

1 ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
2 DAVID D. COOKE (BAR NO. 94939)
KATHRYN D. HORNING (BAR NO. 185610)
3 Three Embarcadero Center, 12th Floor
San Francisco, CA 94111-4074
4 Phone: (415) 837-1515
Fax: (415) 837-1516
5 E-Mail: dcooke@allenmatkins.com
khorning@allenmatkins.com

6
7 MARVIN E. GARRETT (BAR NO. 46735)
515 South Figueroa Street, Ninth Floor
Los Angeles, California 90071-3309
8 Phone: (213) 622-5555
Fax: (213) 620-8816
9 E-Mail: mgarrett@allenmatkins.com

10 Attorneys for Petitioners and Plaintiffs
United Anglers of Southern California, Coastside Fishing
11 Club and Robert C. Fletcher

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 FOR THE COUNTY OF SAN DIEGO

14 CENTRAL DIVISION

15 UNITED ANGLERS OF SOUTHERN
CALIFORNIA; COASTSIDE FISHING
16 CLUB; and ROBERT C. FLETCHER,

17 Petitioners and Plaintiffs,

18 vs.

19 CALIFORNIA FISH AND GAME
COMMISSION,

20 Respondent and Defendant.
21
22
23
24
25
26
27
28

Case No. 37-2011-00084611-CU-WM-CTL

Date: September 26, 2011
Time: 10:00 a.m.
Dept: 71
Judge: Hon. Ronald S. Prager

**PETITIONERS' OPENING BRIEF IN
SUPPORT OF AMENDED PETITION FOR
WRIT OF MANDATE AND COMPLAINT
FOR DECLARATORY AND INJUNCTIVE
RELIEF**

**(THIRD, FOURTH AND FIFTH CAUSES
OF ACTION RE NORTH CENTRAL
COAST MPA REGULATIONS)**

Complaint Filed: January 27, 2011

TABLE OF CONTENTS

| | | <u>Page</u> |
|----|--|-------------|
| 1 | | |
| 2 | | |
| 3 | I. INTRODUCTION AND PRELIMINARY STATEMENT | 1 |
| 4 | II. THE PARTIES | 5 |
| 5 | A. Petitioner | 5 |
| 6 | B. Fish and Game Commission | 5 |
| 7 | III. RELEVANT FACTS | 6 |
| 8 | A. The MLPA and the MMA Improvement Act..... | 6 |
| 9 | 1. The MLPA—Fish & Game Code §§ 2850 et seq | 6 |
| 10 | (a) The Roles of the Department, the Commission, and | |
| 11 | Master Plan..... | 7 |
| 12 | (b) The Master Plan | 7 |
| 13 | (c) The Commission's Authority Under the MLPA..... | 8 |
| 14 | 2. The MMA Improvement Act—Pub. Res. Code §§ 36600 et | |
| 15 | seq..... | 8 |
| 16 | B. Adoption of the North Central Coast Regulations by the | |
| 17 | Commission..... | 11 |
| 18 | 1. Adoption Process..... | 11 |
| 19 | 2. The Adopted NCC Regulations..... | 12 |
| 20 | C. This Lawsuit..... | 13 |
| 21 | IV. ARGUMENT | 13 |
| 22 | A. Standard and Scope of Review..... | 13 |
| 23 | 1. Standard of Review | 13 |
| 24 | 2. Scope of Review—Code Civ. Proc. § 1085 (Traditional | |
| 25 | Mandamus)..... | 14 |
| 26 | 3. Scope of Review—Gov. Code § 11350 (Declaratory Relief)..... | 15 |
| 27 | B. California Agencies May Only Regulate Within the Bounds of | |
| 28 | Specific Statutory Authority..... | 15 |
| | 1. Regulations Adopted Without Statutory Authority Are Void..... | 15 |
| | 2. The Scope of Regulatory Authority Is Strictly Construed | 16 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- C. The Statutes Relied Upon by the Commission Do Not Authorize Adoption of the NCC Regulations 17
 - 1. The Commission Failed to Follow Required Procedures—
Pub. Res. Code § 36725; Fish & Game Code §§ 1590, 1591, 2861 17
 - (a) Pub. Res. Code § 36725; Fish & Game Code §§ 1590, 1591 17
 - (b) Fish & Game Code § 2861 19
 - (i) There was no "petition" 19
 - (ii) There were no submissions by "interested parties" 20
 - 2. The Remaining Cited Statutes Do Not Authorize the Commission to Adopt the NCC Regulations 22
 - (a) Fish and Game Code sections 200-220 22
 - (b) Fish and Game Code section 6750 23
 - (c) Fish and Game Code sections 2860 23
 - (d) Fish and Game Code section 2861(c) 24
 - (e) No portion of the NCC Regulations can be saved 24
- D. The NCC Regulations Are Not the Product of the MLPA Process 24
 - 1. The MOUs Between the Department, Resources Agency and the Resources Legacy Fund Foundation—The Actual Process Undertaken 25
 - (a) Stage 1—The First MOU 25
 - (b) The *Coastside* lawsuit--Challenges to the First MOU 27
 - (c) Stage 2—The Second MOU 28
 - (i) The Department's and BRTF's Changing Roles 28
 - (ii) Role and Activities of Master Plan Team 30
 - (d) The Draft Master Plan 30
 - 2. Failure to Follow the Procedures Set Forth by the Legislature Precludes Reliance on Section 2859(b) as Authority for Adopting the North Central Coast Regulations 31
- E. The Commission Failed to Obtain a Coastal Development Permit 32
 - (ii)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

F. Relief Sought.....34
V. CONCLUSION.....34

TABLE OF AUTHORITIES

Page(s)

Cases

| | | |
|----|--|---------------|
| 1 | | |
| 2 | | |
| 3 | <u>Cases</u> | |
| 4 | <i>Abbett Electric Corp. v. Storek</i> | |
| 5 | (1994) 22 Cal.App.4th 1460..... | 18 |
| 6 | <i>Association for Retarded Citizens—California v. Department of Dev. Services</i> | |
| 7 | (1985) 38 Cal.3d 384..... | 16 |
| 8 | <i>California Assn. of Nursing Homes etc. v. Williams</i> | |
| 9 | (1970) 4 Cal.App.3d 800..... | 32 |
| 10 | <i>Carmel Valley Fire Protection Dist. v. State of California</i> | |
| 11 | (2001) 25 Cal.4th 287..... | 15 |
| 12 | <i>City of Santa Monica v. Gonzalez</i> | |
| 13 | (2008) 43 Cal.4th 905..... | 18 |
| 14 | <i>Coastside Fishing Club v. California Resources Agency</i> | |
| 15 | (2008) 158 Cal.App.4th 1183..... | 2, 16, 27, 28 |
| 16 | <i>Communities for a Better Environment v. California Resources Agency</i> | |
| 17 | (2002) 103 Cal.App.4th 98..... | 14 |
| 18 | <i>Francis v. Superior Court</i> | |
| 19 | (1935) 3 Cal.2d 19..... | 18 |
| 20 | <i>Great Western Savings & Loan v. City of Los Angeles</i> | |
| 21 | (1973) 31 Cal.App.3d 403..... | 17 |
| 22 | <i>Harris v. Alcoholic Beverage Control Appeals Board</i> | |
| 23 | (1964) 228 Cal.App.2d 1..... | 16 |
| 24 | <i>McKell v. Washington Mutual, Inc.</i> | |
| 25 | (2006) 142 Cal.App.4th 1457..... | 23 |
| 26 | <i>Morris v. Williams</i> | |
| 27 | (1967) 67 Cal.2d 733..... | 16, 18, 34 |
| 28 | <i>Pacific Legal Foundation v. California Coastal Com.</i> | |
| | (1982) 33 Cal.3d 158..... | 13 |
| | <i>People v. McGee</i> | |
| | (1977) 19 Cal.3d 948..... | 18 |
| | <i>Ralphs Grocery Co. v. Reimel</i> | |
| | (1968) 69 Cal.2d 172..... | 16, 17 |
| | <i>Schenley Affiliated Brands Corp. v. Kirby</i> | |
| | (1971) 21 Cal.App.3d 177..... | 15 |
| | <i>Terhune v. Superior Court</i> | |
| | (1998) 65 Cal.App.4th 864..... | 16 |

(iv)

| | <u>Page(s)</u> |
|----|----------------|
| 1 | |
| 2 | |
| 3 | |
| 4 | |
| 5 | |
| 6 | |
| 7 | |
| 8 | |
| 9 | |
| 10 | |
| 11 | |
| 12 | |
| 13 | |
| 14 | |
| 15 | |
| 16 | |
| 17 | |
| 18 | |
| 19 | |
| 20 | |
| 21 | |
| 22 | |
| 23 | |
| 24 | |
| 25 | |
| 26 | |
| 27 | |
| 28 | |

| | |
|---|-------------|
| <i>US Ecology, Inc. v. State of California</i> (2001) 92 Cal.App.4th 113..... | 16 |
| <i>Western States Petroleum Assn. v. Superior Court</i> (1995) 9 Cal.4th 559..... | 14, 32 |
| <i>Whitcomb Hotel, Inc. v. Calif. Employment Commission</i> (1944) 24 Cal.2d 753..... | 16, 17 |
| <i>Yamaha Corp. of America v. State Board of Equalization</i> (1998) 19 Cal.4th 1..... | 14 |
| <u>Statutes</u> | |
| Fish & Game Code § 200..... | 22 |
| Fish & Game Code § 2851(a)..... | 1, 6 |
| Fish & Game Code § 2851(h)..... | 25 |
| Fish & Game Code § 2852(c)..... | 6, 8 |
| Fish & Game Code § 2853..... | 7 |
| Fish & Game Code § 2855..... | 7 |
| Fish & Game Code § 2855(b)..... | 7 |
| Fish & Game Code § 2855(b)(1)..... | 27 |
| Fish & Game Code § 2855(c)..... | 7, 30 |
| Fish & Game Code § 2856..... | 7 |
| Fish & Game Code § 2857(a)..... | 7, 30 |
| Fish & Game Code § 2859(a)..... | 7, 25 |
| Fish & Game Code § 2859(b)..... | 2, 7, 8, 25 |
| Fish & Game Code § 2860(a)..... | 8, 23 |
| Fish & Game Code § 2861..... | 19 |
| Fish & Game Code § 2861(a)..... | 10, 20 |
| Fish & Game Code § 2861(c)..... | 24 |
| Fish & Game Code § 6750..... | 23 |
| Fish & Game Code § 700..... | 6 |
| Fish & Game Code § 703..... | 6 |

| | <u>Page(s)</u> |
|--------------------------------------|----------------|
| 1 | |
| 2 Fish & Game Code § 7050(b)(7)..... | 21 |
| 3 Fish & Game Code § 7075..... | 21 |
| 4 Fish & Game Code § 7075(d)..... | 21 |
| 5 Fish & Game Code § 86..... | 12 |
| 6 Fish & Game Code §§ 2855-2857..... | 30 |
| 7 Gov. Code § 11340.6..... | 19 |
| 8 Gov. Code § 11340.7..... | 19 |
| 9 Gov. Code § 11342.1..... | 16 |
| 10 Gov. Code § 11342.2..... | 14 |
| 11 Gov. Code § 11346.5(a)(2)..... | 12 |
| 12 Gov. Code § 11347.3(b)(1)..... | 19 |
| 13 Gov. Code § 11350(d)..... | 15 |
| 14 Pub. Res. Code § 30103(a)..... | 33 |
| 15 Pub. Res. Code § 30106..... | 33 |
| 16 Pub. Res. Code § 30411(a)..... | 33 |
| 17 Pub. Res. Code § 30600(a)..... | 32 |
| 18 Pub. Res. Code § 30610(e)..... | 33 |
| 19 Pub. Res. Code § 30803..... | 33 |
| 20 Pub. Res. Code § 36601..... | 9 |
| 21 Pub. Res. Code § 36602(d)..... | 8, 9 |
| 22 Pub. Res. Code § 36602(e)..... | 6, 8, 9 |
| 23 Pub. Res. Code § 36710(a)..... | 22 |
| 24 Pub. Res. Code § 36710(c)..... | 22 |
| 25 Pub. Res. Code § 36725..... | 9, 17 |
| 26 Pub. Res. Code § 36725(a)..... | 8, 17 |
| 27 Pub. Res. Code § 36725(b)..... | 8 |
| 28 Pub. Res. Code § 36725(e)..... | 8 |

| | <u>Page(s)</u> |
|--|----------------|
| 1 | |
| 2 Pub. Res. Code § 36800 | 9 |
| 3 Pub. Res. Code § 36900 | 10, 20 |
| 4 Pub. Res. Code § 36900(a)..... | 10 |
| 5 Pub. Res. Code § 36900(c)..... | 10 |
| 6 Pub. Res. Code § 36900(d)..... | 33 |
| 7 <u>Regulations</u> | |
| 8 14 C.C.R. § 632..... | 12 |
| 9 14 C.C.R. § 632(b)(1)..... | 22 |
| 10 14 C.C.R. § 632(b)(42-44) | 12, 13 |
| 11 14 C.C.R. § 632(b)(6-33) | 12, 13 |
| 12 14 C.C.R. § 632(b)(7)..... | 22 |
| 13 14 C.C.R. § 632(b)(8)..... | 22 |
| 14 <u>Constitutional Provisions</u> | |
| 15 Cal. Const., art. IV, § 20..... | 5 |
| 16 | |
| 17 | |
| 18 | |
| 19 | |
| 20 | |
| 21 | |
| 22 | |
| 23 | |
| 24 | |
| 25 | |
| 26 | |
| 27 | |
| 28 | |

1 I. INTRODUCTION AND PRELIMINARY STATEMENT

2 Petitioner Coastside Fishing Club ("Coastside" or "Petitioner") seeks a writ of mandate,
3 pursuant to Code of Civil Procedure section 1085, directing respondent California Fish & Game
4 Commission ("Commission," or "Respondent") to vacate and set aside its adoption on August 5,
5 2009 of new or modified "Marine Protected Areas" ("MPAs") in state waters of the Pacific Ocean
6 in an area known as the "North Central Coast study region," and its adoption of implementing
7 regulations (the "NCC Regulations"). Coastside also asks the Court to declare the NCC
8 Regulations invalid pursuant to Government Code section 11350.

9 The Commission's adoption of these MPAs and the accompanying NCC Regulations is
10 invalid because the Commission did not have the statutory authority it needed to take this action.
11 Some of the statutes on which the Commission purported to rely are insufficient to justify its
12 action because the statutes include mandatory prerequisites to regulatory action, and those
13 prerequisites were ignored. "As applied," therefore, the failure to comply with these statutory
14 prerequisites renders the regulations invalid. The other authorities on which the Commission
15 purported to rely are insufficient on their face to justify its action. The terms themselves of these
16 statutes simply did not authorize the Commission to adopt the regulations, in most cases because
17 the scope of the regulations exceeds the scope of the statutory authority to regulate.

18 The MPA designations and NCC Regulations are ostensibly the product of an elaborate
19 rule development process conducted under the banner of a 1999 statute called the Marine Life
20 Protection Act ("MLPA"), Fish & Game Code §§ 2850 et seq. The MLPA was the Legislature's
21 answer to a specific problem:

22 California's marine protected areas (MPAs) were established on a
23 piecemeal basis rather than according to a coherent plan and sound
24 scientific guidelines. Many of these MPAs lack clearly defined
25 purposes, effective management measures and enforcement. As a
26 result, the array of MPAs creates the illusion of protection while
27 falling far short of its potential to protect and conserve living marine
28 life and habitat. Fish & Game Code § 2851(a).

