driving this process** is the one expressed by the Legislature in its detailed articulation of MLPA through its findings and declarations, definitions, goals and elements, **Master Plan components**, and objectives and guidelines [sections 2851-2853, 2856, 2867]. Since the **Legislature** does not engage in idle acts, the fact that it expressly **authorized the Commission in Section 2860 to regulate commercial and recreational fishing and any other taking of marine species in MPAs**, and not just SMRs, presumes such authority can be exercised.

Of course, how the Commission exercises that authority is a matter solely within its purview. Regardless, the authorization of new SMRs cannot be reasonably construed as reflecting a bias against fishing, when the MLPA expressly states that such reserves “may help rebuild depleted fisheries” [subsection 2851(f)]. Further, the Marine Life Management Act (MLMA, Stats. 1998, ch. 1052) links the maintenance, restoration, and enhancement of marine habitat to the

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primary fishery management goal of **sustainability**. In that respect, the Legislature also emphasizes that even fishery management decisions – which include the prevention of overfishing, the rebuilding of depressed stocks, the facilitation of conservation and long-term protection, and the restoration of marine fishery habitats – must not sacrifice long-term goals for short-term benefits [subsections 7055(a), 7055(b), 7056(a), 7056(i)].

2. Inadequacy of Science Standard

Another recurring theme questions the adequacy of the science driving the MLPA process, asserting that the science being used is not the “Best Available Scientific Information” (BASI) and recommending that the process not continue until more research and study is conducted. However, state law emphasizes timeliness over quality. In 2004 the National Academy of Sciences sponsored a major discussion of BASI in the context of the Magnuson-Stevens Fishery Management Act, and noted that “best” explicitly suggests that there is no better scientific information available and implicitly suggests the use of the most relevant and contemporary data and methods. However, the MLPA process is expressly based “on sound scientific guidelines” and “the best readily available science” [subsections 2853(b)(5), 2855(a)]. The MLPA use of best *readily available* science is an important qualification that emphasizes timeliness over quality. Similarly, the MLMA, which predates the MLPA, qualifies its application of BASI with the language: “...on other relevant information that the department possesses, or on the scientific information or other relevant information that can be obtained *without substantially delaying the preparation of the plan*” [Emphasis added, subsection 7072(b)].

The MLPA emphasis of timeliness over quality of information is further underscored by the concept of adaptive management, which recognizes that this process proceeds in the face of “scientific uncertainty” and prospectively contemplates that “monitoring and evaluation shall be emphasized so that the interaction of different elements within marine systems may be better understood” [Section 2852]. The objective of adaptive management under the MLPA is not to reduce uncertainty through increased scientific rigor, but rather to produce practical information that guides management decisions. To date, the California experience with adaptive management of marine resources is exemplified through the MLMA [sections 90.1, 7056(g)] and the Nearshore Fishery Management Plan, which address the critical concepts of the precautionary principle, and the variability of adaptive management strategies in data poor, data moderate, and data rich circumstances.

That the Legislature, as a matter of public policy, has favored timeliness over quality of information does not mean that inadequate science should be used. In that respect, external peer review is a strong guarantor of the adequacy of the science. The MLPA mandates that an external peer review process be established, and allows use of the process identified in Section 7062 of the MLMA “to the extent practicable” [Section 2858]. Subsection 7062(a) allows for submission to peer review of documents “that include, but are not limited to [marine living resources management documents].” However, such submissions are discretionary.

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It is important to understand that **the charge of the peer review entity is not to authenticate the data presented to them, but to evaluate the scientific methodology employed** and the facial plausibility of the conclusions that can be drawn therefrom. More importantly, the **peer review entity is not expected to approve, disapprove, or comment on the wisdom** of those conclusions. This must be so, because reasonable people can in good faith arrive at different conclusions using the same data and methodology.

In that regard, **the Department undertook such a peer review of the scientific basis for the Master Plan.** Consistent with the statutory direction of Section 7062, the scientific design guidelines used in preparing alternative MPA recommendations were reviewed by a panel convened by Oregon Sea Grant. The reviewers were selected by Sea Grant independent of the Department, and asked to review: (1) the MLPA Master Plan Science Advisory Team (SAT) guidance on MPA network design; and (2) the consideration of habitats in the design of MPAs provided by the SAT. The reviewers were also asked: (1) in general, is the document logically organized and factual? (2) are its recommendations clearly and unambiguously stated? (3) are there specific statements that you feel are incorrect or misleading? and (4) is there anything of importance that was not stated or covered? The three reviewers found the document and advice appropriate and not lacking in any way.

Additionally, the scientific review and analysis of alternative MPA recommendations were similarly reviewed. An independent panel convened by California Sea Grant reviewed the documents prepared by the SAT in analysis of various alternatives. Again, the reviewers found the documents, recommendations, and methodologies scientifically sound and concurrent with available information.

