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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.

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

**PETITIONERS' REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF OPENING
BRIEF**

**VOLUME I: Request, Memorandum, and
Exhibits A-R**

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

Complaint Filed: January 27, 2011

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REQUEST FOR JUDICIAL NOTICE

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Evidence Code sections 452(c), 452(d) and 453, Petitioners United Anglers of Southern California, Coastside Fishing Club and Robert C. Fletcher ("Petitioners") hereby request that the Court take judicial notice of the legislative history of the Marine Managed Areas Improvement Act, Public Resources Code sections 36600 et seq. ("MMA Improvement Act"); the California Marine Life Protection Act ("MLPA") Initiative Master Plan Framework adopted by the California Fish and Game Commission on August 22, 2005; an order of the Sacramento County Superior Court in an action brought by Petitioner Robert C. Fletcher against the MLPA Initiative—Blue Ribbon Task Force ("BRTF") and the MLPA Initiative—Science Advisory Team and Master Plan Team ("Master Plan Team"); and California Public Records Act (Govt. Code §§ 6250 et seq.) requests to certain state agencies and their responses thereto. Each is attached hereto as follows:

Exhibit A Background Information Request, AB 2800, from Assembly Committee on Water, Parks and Wildlife (the Assembly Committee to which AB 2800 was assigned), to Assembly member Shelley, author of AB 2800, and response prepared by Assembly member Shelley's office, part of the legislative bill file of the Assembly Committee on Water, Park and Wildlife on Assembly Bill 2800 produced by the Legislative Intent Service, Inc. (also attached is the Declaration of Maria A. Sanders, Legislative Intent Service, Inc., authenticating the documents provided).

Exhibit B California MLPA Initiative Master Plan Framework and appendices, adopted by the California Fish and Game Commission on August 22, 2005.

Exhibit C October 26, 2010 Order on Petition for Writ of Mandate and Motion for Judgment on the Pleadings, "Fletcher v. Blue Ribbon Task Force of the MLPA Initiative, et al.," Sacramento County Superior Court Case No. 34-2010-80000555.

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- Exhibit P December 23, 2010 letter to the California Fish and Game Commission seeking public records pursuant to the California Public Records Act.
- Exhibit Q December 30, 2010 letter response of the Fish and Game Commission to Exhibit P, the December 23, 2010 Public Records Act request.
- Exhibit R January 20, 2010 [sic, 2011] letter from the Fish and Game Commission identifying petitions responsive to Exhibit P, the December 23, 2010 Public Records Act request.
- Exhibit S February 7, 2011 letter from the Fish and Game Commission enclosing copies of documents identified in the Fish and Commission's letter of January 20, 2011 (with enclosures).

MEMORANDUM SUPPORTING REQUEST FOR JUDICIAL NOTICE

An administrative agency's adoption of regulations intended to govern future decisions is a quasi-legislative action reviewable by an action for declaratory relief or for traditional mandamus. *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 168-169. In a challenge to quasi-legislative actions by traditional mandamus, extra-record evidence is admissible for the purpose of demonstrating procedural unfairness and agency misconduct. *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575. Additionally, in an action for declaratory relief under Government Code section 11350, the Court may consider both "[t]he rulemaking file prepared under Section 11347.3" and evidence "that is required to be included in the rulemaking file but is not included in the rulemaking file, for the sole purpose of proving its omission." Gov. Code § 11350(d).

This case is about the California Fish and Game Commission's (the "Commission's") failure to follow statutorily-mandated procedures in adopting the North Central and South Coast MPA Regulations (the "MPA Regulations"), and evidence to show those failures is admissible. The Court may take judicial notice of the attached documents that are relevant to the Commission's misconduct and procedural omissions as authorized by Evidence Code section 452. *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.

1 **A. Legislative History of the MMA Improvement Act**

2 The Commission must be delegated the authority to adopt enforceable regulations from the
3 Legislature, and must cite the particular statutes authorizing its proposed regulation in its Notice
4 of Proposed Regulatory Action. Gov. Code § 11346.5(a)(2). For the MPA Regulations, the
5 Commission cites, among other provisions, Public Resources Code section 36725 and Fish and
6 Game Code section 1591 as ostensibly providing the statutory authority to the Commission to
7 adopt the regulations. Section 36725 is part of the MMA Improvement Act, and authorizes the
8 Commission to designate, delete or modify certain marine managed areas, or "MMAs" (marine
9 protected areas, or "MPAs" are types of MMAs), and regulate commercial and recreational
10 fishing and any other taking of marine species in MMAs. Fish and Game Code section 1591, part
11 of the bill (AB 2800) which became the MMA Improvement Act, incorporates the MMA
12 Improvement Act and requires that "[s]tate marine recreational management areas . . . , state
13 marine reserves and state marine conservation areas shall be designated, deleted, or modified by
14 the commission pursuant to that act." Fish & Game Code § 1591(b).