26 When the problem is the lack of a coherent plan, the solution is a better plan. Accordingly,
27 in the MLPA, the Legislature framed its solution around a plan, called the Master Plan, and
28 mandated a specific process for creating the Master Plan that assigned a lead role to the

1 Department of Fish & Game ("Department"). In doing so, "the Legislature . . . elaborately cabined
2 the substance and scope of the master plan . . ." and imposed "judicially enforceable standards
3 [that] . . . specify the transparent manner in which the plan is prepared. . . ." *Coastside Fishing*
4 *Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1209, 1211 ("*Coastside*").
5 Under this carefully crafted legislative scheme, the Commission, after multiple public hearings on
6 a draft Master Plan, was to adopt a final Master Plan "with regulations based on the plan." Fish &
7 Game Code § 2859(b). Thus was the cart of enforceable regulations made to follow the horse of
8 an adopted final Master Plan.

9 Things did not, however, work out the way the Legislature mandated. During the first few
10 years after enactment of the MLPA, several obstacles, including funding shortfalls, stalled
11 implementation of the MLPA, making it impossible for the Commission to adopt a final Master
12 Plan, and "regulations based on the plan," by December of 2005, as the MLPA required. *Id.*; see
13 generally *Coastside, supra*, 158 Cal.App.4th at 1196-1201. In 2004, however, with the advent of
14 a "public-private partnership" between the Department, the California Resources Agency and a
15 wealthy foundation, private funds were injected into the public process of MLPA
16 implementation. This "partnership" fundamentally transformed MLPA implementation into a
17 process that the Legislature would not have recognized. The foundation did not simply write
18 checks to fund the process mandated by the Legislature in the MLPA. Rather, pursuant to terms
19 of several "Memoranda of Understanding" ("MOUs"), foundation money was channeled through
20 a new apparatus called the "MLPA Initiative." (North Central Coast Administrative Record at
21 Bates-labeled pages 686, 694-697 (hereafter, NCCAR [xx]).) Under this new process (the "MOU
22 Process"), the state's marine waters were divided into five sub-regions for purposes of developing
23 networks of MPAs, with the foundation agreeing, one region at a time, to pay for the
24 development of regional MPA networks. (NCCAR 6, 26, 690, 705-706.) Central to the MOU
25 process was the formation of a wholly new state agency, unknown to the MLPA, called the "Blue
26 Ribbon Task Force" ("BRTF"), to manage and control the development of MPA networks within
27 these sub-regions. (NCCAR 687, 700, 703.) At first, the Department retained its statutory
28 prerogative to recommend a "preferred siting alternative" for MPAs to the Commission.

1 (NCCAR 689 (¶ ii).) But by the time the MOU Process reached the North Central Coast region,
2 that prerogative was taken away and handed over to the BRTF, thereby inserting the BRTF
3 between the Department and the Commission. (NCCAR 703 (¶ 3.2(b),(c)), 705 (¶ 3.13), 780.)
4 The MOU Process also scaled back the statutory role of the "Master Plan Team," an entity
5 established in the MLPA and appointed by the Department. Under the MOU Process its name
6 was changed to the "science advisory team," its function was reduced to providing advice on
7 science issues only, and it was forbidden from performing some of the functions the Legislature
8 assigned to it in the MLPA. (NCCAR 688 (¶ II.E).)

9 The MOU Process also fundamentally transformed the Master Plan and regulatory process
10 that the Legislature had so carefully prescribed in the MLPA. The MOU Process purported to
11 address the Legislature's requirements for the Master Plan—the centerpiece of the MLPA—first
12 with a document called the "Master Plan Framework" ("Framework"), and later with a reworked
13 version of that document called the Draft Master Plan, which the Commission adopted in
14 February of 2008. (NCCAR 686 (¶ G), 779.) The Draft Master Plan contains some of the
15 elements of the Master Plan contemplated in the MLPA, but it does not and cannot contain
16 others, including two of the most critical ones—"r]ecommended alternative networks of MPAs"
17 and "r]ecommendations for a preferred siting alternative for a network of MPAs." Fish & Game
18 Code § 2856(a)(2)(D), (F). As the Framework explained, "[t]he requirement for a full master
19 plan and implementing regulations will be met when the Commission adopts the final portion of
20 the plan and all regions of the coast have been completed." (Request for Judicial Notice ("RJN")
21 Ex. B, p. RJN 032.) Until all five regional preferred siting alternatives are added to the Draft
22 Master Plan, it remains a work in progress, inherently incomplete, and the Commission may not
23 rely on it as a basis for approving regulations.

24 Unwilling to wait for the final Master Plan, however, the Commission forged ahead to
25 adopt MPAs and implementing regulations anyway, giving the force of law to regional MPA
26 designations recommended to it by the BRTF. The Commission adopted MPAs and
27 implementing regulations for the Central Coast area in 2007, for the North Central Coast on
28 August 5, 2009, (NCCAR 4341-4342, 4387), and for the South Coast on December 15, 2010.

1 Verified Amended Petition ("Petition"), ¶ 44. Regulations for the North Coast region will
2 reportedly be coming soon, with regulations for the San Francisco Bay region to follow. When
3 all are done, the draft Master Plan may be ready to be finalized, but by then there will be no
4 regulations to adopt, for they will have already been adopted. The proverbial cart, in other words,
5 has been placed before the horse; instead of adopting regulations based on the final plan, the
6 Commission will adopt a final plan based on the regulations. Thus has the Commission
7 sanctioned the re-writing of the MLPA in order to meet the demands of the "public-private
8 partnership."

9 The Commission impliedly acknowledges that this MOU process is not the Legislature's
10 MLPA process by excluding Section 2859(b), its core rulemaking authority in the MLPA, from
11 the list of statutory authorities on which it relied to take regulatory action. The authorities it does
12 cite do not provide it with the authority it needed. In particular, its authority in the MLPA to
13 grant "petitions" by "interested parties" to add or modify MPAs before adoption of the final
14 Master Plan was never triggered, and it utterly-disregarded the procedural requirements for
15 adopting MPAs mandated by the Marine Managed Areas Improvement Act ("MMA
16 Improvement Act"), a companion statute to the MLPA.

17 The record is, to be sure, thick with evidence of hard work invested in the process leading
18 up to this regulatory action. But that is beside the point. No matter how laudable their goals may
19 appear to be, the power of state agencies to act requires express statutory authority, and they are
20 not free to deviate from the clearly defined regulatory processes mandated by the Legislature in
21 statutes like the MMA Improvement Act and the MLPA. This fundamental principle applies and
22 must be honored even in the hard cases—when the substantive result may be politically popular
23 with some interest groups, or when the statutorily mandated process is inconvenient, or
24 expensive, or, as is apparently the case here, unacceptable to the private side of a public-private
25 partnership.

26 Petitioners take the Commission's list of claimed regulatory authorities at face value, both
27 for the statutes it includes, and for the one, Section 2859(b), it conspicuously omits. Accordingly,
28 after a brief summary of the essential facts and controlling legal principles, Petitioners explain

1 why the authorities actually cited by the Commission are insufficient to justify its actions with
2 respect to the North Central Coast. Petitioners then present a detailed discussion of the many
3 ways in which the MOU process strayed from the legislative mandate in the MLPA, thereby
4 disabling the Commission from relying on the core rulemaking authority of the MLPA when it
5 decided to adopt the NCC regulations. Petitioners close with a short discussion of the reasons
6 why these regulations are invalid due to a failure to obtain a coastal development permit
7 mandated by the California Coastal Act.

8 **II. THE PARTIES**

9 **A. Petitioner**

10 Coastside,¹ a California non-profit mutual benefit corporation, has more than 10,000
11 members, California anglers with particular interests in the regulation, protection and
12 enhancement of California's marine resources, especially in California's central and north central
13 coastal regions. Coastside and its members have been directly affected by the NCC Regulations
14 since they became effective on May 1, 2010, and will continue to be affected as long as the
15 regulations remain in place. (See Petition, ¶ 10.)

16 **B. Fish and Game Commission**

17 The Commission is a state agency authorized by Article IV, Section 20 of the California
18 Constitution. The Commission, part of the California Natural Resources Agency ("Resources
19 Agency"), Fish & Game Code § 101, is composed of five members appointed by the Governor
20 and confirmed by the Senate. The Commission has regulatory powers delegated to it by the
21 Legislature, primarily over hunting and fishing. Cal. Const., art. IV, § 20. The Commission
22 adopted the MPA regulations challenged in this action.

23 The Commission should not be confused with the Department, which is also an agency
24 within the Resources Agency but, unlike the constitutionally-created Commission, is created by
25

26
27 ¹ The other two named petitioners, United Anglers of Southern California, most of whose
28 members are residents of Southern California, and Robert C. Fletcher, a San Diego County
resident, bring claims seeking to invalidate MPA regulations along California's South Coast, a
matter not directly at issue in this brief. The South Coast regulations will be considered later
in this action.

1 statute. Fish & Game Code § 700. The Department is responsible for administering and
2 enforcing the Fish & Game Code through regulations it adopts, except where the Code requires
3 the Commission to adopt such regulations. *Id.*, § 702. The director of the Department is
4 responsible to the Commission for administration of the Department in accordance with policies
5 formulated by the Commission. *Id.*, § 703.

6 **III. RELEVANT FACTS**

7 **A. The MLPA and the MMA Improvement Act**

8 In order to understand what went wrong with the NCC Regulations, it is necessary first to
9 summarize the requirements of the MLPA and the MMA Improvement Act.

10 **1. The MLPA—Fish & Game Code §§ 2850 et seq.**

11 A Marine Protected Area, or MPA, is an area "primarily intended to protect or conserve
12 marine life and habitat," and is "a named, discrete geographic marine or estuarine area seaward of
13 the mean high tide line or the mouth of a coastal river . . . [which] includes marine life reserves
14 and other areas that allow for specified commercial and recreational activities, including fishing
15 for certain species but not others, fishing with certain practices but not others, and kelp
16 harvesting, provided that these activities are consistent with the objectives of the area and the
17 goals and guidelines of the [MLPA]." Fish & Game Code § 2852(c). There are three kinds of
18 MPAs with descending levels of protection for marine resources—state marine reserves, state
19 marine conservation areas, and state marine parks. Pub. Res. Code § 36602(e).

20 In 1999, the Legislature determined that MPAs in California's ocean and estuarine waters
21 had been established on a piecemeal basis rather than according to a coherent plan and sound
22 scientific guidelines. It found, in addition, that many MPAs lacked clearly defined purposes,
23 effective management measures and enforcement, "creat[ing] the illusion of protection while
24 falling short of [their] potential." Fish & Game Code § 2851(a). To address this problem and
25 improve the design and management of the existing system of MPAs, the Legislature enacted the
26 MLPA and directed the Commission to adopt a state-wide Marine Life Protection Program with
27 six specific goals and five mandatory elements, including a requirement that the process involve
28 the sport and commercial fishing industries, aquaculture industries, coastal and ocean tourism and

1 recreation industries, marine conservation organizations, local governments and marine scientists.
2 *Id.*, § 2853. Thus, the Legislature envisioned a publicly inclusive process that takes into account
3 the many diverse interests that would be affected.

4 The Legislature also instructed the Commission to adopt a Master Plan to guide the
5 implementation of the MLPA in accordance with the legislative objectives, and delegated specific
6 roles to the Department, the Commission and the Master Plan Team. *Id.* § 2855.

7 (a) **The Roles of the Department, the Commission, and Master Plan**
8 **Team**

9 Among the major functions of the Department in implementing the MLPA are its
10 obligations to review alternative proposals for MPA networks, and, with the Master Plan Team,
11 to "develop a preferred siting alternative." *Id.*, § 2857(a). The Department is also required to
12 prepare, or by contract cause to be prepared, a draft Master Plan for implementation of the
13 Marine Life Protection Program. Following public review, the Department is required to submit
14 a proposed final Master Plan to the Commission for adoption. *Id.*, § 2859(a).

15 The Legislature also mandated the appointment of a Master Plan Team to advise and assist
16 the Department in creating the draft Master Plan, and imposed specific requirements concerning
17 the qualifications of the Team's members. *Id.*, § 2855(b). The MLPA required the Department
18 and Master Plan Team to perform certain tasks together, including obtaining information from
19 local communities; and obtaining input from interested parties on fishing and other resource uses,
20 socioeconomic and environmental impacts, monitoring and evaluation activities, and methods to
21 encourage public participation. Together, "the Department and team shall develop a preferred
22 siting alternative." *Id.*, §§ 2855(c), 2857(a).

23 (b) **The Master Plan**

24 The Legislature also provided detailed instructions about the Master Plan itself, specifying
25 that it include eleven components including the Department's and Master Plan Team's
26 recommended preferred siting alternative for a network of MPAs and recommended alternative
27 networks. *Id.*, § 2856. Following at least two public hearings, the Commission could adopt the
28 final Master Plan and regulations based on the plan. *Id.*, § 2859(b).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(c) The Commission's Authority Under the MLPA

The MLPA provided two ways for the Commission to add, modify or delete an MPA. One is by adoption of regulations "based on the plan," i.e., at the end of the detailed MLPA process, described above, which culminates in the Commission's adoption of a final Master Plan (*id.*, § 2859(b)). Because the Commission did not rely upon Section 2859(b), further discussion of the planning process and the way in which the MOU Process deviated from the MLPA process is deferred until later in this brief.

The other way does not require the Commission to wait for the adoption of the final Master Plan. Section 2861(a) authorizes the Commission to act on "petitions from any interested party" to add, delete or modify MPAs on an annual basis until adoption of the final Master Plan, and every three years thereafter. Unlike Section 2859(b), Section 2861(a) does not explicitly authorize the Commission to adopt regulations, which is what the Commission did in connection with the North Central Coast.,

The MLPA also gives the Commission the authority to regulate both recreational and commercial taking of all species within an MPA. *Id.*, § 2860(a). Section 2860(a) makes no mention of adding, modifying or deleting MPAs.

2. The MMA Improvement Act—Pub. Res. Code §§ 36600 et seq.

The MMA Improvement Act, Pub. Res. Code § 36600 et seq, authorizes the Commission and the State Parks and Recreation Commission to designate, delete or modify marine managed areas, or "MMAs," Pub. Res. Code §§ 36725(a), (b), and to restrict activities within MMAs. *Id.*, § 36725(e). An MMA is "a named, discrete geographic marine or estuarine area along the California coast designated by law or administrative action, and intended to protect, conserve, or otherwise manage a variety of resources and their uses." Pub. Res. Code § 36602(d). MPAs, the principal subject of the MLPA, are a subset of MMAs. Fish & Game Code § 2852(c); Pub. Res. Code § 36602(e). The MMA Improvement Act therefore works in concert with the MLPA.

The Legislature enacted the MMA Improvement Act in 2000 (A.B. 2800), the year after the MLPA, upon a finding that MMAs had been established without conforming to any particular plan and without ensuring that the most representative and unique areas were included. The

1 Legislature also determined that the existing array of MMAs did not comprise an organized
2 system and were not classified or managed in a systematic manner. The Legislature found, as it
3 had in the MLPA, that many MMAs lacked a clearly defined purpose, effective management
4 measures, and enforcement, creating the illusion of a comprehensive system of management but
5 falling short of the potential to protect, conserve and manage ocean resources. Pub. Res. Code §
6 36601.

7 The MMA Improvement Act addresses these problems in part by simplifying the
8 regulatory structure. The number of protected categories is reduced from eighteen to six, with
9 standard protection levels for each. Of the six MMAs, three are MPAs—state marine reserves,
10 state marine parks, and state marine conservation areas. Pub. Res. Code § 36602(d), (e). The
11 MMA Improvement Act also reduces the number of agencies that may designate MMAs to
12 three—the Commission, the State Parks and Recreation Commission, and the State Water
13 Resources Control Board—and requires these agencies to consult with and secure concurrence
14 from the others before modifying an MMA already designated by another of them. *Id.*, § 36725.