3. Inadequacy of Socioeconomic Analyses

A variant of the theme in Master Response 2 is that the socioeconomic information is fatally deficient. However, nothing in the MLPA imposes an affirmative duty to generate socioeconomic data beyond that which is required by other applicable laws, such as the Administrative Procedure Act or -- to the extent a socioeconomic change induces significant adverse environmental impacts -- the California Environmental Quality Act. The MLPA authorizes the establishment of a Master Plan team of scientists, one of which "may" have expertise in socioeconomics [subsection 2855(b)(3)(A)].

The preferred siting alternative must incorporate information and views provided by people who live in the area and other interested parties, including economic information [subsection 2857(a)]. Here, the term "economic information" relates back to "information" so we reasonably interpret this to mean that it is the "people who live in the area and other interested parties" that provide the economic information. Conversely, neither the five MLPA Program elements in subsection 2853(c), nor the eleven Master Plan components in subsection 2856(a)(2), address socioeconomics. Socioeconomics, then, is only one factor to consider in the development of a siting alternative [subsections 2855(c)(2), 2857(a)], which still must be

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consistent with the ecosystem-based goals and elements (Section 2853) and sound scientific guidelines [subsection 2857(c)] of the MLPA. Consistent with CEQA Guidelines [14 C.C.R. subsection 15131(a)], there is no duty to mitigate for adverse socioeconomic impacts under the MLPA. The MLPA expressly addresses mitigation of adverse impacts “on marine life and habitat in MPAs,” and if the Legislature had intended that socioeconomic impacts also be mitigated, it plainly would have said so (Section 2862). However, detailed socioeconomic information generated during the siting process may be relevant in the subsequent implementation of regulations under the Administrative Procedure Act (Government Code Section 11346.3).

4. Failure to Consider Existing Marine Protected Areas

There is no authority for the proposition that the MLPA requires holistic understanding of the resource contributions of existing MPAs before new ones may be considered. Indeed, such a conclusion is precluded by a plain reading of the statute. The MLPA only contemplates “an analysis of the state's current MPAs, based on the preferred siting alternative, and recommendations as to whether any specific MPAs should be consolidated, expanded, abolished, reclassified, or managed differently so that, taken as a group, the MPAs best achieve the goals of Section 2853 and conform to the guidelines in subdivision (c) of Section 2857” [subsection 2856(a)(2)(F)]. This indicates that the assessment of existing MPAs is driven by the configuration of the preferred siting alternative, not the reverse. That assessment of existing MPAs is intended as part of the ongoing process, as opposed to being a necessary precondition to future MPAs, is further indicated in the Master Plan component requiring “recommendations for monitoring, research, and evaluation in selected areas of the preferred alternative, including existing and long established MPAs, to assist in adaptive management of the MPA network” [subsection 2856(a)(2)(H)]. Also, the MLPA requires that the Fish and Game Commission “promptly act” on petitions to “add MPAs” and states that “nothing in this chapter” restricts any existing authority to designate new MPAs prior to the completion of the Master Plan [subsections 2861(a), (c)]. If a comprehensive assessment of the resource contributions of existing MPAs was required before new MPAs could be created, then these provisions would be rendered a nullity.

5. Failure to Consider Existing Fishing Management Measures

Several commenters asserted that MPAs were unnecessary because existing fishery conservation and management were capable of performing the same function, with less impact to commercial and recreational fishing interests. A variant of this theme asked why MPAs were necessary when particular fish stocks were either healthy, or rebuilding on their own.

The MLPA expressly states that MPAs and fisheries management are complementary [subsection 2851(d)]. Similarly, the MLMA declares that conservation and management programs prevent overfishing, rebuild depressed stocks, ensure conservation, facilitate long term protection and, where feasible, restore marine fishery habitats [subsection 7055(b); see also subsections 7056(b), (c)]. Although MPAs and fisheries management are complementary, they are not equivalent. The purpose of habitat protection in the MLMA is to advance the “primary fishery

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management goal” of sustainability (Section 7056). Moreover, that which is being managed is a specific fishery -- which may be based on geographical, scientific, technical, recreational and economic characteristics (Section 94) -- and so may only provide limited protection of a particular habitat.

Conversely, although the MLPA considers managing fishery habitat [subsections 2851(c), (d)], it also encompasses broader, ecosystem-based objectives that are not limited to *only* managing fisheries. If only existing fishery conservation and management measures were considered in designing the MLPA networks, then arguably only some of the ecosystem goals and objectives might be met. Other goals and elements would be undervalued (e.g. improving “recreational, educational and study opportunities provided by marine ecosystems” and protecting “marine natural heritage...for their intrinsic value” [subsection 2853(b)]. The MLPA also states that one of the purposes of the marine reserve component is to generate baseline data that allows the quantification of the efficacy of fishery management practices outside the reserve [subsections 2851(e), (f)]. This would be difficult to implement if the MPA design itself must consider those very same existing conservation and management measures.