15 The MMA Improvement Act was enacted by the Legislature to correct problems of
16 disorganization and lack of purpose, management measures and enforcement that had plagued
17 California's MMAs, and establishes the State Interagency Coordinating Committee (the
18 "Coordinating Committee") to review proposals for new or amended MMAs to ensure
19 consistency and completeness of proposals. Pub. Resources Code §§ 36601, 36800. Proposals
20 for MMAs received by a designating entity (i.e., the Commission, the State Parks and Recreation
21 Commission and the State Water Resources Control Board (*id.*, § 36602)) must be forwarded to
22 the Coordinating Committee to initiate the review process. *Id.*, § 36900. Thus, the Legislature
23 coordinated the activities of the agencies allowed to designate MMAs through the Coordinating
24 Committee. In adopting the MPA Regulations, the Commission failed to comply with the MMA
25 Improvement Act—it never sought review by the Coordinating Committee of the proposed MPAs
26 added or amended by the MPA Regulations.

27 The legislative history of the MMA Improvement Act, explaining the Legislature's reasons
28 for requiring review by the Coordinating Committee, is relevant to whether review by the

1 Coordinating Committee, as required by sections 36800 and 36900 of the MMA Improvement, is
2 mandatory and whether the Commission's failure to obtain that review invalidates the MPA
3 Regulations. The bill's author's response to the Assembly Committee on Water, Parks and
4 Wildlife Background Information Request, attached hereto as Exhibit A, explains that the various
5 designating agencies' failure to work together in designating and managing MMAs was one of the
6 express deficiencies to be corrected by the MMA Improvement Act, and that the Coordinating
7 Committee, the coordinating mechanism chosen by the Legislature, was essential. This
8 document is part of the legislative history of AB 2800, the MMA Improvement Act (*see*
9 Declaration of Maria A. Sanders, Legislative Intent Service, attached to the Assembly Committee
10 report), and may be judicially noticed under Evidence Code section 452(c). "The court will take
11 judicial notice of the legislative history of a statute in order to ascertain the purpose of and
12 meaning of an ambiguous statute. [Citation.] This includes reports of Senate and Assembly
13 committees." *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45 fn.9; *see*
14 *also Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133
15 Cal.App.4th 26, 33 (Assembly Committee on Water, Parks and Wildlife documents on a
16 particular bill are cognizable legislative history); *Arce v. Kaiser Foundation Health Plan, Inc.*
17 (2010) 181 Cal.App.4th 471, 484 (judicial notice of reports of legislative committees and
18 commissions as part of statute's legislative history).

19 **B. Master Plan Framework Adopted by the Commission**

20 The MLPA Initiative Master Plan Framework and appendices, attached hereto as Exhibit
21 B, is a document prepared pursuant to the August 27, 2004 Memorandum of Understanding
22 among the California Resources Agency, the California Department of Fish and Game, and the
23 Resources Legacy Fund Foundation for the California Marine Life Protection Act Initiative
24 ("First MOU"), to guide the development of networks of MPAs within individual regions of the
25 state. (North Central Coast Administrative Record at Bates-labeled pages 684-699 (hereafter,
26 NCCAR[xx]).) "'Master Plan Framework' means a document that addresses certain of the matters
27 set forth in [MLPA] Sections 2853(c) and 2856(a)(2), as determined by the [BRTF] . . . at a
28 programmatic level for the purpose of providing a framework for developing succeeding phases

1 of the Master Plan." (NCCAR 685) Official acts of state agencies include records, reports and
2 orders of administrative agencies, and documents in the agency's files. *Rodas v. Spiegel* (2001)
3 87 Cal.App.4th 513, 518; *Hogen v. Valley Hosp.* (1983) 147 Cal.App.3d 119, 125; *Munoz v. State*
4 (1995) 33 Cal.App.4th 1767, 1773, fn.2. The Master Plan Framework, downloaded from the
5 Department of Fish and Game's website at <http://www.dfg.ca.gov/mlpa/pdfs/mpf082205.pdf>
6 (framework) and <http://www.dfg.ca.gov/mlpa/pdfs/mpfapp082205.pdf> (appendices), was adopted
7 by the Commission on August 22, 2005 (NCCAR 61), and is judicially noticeable as an official
8 act of the Commission under Evidence Code section 452(c).