15 The MMA Improvement Act requires that the activities of these three agencies be
16 coordinated through a broader consortium of state agencies called the State Interagency
17 Coordinating Committee ("Coordinating Committee").

18 The committee shall review proposals for new or amended MMAs
19 to ensure that the minimum required information is included in the
20 proposal, to determine those state agencies that should review the
21 proposal, and to ensure consistency with other such designations in
22 the state. The committee shall also serve to ensure the proper and
23 timely routing of site proposals, review any proposed site-specific
24 regulations for consistency with the state system as a whole, and
25 conduct periodic reviews of the statewide system to evaluate
26 whether it is meeting the mission and statement of objectives. Pub.
27 Res. Code § 36800.

24 The Secretary of the Resources Agency is required to chair the Coordinating Committee,
25 and the Committee's members must include representatives from the Department, the Department
26 of Parks and Recreation, the California Coastal Commission, the State Water Resources Control
27 Board, and the State Lands Commission.

1 Under the MMA Improvement Act, all proposals for designation of MMAs must go to the
2 Coordinating Committee. "Individuals or organizations" may submit them directly to the
3 Coordinating Committee or to a designating entity (e.g., the Commission). "Proposals submitted
4 to a designating entity shall be forwarded to the committee to initiate the review process." Pub.
5 Res. Code § 36900.

6 The committee shall review proposals to ensure that the minimum
7 required information is included in the proposal, to determine those
8 state agencies that should review the proposal, and to ensure
9 consistency with other designations of that type in the state. After
10 initial review by the coordinating committee and appropriate
11 agencies, the proposal shall be forwarded to a scientific review panel
12 established pursuant to subdivision (b). Pub. Res. Code § 36900(a).

13 The scientific review panel, referred to in the foregoing passage, is to be appointed by the
14 Resources Secretary "with statewide representation and direction from the committee," and its
15 role is to "evaluate proposals for technical and scientific validity, including consideration of such
16 things as site design criteria, location, and size." *Id.*, § 36900(c). "[T]o the extent practical," the
17 scientific review panel "shall be the same as the master plan team used in the process set forth in
18 the [MLPA]. . . ." *Id.* The MMA Improvement Act contemplates that the Coordinating
19 Committee and the scientific review panel would be busier before the Commission adopts a final
20 Master Plan under the MLPA than it would be afterwards:

21 The committee and scientific review panel . . . shall annually
22 consider and promptly act upon proposals until an MPA master plan
23 is adopted pursuant to subdivision (b) Section 2859 of the Fish and
24 Game Code, and thereafter, no less than once every three years.
25 Upon adoption of a statewide MPA plan, subsequent site proposals
26 determined by the committee to be consistent with that plan shall be
27 eligible for a simplified and cursory review of not more than 45
28 days. Pub. Res. Code § 36900.²

29 This timetable for the Coordinating Committee's actions on proposals for MMAs by
30 "individuals or organizations" echoes the MLPA's timetable for Commission action on "petitions"
31 by "interested parties" to add, delete or modify MPAs. Fish & Game Code § 2861(a). Both
32 provisions call for annual review and action before adoption of the final Master Plan, and review

33
34
35
36
37
38 ² The Coordinating Committee was also required to establish, by January 1, 2002, standard
instructions for each MMA classification. Pub. Res. Code § 36900.

1 at least once every three years thereafter.

2 The legislative history of the MMA Improvement Act highlights the importance of the
3 Coordinating Committee function to the legislative scheme:

4 . . . [D]eficiencies [in the MMA classification process' include the
5 fact . . . that there is no coordination mechanism identified in law for
6 requiring or even encouraging managing agencies to work together
7 during the designation process or later when management
8 responsibilities [were] assumed.

9 *The only effective way to establish a comprehensive system of
10 MMAs is to legislatively repeal use of the existing 18 classifications
11 for the designation of any new State MMAs and create a new
12 classification system with a clearly identified mission and goals, a
13 consistent designation process, and a coordinating mechanism for
14 state agencies with jurisdiction or management responsibilities for
15 marine managed areas. (RJN, Ex. A, p. RJN 002-003) (emphasis
16 supplied).*

17 Fish & Game Code sections 1590 and 1591 were part of the same bill (A.B. 2800) that,
18 upon enactment, became the MMA Improvement Act. Section 1591(a) specifically incorporates
19 the MMA Improvement Act, and requires that any MPA proposals made after January 1, 2002-
20 follow the guidelines set forth in the MMA Improvement Act. Subsection (b) provides: "State
21 marine recreational management areas . . . , state marine reserves, and state marine conservation
22 areas shall be designated, deleted, or modified by the commission pursuant to that act [the MMA
23 Improvement Act]."

24 **B. Adoption of the North Central Coast Regulations by the Commission**

25 **1. Adoption Process**

26 Following the development of several alternative MPA network proposals and receipt of a
27 recommendation from the BRTF, at a public hearing on June 11, 2008, the Commission adopted
28 a preferred siting alternative, called the "integrated preferred alternative," for MPAs in the North
Central Coast (defined as State waters between Alder Creek, near Point Arena (Mendocino
County) and Pigeon Point (San Mateo County)). (NCCAR 1781, 3381.) The Commission
directed the Department to prepare the ISOR for the implementing NCC Regulations. (NCCAR
1781-171, 1782.) The ISOR was published on September 18, 2008, identifying the statutory
authority upon which the Commission was relying, citing Fish and Game Code sections 200, 202,

1 203.1, 205(c), 219, 220, 1590, 1591, 2860, 2861, and 6750; and Public Resources Code
2 sections 36725, subdivisions (a) and (e). (NCCAR 1820.) Presumably because there was no
3 final Master Plan, the Commission did not cite Fish & Game Code section 2859(b), which
4 authorizes it to adopt regulations based on a final Master Plan.

5 On May 1, 2009, the Commission published its Notice of Proposed Regulatory Action
6 ("Notice"), again identifying the same statutory authorities it cited in the ISOR.³ (NCCAR 3380,
7 3381, 3408, 3423.) After a public hearing on August 5, 2009, the Commission adopted the
8 proposed NCC Regulations. (NCCAR 4387.) These regulations became effective on May 1,
9 2010, amending Section 632, subsections (b)(6)-(b)(33) and b(42)-(b)(44) of Title 14 of the
10 California Code of Regulations. (NCCAR 35705.)

11 2. The Adopted NCC Regulations

12 The NCC Regulations both establish MPAs and regulate "taking"⁴ of marine species within
13 those MPAs. 14 C.C.R. § 632. Prior to May 1, 2010, thirteen MPAs covering about 26.8 square
14 miles existed in the North Central Coast region. The NCC Regulations expanded all-but two of
15 these existing MPAs and added new ones, for a total of twenty-four MPAs and six special
16 closures, increasing the covered area to about 153.3 square miles, nearly a six-fold increase in the
17 area of the ocean within the North Central Coast region that was affected by an MPA designation.
18 (14 C.C.R. § 632 (b)(6-33) and (b)(42-44); NCCAR 3714-3715, 35605-35607.) Of the twenty-
19 four MPAs, nine are "state marine reserves," in which take of any living marine resource,
20 whether plant or animal, for any purpose, whether recreational or commercial, is prohibited.
21 Eleven are "state marine conservation areas," in which take of all living marine resources is
22 prohibited with stated exceptions within each area permitting take of certain animal species (such
23 as crab or salmon) by specified method (such as by trap or trolling). Three are "state marine
24 recreational management areas," in which take of all living species is prohibited except
25

26 ³ Government Code section 11346.5(a)(2) requires the Commission to reference in its Notice
27 "the authority under which the regulation is proposed and a reference to the particular code
sections or other provisions of law that are being implemented, interpreted, or made specific."

28 ⁴ "'Take' means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or
kill." Fish & Game Code § 86.

1 recreational hunting of waterfowl. The special closures prohibit all entry.⁵ (*Id.*)

2 **C. This Lawsuit**

3 Petitioners filed their Petition for Writ of Mandate and Complaint for Declaratory and
4 Injunctive Relief on January 27, 2011, and an amended Petition on February 11, 2011,
5 challenging the validity of the NCC Regulations as well as more recently adopted MPA
6 regulations pertaining to the South Coast Study Region.⁶ In their causes of action pertaining to
7 the NCC Regulations, Petitioners seek a writ of mandate setting aside the NCC Regulations on
8 the ground that the Commission lacked the necessary statutory authority to adopt them (Third
9 Cause of Action); a declaration under Government Code section 11350 and Code of Civil
10 Procedure section 1060 that the Commission lacked statutory authority to adopt the NCC
11 Regulations and that the regulations are therefore void and invalid (Fourth Cause of Action); and
12 a declaration that the Commission failed to obtain a coastal development permit prior to adopting
13 the NCC Regulations, in violation of the California Coastal Act, Public Resources Code
14 §§ 30000 et seq., and that the regulations are invalid for this independent reason (Fifth Cause of
15 Action).

16 **IV. ARGUMENT**

17 **A. Standard and Scope of Review**

18 **1. Standard of Review**

19 An administrative agency's adoption of regulations intended to govern future decisions is a
20 quasi-legislative action reviewable by an action for declaratory relief or for traditional mandamus.
21 *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 168-169.
22 Government Code section 11342.2, part of the APA, sets the standard for determining whether
23 adopted regulations are valid:

24 Whenever by the express or implied terms of any statute a state
25 agency has authority to adopt regulations to implement, interpret,
26 make specific or otherwise carry out the provisions of the statute, no

27 ⁵ A map of the North Central Coast MPAs, as adopted, is attached hereto as Exhibit 1. The
28 NCC Regulations, part of 14 C.C.R. § 632, are attached hereto as Exhibit 2.

⁶ The South Coast region is defined as State waters from Point Conception in Santa Barbara
County to the California-Mexico border. (NCCAR 26.)

1 regulation adopted is valid or effective unless consistent and not in
2 conflict with the statute and reasonably necessary to effectuate the
purpose of the statute.

3 Gov. Code § 11342.2; *Communities for a Better Environment v. California Resources Agency*
4 (2002) 103 Cal.App.4th 98, 108. Section 11342.2 has two prongs—consistency with authorizing
5 statutes and reasonable necessity. This lawsuit involves the consistency prong. Under either
6 traditional mandamus or an action for declaratory relief, the Court independently reviews the
7 administrative regulation for consistency with controlling law. *Communities for a Better*
8 *Environment*, 103 Cal.App.4th at 108; *Watkins v. County of Alameda* (2009) 177 Cal.App.4th 320,
9 335.

10 The question is whether the regulation alters or amends the
11 governing statute or case law, or enlarges or impairs its scope. *In*
12 *short, the question is whether the regulation is within the scope of*
13 *the authority conferred; if it is not, it is void.* This is a question
particularly suited for the judiciary as the final arbiter of the law,
and does not invade the technical expertise of the agency.

14 *Communities for a Better Environment*, 103 Cal.App.4th at 108-109 (emphasis added); *Yamaha*
15 *Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 11 n.4.

16 **2. Scope of Review—Code Civ. Proc. § 1085 (Traditional Mandamus)**

17 Judicial review of quasi-legislative action under Code of Civil Procedure section 1085 is
18 generally limited to the record of proceedings before the administrative agency. *Western States*
19 *Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573. Most of the facts discussed in this
20 Brief are supported with citations to the Administrative Record produced by the Commission on
21 July 27, 2011.

22 In a challenge to quasi-legislative actions, the Court may also consider extra-record
23 evidence relevant to procedural unfairness and agency misconduct. *Id.* at 575. This action, at
24 bottom, is about agency misconduct—the Commission regulated without statutory authority. The
25 Administrative Record helps to understand what the Commission did do, but, because the
26 misconduct consists in part of agency failures to comport themselves as the statutes commanded,
27 some of the proof of misconduct necessarily comes from outside the Administrative Record. In
28 the accompanying RJN, Petitioner provides judicially noticeable, extra-record evidence of certain

1 of the facts discussed in this Brief. Most of this evidence proves the non-occurrence of certain
2 events that were required to occur prior to the adoption of the regulations. *See Schenley Affiliated*
3 *Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177, 197 (validity of regulation depended on review
4 of statute and undisputed or judicially known facts).

5 **3. Scope of Review—Gov. Code § 11350 (Declaratory Relief)**

6 In a proceeding for declaratory relief under Government Code section 11350, the court
7 may consider the following evidence:

- 8 (1) The rulemaking file prepared under Section 11347.3.
9 (2) The written statement prepared pursuant to [§ 11346.1(b),
10 concerning an emergency].
11 (3) An item that is required to be included in the rulemaking file but
12 is not included in the rulemaking file, for the sole purpose of
13 proving its omission.
14 (4) Any evidence relevant to whether a regulation used by an
15 agency is required to be adopted under this chapter.

16 *Id.*, § 11350(d). As explained by the Law Revision Commission in its Comments to the 2000
17 Amendments to section 11350, under subsection (d)(3), the court may consider evidence that was
18 not part of the rulemaking file, if such evidence "may be necessary to prove a substantial failure to
19 follow required procedures. . . . For example, an agency's failure to include a public comment in
20 the rulemaking file may constitute a substantial failure to follow required procedures. . . . Proof of
21 such omission requires consideration of the omitted item."

22 **B. California Agencies May Only Regulate Within the Bounds of Specific**
23 **Statutory Authority**

24 **1. Regulations Adopted Without Statutory Authority Are Void**

25 An administrative agency has no independent authority to adopt regulations; it has "only as
26 much rulemaking power as is invested in it by statute." *Carmel Valley Fire Protection Dist. v.*
27 *State of California* (2001) 25 Cal.4th 287, 299. Furthermore,

28 If, in interpreting the [authorizing] statute, the court determines that
the administrative action under attack has, in effect, "[altered] or
[amended] the statute or [enlarged] or [impaired] its scope," it must
be declared void. [Citations.] Thus, if the court concludes that the
administrative action transgresses the agency's statutory authority, it
need not proceed to review the action for abuse of discretion; in
such a case, there is simply no discretion to abuse.

1 *Association for Retarded Citizens—California v. Department of Dev. Services* (1985) 38 Cal.3d
2 384, 391. Similarly, "[i]f the court determines that a challenged administrative action was not
3 authorized by or is inconsistent with acts of the Legislature, that action is void." *US Ecology,*
4 *Inc. v. State of California* (2001) 92 Cal.App.4th 113, 132 (quoting *Terhune v. Superior Court*
5 (1998) 65 Cal.App.4th 864, 873); *Morris v. Williams* (1967) 67 Cal.2d 733, 748 (courts are
6 obligated to strike down regulations exceeding scope of delegated authority); *see also* Gov. Code
7 § 11342.1.

8 These rules are grounded in the non-delegation doctrine, which prevents the fundamental
9 powers of government from being combined in the hands of a single person or group. *Coastside,*
10 *supra*, 158 Cal.App.4th at 1204. When the Legislature does delegate power to an administrative
11 agency to establish rules to carry out its stated policy, the Legislature must establish sufficiently
12 clear standards so that the legislative function is not usurped. *Id.* at 1205.

13 **2. The Scope of Regulatory Authority Is Strictly Construed**

14 The power given to an agency to adopt rules and regulations "is not a grant of legislative-
15 power," and the agency must strictly follow the procedures directed by the Legislature.
16 *Whitcomb Hotel, Inc. v. Calif. Employment Commission* (1944) 24 Cal.2d 753, 759.