Moreover, it is important to remember that the MLMA is the most comprehensive revision of state marine fishery management procedures in history. The subsequent enactment of the MLPA the following year strongly suggests the Legislature recognized that fishery conservation and management measures alone were inadequate to the task of broad ecosystem protection. Finally, had the Legislature intended existing fishery conservation and management measures to be considered in designing MPAs, then it plainly would have said so, as it did in the MLMA (Section 7083). As it is, the fact that the MLPA allows the Commission to “regulate commercial and recreational fishing and any other taking of marine species in MPAs” [subsection 2860(a)] strongly suggests that fishery measures are not intended to be considered in the design of MPAs but may in fact be subject to limitations beyond those already existing under fishery management regimes. In particular, the Nearshore Fisheries Management Plan (NFMP) developed pursuant to MLMA is specifically designed to adapt management in the presence of MPAs. Similarly, other fishery management changes, if necessary, would occur after the implementation of MPAs through the MLMA process. Thus, while the design of fishery management measures should properly consider the existence of MPAs, the reverse is not true.

The conclusion that existing fishery management measures are not properly considered in designing MPAs is further bolstered by three “real world” considerations. First, the direction from the Legislature is to use “the best readily available information” and studying the interaction of existing fishery management practices would add another dimension of complexity that retards, not facilitates, the process (See Master Response 1). Second, the subject of interaction with existing fishery management processes reflects exactly the kind of “scientific uncertainty” acknowledged by the Legislature when it authorized the application of adaptive management to the MLPA process (See Master Response 2). Third, the unfortunate reality is that existing fishery management processes do not always work. Indeed, as evidenced by the

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disastrous collapse of the west coast groundfish and the red abalone fisheries, they can fail entirely. Fishery conservation and management measures alone do not necessarily guarantee either fishery sustainability or ecosystem health.

6. Improper funding of MLPA process.

It is well-settled that, generally, public funds cannot be used for private purposes (see California Constitution article 16, section 6). However, several commenters have argued that the reverse is also true, and that the use of private funds for public purposes is equally repugnant to the constitution and other laws. Related arguments assert that the Legislature did not approve of the public/private partnership that created the MLPA Initiative, and that public agency decision-makers have been unduly influenced by such private funding.

Assembly Bill 993 (1999) enacted the MLPA to mandate the adoption by the Fish and Game Commission of a Master Plan guiding implementation of the Marine Life Protection Program,¹ concerning the creation of MPA networks off the California coast. The MLPA specifies the Master Plan components, including recommendations for funding sources to ensure all MPA management activities are carried out and the Marine Life Protection Program is implemented.²

In signing AB 993 into law, Governor Davis stated he was encouraging the proponents and the Department of Fish and Game “to seek assistance from private resources to help implement the provisions of the bill.” The following year, AB 2800 (Stats.2000, Chapter 385) enacted the Marine Managed Areas Improvement Act (MMAIA), to require a standardized classification system for marine managed areas. The MMAIA expressly recognizes the need to coordinate efforts to identify opportunities for public/private partnerships,³ and is intended to work in coordination with the MLPA⁴. The MLPA, in turn, requires that the Master Plan be prepared with the advice, assistance, and involvement of [fisheries] participants, marine conservationists, marine scientists, and other interested persons, and allows the Department to engage other experts to contribute to the Master Plan⁵.

In January 2004, the Department announced that budget shortfalls necessitated postponing its efforts under the MLPA. The current MLPA effort began with a 2004 public/private partnership created between the Resources Agency, the Department, and the Resources Legacy Fund Foundation, through a Memorandum of Understanding (MOU). The MOU recognized the prudence of preparing the Master Plan in phases. Consistent with its role in the MMAIA and the California Ocean Protection Act, the Agency agreed to establish the BRTF to oversee and coordinate the preparation of a Master Plan Framework. The Department agreed to expand the Master Plan Team to include more scientists, and to charge it with advising and assisting the BRTF and its staff in the preparation of the draft Master Plan Framework, and alternative networks along the central California coast. The Foundation agreed to fund staff and consultants for the BRTF, the expenses of the BRTF and the SAT, and costs for five Department positions which would be redirected to the MLPA effort⁶.

The effort has had the full knowledge and support of the Legislature. The anticipated use of

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private matching funds for MLPA implementation was acknowledged in the agendas of both the Assembly Budget Subcommittee No. 3 (April 21, 2004) and the Senate Budget and Fiscal Review Subcommittee No. 2 (May 19, 2004). In appropriating \$500,000 (Item 3600-001-0647), the Budget Bill (SB 1113; Stats.2004, Chapter 208) provided that the funds shall be available to match private funds for expenditure for MLPA-related activities. The Budget Bill was signed by the Governor on July 31, 2004. On August 27, 2004, the three entities executed a MOU that laid the groundwork for the MLPA Initiative's public/private partnership.

In 2005, the Governor's budget proposed \$500,000 from the **Environmental License Plate Fund** to continue MLPA implementation. The agendas for both the Assembly Budget Subcommittee No. 3 (April 13, 2005) and the Senate Budget and Fiscal Review Subcommittee No. 2 (May 18, 2005) note the funding "is leveraging over \$2 million in private foundation expenditures." In February, the Legislative Analyst's Office recommended that the Legislature hold the issue open pending receipt and review of the draft Master Plan Framework from the BRTF.⁷ After the draft Framework was transmitted to the Fish and Game Commission on May 13, 2005, the Senate Subcommittee staff recommended approving the proposal as budgeted. Consistent with the subcommittee actions, the Budget Bill (SB 77, Stats.2005, Chapter 38) appropriated \$15,802,000 (Item 3600-001-0005), of which \$500,000 was allocated through a Budget Change Proposal to the Marine Region for MLPA Design Management (PCA A1020) totaling \$416,667.