9 Although the Master Plan Framework was purportedly superseded by the draft Master Plan
10 adopted by the Commission in February, 2008, the process by which the North Central Coast
11 MPAs were adopted began with the Second MOU in January, 2007 while the Master Plan
12 Framework still controlled the process. Numerous meetings of the BRTF, Science Advisory
13 Team, Regional Stakeholder Groups and public workshops occurred throughout 2007, during
14 which alternative networks of MPAs were developed in accordance with the guidelines provided
15 by the Master Plan Framework. (NCCAR 1145-1148.) Indeed, the ISOR states that each
16 alternative MPA network "meets the goals and guidelines of the MLPA to varying degrees, and
17 attempts to adhere to the Science Advisory Team (SAT) guidelines in the Master Plan
18 Framework to the extent possible." (NCCAR 3055.)

19 Not only was the Master Plan Framework part of the process by which the MPA
20 Regulations were adopted and is relevant on that basis alone, it is also relevant to show that the
21 Commission understood that, under the MLPA, a final master plan and implementing regulations
22 could be adopted only after networks of MPAs had been proposed for all regions of the coast.
23 (Ex. B, p. RJN 032.) Additionally, when compared to the actual process undertaken in adopting
24 the MPA Regulations in 2007-2011, the 2005 Master Plan Framework shows how far that actual
25 process diverged from the requirements of the MLPA.

26 **C. Order of the Sacramento County Superior Court**

27 On February 19, 2010, Petitioner Robert C. Fletcher requested public records pursuant to
28 the California Public Records Act, Govt. Code §§ 6250 et seq., from the Resources Agency, the

1 Department of Fish and Game, the Commission, the BRTF and the Master Plan Team. The
2 Resources Agency, the Department and the Commission each responded, but the BRTF and
3 Master Plan Team refused to respond, claiming they were not "state agencies" within the meaning
4 of Government Code section 6252(f). (Declaration of David D. Cooke ("Cooke Decl."), ¶ 4, filed
5 concurrently herewith.) Petitioner Fletcher sought a writ of mandate from the Sacramento
6 County Superior Court compelling the BRTF and Master Plan Team to respond. In its order
7 issued October 26, 2010 (the "Order," attached hereto as Exhibit C), the court found that the
8 BRTF and the Master Plan Team functioned "as components of the state administrative structure
9 for the purpose of implementing the MLPA" and were "'state bodies' engaged in state
10 governmental functions." (Ex. C, p. RJN 196.) The Order is judicially noticeable under
11 Evidence Code section 452(d) as a court record, and is relevant to whether the BRTF was acting
12 as a state agency under the MLPA, or could be considered an interested member of the public and
13 thereby permitted, as an "interested party," to "petition" the Commission under Fish and Game
14 Code section 2861(a) to add, delete or modify MPAs before a final master plan was adopted.

15 **D. State Agency Responses to Public Records Act Requests**

16 As noted, the Commission cites Public Resources Code section 36725 and Fish and Game
17 Code section 1591 as statutes authorizing it to adopt the MPA Regulations. But under both
18 provisions, any proposal for new or amended MMAs must be reviewed by the Coordinating
19 Committee. The administrative record contains no evidence that the Coordinating Committee
20 reviewed or took any other action concerning the MPAs established by the MPA Regulations.
21 (Cooke Decl., ¶¶ 10, 11.) Evidence to prove the Commission's failure to comply with this
22 statutory requirement is relevant and admissible.

23 The Commission has also cited Fish and Game Code section 2861 as one of the statutes
24 authorizing it to adopt the MPA Regulations, but under section 2861(a), the Commission is only
25 authorized to "receive, consider, and promptly act upon petitions from any interested party, to
26 add, delete, or modify MPAs" The rulemaking file, part of the administrative record, must
27 contain such petitions (Govt. Code § 11347.3(b)(1)), and it contains none. (Cooke Decl., ¶ 12.)
28 Evidence to prove the absence of any such petition is relevant and admissible.

1 On December 23, 2010, Petitioners requested public records pursuant to the California
2 Public Records Act, Govt. Code §§ 6250 et seq., from the state agency members of the MMA
3 Improvement Act's Coordinating Committee (the Resources Agency, the Department of Parks
4 and Recreation, the State Water Resources Control Board, the Coastal Commission, the
5 Department of Fish and Game, and the State Lands Commission), seeking records of activities of
6 the Coordinating Committee after August 27, 2004 in connection with proposals for new or
7 amended MMAs in the North Central Coast, South Coast or North Coast study regions. (Exs. D,
8 F, H, J, L, N, P.) Also on December 23, 2010, Petitioners sought records from the Commission
9 constituting or pertaining to actions on petitions received by the Commission from any interested
10 party, as that phrase is used in Fish and Game Code section 2861(a), to add, delete, or modify
11 MPAs in the North Central Coast, South Coast, or North Coast study regions. The request sent to
12 the Commission also sought records pertaining to the Commission's adoption of site proposal
13 guidelines pursuant to Pub. Res. Code § 36870, and to its act, if any, of forwarding proposals for
14 designation of MPAs within the North Central Coast, South Coast or North Coast study regions
15 to the Coordinating Committee. (Ex. P.) The responses are as follows:

- 16 • The Resources Agency responded that if any responsive documents not previously
17 produced were found to exist, it would notify Mr. Cooke. (Exhibit E.) The Resources
18 Agency never notified Mr. Cooke that responsive documents had been located. (Cooke
19 Decl., ¶ 6.)
- 20 • The Department of Parks and Recreation "found no records responsive to [the]
21 request." (Exhibit G.)
- 22 • The State Water Resources Control Board responded that it "does not have any records
23 that are responsive to [the request]" and that its "staff does not recall any instances in
24 which new or amended [MMAs] . . . were considered or discussed by the State
25 Interagency Coordinating Committee." (Exhibit I.)
- 26 • The Coastal Commission responded that it "found no documents responsive to any of
27 the seven categories of requested records." (Exhibit K.)

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- The Department of Fish and Game responded that it would contact Mr. Cooke after locating any responsive documents. The Department never notified Mr. Cooke that responsive documents had been located. (Cooke Decl., ¶ 6.)
- The State Lands Commission responded by attaching responsive documents to a January 6, 2011 cover letter. (Exhibit O.) The only references to the Coordinating Committee are contained in two email strings, one in 2003 and one in 2004, concerning the need for a lease from the State Lands Commission when designating MMAs, an issue discussed by the Coordinating Committee. Also enclosed is a 2004 email re "marine protected area leases" pertaining to re-naming of established MPAs. None of the documents produced pertain to any meeting of the Coordinating Committee or review of proposed MPAs in the North Central or South Coast regions.
- The Commission responded in a letter dated December 30, 2010, that it would contact Mr. Cooke when it had located responsive documents (Exhibit Q), and in a letter dated January 20, 2010 [sic, 2011] that it had identified six "petitions." (Exhibit R.) Those petitions were enclosed with a February 7, 2011 cover letter. (Exhibit S.) None of the documents are a petition by an interested party to add, delete or modify MPAs as required by Fish and Game Code section 2861(a), and none are in the form required for a petition under Government Code section 11340.6. Rather, these "petitions" may be described as: (1) a collection of signatures expressing concern over human health effects resulting from the site selection of fishing closures in Palos Verdes; (2) a collection of signatures against fishing closures in Laguna Beach and Dana Point and in support of a proposal for partial closure in Central Laguna Beach; (3) a collection of signatures against fishing closures on the North Palos Verdes Peninsula and in support of a proposal for partial closures in Southern-Central Palos Verdes; (4) a request by the Kashia Band of Pomo Indians to the Commission, and supporting documents, seeking a modification to the proposed regulation and an emergency amendment to the adopted regulation establishing an MPA at Stewarts Point State Marine Reserve in the North Central Coast to allow tribal activities (these documents bear dates of April and June,

1 2010, after the Commission's adoption of the North Central Coast Regulations); (5) a
2 collection of signatures supporting High Tech High Sierra Club's Petition to Support
3 MLPA Plus, "the largest agreement of reserves . . . creat[ing] a reserve from
4 Windansea beach to the Crystal Pier" (in San Diego County); and (6) a collection of
5 signatures supporting a state marine reserve at Naples Reef in Santa Barbara County.
6 The Commission produced no documents pertaining to the Coordinating Committee.
7 (Cooke Decl., ¶ 9.)

8 The responses from these state agencies may be judicially noticed as an official act of a
9 state agency (Evid. Code § 452(c)), which includes records, reports and orders of administrative
10 agencies, and documents in the agency's files. *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518;
11 *Hogen v. Valley Hosp.* (1983) 147 Cal.App.3d 119, 125; *Munoz v. State* (1995) 33 Cal.App.4th
12 1767, 1773, fn.2. In particular, responses by public agencies to Public Records Act requests
13 documenting both official acts and demonstrating the non-occurrence of certain events are
14 judicially noticeable. See *Citizens for Responsible Open Space v. San Mateo County Local*
15 *Agency Formation Commission* (2010) 159 Cal.App.4th 717, 731 fn.10 (judicial notice of
16 agency's response to Public Records Act request, stating that none of the requested records were
17 found).

18 Petitioners respectfully request the Court grant judicial notice of each of the above
19 documents.

20 Dated: August 19, 2011

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