17 In the absence of valid statutory authority, an administrative agency
18 may not, under the guise of a regulation, substitute its judgment for
19 that of the Legislature. It may not exercise its sublegislative powers
20 to modify, alter or enlarge the provisions of the legislative act which
21 is being administered. Administrative regulations in conflict with
22 the Constitution or statutes are generally declared to be null or void.
23 *Harris v. Alcoholic Beverage Control Appeals Board* (1964) 228 Cal.App.2d 1, 6. Thus, "[t]o the
24 extent that the Legislature considers a given problem and determines the best method of dealing
25 with it, it may specifically include its resolution of the matter in statutory law" *Ralphs*
26 *Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 182. When the Legislature does so, as it did in both
27 the MLPA and the MMA Improvement Act, the agency is not at liberty to ignore or compromise
28 that method. "Where a statute or ordinance clearly defines the specific duties or course of conduct
that a governing body must take, that course of conduct becomes mandatory and eliminates any
element of discretion." *Great Western Savings & Loan v. City of Los Angeles* (1973) 31

1 Cal.App.3d 403, 413.

2 **C. The Statutes Relied Upon by the Commission Do Not Authorize Adoption of**
3 **the NCC Regulations**

4 In *Ralph's Grocery, supra*, the Supreme Court observed:

5 "In reviewing a legislative rule a court is free to make three
6 inquiries: (1) whether the rule is within the delegated authority, (2)
7 whether it is reasonable, and (3) whether it was issued pursuant to
8 proper procedure." (1 Davis, *Administrative Law Treatise* (1958)
9 § 5.05; cf. *Whitcomb Hotel, Inc. v. California Emp. Com.* (1944) 24
10 Cal.2d 753, 756, 759 . . .). *Ralphs Grocery Co, supra*, 69 Cal.2d at
11 175 n.2.

12 In this action Petitioner asks the Court to make two of these three inquiries. The first, an
13 "as applied" inquiry, entails a review of the Commission's compliance with mandatory statutory
14 procedures that are prerequisite to exercise of its authority to adopt MPAs and implementing
15 regulations. The second, a type of "facial" inquiry, entails a determination whether the terms of
16 the statutory authority claimed by the Commission in fact delegated to it the power to take the
17 action it did. We address the "as applied" inquiry first.

18 **1. The Commission Failed to Follow Required Procedures—**
19 **Pub. Res. Code § 36725; Fish & Game Code §§ 1590, 1591, 2861**

20 **(a) Pub. Res. Code § 36725; Fish & Game Code §§ 1590, 1591**

21 Public Resources Code § 36725(a), part of the MMA Improvement Act, authorizes the
22 Commission to "designate, delete, or modify state marine recreational management areas . . . ,
23 state marine reserves, and state marine conservation areas." Subsection (e) authorizes the
24 Commission to "regulate commercial and recreational fishing and any other taking of marine
25 species in MMAs." Pub. Res. Code § 36725. As explained above, Fish & Game Code §§ 1590
26 and 1591 obligate the Commission to comply with the MMA Improvement Act when
27 designating, deleting or modifying MPAs.

28 The evidence in the record is indisputable that, in the process leading up to adoption of the
North Central Coast MPAs and the NCC Regulations, the requirements of the MMA
Improvement Act were completely ignored. The Coordinating Committee, which was to play a
critical role in the statutory scheme of the MMA Improvement Act, particularly before adoption

1 of a final Master Plan under the MLPA, played utterly no role in the process leading up to the
2 MPA designations and NCC regulations. Neither the Commission nor the Department forwarded
3 the Task Force's proposal for the North Central Coast MPAs to the Coordinating Committee.
4 The record is silent as to *any* review or other action by the Coordinating Committee. Responses
5 to Public Records Act requests sent to the agencies comprising the Coordinating Committee
6 acknowledge that the Coordinating Committee had no such involvement. Indeed, based upon
7 these responses, it appears that the Coordinating Committee was never convened in connection
8 with any MMA proposal. (RJN Exs. D-O; Cooke Decl. ¶¶ 5-7, 10, 11.)

9 The Commission's failure to comply with, and ensure compliance with, the MMA
10 Improvement Act, is fatal to the MPA adoption and the NCC Regulations. "[W]hen the
11 Legislature imposes particular statutory requirements, it generally does not intend them to be
12 disregarded." *City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 1039. Throughout its
13 relevant provisions the MMA Improvement Act uses the term "shall" – the language of
14 Legislative command – indicating that statute's provisions are mandatory. *Abbett Electric*
15 *Corp. v. Storek* (1994) 22 Cal.App.4th 1460, 1469. The central role of the Coordinating
16 Committee in accomplishing the Legislature's objectives in the MMA Improvement Act also
17 requires the construction of that Act's requirements relating to the Coordinating Committee as
18 mandatory. *Francis v. Superior Court* (1935) 3 Cal.2d 19, 28. In short, the requirements of the
19 MMA Improvement Act are mandatory. As such, "failure to comply with a particular procedural
20 step will . . . have the effect of invalidating the governmental action to which the procedural
21 requirement relates." *Morris, supra*, 18 Cal.3d at 908.

22 The MMA Improvement Act, moreover, does not hold out the Commission's authority
23 thereunder as an alternative to other regulatory authority the Commission may have. When the
24 Commission wishes to adopt an MMA, it must do so in compliance with the MMA Improvement
25 Act, period. Thus its failure to comply with the MMA Improvement Act is fatal to the NCC
26 Regulations not just to the extent that the Commission purported to exercise its regulatory
27 authority under that Act, but to the extent that the Commission purported to exercise power to
28 regulate under any statutory authority. *People v. McGee* (1977) 19 Cal.3d 948, 958.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(b) Fish & Game Code § 2861

Fish and Game Code section 2861 is part of the MLPA, and provides the Commission with authority only to "act upon" a "petition" from an "interested party":

The commission shall, annually until the master plan is adopted and thereafter at least every three years, receive, consider, and promptly act upon petitions from any interested party, to add, delete, or modify MPAs, favoring those petitions that are compatible with the goals and guidelines of this chapter.

In this case the Commission received no "petition" to add or modify MPAs in the North Central Coast region, and the recommendation it did receive, the BRTF's recommendation of a preferred siting alternative, was not submitted by an "interested party." Thus the Commission's authority to act under Section 2861(a) was never triggered. Section 2861(a) provides no authority to adopt regulations.

(i) There was no "petition"

When used in connection with adopting, amending or repealing regulations, the term "petition" has a specific meaning:

- [A]ny interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation as provided in Article 5 (commencing with Section 11346). This petition shall state the following clearly and concisely:
 - (a) The substance or nature of the regulation, amendment or repeal requested.
 - (b) The reason for the request.
 - (c) Reference to the authority of the state agency to take the action requested.

Gov. Code § 11340.6. Once the agency receives a petition, the agency must notify the petitioner of receipt and within 30 days either deny the petition or schedule a public hearing. *Id.*, § 11340.7.

Under the Administrative Procedures Act, an agency "rulemaking file" must include any "petitions received from interested persons proposing the adoption, amendment, or repeal of the regulation, and a copy of any decision . . . which grants a petition in whole or in part." Govt. Code § 11347.3(b)(1). The Administrative Record includes an exact replica of the rulemaking file. Cooke Decl., ¶ 12, Ex. 1. The Administrative Record is devoid of petitions to the Commission for adoption of the North Central Coast MPAs or the NCC Regulations. In response to Petitioners' Public Records Act request, the Commission effectively admitted that it received

1 no petitions to add, delete or modify MPAs in the North Central Coast sub-region. (RJN Exs. P-
2 S; Cooke Decl. ¶¶ 8, 9, 12.)

3 (ii) There were no submissions by "interested parties"

4 Even if the Department or the BRTF had "petitioned" the Commission, neither of them
5 would qualify as an "interested party" within the meaning of Section 2861(a).

6 The original version of Section 2861(a) was different. It provided:

7 The commission shall, annually until the master plan is adopted and
8 thereafter at least every three years, receive, consider, and promptly
9 act upon petitions from *the department or any other interested party*
10 to add, delete or modify MPAs . . . (emphasis supplied)

11 The statute was amended in 2001, however, deleting the reference to "the department" as
12 an "interested party." Since the MLPA is replete with specific references to the functions of the
13 Department, the intent of amendment can only be to clarify that the Department is not supposed
14 to be a "petitioner." The amendment, furthermore, brings this provision into closer line with the
15 parallel provision of the MMA Improvement Act, which requires the Coordinating Committee to
16 take action annually on "proposals" (*not* "petitions") by "individuals or organizations" until the
17 final Master Plan is adopted, and once every three years thereafter. Pub. Res. Code § 36900.

18 Elsewhere, the MLPA further confirms that the Department is not to be treated as an
19 "interested party." Fish & Game Code section 2853, which sets forth the elements for
20 implementing the MLPA through the Marine Life Protection Program, requires "[a] process for
21 the establishment, modification, or abolishment of existing MPAs or new MPAs established
22 pursuant to this program, that involves interested parties, consistent with paragraph (7) of
23 subdivision (b) of Section 7050" In turn, Section 7050 of the Fish & Game Code, part of the
24 Marine Life Management Act, states the legislative policy of ensuring conservation, sustainable
25 use and restoration of marine living resources for the benefit of all California's citizens by
26 involving members of the public in the process:

27 Involv[ing] all interested parties, including but not limited to,
28 individuals from the sport and commercial fishing industries,
aquaculture industries, coastal and ocean tourism and recreation
industries, marine conservation organizations, local governments,
marine scientists, and the public in marine living resource
management decisions.

1 Fish & Game Code § 7050(b)(7). Like the MLPA, the Marine Life Management Act requires that
2 the Department prepare fishery management plans, but includes a process for the incorporation of
3 proposals submitted by "interested parties" into the Department's plan. *Id.*, § 7075. "Fishery
4 participants and their representatives, fishery scientists, or other interested parties may propose
5 plan provisions or plan amendments to the department or commission." *Id.*, § 7075(d).

6 The BRTF, unmentioned in the MLPA and a creature solely of the MOU Process, likewise
7 does not qualify as an "interested party." The status of the BRTF as a "state agency" arose last
8 year in litigation by one of the petitioners in this case against the BRTF and the Master Plan Team
9 to enforce their compliance with the Public Records Act. The Superior Court for Sacramento
10 County held:

The Blue Ribbon Task Force . . . function[s], as a matter of fact, as
[a] component[] of the state administrative structure for the purpose
of implementing the MLPA. Based on the facts present here, they
cannot be characterized as private contractors or consultants or truly
independent advisory bodies, but are "state bodies" engaged in state
governmental functions.

11
12
13
14 (RJN Ex. C, p. RJN 196.) The BRTF, which took over the Department's role in selecting the
15 preferred siting alternative and recommending it to the Commission, is no more an "interested
16 party" under the MLPA, for purposes of submission of "petitions" to the Commission, than the
17 Department itself.

18 In any event, even if the BRTF recommendation of a preferred siting alternative for MPAs
19 in the North Central Coast constituted a "petition" from an "interested party" – and it did not –
20 then the "petition" would still have been a "proposal" that the Commission was obligated under
21 the MMA Improvement Act and Fish & Game Code §§ 1590 and 1591 to forward to the
22 Coordinating Committee. As explained above, it failed to do so.

23 In both the MLPA and the MMA Improvement Act, the Legislature clearly specified the
24 procedures for Commission adoption of MPAs in the interim period before it adopted the final
25 Master Plan. The Commission chose to ignore, or neglected, those procedures. It was not at
26 liberty to do so. The regulations that are the product of its unauthorized action must therefore be
27 set aside.
28

1 2. **The Remaining Cited Statutes Do Not Authorize the Commission to**
2 **Adopt the NCC Regulations**

3 On their face, the remaining statutes cited by the Commission do not authorize the
4 adoption of the North Central Coast MPAs or the NCC Regulations.

5 (a) **Fish and Game Code sections 200-220**

6 Sections 200-220 of the Fish and Game Code are within Division 1, Chapter 2, Article 1 of
7 that Code. The Commission is authorized to regulate under Article 1 *only* for noncommercial
8 purposes.

9 There is hereby delegated to the commission the power to regulate
10 the taking or possession of birds, mammals, fish, amphibia, and
11 reptiles to the extent and in the manner prescribed in this article.

12 No power is delegated to the commission by this article to regulate
13 the taking, possession, processing, or use of fish, amphibia, kelp, or
14 other aquatic plants for commercial purposes

15 *Id.*, § 200. Section 202 requires regulations under this article to be "made and promulgated
16 pursuant to this article;" Section 203.1 provides factors to be considered when adopting
17 regulations pursuant to section 203, which concerns game birds, game mammals and fur-bearing
18 mammals—not fish (and the Commission does not cite Section 203); Section 205(c) permits the
19 Commission to establish and change territorial limits for noncommercial taking of fish, amphibia
20 and reptiles; Section 219 pertains to temporary regulation of birds, mammals, fish, amphibia and
21 reptiles in cases of emergency or when necessary for the protection of natural resources; and
22 Section 220 describes the duration of regulations under Article 1.

23 Under the NCC Regulations, nine MPAs are state marine reserves prohibiting the take of
24 "any living, geological or cultural marine resource . . ." (Pub. Res. Code § 36710(a); *see, e.g.*, 14
25 C.C.R. § 632(b)(1)), and eleven are state marine conservation areas prohibiting the take of "any
26 living, geological, or cultural marine resource for commercial or recreational purposes . . .,"
27 except as expressly permitted. Pub. Res. Code § 36710(c); *see e.g.*, 14 C.C.R. § 632(b)(7) (all
28 take prohibited except recreational and commercial take of salmon); § 632(b)(8) (recreational and
 commercial take of marine invertebrates prohibited). Since all of these regulations restrict
 commercial take, the provisions of Article 1 do not authorize their adoption.

1 Section 205(c), which generally allows the Commission to establish or change territorial
2 limits for taking of fish, amphibia and reptiles, is also part of Article 1. The Commission may not
3 establish MPAs under section 205(c), and not only because the NCC Regulations include many
4 MPAs in which commercial as well as recreational "take" is prohibited. "[I]t is well established
5 that a more recent and more specific statute controls over an earlier and more general statute."
6 *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1486. Section 205(c) was
7 enacted in 1957. The MLPA and the MMA Improvement Act were adopted in 1999 and 2000,
8 respectively. The MLPA authorizes the Commission to adopt MPAs through a final Master Plan,
9 and it authorizes the Commission to act on petitions to add, modify or delete MPAs. The MMA
10 Improvement Act specifies the manner in which the Commission may add, modify or delete
11 MMAs. The Commission failed to comply with either statute, and it was not free to circumvent
12 the requirements of these statutes simply by citing its traditional authority to establish territorial
13 limits for take of fish, amphibia and reptiles.

14 (b) **Fish and Game Code section 6750**

15 Fish and Game Code section 6750 delegates authority to the Commission to "regulate the
16 taking, collecting, harvesting, gathering, or possession of kelp for purposes other than profit."
17 This section does not authorize the Commission to establish MPAs, to regulate any of the many
18 other species regulated by the NCC Regulations, or to regulate taking of kelp for commercial
19 purposes.

20 (c) **Fish and Game Code sections 2860**

21 Fish and Game Code section 2860 is part of the MLPA. Section 2860(a) authorizes the
22 Commission to "regulate commercial and recreational fishing and any other taking of marine
23 species in MPAs." *Id.*, § 2860(a). Section 2860 does not provide any authority to add, modify or
24 delete MPAs. In conjunction with the NCC Regulations, the Commission added new MPAs and
25 it modified existing MPAs. Since it did not do so pursuant to Section 2859(b) – because there
26 was no final Master Plan – or pursuant to Section 2861(a) – because it did not act on a petition
27 from an interested party – the Commission's authority to regulate within these improperly
28 adopted MPAs was never triggered.