In November 2005, the **Coastside Fishing Club, whose members are recreational anglers, filed a lawsuit**, claiming that the Agency and Department were not authorized to seek private funding, that the MOU violated Article 16, section 7 of the California Constitution (relating to State Controller's warrants) and the separation of powers doctrine, and that the MOU amounts to a gift in violation of Government Code § 11005. In September 2006, the trial court found that the MOU was authorized by the MLPA, did not violate either Article 16, section 7 or the separation of powers doctrine, that, further, the Legislature specifically authorized that the appropriate funds would be used to match private funds, and the resources provided under the MOU did not amount to a gift but rather that the MOU was a bilateral contract with consideration on both sides⁸.

The Governor's January 10, 2006 budget again proposed \$500,000 from the **Environmental License Plate Fund** to continue MLPA implementation⁹. A March 30, 2006 Finance Letter included an additional \$380,000 from the General Fund to fund existing Department positions that were supported by a reimbursement contract with the Resources Legacy Fund Foundation, which expired December 31, 2006¹⁰. On April 24, 2006, Senate Subcommittee No. 2 staff recommended that it hold the issue open and request the Department to provide additional information. The Governor's May Revision proposed \$2.6 million from the General Fund to the Ocean Protection Council for MLPA implementation, together with an equivalent amount of reimbursement authority to the Department. On May 17, 2006, staff for the Senate Budget and Fiscal Review Subcommittee No. 2 recommended that it approve all MLPA proposals as

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budgeted. Consistent with the subcommittee actions, the Budget Bill (AB 1801, Stats.2006, Chapter 47) appropriated “at least” \$ 3.47 million for MLPA implementation (Item 3600-001-0001, paragraph 8).

In anticipation of the expiration of the initial MOU at year's end, the parties entered into another MOU regarding the second phase of the MLPA Initiative in December 2006. The Foundation expressly agreed that its funding and services were not contingent on the content of the Task Force's recommendations or on the MPA alternatives ultimately selected by the Commission. At this writing, the budget process for Fiscal Year 2007-2008 is currently ongoing. The MLPA itself encourages public participation and involvement¹². The MOU (August 2004) establishing the MLPA Initiative commits to such public transparency, and the BRTF created pursuant to the MOU values this commitment so highly it adopted its own policy on the subject (October 2004). The SAT Charter (October 2004) expressly commits to regular open meetings. To further facilitate public participation in this process, the BRTF created a “Statewide Interest Group” (SIG) in December 2004. Both the SIG and the RSG provided additional forum for public participation and comment as products were developed and forwarded to the BRTF. The MLPA Initiative maintains a dedicated website where meeting notices, agendas, and meeting materials are posted.

The MLPA Initiative website identifies the eleven members of the SAT who, based on their qualifications¹³, constitute the Master Plan Team as distinguished from those individuals who were specifically retained for the Central California project. These additional members are neither appointed pursuant to statute nor are they appointed by another multimember body (i.e. the Master Plan Team)¹⁴. The SAT met 15 times. A review of attendance shows that six meetings did not have a majority of these persons present and so did not constitute a “meeting”¹⁵ for purposes of Bagley-Keene: July 2005, August 30, 2005, October 2005, November 2005, May 2006, and September 2006.

Irrespective of any uncertainty over whether a “team” is sufficiently analogous to a “state body” to bring the Master Plan Team within the ambit of Bagley-Keene, the SAT fulfilled an intermediate function, acquiring and synthesizing scientific information for subsequent consideration and use by the BRTF, the Department, and finally the Commission. Indeed, by design, the MLPA Initiative scheduled the meetings of the SAT, BRTF, SIG, and RSG to maximize opportunities for review and comment on the products and processes as they developed, and the Commission held multiple public hearings after the SAT completed their work (Table 4):

Although a person may legally challenge an action taken at a meeting subject to Bagley-Keene within 90 days, nothing prevents a state body from *curing or correcting* an action taken that was allegedly not in compliance¹⁶. Moreover, such an action is not null and void if taken in *substantial compliance* with the Bagley-Keene meeting notice and agenda requirements¹⁷. The one SAT meeting that originally gave rise to this issue – September 2006 – did not have a quorum of MLPA Master Plan Team members and so, for purposes of Bagley-Keene, we believe

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that no meeting violation could have occurred even if the MLPA Master Plan is indeed a “state body.” The record shows that at least five other SAT meetings similarly lacked a MLPA Master Plan Team quorum. Of the remaining nine SAT meetings, the record shows that the notice and agenda requirements were either substantially complied with, or cured by subsequent action.

COMMENTs Sampling:

Allow kelp harvest in leased and open beds. **Response:** Kelp harvest guidelines for each MPA are provided for those where commercial kelp harvest is proposed.