1 (d) **Fish and Game Code section 2861(c)**

2 Finally, Fish and Game Code section 2861(c) provides, "Nothing in this chapter restricts
3 any existing authority of the department or the commission to make changes to improve the
4 management or design of existing MPAs or designate new MPAs prior to the completion of the
5 master plan." This section does not confer upon the Commission any new authority. Rather, it is
6 a savings clause. "Existing authority" must exist elsewhere, and it does not.

7 (e) **No portion of the NCC Regulations can be saved**

8 The NCC Regulations include take restrictions within two pre-existing MPAs -- the
9 Gerstle Cove State Marine Reserve and the Duxbury Reef State Marine Conservation Area --
10 whose boundaries were not modified. (See NCCAR 3776, 3780.) Theoretically, therefore, the
11 Commission *could* have regulated recreational and commercial fishing within these two MPAs
12 pursuant to its authority under Fish & Game Code section 2860(a). But that is not what the
13 Commission did. It purported to adopt an entire regional network of MPAs and restrictions of
14 which the restrictions within this pair of MPAs were only a small part.:

15 One of the goals of the Marine Life Protection Program calls for
16 improving and managing the state's MPAs as a network, to the
17 extent possible. Although neither statute nor legislative history
18 defines "network," the ordinary dictionary usage contemplates
19 *interconnectedness* as a characteristic of the term. . . . The
20 important aspects of this interpretation are that MPAs are linked by
21 common goals and a comprehensive management and monitoring
22 plan, and that they protect areas with a wide variety of representative
23 habitat as required by the MLPA. . . . At a minimum, the master
24 plan should insure that the statewide network of MPAs reflects a
25 consistent approach to design, funding and management. The
26 desired outcome would include components of both biological
27 connectivity and administrative function to the extent that each are
28 practicable and supported by available science.

23 (NCCAR 45 (emphasis in original).) In light of the stated purpose of the NCC Regulations,
24 (NCCAR 3381-3382, 3699, 3700), it cannot be assumed that the isolated restrictions in these two
25 pre-existing MPAs would properly function as stand-alone regulations, and hence they should not
26 survive an order setting aside the regulations as a whole.

27 **D. The NCC Regulations Are Not the Product of the MLPA Process**

28 Although the NCC Regulations were ostensibly adopted to implement the MLPA's

1 directive to "modify the existing collection of MPAs" (Fish and Game Code § 2851(h)), the
2 Commission does not cite the core rulemaking authority of the MLPA, Fish and Game Code
3 section 2859(b), as a basis for adopting these regulations. (NCCAR 3381.) It did not do so
4 because, without a final Master Plan, it could not do so. Because the Commission has described
5 the process leading to adoption of the North Central Coast MPAs and NCC Regulations as a
6 process mandated by the MLPA⁷, however, petitioners undertake to describe the actual MOU
7 Process that led to adoption of the NCC Regulations in more detail. It was a process that differs
8 markedly from the MLPA process mandated by the Legislature.

9 1. **The MOUs Between the Department, Resources Agency and the**
10 **Resources Legacy Fund Foundation—The Actual Process Undertaken**

11 The divergence of the MOU Process from the requirements of the MLPA began in 2004
12 with the First MOU and, with each phase, strayed farther from the process mandated by the
13 Legislature.

14 (a) **Stage 1—The First MOU**

15 As amended, the MLPA required the Department to submit a draft of the Master Plan to
16 the Commission on or before January 1, 2005, and a proposed final Master Plan by April 1, 2005.
17 Fish & Game Code § 2859(a), (b). But the Legislature failed to appropriate funds sufficient for
18 the Department to carry out its responsibilities under the MLPA within the specified period.
19 (NCCAR 21.) Therefore, on August 27, 2004, the Department, the Resources Agency, and a
20 private, nonprofit organization called the Resources Legacy Fund Foundation (the "Foundation")
21 entered into a "public-private partnership" memorialized in a "Memorandum of Understanding
22 Among the California Resources Agency, the California Department of Fish and Game, and the

23
24 ⁷ "The ultimate goal of these activities is compliance with the MLPA . . ." (NCCAR 33.) As explained in the Amended ISOR:

25 The proposed regulation change is intended to meet the goals
26 described in the Marine Life Protection Act (MLPA, Stats. 1999, ch.
27 1015) within a portion of California's State waters. . . . The MLPA
28 specifically requires that the Department of Fish and Game
(Department) prepare a master plan and that the Fish and Game
Commission (Commission) adopt regulations based on the plan to
achieve MLPA goals. (NCCAR 3698.)

1 Resources Legacy Fund Foundation for the California Marine Life Protection Act Initiative"
2 ("First MOU"). (NCCAR 26, 684-699.) The First MOU documented a decision by its parties to
3 prepare the draft Master Plan in phases, on a region-by-region basis. The parties called their
4 implementation of the First MOU the "MLPA Initiative." (NCCAR 686.) The First MOU
5 provided funding only for phase one—preparation of a Master Plan Framework ("Framework")
6 and development of alternative networks of MPAs along the Central Coast region of California
7 (from Pigeon Point in San Mateo County to Point Conception in Santa Barbara County).
8 (NCCAR 686-687.) The First MOU terminated on December 31, 2006. (NCCAR 686 (Recitals,
9 ¶ K), 690 (¶ III.C), 692 (¶ VI.G).)

10 The Framework was a "programmatic" document written "for the purpose of providing a
11 framework for developing succeeding phases of the Master Plan." (NCCAR 686 (¶ G).)
12 Adopted by the Commission in August 2005 (NCCAR 231), the Framework explained how the
13 process was to unfold:

14 The MLPA calls for the development of a master plan by the
15 Department, and its adoption by the Commission. [Citing MLPA §
16 2859.] The MLPA Initiative has divided the master plan into two
17 principal parts: a section providing guidance in the application of
18 the MLPA to the development of a statewide MPA network (the
19 master plan framework), and a section describing the preferred
20 alternatives for MPA proposals. The MLPA Initiative envisions a
21 focus on portions of the state in a series of regional processes,
22 beginning with the central coast. *The requirement for a full master
23 plan and implementing regulations will be met when the
24 Commission adopts the final portion of the plan and all regions of
25 the coast have been completed.*

26 (RJN Ex. B, p. RJN 32.) (emphasis supplied)

27 The First MOU provided for the establishment of the Blue Ribbon Task Force (BRTF), a
28 group of unpaid "advisors" appointed by the Secretary of the Resources Agency. The BRTF's
original functions in the First MOU were, among other things, to oversee the preparation of the
Framework and of proposals for alternative networks of MPAs in the Central Coast. (NCCAR
687.) The BRTF would be assisted by a staff retained and paid by the Foundation and would be
responsible for "resolv[ing] policy disputes and provid[ing] direction in the face of uncertainty."
(NCCAR 27.) The Foundation also agreed to pay the salaries of certain Department staff (up to a

1 limit of \$750,000). These privately paid BRTF staff members, together with Department
2 personnel, were to form a "Steering Committee" responsible for coordinating work under the
3 First MOU. (NCCAR 687, 690.)

4 Under the First MOU the Master Plan Team was expanded and "re-established" as the
5 "Master Plan Science Advisory Team" ("SAT"), whose new function was to "advise and assist the
6 [BRTF] and its staff . . . by providing scientific and technical support." (NCCAR 688.)

7 Under the First MOU, the Department was required to "independently review and make
8 any amendments or modifications to the draft documents that it determines appropriate," and
9 "submit to the Commission for its review and consideration the revised drafts as the Department's
10 draft Master Plan Framework and proposal for alternative networks of MPAs in an area along the
11 central coast." (NCCAR 689 (§ ii).) As described in the Master Plan Framework, the Department
12 "reviews the proposals, sponsors a peer review and selects a preferred alternative" (RJN Ex. B, p.
13 RJN 34), and the Department "is ultimately responsible for presenting a final draft master plan and
14 alternatives for marine protected areas in each region, including preferred alternatives for each
15 region, to the Commission." (*Id.*, p. RJN 30.)

16 On April 13, 2007, following the performance of activities described in the First MOU, the
17 Commission adopted MPAs and implementing regulations for the Central Coast region. After
18 review by OAL, the Central Coast regulations became effective on September 21, 2007.
19 (NCCAR 26.)

20 (b) **The Coastside lawsuit--Challenges to the First MOU**

21 On December 14, 2005, Coastside filed the *Coastside* action in the superior court against
22 the Resources Agency and others, challenging implementation of the MLPA through the First
23 MOU. The superior court sustained a demurrer without leave to amend on September 2, 2006,
24 whereupon Coastside appealed. The litigation concluded with the First District Court of Appeal's
25 opinion, issued on January 14, 2008, holding that the funds provided by the Foundation were not
26 a "gift" because the state agencies had agreed to perform additional tasks not mandated by statute,
27 *Coastside, supra*, 158 Cal.App.4th at 1194. It also held that a funding contract (the First MOU)
28 was authorized by Fish & Game Code § 2855(b)(1), which provided that the Department "shall

1 (§ 3.2(b)).) The Second MOU deleted the requirement that the Department independently review
2 and revise the Task Force's preferred alternative. (NCCAR 704-705.)

3 The Second MOU also provided that the "selected" members of the BRTF would now
4 make the recommendations to the Commission (NCCAR 703 (§ 3.2(c))), deleting the requirement
5 that the Department submit the revised draft to the Commission as the Department's
6 recommended alternative. Instead, the Department's role was reduced to commenting on the
7 "feasibility" of the BRTF's alternative proposals of achieving the objectives of the MLPA,
8 (NCCAR 705 (§ 3.13)), while the function of selecting a preferred siting alternative from among
9 various feasible alternatives was shifted to the BRTF. (NCCAR 880-887.) In a June 2, 2008
10 memo to the Commission, the Department acknowledged that it "will not develop its own
11 preferred alternative or recommend any particular alternative as a whole. . . Department review .
12 . . has focused on feasibility aspects of individual MPAs and on the individual areas' prospects to
13 help achieve the MLPA overarching ecosystem and biodiversity goals." (NCCAR 780.) The
14 Commission acknowledged: ". . . rather than developing its own preferred alternative or
15 recommend any particular alternative as a whole, the Department provided input to the [North
16 Central Coast Regional Stakeholder Group] and [BRTF] throughout proposal development."
17 (NCCAR 3702.) The Commission further acknowledged: "[T]he BRTF created an Integrated
18 Preferred Alternative proposal (IPA) by selecting, and in some cases slightly modifying, MPAs
19 from each of the three proposals The BRTF recommended that the Commission select the
20 IPA as the regulatory preferred alternative for the north central coast." (NCCAR 3703.)

21 The draft Master Plan, which the Commission adopted in February 2008, describes the
22 Department's role as an assistant in the development of the draft master plan and MPA proposals,
23 and as a provider of information, participant in meeting, and document reviewer. (NCCAR 27.)

24 It also states:

25 Rather than creating or selecting a separate preferred alternative (as
26 was done in the central coast study region), the Department will
27 provide specific comments on the task force preferred alternative.
28 . . . The Department's comments on the preferred alternative . . . will
ensure that all of the alternatives forwarded to the Commission are
feasible. (NCCAR 41.)

1 By contrast, "[t]he task force oversees regional projects to develop alternative MPA proposals to
2 present to the Commission, prepares information and recommendations for coordinating
3 management of MPAs with federal agencies, and provides direction for expenditure of initiative
4 funds." (NCCAR 27.)

5 The BRTF was not an entity contemplated by the Legislature when it created the MLPA.
6 The authority reposed in the BRTF through the MOU Process was inconsistent with, and
7 antithetical to, the language and legislative intent of the MLPA.

8 **(ii) Role and Activities of Master Plan Team**

9 Under the MLPA, the purpose of the Master Plan Team was to advise and assist in
10 preparing the draft Master Plan, including the development of recommendations for alternative
11 networks of MPAs and the preferred siting alternative. Fish & Game Code §§ 2855-2857. The
12 MLPA also directed the Master Plan Team, with the Department, to obtain information from
13 local communities and to obtain input from interested parties on fishing and other resources use,
14 socioeconomic and environmental impacts, the design of monitoring and evaluation activities,
15 and methods to encourage public participation. *Id.*, § 2855(c). But under both the First and
16 Second MOUs, the SAT, a renamed and "re-established" version of the Master Plan Team, was
17 relegated to addressing science issues only. (NCCAR 688, 700; NCCAR 28.) Rather than
18 working with the Department in developing the preferred siting alternative as required under the
19 MLPA (§ 2857(a)), the SAT refers choices between viable alternatives to the Department or the
20 BRTF: "[B]ecause policy considerations of the master plan will be addressed by the [BRTF]
21 through recommendations to the [Commission], the Department is focusing the charge of the
22 master plan team to scientific considerations involved in drafting the programmatic portion of the
23 master plan and designing alternative regional proposals for marine protected areas. . . .
24 [M]embers [of the SAT] shall refrain from making policy judgments; rather, where available
25 science presents options or uncertainty, the SAT shall frame and refer those policy questions to
26 the Department or, if appropriate, the BRTF." (NCCAR 831-832.)

27 **(d) The Draft Master Plan.**

28 The Commission adopted a draft Master Plan in February 2008. (NCCAR 779.) The

1 Framework was the "backbone" of the draft Master Plan, (NCCAR 5), and indeed the latter
2 document contains much of the text of the former. The Draft Master Plan contained no
3 alternative networks of MPAs, nor a recommendation for a preferred siting alternative, as is
4 required of the Master Plan under Section 2856(a)(2). The draft Master Plan does include an
5 "Appendix P," entitled "Alternative Recommendations for MPAs Considered in Each Study
6 Region," but for the North Central Coast Appendix P states, "To be added upon region
7 completion." (NCCAR 667) The "draft Master Plan" may as well have been called the Partial
8 Master Plan, since it was, and is, an incomplete document that cannot form the basis for
9 regulation pursuant to the MLPA process.

10 **2. Failure to Follow the Procedures Set Forth by the Legislature**
11 **Precludes Reliance on Section 2859(b) as Authority for Adopting the**
12 **North Central Coast Regulations**

12 The adoption of North Central Coast MPAs and the NCC Regulations was the product of
13 the MOU Process, not the MLPA process. On April 22-23, 2008, the BRTF selected its
14 integrated preferred alternative for the North Central Coast region (NCCAR 1781-25; 3703). At
15 a public hearing on June 11, 2008, the BRTF presented its integrated preferred alternative to the
16 Commission and recommended the Commission select that alternative as the Commissions'
17 preferred siting alternative for the North Central Coast. (NCCAR 3703.) The Department
18 provided a feasibility evaluation. (NCCAR 780, 3737.) On this basis the Commission adopted
19 the MPAs and the NCC Regulations, on August 5, 2009 (NCCAR 4387). With changes in the
20 regulatory language, they were confirmed on April 8, 2010. (NCCAR 35598.) The regulations
21 became effective on May 1, 2010. (NCCAR 35705.)

22 Apart from the fact that the absence of a final Master Plan precluded regulation pursuant to
23 Section 2859(b), the curtailment by contract of the Department's and Master Plan Team's
24 statutory roles and the usurpation of the Department's role by the BRTF through the Second
25 MOU disable the Commission from claiming that the NCC Regulations are the product of the
26 MLPA process. Significant responsibilities of the Department were appropriated by the BRTF,
27 which then directed a regulatory enterprise funded by enormously wealthy foundations with their
28

1 own agendas.⁸ The MLPA required the Master Plan Team to perform a variety of functions
2 beyond mere science advice, yet but its role was relegated by contract, both in name and in
3 function, to the latter.

4 These contractual revisions to the statutory scheme of the MLPA deprived the Commission
5 of the full measure of the Department's and the Team's expertise and judgment that the
6 Legislature mandated them to provide. "[A]dministrative agencies to which the Legislature has
7 delegated regulatory authority in particular areas often develop a high degree of expertise in those
8 areas and the body of law that govern them." *Western States Petroleum Assn., supra*, 9 Cal.4th at
9 572. Therefore, when the Legislature directs performance of a task to a specific agency, that
10 command cannot be disregarded. *California Assn. of Nursing Homes etc. v. Williams* (1970) 4
11 Cal.App.3d 800, 815 ("In the enactment of these regulations he [the Director of Health Services],
12 no one else, is to receive and consider the evidence which will permit compliance with the
13 statutory standard")

14 The multiple failures to comply with the MLPA's legislative mandates voids regulatory
15 action taken in reliance on the fundamentally flawed MOU Process.

16 **E. The Commission Failed to Obtain a Coastal Development Permit**

17 The goals and objectives of the California Coastal Act, Public Resources Code §§ 30000 et
18 seq., are implemented in part through a permit process. Section 30600(a) provides:

19 Except as provided in subdivision (c), and in addition to obtaining
20 any other permit required by law from any local government or from
21 any state, regional, or local agency, any person, as defined in
22 Section 21066 [of the Public Resources Code], wishing to perform
or undertake any development in the coastal zone, other than a
facility subject to Section 25500, shall obtain a coastal development
permit.

23 Coastal development permits are issued by the California Coastal Commission, or by
24

25
26 ⁸ The Foundation's mission is to "[c]onserve or restore natural landscapes, marine systems, and
27 preserve wild lands" (NCCAR 227.) The donors supporting the Foundation's funding of
28 MLPA implementation are themselves foundations organized by well-known and enormously
wealthy individuals—the Gordon and Betty Moore Foundation, the David and Lucile Packard
Foundation, and the Marisla Foundation, and the Foundation's board has a fiduciary obligation
to its funders to use those donations in a manner consistent with its goals and guidelines.
(NCCAR 238, 239.)

1 qualified local governments pursuant to a certified local coastal program. The NCC Regulations
2 constitute a "development" in the coastal zone because they effect a "change in the intensity of
3 use of water, or of access thereto" (Pub. Res. Code §§ 30103(a), 30106). The MMA Improvement
4 Act specifically provides that the process for designating MMAs (which include MPAs) "does
5 not replace the need to obtain the appropriate permits or reviews of other government agencies
6 with jurisdiction or permitting authority." Pub. Res. Code § 36900(d). A coastal development
7 permit issued by the Coastal Commission was therefore required. But, as shown by its absence in
8 the Administrative Record, Cooke Decl., ¶ 13, a coastal development permit was never applied
9 for or obtained. This constitutes a violation of the Coastal Act, justifying declaratory and
10 injunctive relief. Pub. Res. Code § 30803.

11 Although certain types of developments and certain areas are exempt from coastal
12 development permit requirements, none of the exemptions apply to the NCC Regulations. First,
13 under the Coastal Act, a coastal development permit is not required if the Coastal Commission,
14 after public hearing and by two-thirds vote of its appointed members, describe or identify the
15 adoption of MPAs by category and find that there is no potential for any significant adverse
16 effect, either individually or cumulatively, on coastal resources or on public access to, or along,
17 the coast, and that the exclusion of MPA designations will not impair the ability of local
18 government to prepare a local coastal program. Pub. Res. Code § 30610(e). There is no evidence
19 in the administrative record that the Coastal Commission held such a hearing or took such a vote.
20 Second, although the Coastal Commission may not impose controls on either the Department or
21 the Commission with respect to wildlife and fishery management programs (*id.*, § 30411(a)), the
22 scope of restrictions on "take" in some of the MPAs created in the North Central Coast region,
23 such as restrictions on "take" of "all living marine resources," extends to living marine resources
24 of which fish species are but one subset. Since the regulations establishing marine reserves effect
25 a "change in intensity of the use of water, or access thereto" with respect to *all* living marine
26 resources, not just fish, the coastal development permit exemption applicable to any controls
27 regarding wildlife and fishery management programs does not excuse the Commission from
28 obtaining a coastal development permit.

1 F. Relief Sought

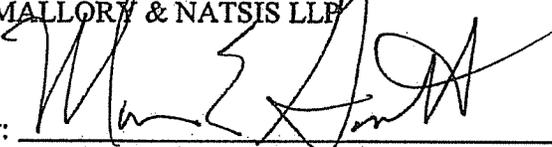
2 Because the Commission lacked the required statutory authority to adopt the new and
3 modified MPAs in the North Central Coast region, and to adopt the NCC Regulations, the Court
4 should issue a writ of mandate directing the Commission to vacate and set aside its adoption of
5 the North Central Coast MPA network and its approval of the NCC Regulations, a judgment
6 declaring the NCC Regulations void and unenforceable, injunctive relief ordering the
7 Commission to withdraw its adoption of the MPA network and the NCC Regulations and
8 restraining the Commission from adopting further MPA designations and implementing
9 regulations unless it does so in accordance with valid statutory authority, and a judgment
10 declaring that the NCC Regulations are null and void due to the Commission's failure to obtain a
11 coastal development permit.

12 V. CONCLUSION

13 "Administrative regulations that violate acts of the Legislature are void and no
14 protestations that they are merely an exercise of administrative discretion can sanctify them.
15 They must conform to the legislative will if we are to preserve an orderly system of government."
16 *Morris v. Williams, supra*, 67 Cal.2d at 737. In the MLPA and the MMA Improvement Act, the
17 Legislature specified the ways in which the Commission could adopt or modify MPAs and
18 regulate activities within them. The Commission chose to ignore the will of the Legislature and
19 to adopt MPAs and implementing regulations without the requisite statutory authority. These
20 actions are void and must be set aside.

21 Dated: August 19, 2011

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

22
23
24 By: 
MARVIN E. GARRETT

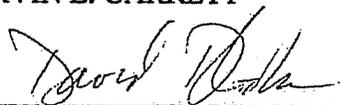
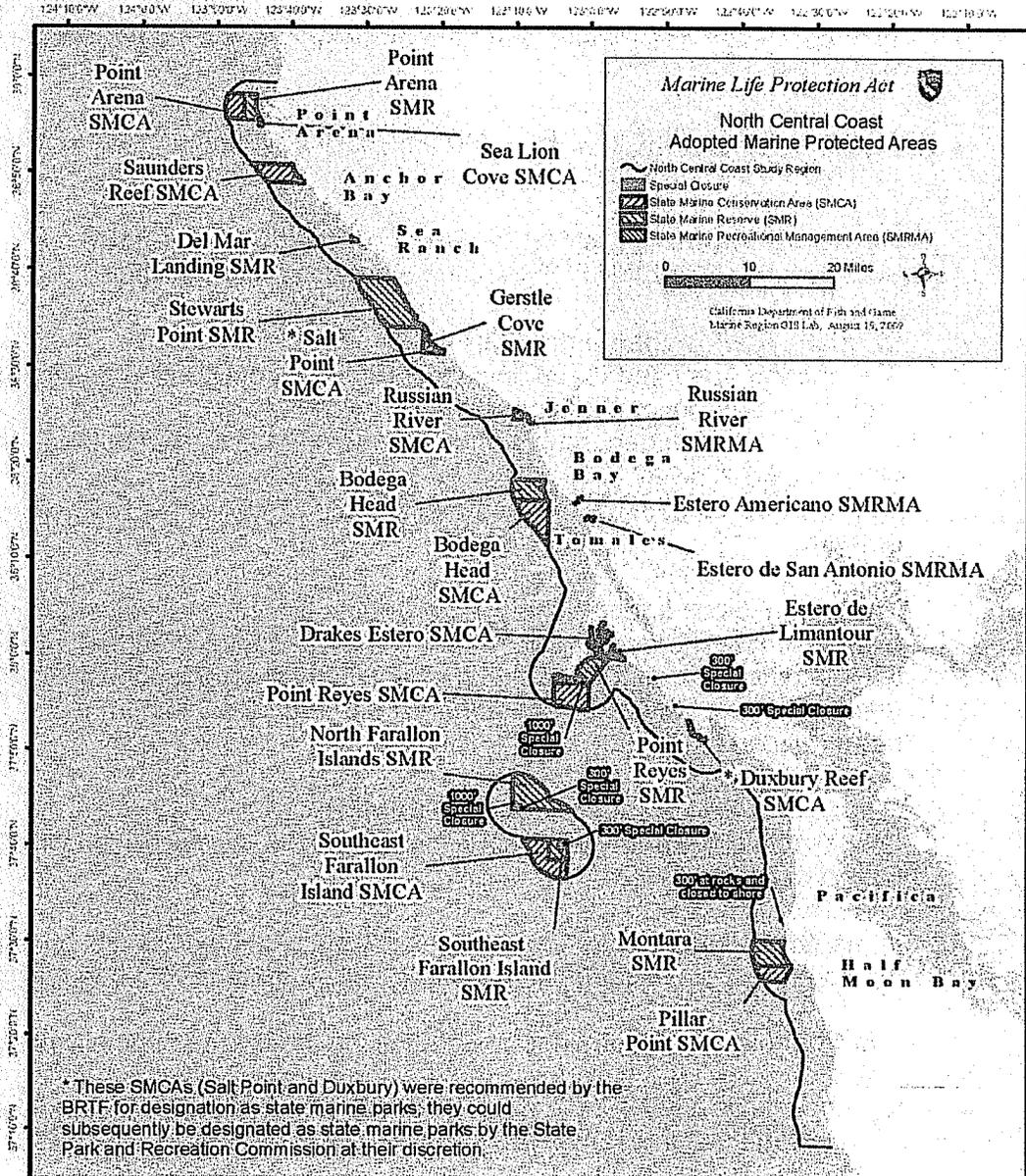
25
26 By: 
DAVID D. COOKE
Attorneys for Petitioners and Plaintiffs

Figure 1. Marine protected areas included in the regulation.





Welcome to the online source for the California Code of Regulations

14 CA ADC § 632

§ 632. Marine Protected Areas (MPAs), Marine Managed Areas (MMAs), and Special Closures.

1 2 >
(2 screens)

Term

14 CCR § 632

Cal. Admin. Code tit. 14, § 632

Barclays Official California Code of Regulations Currentness

Title 14. Natural Resources

Division 1. Fish and Game Commission-Department of Fish and Game

Subdivision 2. Game and Furbearers

Chapter 11. Ecological Reserves (Refs & Annos)

⇒ § 632. Marine Protected Areas (MPAs), Marine Managed Areas (MMAs), and Special Closures.

The areas specified in this section have been declared by the commission to be marine protected areas, marine managed areas, or special closures. Public use of marine protected areas, marine managed areas, or special closures shall be compatible with the primary purposes of such areas. MPAs, MMAs, and special closures are subject to the following general rules and regulations in addition to existing Fish and Game Code statutes and regulations of the commission, except as otherwise provided for in subsection 632(b), areas and special regulations for use. Nothing in this section expressly or implicitly precludes, restricts or requires modification of current or future uses of the waters identified as marine protected areas, special closures, or the lands or waters adjacent to these designated areas by the Department of Defense, its allies or agents.

(a) General Rules and Regulations:

(1) Protection of Resources.

(A) State Marine Reserves: In a state marine reserve, it is unlawful to injure, damage, take, or possess any living, geological, or cultural marine resource, except under a scientific collecting permit issued pursuant to Section 650 or specific authorization from the commission for research, restoration, or monitoring purposes.

(B) State Marine Parks: In a state marine park, it is unlawful to injure, damage, take, or possess any living or nonliving marine resource for commercial purposes. Any human use that would compromise protection of the species of interest, natural community or habitat, or geological, cultural, or recreational features, may be restricted by the commission as specified in subsection 632(b), areas and special regulations for use. The commission may issue scientific collecting permits pursuant to Section 650 or specifically authorize research, monitoring, and educational activities and certain recreational harvest in a manner consistent with protecting resource values.

(C) State Marine Conservation Areas: In a state marine conservation area, it is unlawful to injure, damage, take, or possess any living, geological, or cultural marine resource for commercial or recreational purposes, or a combination of commercial and recreational purposes except as specified in subsection 632(b), areas and special regulations for use. The commission may issue

scientific collecting permits pursuant to Section 650 or specifically authorize research, education, and recreational activities, and certain commercial and recreational harvest of marine resources, provided that these uses do not compromise protection of the species of interest, natural community, habitat, or geological features.

(D) State Marine Recreational Management Areas: In a state marine recreational management area, it is unlawful to perform any activity that would compromise the recreational values for which the area may be designated. Recreational opportunities may be protected, enhanced, or restricted, while preserving basic resource values of the area. No other use is restricted unless specified in subsection 632(b), areas and special regulations for use.

(2) Finfish. Finfish, for the purpose of this section, are defined as any species of bony fish or cartilaginous fish (sharks, skates and rays). Finfish do not include amphibians, invertebrates, plants or algae. The definition of finfish provided in Section 159 does not apply to this Section.

(3) Pelagic Finfish. Pelagic finfish, for the purpose of this section, are a subset of finfish defined as: northern anchovy (*Engraulis mordax*), barracudas (*Sphyraena* spp.), billfishes* (family Istiophoridae), dolphinfish (*Coryphaena hippurus*), Pacific herring (*Clupea pallasii*), jack mackerel (*Trachurus symmetricus*), Pacific mackerel (*Scomber japonicus*), salmon (*Oncorhynchus* spp.), Pacific sardine (*Sardinops sagax*), blue shark (*Prionace glauca*), salmon shark (*Lamna ditropis*), shortfin mako shark (*Isurus oxyrinchus*), thresher sharks (*Alopias* spp.), swordfish (*Xiphias gladius*), tunas (family Scombridae), and yellowtail (*Seriola lalandi*). *Marlin is not allowed for commercial take.

(4) Access. Access into marine protected areas or marine managed areas for non-consumptive uses including but not limited to swimming, surfing, diving, boating, hiking and walking is allowed unless otherwise specified in subsection 632(b), areas and special regulations for use.

(5) Introduction of Species. Unless authorized by the commission or as a result of authorized fishing activities, the release of any fish or wildlife species, including domestic or domesticated species, or the introduction of any plant species, is prohibited. The department may reintroduce endemic species to marine protected areas or marine managed areas for management purposes.

(6) Feeding of Fish and Wildlife. The feeding of fish and wildlife is prohibited except permitted scientific collection pursuant to Section 650 or as a result of authorized fishing within state marine conservation areas, state marine parks, and state marine recreational management areas.

(7) Anchoring. Vessels shall be allowed to anchor in any marine protected area or marine managed area with catch onboard unless otherwise specified in subsection 632(b), areas and special regulations for use. Fishing gear shall not be deployed in the water while anchored in a state marine reserve. Fishing gear, except legal fishing gear used to take species identified as allowed for take in subsection 632(b), shall not be deployed in the water while anchored in a state marine recreational management area, state marine park or state marine conservation area. Anchoring regulations shall be consistent with federal law and allowances made for anchoring required by emergency or severe weather.

(8) Transit or Drifting. Vessels shall be allowed to transit through marine protected areas and marine managed areas with catch onboard. Fishing gear shall not be deployed in the water while transiting through a state marine reserve. Fishing gear, except legal fishing gear used to take species identified as allowed for take in subsection 632(b), shall not be deployed in the water while transiting through a state marine recreational management area, state marine park or state marine conservation area.