Urchin are a pest and a nuisance, if you close the area to urchin harvest you will have urchin barrens. You must remove urchins to maintain a healthy environment. **Response:** See Master Responses 1 and 5. The MLPA contemplates the protection of the natural diversity and abundance of marine life, and the structure, function, and integrity of marine ecosystems. Urchins are a natural ecosystem component, and are afforded protection to preserve the integrity and natural predator-prey relationships. In existing MPAs in California, urchin barrens have been less common than non-MPA areas nearby

Do not change the status of an SMR to SMCA to allow kelp harvest See response to comment 33 for kelp harvest rates. **Response:** The Año Nuevo and Cambria areas have existing kelp leases. The commercial take of kelp has existed in these areas and there have been no adverse environmental impacts from these kelp leases prior to MLPA proposals. With the adoption of the preferred alternative, restrictions will be implemented that limit the take of kelp and further prevent adverse ecological impacts.

Kelp thinning has major ecological impacts on trophic structure and ecosystem function. **Response:** Current kelp harvest practices have not been found to have adverse ecological impacts. The MLPA contemplates adaptive management and changes in take designations may be made as warranted.

The Commission adopted suboption 2 for Año Nuevo. The take of all living marine resources (except giant kelp *Macrocystis pyrifera*) is prohibited. This simplifies enforcement, since giant kelp is easily distinguished from other living resources

Commenters urge the Commission honor kelp bed leases:

Response: The proposed regulations allow for kelp harvest in leased areas. [See Fish and Game Code subsection 2857(d)].

Allow kelp harvest but do not downgrade SMR status to honor kelp leases An MPA must be designated as a SMCA to allow kelp harvesting.

Response: See response to comment 70. P 28-29

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Regulate kelp harvest guidelines for each individual area.

Response: Kelp harvest guidelines for each MPA are provided for those where commercial kelp harvest is proposed. The proposed limit within Edward Ricketts SMCA is 12 tons per harvester per month; and 44 tons per month per harvester in the Pacific Grove Marine Gardens SMCA. Proposed regulations in these MPAs limiting the take of kelp to hand harvest only will help limit potential ecological impacts of harvest by decreasing potential bycatch and potential total take.

Comment: Preferred alternative does not recognize aboriginal fishing rights in closures at Vandenberg SMR.

Response: The MLPA does not restrict aboriginal fishing rights. The Department has afforded the San Ynez Band of Chumash Indians the opportunities to participate in the stakeholder process through numerous public hearings and public comment periods along with other stakeholder groups. The Draft EIR considered aboriginal fishing rights as part of the larger analysis related to effects of the MLPA process on fishing. Many areas would remain open to fishing with little impact to tribal fisherman.

The goals of the MLPA do not include the management of individual fisheries, but include the protection of the natural diversity and abundance of marine life, and the structure, function, and integrity of marine ecosystems. While certain fish stocks may be healthy, the MLPA still contemplates that habitats and ecosystems be protected through the designation of MPAs. State marine reserves provide complete ecosystem protection as well as protection to specific fisheries through a no-take designation. State marine conservation areas are established such that certain take may be allowed according to the objectives of the MPA. See also Master Response 5.

A goal of the MLPA contemplates the protection of the natural diversity and abundance of marine life, and the structure, function, and integrity of marine ecosystems. Urchins are a natural component of the ecosystem and are thus afforded protection to preserve the integrity and natural predator prey relationships of the ecosystem. In existing MPAs in California urchin barrens have been less common than non-MPA areas nearby.

Comment: Do not change the status of an SMR to SMCA to allow kelp harvest.

Response: See response to comment 33 for kelp harvest rates. The Año Nuevo and Cambria areas have existing kelp leases still under contract. As a business agreement, legal measures would apply to abolishing current contracts with those lease holders. The commercial take of kelp has existed in these areas and there have been no adverse environmental impacts from these kelp leases prior to MLPA proposals. With the adoption of the preferred alternative, restrictions would be implemented that limit the take of kelp to hand harvest only, to further prevent adverse ecological impacts, and the maximum that kelp harvesters may take from those areas.

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Kelp thinning has major ecological impacts on trophic structure and ecosystem function.

Response: Current kelp harvest practices have not been found to have adverse ecological impacts. The MLPA contemplates adaptive management and changes in take designations may be made as warranted.

No evidence has been provided that poaching has increased or will increase. Two options are proposed for Año Nuevo, one is a SMR and the other is SMCA. Under both options the take of all living marine resources (except giant kelp *Macrocystis pyrifera*) is prohibited. This makes enforcement much easier as there is no need to differentiate between the take of an allowed organism and a prohibited organism. The commercial take of giant kelp is easily distinguished.

Comment: Proposes a balance between existing local kelp harvesters and the ecological and economical (from tourism) benefits of leaving kelp in place. Suggests changes to proposed kelp harvest regulations for Pacific Grove and Ed Ricketts SMCA to allow harvest in bed 220 that do not exceed 25% more than the annual average kelp harvest from 2000 to 2006.

Response: Current kelp harvest practices have not been found to have adverse ecological impacts. Based on historic monthly kelp harvest in area the proposed regulations will maintain an acceptable level and place a cap on harvest. However, the MLPA allows for adaptive management if adverse ecological impacts occur as a result of these regulations. See also responses to comments 33, 48, and 70.

We need to decrease the impact of the US military operations adjacent or within the State of California's MPAs.

Response: The MLPA does not manage military operations

Kelp Harvest at Cambria Response: DFG does not provide rationale in the ISOR for allowing kelp harvest at Año Nuevo and Cambria. Existing data on the harvest of giant kelp and bull kelp indicate that no adverse ecological impacts would occur. However, the MLPA provides for adaptive management measures to facilitate revisions if adverse ecological impacts do occur as a result of implementing these regulations. See also responses to comments 33 and 48, and Fish and Game Code subsection 2857(d).

Some assert that Article 1, Section 25, of the California Constitution seems to give the public a “right to fish.” It states “The people shall have the right to fish upon and from the public lands of the State and in the waters thereof...provided, that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.” This “right to fish”, however, is not absolute. In 1918, the California Supreme Court considered whether a law providing for the licensing of fishermen was unconstitutional because it violated Article 1, Section 25. The court rejected the argument, finding that the provision authorizing the Legislature to fix the seasons and conditions under which fish are taken was intended to leave the matter in under the Legislature’s discretion [*Paladini v. Superior Court* (1918) 178 Cal. 369]. As recently as 1995, a court reaffirmed the qualified, not fundamental,

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right to fish and that the language of the State Constitution was not intended to curtail the ability of the Legislature (or the Fish and Game Commission through legislated authority) to regulate fishing [*California Gillnetters Association v. Department of Fish and Game* (1995) 39 Cal.App.4th 1145].

Section 25 must be read in connection with article 4, section 20 (formerly section 25½), which states that the Legislature may enact appropriate laws for protection of fish and game, and may delegate to the Fish and Game Commission such powers relating to protection and propagation of fish and game [*Ex parte Parra* (1914) 24 Cal.App. 339, 340]. In that respect, the California Supreme Court found it “most apparent” that the purpose of (now) article 4, section 20 “was to clothe the Legislature with ample power to adequately protect the fish and game of the state.” Further, the California Supreme Court has long declared that the power to regulate fishing has always existed as an aspect of the inherent power of the Legislature to regulate the terms under which a public resource may be taken by private citizens [*In re Phoedovius* (1918) 177 Cal. 238, 245-246; *People v. Monterey Fish Products Company* (1925) 195 Cal. 548, 563]. This regulatory power clearly includes the regulation of fishing within MPAs [Section 2860, FGC].

Further, research opportunity exists through the network of MPAs, other MPAs containing similar habitats, and through comparison to reference areas, containing similar habitat, outside MPAs. One of the goals of the MLPA is to provide protection for ecosystem structure, function, and integrity. MPA boundaries were developed considering this important goal and the size of the MPAs reflect the goals of the MLPA. Additionally, one objective identified in the Master Plan for the Pt. Sur SMR is to protect an area of high species diversity associated with upwelling in the lee of a headland and an area immediately north of a headland.

The MLPA contemplates that MPAs be designed in part to provide for protection of replicate habitats. MPA spacing and boundaries are based on guidelines provided by the SAT which consider such factors as fishing effort, distance from ports, habitat, and numerous other factors. The boundaries presented in the Commission's preferred alternative are a reflection of those guidelines and factors. Under the goals and objectives set forth in the MPA Master Plan, replicate habitats should be included in each region. Therefore, there may need to be more than one MPA in a region with similar habitat.

The “Hillborn Report” the commenter references [“Peer Review: California Marine Life Protection Act (MLPA) Science Advice and MPA Network Proposals (May 25, 2006)”] was addressed in detail in the Final EIR responses to comments. The neutral third party retained to facilitate the RSG (of which the commenter was a member), noted this report fell short of a classic “arm's length” peer review and that a true peer review “would not be commissioned by or affiliated with a specific stakeholder group.” (CONCUR Facilitator's Report (August 2006) at page 26.

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More responses are included here for educational purposes only:

IF YOU ARE MAKING COMMENTS on any MPA –

The comment confuses volume with substance. The Coalition indeed submitted about 80 pages of materials on the Draft EIR, from which 31 distinct comments were identified. Each comment was systematically evaluated and responded to, often in great detail, consistent with CEQA⁷, and the Guidelines promulgated pursuant thereto.⁸ Of these 31 comments, at least 16 constituted unsubstantiated narrative or opinion and 1 comment addressed the proposed regulations, not the Draft EIR. The remaining 14 comments received detailed responses either directly or by reference to comprehensive Master Responses.

During the development of alternative packages in 2006, the BRTF asked the Department to look into spearfishing contests. The Department found that proposed restrictions on spearfishing contests were unwarranted. Divers using spears are subject to the same bag and size limits as hook and line anglers. Spearfishing contests generally occur no more than once a year in any given location and are monitored by Department biologists. Most species harvested in these contests over the past several decades have shown no changes in average length, number of fish caught or fishing effort. These statements apply to general fishing contests as well. In addition, fishing contests often impose their own restrictions which are more stringent than general recreational fishing regulations.