(b) Areas and Special Regulations for Use. Pursuant to the commission's authority in Fish and Game Code Section 2860 to regulate commercial and recreational fishing and any other taking of marine species in MPAs, Fish and Game Code Sections 10500(f), 10500(g), 10502.5, 10502.6, 10502.7, 10502.8, 10655, 10655.5, 10656, 10657, 10657.5, 10658, 10660, 10661, 10664, 10666, 10667, 10711, 10801, 10900, 10901, 10902, 10903, 10904, 10905, 10906, 10907, 10908, 10909, 10910, 10911, 10912, 10913, and 10932 are made inoperative as they apply to Subsection 632(b). All geographic coordinates listed use the North American Datum 1983 (NAD83) reference datum:

(1) Punta Gorda State Marine Reserve.

(A) This area is bounded by the three-fathom inshore depth contour, the 30-fathom depth contour and the following points:

40° 16.43'N. lat. 124° 22.00'W. long.;

40° 16.43'N. lat. 124° 23.50'W. long.;

40° 14.83'N. lat. 124° 23.18'W. long.; and

40° 15.23'N. lat. 124° 21.62'W. long.

(B) Take of all living marine resources is prohibited.

(C) Swimming. No person shall swim, wade, dive, or use any diving equipment within the Punta Gorda State Marine Reserve except as authorized pursuant to scientific research approved by the department.

(D) Boating. Except as allowed pursuant to Federal law, no person shall launch or operate a boat or other floating device within the Punta Gorda State Marine Reserve except to pass through the area during the normal course of vessel transit along the coast, to avoid inclement weather, or pursuant to scientific research approved by the department.

(E) Firearms. No person shall possess, fire, or discharge any firearm, bow and arrow, air or gas gun, spear gun, or any other weapon of any kind within, or into the Punta Gorda State Marine Reserve except as authorized pursuant to scientific research approved by the department.

(F) Public Entry. Public entry into the Punta Gorda State Marine Reserve may be restricted at the discretion of the department to protect wildlife, aquatic life, or habitat. No person, except state and local law enforcement officers, fire suppression agencies and employees of the department in the performance of their official duties or persons possessing written permission from the department, or institution or agency entering into a memorandum of understanding (MOU) with the department, may enter an area which is closed to public entry.

(G) Pesticides, Herbicides, and Other Regulated Chemicals. The use of pesticides, herbicides, and other regulated chemicals is prohibited in the Punta Gorda State Marine Reserve except as authorized pursuant to scientific research approved by the department. Where such chemicals are intended to be used as a part of any research program, any necessary authorization and/or permits required to dispense such chemicals into state waters or tide and submerged lands shall be obtained prior to final approval of the research by the department.

(H) Litter. No person shall deposit, drop, or scatter any debris on the Punta Gorda State Marine Reserve. Any refuse resulting from a person's use of an area must be removed from that area by such person.

(I) Aircraft. No person shall operate any aircraft or hovercraft within the Punta Gorda State Marine Reserve, except as authorized pursuant to scientific research approved by the department.

(J) Pets. Pets, including but not limited to, dogs and cats, are prohibited from entering the Punta Gorda State Marine Reserve unless authorized by the department.

(K) Memorandum of Understanding (MOU). The department may enter into MOU's with colleges, universities, and other bonafide research organizations to conduct marine-related research within the Punta Gorda State Marine Reserve.

(L) Scientific research conducted within the Punta Gorda State Marine Reserve shall not interfere with access by land to coastal trails along the shoreline adjacent to the reserve.

(2) MacKerricher State Marine Conservation Area.

(A) This area is bounded by the mean high tide line, the 3-fathom depth contour and the following points:

39° 29.81'N. lat. 123° 47.50'W. long.;

39° 29.95'N. lat. 123° 47.80'W. long.;

39° 27.62'N. lat. 123° 48.80'W. long.; and

39° 27.55'N. lat. 123° 48.52'W. long.

(B) Take of all living marine resources is prohibited except:

1. Only the following species may be taken recreationally: finfish, red abalone, chiones, clams, cockles, rock scallops, native oysters, crabs, lobster, ghost shrimp, sea urchins, mussels and marine worms except that no worms may be taken in any mussel bed unless taken incidentally to the take of mussels.

2. Only the following species may be taken commercially: finfish, crabs, ghost shrimp, jackknife clams, sea urchins, squid, algae except giant kelp and bull kelp and worms except that no worms may be taken in any mussel bed, nor may any person pick up, remove, detach from the substrate any other organisms, or break up, move or destroy any rocks or other substrate or surfaces to which organisms are attached.

(3) Point Cabrillo State Marine Conservation Area.

(A) This area is bounded by the mean high tide line, a distance of 1000 feet seaward of mean lower low water, and the following points:

39° 21.24'N. lat. 123° 49.25'W. long.;

39° 21.33'N. lat. 123° 49.64'W. long.;

39° 20.66'N. lat. 123° 49.68'W. long.; and

39° 20.57'N. lat. 123° 49.27'W. long.

(B) Take of all living marine resources is prohibited except the commercial take of finfish and marine aquatic plants.

(4) Russian Gulch State Marine Conservation Area.

(A) This area is bounded by the mean high tide line, the 3-fathom depth contour and the following points:

39° 19.86'N. lat. 123° 48.84'W. long.;

39° 19.85'N. lat. 123° 48.89'W. long.;

39° 19.52'N. lat. 123° 48.46'W. long.; and

39° 19.52'N. lat. 123° 48.23'W. long.

(B) Take of all living marine resources is prohibited except:

1. Only the following species may be taken recreationally: finfish, red abalone, chiones, clams, cockles, rock scallops, native oysters, crabs, lobster, ghost shrimp, sea urchins, mussels and marine worms except that no worms may be taken in any mussel bed unless taken incidentally to the take of mussels.

2. Only the following species may be taken commercially: finfish, crabs, ghost shrimp, jackknife clams, sea urchins, algae except giant kelp and bull kelp and worms except that no worms may be taken in any mussel bed, nor may any person pick up, remove, detach from

the substrate any other organisms, or break up, move or destroy any rocks or other substrate or surfaces to which organisms are attached.

(5) Van Damme State Marine Conservation Area.

(A) This area is bounded by the mean high tide line, the 3-fathom depth contour and the following points:

39° 16.45'N. lat. 123° 47.60'W. long.;

39° 16.355'N. lat. 123° 47.60'W. long.;

39° 16.27'N. lat. 123° 47.545'W. long.; and

39° 16.27'N. lat. 123° 47.43'W. long.

(B) Take of all living marine resources is prohibited except:

1. Only the following species may be taken recreationally: finfish, red abalone, chiones, clams, cockles, rock scallops, native oysters, crabs, lobster, ghost shrimp, sea urchins, mussels and marine worms except that no worms may be taken in any mussel bed unless taken incidentally to the take of mussels.

2. Only the following species may be taken commercially: finfish, crabs, ghost shrimp, jackknife clams, sea urchins, algae except giant kelp and bull kelp and worms except that no worms may be taken in any mussel bed, nor may any person pick up, remove, detach from the substrate any other organisms, or break up, move or destroy any rocks or other substrate or surfaces to which organisms are attached.

(6) Point Arena State Marine Reserve.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed:

38° 57.35'N. lat. 123° 44.50'W. long.;

38° 59.00'N. lat. 123° 44.50'W. long.;

38° 59.00'N. lat. 123° 46.00'W. long.;

38° 56.40'N. lat. 123° 46.00'W. long.; and

38° 56.40'N. lat. 123° 43.82'W. long.

(B) Take of all living marine resources is prohibited.

(7) Point Arena State Marine Conservation Area.

(A) This area is bounded by straight lines connecting the following points in the order listed except where noted:

38° 59.00'N. lat. 123° 46.00'W. long.;

38° 59.00'N. lat. 123° 48.16'W. long.; thence southward along the three nautical mile offshore boundary to

38° 56.40'N. lat. 123° 48.35'W. long.;

38° 56.40'N. lat. 123° 46.00'W. long.; and

38° 59.00'N. lat. 123° 46.00'W. long.

(B) Take of all living marine resources is prohibited except:

1. The recreational take of salmon by trolling [subsection 27.80(a)(3)] is allowed.
2. The commercial take of salmon with troll fishing gear [subsection 182.1(l)] is allowed.

(8) Sea Lion Cove State Marine Conservation Area.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed:

38° 56.40'N. lat. 123° 43.82'W. long.;

38° 56.40'N. lat. 123° 44.00'W. long.;

38° 55.79'N. lat. 123° 44.00'W. long.; and

38° 55.79'N. lat. 123° 43.74'W. long.

(B) Recreational and commercial take of marine invertebrates and marine aquatic plants is prohibited. Take of all other species is allowed.

(9) Saunders Reef State Marine Conservation Area

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed except where noted:

38° 51.80'N. lat. 123° 39.23'W. long.;

38° 51.80'N. lat. 123° 44.78'W. long.; thence southward along the three nautical mile offshore boundary to

38° 50.00'N. lat. 123° 42.58'W. long.; and

38° 50.00'N. lat. 123° 37.60'W. long.

(B) Take of all living marine resources is prohibited except:

1. The recreational take of salmon by trolling [subsection 27.80(a)(3)] is allowed.
2. The commercial take of salmon with troll fishing gear [subsection 182.1(l)] and urchin is allowed.

(10) Del Mar Landing State Marine Reserve.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed:

38° 44.70'N. lat. 123° 31.00'W. long.;

38° 44.20'N. lat. 123° 31.00'W. long.;

38° 44.20'N. lat. 123° 30.30'W. long.; and

38° 44.43'N. lat. 123° 30.30'W. long.

(B) Take of all living marine resources is prohibited.

(11) Stewarts Point State Marine Conservation Area.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed:

38° 40.500'N. lat. 123° 25.370'W. long.;

38° 40.500'N. lat. 123° 25.500'W. long.;

38° 37.500'N. lat. 123° 23.500'W. long.;

38° 37.535'N. lat. 123° 23.027'W. long.

(B) Take of all living marine resources is prohibited except the following may be taken recreationally from shore only: marine aquatic plants other than sea palm, marine invertebrates, finfish [subsection 632(a)(2)] by hook and line, surf smelt by beach net, and species authorized in Section 28.80 of these regulations by hand-held dip net.

(12) Stewarts Point State Marine Reserve.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed except where noted:

38° 40.50'N. lat. 123° 25.37'W. long.;

38° 40.50'N. lat. 123° 30.24'W. long.; thence southward along the three nautical mile offshore boundary to

38° 35.60'N. lat. 123° 26.01'W. long.; and

38° 35.60'N. lat. 123° 20.80'W. long., except that Stewarts Point State Marine Conservation Area as described in subsection 632(b)(11)(A) is excluded.

(B) Take of all living marine resources is prohibited.

(13) Salt Point State Marine Conservation Area.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed:

38° 35.60'N. lat. 123° 20.80'W. long.;

38° 35.60'N. lat. 123° 21.00'W. long.;

38° 33.50'N. lat. 123° 21.00'W. long.; and

38° 33.50'N. lat. 123° 18.91'W. long., except that Gerstle Cove as described in subsection 632(b)(14)(A) is excluded.

(B) Take of all living marine resources is prohibited except the recreational take of abalone and finfish [subsection 632(a)(2)].

(14) Gerstle Cove State Marine Reserve.

(A) This area lies within the Salt Point State Marine Conservation Area and is bounded by the mean high tide line and a straight line connecting the following points:

38° 33.95'N. lat. 123° 19.92'W. long.; and

38° 33.95'N. lat. 123° 19.76'W. long.

(B) Take of all living marine resources is prohibited.

(15) Russian River State Marine Recreational Management Area.

(A) This area includes the waters below the mean high tide line eastward of the mouth of the Russian River estuary defined as a line connecting the following two points:

38° 27.16'N. lat. 123° 07.91'W. long.;

38° 27.01'N. lat. 123° 07.74'W. long.

And westward of the Highway 1 Bridge.

(B) Waterfowl may be taken in accordance with the general waterfowl regulations (Sections 502, 550, 551, and 552).

(C) Take of all living marine resources is prohibited.

(16) Russian River State Marine Conservation Area.

(A) This area is bounded by the mean high tide line, the mouth of the Russian River estuary as defined in subsection 632(b)(15)(A), and straight lines connecting the following points in the order listed:

38° 27.38'N. lat. 123° 08.58'W. long.;

38° 26.38'N. lat. 123° 08.58'W. long.;

38° 26.38'N. lat. 123° 07.70'W. long.

(B) Take of all living marine resources is prohibited except:

1. Only the following species may be taken recreationally: Dungeness crab by trap, and surf smelt using hand-held dip net or beach net.

2. Only the following species may be taken commercially: Dungeness crab by trap.

(17) Bodega Head State Marine Reserve.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed except where noted:

38° 20.10'N. lat. 123° 04.04'W. long.;

38° 20.10'N. lat. 123° 08.38'W. long.; thence southward along the three nautical mile offshore boundary to

38° 18.00'N. lat. 123° 08.08'W. long.; and

38° 18.00'N. lat. 123° 03.64'W. long.

(B) Take of all living marine resources is prohibited.

(C) Except as permitted by federal law or emergency caused by hazardous weather, it is unlawful to anchor or moor a vessel in the Bodega Head State Marine Reserve without authorization from

the director of the Bodega Marine Laboratory.

(D) The director of the Bodega Marine Laboratory may authorize any person who holds a scientific collector's permit from the department, under the conditions prescribed by the department, to enter the Bodega Head State Marine Reserve to take any finfish [subsection 632(a)(2)], invertebrate, or marine plant or algae for scientific purposes.

(E) The director of the Bodega Marine Laboratory may authorize students enrolled in educational programs conducted by the Bodega Marine Laboratory, under general conditions outlined in a memorandum of understanding with the department, to enter the Bodega Head State Marine Reserve to take any finfish [subsection 632(a)(2)], invertebrate, or marine plant or algae for educational and study purposes.

(18) Bodega Head State Marine Conservation Area.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed except where noted:

38° 18.00'N. lat. 123° 03.64'W. long.;

38° 18.00'N. lat. 123° 08.08'W. long.; thence southward along the three nautical mile offshore boundary to

38° 13.34'N. lat. 123° 03.51'W. long.; and

38° 17.93'N. lat. 123° 03.51'W. long.

(B) Take of all living marine resources is prohibited except:

1. The recreational take of pelagic finfish [subsection 632(a)(3)] by trolling [subsection 27.80(a)(3)], Dungeness crab by trap, and market squid by hand-held dip net, are allowed.

2. The commercial take of pelagic finfish [subsection 632(a)(3)] by troll fishing gear [subsection 182.1(l)] or round haul net [Section 8750, Fish and Game Code], Dungeness crab by trap, and market squid by round haul net [Section 8750, Fish and Game Code], are allowed.

(19) Estero Americano State Marine Recreational Management Area.

(A) This area includes the waters below the mean high tide line within Estero Americano westward of longitude 122° 59.25'W.

(B) Waterfowl may be taken in accordance with the general waterfowl regulations (Sections 502, 550, 551, and 552).

(C) Take of all living marine resources is prohibited.

(20) Estero de San Antonio State Marine Recreational Management Area.

(A) This area includes the waters below the mean high tide line within Estero de San Antonio westward of longitude 122° 57.40'W.

(B) Waterfowl may be taken in accordance with the general waterfowl regulations (Sections 502, 550, 551, and 552).

(C) Take of all living marine resources is prohibited.