Recreational fishing should continue to be allowed from the breakwater, which is by definition a public fishing pier, and also provides one of the few wheel chair access points for fishing in the central coast. The outer one third of the breakwater is already closed to fishing in order to protect a sea lion haul out area, but is accessible to the dive community from the water. The Department agrees with the City of Monterey that recreational fishing with hook and line from small boats is a legitimate traditional use.

The primary goal of the MLPA is not solely fisheries management. Rather, the MLPA seeks to represent and replicate a variety of habitats, protect diversity, abundance, and integrity of ecosystems and maintain marine life populations within a network of scientifically designed protected areas. Exemption to one user group contradicts the goals and/or objectives of the MLPA and individual MPAs. In addition, Point Buchon and Point Piedras Blancas areas are recommended as SMRs (no-take) by the SAT, and are considered important to the formation of an ecologically sound MPA network due to the high diversity of species and habitats, and due to their location in relation to other MPAs. See Master Responses 1 and 5

The Department disagrees. The department's analysis of fishing effort shows that **most fishing effort is outside MPAs suggesting prime fishing grounds lay outside the MPAs.** The EIR concluded that a concentration of fishing effort would have a less than significant impact on marine species and habitats.

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The department's analysis of fishing effort indicated that most fishing effort is outside MPAs suggesting prime fishing grounds are outside the MPAs. The commenter has not provided sufficient data to quantify prime habitat or identify its location. Therefore, these comments are presumptuous. The Commission's preferred boundaries provide for complete protection of diverse areas containing shallow hard and soft habitats, kelp beds, and associated fish and invertebrates.

MPAs are an ecosystem-based approach to protecting the natural diversity and abundance of species within those areas. While the primary change in regulations is to prohibit or limit fishing within MPAs, their basis is actually in protecting habitats and all species, not just those targeted by fishing. The MLPA contemplates the review of existing MPAs and improvement of their function and design. This process implements the law which was enacted when the MLPA was signed. Along with restricting fishing efforts in these areas, MPAs also restrict certain non-consumptive uses which may have an adverse impact on the ecosystem in those areas. Other environmental issues are addressed by other statutes and agencies responsible for regulating adverse non-fishing impacts upon the ocean resources.

The intent of the Commission in accordance with the MLPA, is to preserve kelp habitat within Edward Ricketts SMCA while allowing the sustainable take of kelp to provide for its commercial user's. The proposed harvest limits are intended to be conservative enough to prevent overharvest, **while providing for kelp reliant businesses (e.g abalone farmers)**. Presently total take and method of take are not limited, thus the Commission's proposed kelp harvest limits are more conservative than existing restrictions. Additionally, while isolated incidents of **high level harvest have occurred, this resilient kelp bed has not been subject to permanent damage.**

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Commenters urged the Commission **honor kelp bed leases An MPA with a SMCA status would** allow for the sustainable harvest of kelp in those areas, honoring existing kelp bed leases.

Response: Regulations for kelp harvesting within SMCA's would apply to those leased kelp beds, limiting take to hand harvest only. Included in the ISOR document of proposed changes to the Commission's preferred alternative is a sub-option allowing for the commercial take of kelp to continue in those areas where leased kelp beds overlap MPAs.

Regulate kelp harvest guidelines for each individual area. **Response:** Kelp harvest guidelines for each marine reserve are provided for those MPAs where commercial kelp harvest is proposed. The proposed regulations limit the take of kelp within Edward Ricketts SMCA to 12 tons per harvester per month and within Pacific Grove Marine Gardens SMCA to 44 tons per month per harvester. The maximum allowable limits of kelp harvested within leased kelp beds are included in the lease agreement; however, regulations limiting the take of kelp to hand harvest only will be implemented upon adoption of the proposed regulatory package as it limits the ecological impacts to kelp habitat areas. p80

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Updated Informative Digest (Policy Statement Overview)

The Marine Life Management Act (MLMA, Stats. 1998, ch. 1052) created a broad programmatic framework for managing fisheries through a variety of conservation measures, including Marine Protected Areas (MPAs). The Marine Life Protection Act (MLPA, Stats. 1999, ch. 1015) established a programmatic framework for designating such MPAs in the form of a statewide network. AB 2800 (Stats. 2000, ch. 385) enacted the Marine Managed Areas Improvement Act (MMAIA), among other things, to standardize the designation of Marine Managed Areas (MMAs), which include MPAs. The overriding goal of these acts is to ensure the conservation, sustainable use, and restoration of California's marine resources. Unlike previous laws, which focused on individual species, the acts focus on maintaining the health of marine ecosystems and biodiversity in order to sustain resources.

The proposed regulation is intended to meet the goals described in the MLPA within the central coast study region bounded by Pigeon Point, San Mateo County, in the north and Point Conception, Santa Barbara County, in the south. These goals address an overall concept of ecosystem-based management and the intent to improve upon California's existing array of marine protected areas (MPAs). Important in developing the proposed regulation was the consideration that the central coast MPAs form a component of a statewide network. Existing regulations (the no-project alternative) provide for 12 MPAs and one special closure covering an area of approximately 43 square miles, which represents approximately 3.8 percent of state waters within the central coast region. Of this, one fifth of the area is within no-take state marine reserves covering approximately 7.5 square miles or approximately 0.7 percent of state waters within the central coast region.

The proposed regulation establishes a network component of MPAs designed to include all representative central coast habitats and major oceanic conditions. Unique and critical habitats were considered separately to guarantee both representation and protection. The proposed regulation includes a total of 29 MPAs for the central coast region. Eight existing MPAs are included and have been expanded or, in the case of Pacific Grove SMCA and Carmel Bay SMCA, split into two new MPAs. Although the proposed regulation contains 19 new MPAs, five are directly adjacent to existing areas and can be considered further expansion of the area. In these five cases, the additional expansion is a conservation area or a park with some allowed take. Thus, the proposed regulation includes 14 MPAs that are in areas previously not designated as MPAs.

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The Commission adopted the proposed changes to the regulations at its April 13, 2007 meeting. The Commission selected the "Preferred Alternative" including the following sub-options:

Año Nuevo - Option 2 - Allow kelp harvest

Soquel Canyon - Option 1 - Prohibit spot prawn harvest

Portuguese Ledge - Option 1 - Prohibit spot prawn harvest

Edward F. Ricketts - Option 1 - Allow recreational hook and line fishing

Cambria (northern area) - Option 1 - Northerly boundaries

Cambria (southern area) - Option 3 - Northerly boundaries and allowing kelp harvest

The proposed change adds restrictions on the amount of kelp that may be harvested on a monthly basis in certain MPAs. In order to adequately link this change to the existing kelp harvest regulations, changes are proposed to subsection 165(b). The change clarifies that if kelp is harvested from a marine protected area which limits the total take, records must be available on the harvest vessel for examination. The forms specified for reporting monthly kelp harvest are added to Title 14 Appendix A. The term "public weighmaster" is replaced in subsection 165(b)(1) with the term "certified or licensed weighmaster" to be consistent with current legal definitions.

Additionally, the existing restriction on kelp harvest in the vicinity of the Monterey Breakwater is clarified in subsection 165(c). The proposed change removes confusing language and reference to the "Chart House restaurant" and replaces it with a defined line of latitude. This change will allow the proposed language in Section 632 to remain consistent if future changes to Section 165 are made.

Addendum to Final Statement of Reasons Section 632, Title 14, CCR Marine Protected Areas Non-duplication Statement

Subsection 36710(e) of the Public Resources Code defines the activities which are allowed in state marine recreational management areas. That definition is duplicated in subsection 632(a)(1)(D) for consistency with subsections 632(a)(1)(A) through (C) which define the allowed activities in State Marine Reserves, State Marine Parks, and State Marine Conservation Areas, to facilitate public understanding of the regulations as readers are not forced to review a separate document; and to provide clarity concerning the exceptions to such activities which are specified in subsection 632(b).

Non-substantive Changes to Regulations

The "State Marine Parks" that are listed in Section 632, Title 14, were not designated by the State Parks and Recreation Commission. These "Parks" were previously listed in Section 630, Title 14, CCR, under the Commission's authority as Ecological Reserves or as the marine component of Ecological reserves or were listed in the Fish and Game Code, by the State Legislature, as Marine Life Refuges. Therefore, consultation with, and concurrence from, the State Parks and Recreation Commission as specified in Section 36725(a) of the Public Resources Code does not apply to this rulemaking.

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In several subsections of Section 632, the term "offshore" is replaced with "seaward of mean lower low water". "Offshore" is a term-of-art for "seaward of mean lower low water"; therefore changing "offshore" to "seaward of mean lower low water" is a non-substantive change.

Subsection 165(a) indicates that **kelp harvesters are given a "license" not a "permit"** and "companies" as well as "individuals" are entitled to apply. Therefore, regulatory text in subsections 632(b) (35), (37), (40), and (50), was non-substantively amended to read "A kelp harvester with a valid license..." instead of "Any individual kelp harvester with a valid permit...."

The proposed regulations do not change requirements for or restrictions on the abalone aquaculture industry. Changes to kelp harvest restrictions could potentially be considered as having an indirect impact on abalone aquaculture. The proposed regulations, however, do not alter existing kelp harvest to an extent that would change the price of kelp required to feed aquaculture raised abalone. Caps on harvest in Monterey area MPAs are proposed at levels of maximum harvest and existing leases were allowed to continue. Therefore, no economic impact to the abalone aquaculture industry is expected. In addition, long-term ecological benefits of the proposed regulations should provide for a more consistent kelp resource that may provide food sources for the abalone aquaculture industry.

It all begins with seaweed.

Join the Seaweed Rebellion – Every effort should be made by those who can, to **RESCIND the MLPA** – Initiative. *Tomas DiFiore - Seaweed Rebel - Astral Arts Mendocino*

One Caveat: As always, use of dated material should be researched for any current application.

Tomas DiFiore

Seaweed Rebellion

Seaweed Rebellion MLPA Resources

<http://www.astral-arts.com/resources.html>