(21) Point Reyes State Marine Reserve.

(A) This area is bounded by the mean high tide line and straight lines connecting the following

points in the order listed:

37° 59.90'N. lat. 123° 01.29'W. long.;

37° 59.90'N. lat. 123° 02.00'W. long.;

37° 59.00'N. lat. 123° 02.00'W. long.;

37° 59.00'N. lat. 122° 57.34'W. long.; and

38° 01.75'N. lat. 122° 55.00' W. long.; thence westward along the mean high tide line onshore boundary to

38° 01.783'N. lat. 122° 55.286'W. long.; and

38° 01.954'N. lat. 122° 56.451'W. long.

(B) Take of all living marine resources is prohibited.

(22) Point Reyes State Marine Conservation Area.

(A) This area is bounded by straight lines connecting the following points in the order listed except where noted:

37° 59.00'N. lat. 123° 02.00'W. long.;

37° 56.71'N. lat. 123° 02.00'W. long.; thence eastward along the three nautical mile offshore boundary to

37° 56.36'N. lat. 122° 57.34'W. long.;

37° 59.00'N. lat. 122° 57.34'W. long.; and

37° 59.00'N. lat. 123° 02.00'W. long.

(B) Take of all living marine resources is prohibited except:

1. The recreational take of salmon by trolling [subsection 27.80(a)(3)] and Dungeness crab by trap is allowed.

2. The commercial take of salmon with troll fishing gear [subsection 182.1(l)] and Dungeness crab by trap is allowed.

(23) Point Reyes Headlands Special Closure. Special restrictions on boating and access apply to the Point Reyes headlands as follows.

(A) A special closure is designated on the south side of the Point Reyes Headlands from the mean high tide line to a distance of 1000 feet seaward of the mean lower low tide line of any shoreline between lines extending due south from each of the following two points:

37° 59.65'N. lat. 123° 01.00'W. long; and

37° 59.39'N. lat. 122° 57.80'W. long.

(B) No person except department employees or employees of the United States Fish and Wildlife Service, National Park Service, or United States Coast Guard, in performing their official duties, or unless permission is granted by the department, shall enter this area at any time.

(24) Estero de Limantour State Marine Reserve.

(A) This area consists of waters below the mean high tide line within Estero de Limantour and within Drakes Estero, southward of a line connecting the following two points:

38° 02.66'N. lat. 122° 56.89'W. long.; and

38° 02.66'N. lat. 122° 56.15'W. long.

And northward of a line connecting the following two points:

38° 01.783'N. lat. 122° 55.286'W. long.; and

38° 01.954'N. lat. 122° 56.451'W. long.

(B) Take of all living marine resources is prohibited.

(25) Drakes Estero State Marine Conservation Area.

(A) This area includes the waters below the mean high tide line within Drakes Estero northward of a line connecting the following two points:

38° 02.66'N. lat. 122° 56.89'W. long.; and

38° 02.66'N. lat. 122° 56.15'W. long.

(B) Take of all living marine resources is prohibited except:

1. The recreational take of clams; and

2. Aquaculture of shellfish, pursuant to a valid State water bottom lease and-stocking permit.

(26) Point Resistance Rock Special Closure. Special restrictions on boating and access apply to Point Resistance Rock as follows:

(A) A special closure is designated from the mean high tide line to a distance of 300 feet seaward of the mean lower low tide line of any shoreline of Point Resistance Rock, located in the vicinity of 37° 59.92'N. lat. 122° 49.75'W. long.

(B) No person except department employees or employees of the United States Fish and Wildlife Service, National Park Service, or United States Coast Guard, in performing their official duties, or unless permission is granted by the department, shall enter this area at any time.

(27) Double Point/Stormy Stack Rock Special Closure. Special restrictions on boating and access apply to Stormy Stack Rock as follows.

(A) A special closure is designated from the mean high tide line to a distance of 300 feet seaward of the mean lower low tide line of any shoreline of Stormy Stack Rock, located in the vicinity of 37° 56.83'N. lat. 122° 47.14'W. long.

(B) No person except department employees or employees of the United States Fish and Wildlife Service, National Park Service, or United States Coast Guard, in performing their official duties, or unless permission is granted by the department, shall enter this area at any time.

(28) Duxbury Reef State Marine Conservation Area.

(A) This area is bounded by the mean high tide line, a distance of 1000 feet seaward of mean lower low water, and the following points:

37° 55.52'N. lat. 122° 44.17'W. long.;

37° 55.42'N. lat. 122° 44.31'W. long.;

37° 53.65'N. lat. 122° 41.91'W. long.; and

37° 53.77'N. lat. 122° 42.02'W. long.

(B) Take of all living marine resources is prohibited except the recreational take of finfish [subsection 632(a)(2)] from shore and abalone.

(29) North Farallon Islands State Marine Reserve

(A) This area is bounded by straight lines connecting the following points in the order listed except where noted:

37° 45.70'N. lat. 122° 59.08'W. long.; thence northwestward along the three nautical mile offshore boundary to

37° 49.34'N. lat. 123° 7.00'W. long.;

37° 45.70'N. lat. 123° 7.00'W. long.; and

37° 45.70'N. lat. 122° 59.08'W. long.

(B) Take of all living marine resources is prohibited.

(30) North Farallon Islands Special Closure. Special regulations on boating and access apply to the North Farallon Islands as follows.

(A) A special closure is established at the islets comprising the North Farallon Islands.

(B) Except as permitted by federal law or emergency caused by hazardous weather, or as authorized by subsection 632(b)(30)(C), no vessel shall be operated or anchored at any time from the mean high tide line to a distance of 1000 feet seaward of the mean lower low tide line of any shoreline of North Farallon Island, or to a distance of 300 feet seaward of the mean lower low tide line of any shoreline of the remaining three southern islets, including the Island of St. James, in the vicinity of 37° 46.00'N. lat. 123° 06.00'W. long.

(C) No person except department employees or employees of the United States Fish and Wildlife Service, National Oceanic and Atmospheric Administration, or United States Coast Guard, in performing their official duties, or unless permission is granted by the department, shall enter the area defined in subsection 632(b)(30)(B).

(D) All vessels shall observe a five (5) nautical mile per hour speed limit within 1,000 feet seaward of the mean lower low tide line of any shoreline of the islets defined in subsection 632(b)(30)(B).

(E) In an area bounded by the mean high tide line and a distance of one nautical mile seaward of the mean lower low tide line of any of the four islets comprising the North Farallon Islands, the following restrictions apply:

1. All commercial diving vessels operating in the defined area shall have their vessel engine exhaust system terminate either through a muffler for dry exhaust systems, or below the vessel waterline for wet exhaust systems.

2. All commercial diving vessels equipped with an open, deck-mounted air compressor system, while operating in the defined area, shall have their air compressor's engine exhaust system terminate below the vessel waterline.

(31) Southeast Farallon Island State Marine Reserve.

(A) This area is bounded by straight lines connecting the following points in the order listed:

37° 42.60'N. lat. 122° 59.50'W. long.;

37° 42.60'N. lat. 123° 02.00'W. long.;

37° 40.50'N. lat. 123° 02.00'W. long.;

37° 40.50'N. lat. 122° 59.50'W. long.; and

37° 42.60'N. lat. 122° 59.50'W. long.

(B) Take of all living marine resources is prohibited.

(32) Southeast Farallon Island State Marine Conservation Area.

(A) This area is bounded by straight lines connecting the following points in the order listed except where noted:

37° 42.60'N. lat. 123° 02.00'W. long.;

37° 42.60'N. lat. 123° 05.46'W. long.; thence southeastward along the three nautical mile offshore boundary to

37° 38.66'N. lat. 122° 59.50'W. long.;

37° 40.50'N. lat. 122° 59.50'W. long.;

37° 40.50'N. lat. 123° 02.00'W. long.; and

37° 42.60'N. lat. 123° 02.00'W. long.

(B) Take of all living marine resources is prohibited except:

1. The recreational take of salmon by trolling [subsection 27.80(a)(3)] is allowed.
2. The commercial take of salmon with troll fishing gear [subsection 182.1(l)] is allowed.

(33) Southeast Farallon Island Special Closure. Special regulations on boating and access apply to the island and islets comprising the Southeast Farallon Island as follows.

(A) A special closure is established at the Southeast Farallon Island.

(B) Except as permitted by federal law or emergency caused by hazardous weather, or as authorized by subsection 632(b)(33)(D), no vessel shall be operated or anchored at any time from the mean high tide line to a distance of 300 feet seaward of the mean lower low tide line of any shoreline of the Southeast Farallon Island year-round,

EXCEPT:

1. The area north of Fisherman's Bay, from a line extending due west from 37°42.26' N. lat. 123°00.16' W. long., following clockwise around the island (including Fisherman's Bay), to a line extending due east from 37°42.05' N. lat. 123°00.07' W. long.
2. At East Landing, from a line extending due east from 37°41.83' N. lat. 122°59.98' W. long., following clockwise around the island, to a straight line connecting the following two points:

37°41.72' N. lat. 123°00.05' W. long.; and

37°41.68' N. lat. 123°00.07' W. long.

(C) This closure as defined in subsection 632(b)(33)(B) exists year round, except for the following areas, which are closed only from December 1 through September 14 of each year:

1. From Fisherman's Bay to East Landing, from a line extending due east from 37°42.05' N. lat. 123°00.07' W. long., following clockwise around the island to a line extending due east from 37°41.83' N. lat. 122°59.98' W. long.

2. The area southwest of East Landing, from a straight line connecting the following two points:

37°41.72' N. lat. 123°00.05' W. long.; and

37°41.68' N. lat. 123°00.07' W. long.

Following clockwise around the main island to a straight line extending due south from 37°41.76' N. lat. 123°00.16' W. long. to 37°41.64' N. lat. 123°00.16' W. long., and on the southeast side of Saddle (Seal) Rock, from a straight line extending due south from 37°41.76' N. lat. 123°00.16' W. long., following clockwise around Saddle (Seal) Rock, to a line extending due west from 37°41.60' N. lat. 123°00.26' W. long.

(D) No person except department employees or employees of the United States Fish and Wildlife Service, National Oceanic and Atmospheric Administration, or United States Coast Guard, in performing their official duties, or unless permission is granted by the department, shall enter the area defined in subsection 632(b)(33)(B) or 632(b)(33)(C) during the closure period.

(E) All vessels shall observe a five (-5) nautical mile per hour speed limit 1,000 feet seaward of the mean lower low tide line of any shoreline of the Southeast Farallon Island.

(F) In an area bounded by the mean high tide line and a distance of one nautical mile seaward of the mean lower low tide line of any of the islands and islets comprising the Southeast Farallon Island, the following restrictions apply:

1. All commercial diving vessels operating in the defined area shall have their vessel engine exhaust system terminate either through a muffler for dry exhaust systems, or below the vessel waterline for wet exhaust systems.

2. All commercial diving vessels equipped with an open, deck-mounted air compressor system, while operating in the defined area, shall have their air compressor's engine exhaust system terminate below the vessel waterline.

(34) Fagan Marsh State Marine Park.

(A) This area consists of waters below the mean high tide line within the Fagan Marsh Ecological Reserve.

(B) Take of all living marine resources is prohibited except the recreational hook and line take of species other than marine aquatic plants.

(C) Only lightweight, hand-carried boats may be launched or operated within the park.

(35) Peytonia Slough State Marine Park.

(A) This area consists of waters below the mean high tide line within the Peytonia Slough Ecological Reserve.

(B) Take of all living marine resources is prohibited except the recreational hook and line take of species other than marine aquatic plants.

(C) Only lightweight, hand-carried boats may be launched or operated within the park.

(36) Corte Madera Marsh State Marine Park.

(A) This area consists of waters below the mean high tide line within the Corte Madera Marsh Ecological Reserve.

(B) Take of all living marine resources is prohibited except the recreational hook and line take of species other than marine aquatic plants from shore only.

(C) Only lightweight, hand-carried boats may be launched or operated within the park.

(D) Swimming, wading, and diving are prohibited within the park.

(37) Marin Islands State Marine Park.

(A) This area consists of waters below the mean high tide line within the Marin Islands Ecological Reserve.

(B) Take of all living marine resources is prohibited except the recreational hook and line take of species other than marine aquatic plants from shore only.

(C) Boating, swimming, wading, and diving are prohibited within the park.

(38) Albany Mudflats State Marine Park.

(A) This area consists of waters below the mean high tide line within the Albany Mudflats Ecological Reserve.

(B) Take of all living marine resources is prohibited except the recreational hook and line take of species other than marine aquatic plants from shore only.

(C) Boating, swimming, wading, and diving are prohibited within the park.

(39) Robert W. Crown State Marine Conservation Area.

(A) This area is bounded by the mean high tide line and a distance of 150 feet seaward of mean lower low water, between the following points:

37° 45.97'N. lat. 122° 16.84'W. long.; and

37° 45.95'N. lat. 122° 16.52'W. long.

(B) Take of all living marine resources is prohibited except:

1. Finfish may be taken recreationally by hook and line only.
2. Finfish and kelp may be taken commercially.

(40) Redwood Shores State Marine Park.

(A) This area consists of waters below the mean high tide line within the Redwood Shores Ecological Reserve.

(B) Take of all living marine resources is prohibited except the recreational hook and line take of species other than marine aquatic plants.

(C) Only lightweight, hand-carried boats may be launched or operated within the park.

(41) Bair Island State Marine Park.

(A) This area consists of waters below the mean high tide line within the Bair Island Ecological Reserve.

(B) Take of all living marine resources is prohibited except the recreational hook and line take of species other than kelp from shore only.

(C) Boating, swimming, wading, and diving are prohibited within the park.

(D) No person, except state and local law enforcement officers, fire suppression agencies and employees of the department in the performance of their official duties or persons possessing written permission from the department, shall enter this park during the period February 15 through May 20.

(E) Waterfowl may be taken in accordance with the general waterfowl regulations (Sections 502, 550, 551, and 552).

(42) Egg (Devil's Slide) Rock to Devil's Slide Special Closure. Special restrictions on boating and access apply as follows.

(A) A special closure is designated from the mean high tide line to a distance of 300 feet seaward of the mean lower low tide line of any shoreline of any of the three rocks comprising Egg (Devil's Slide) Rock, located in the vicinity of 37° 34.64'N. lat. 122° 31.29'W. long.; 37° 34.66'N. lat. 122° 31.32'W. long.; and 37° 34.63'N. lat. 122° 31.29'W. long.; and the area bounded by the mean high tide line and straight lines connecting the following points in the order listed:

37° 34.74'N. lat. 122° 31.08'W. long.;

37° 34.72'N. lat. 122° 31.31'W. long.;

37° 34.60'N. lat. 122° 31.33'W. long.; and

37° 34.52'N. lat. 122° 31.21'W. long.

(B) Transit in between the rock and the mainland between these points is prohibited at any time.

(C) No person except department employees or employees of the United States Fish and Wildlife Service, U.S. Bureau of Land Management, National Oceanic and Atmospheric Administration, or United States Coast Guard, in performing their official duties, or unless permission is granted by the department, shall enter this area.

(43) Montara State Marine Reserve.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed except where noted:

37° 32.70'N. lat. 122° 31.00'W. long.;

37° 32.70'N. lat. 122° 34.91'W. long.; thence southward along the three nautical mile offshore boundary to

37° 30.00'N. lat. 122° 34.61'W. long.; and

37° 30.00'N. lat. 122° 29.93'W. long.

(B) Take of all living marine resources is prohibited.

(44) Pillar Point State Marine Conservation Area.

(A) This area is bounded by the mean high tide line and straight lines connecting the following