

## **TITLE 14. Fish and Game Commission Notice of Proposed Changes in Regulations**

**NOTICE IS HEREBY GIVEN** that the Fish and Game Commission (Commission), pursuant to the authority vested by sections 200, 205(c), 265, 399, 1590, 1591, 2860, 2861 and 6750 of the Fish and Game Code and sections 36725(a) and 36725(e) of the Public Resources Code and to implement, interpret or make specific sections 200, 205(c), 265, 399, 2861, 5521, 6653, 8420(e) and 8500 of said Code and sections 36700(e), 36710(e), 36725(a) and 36725(e) of the Public Resources Code, proposes to amend Section 632, Title 14, California Code of Regulations, relating to incidental take authorization for work on pre-existing artificial structures in Marine Protected Areas and Marine Managed Areas.

### **Informative Digest/Policy Statement Overview**

Implemented in 1999, the Marine Life Protection Act (MLPA) (Fish and Game Code sections 2850-2863) required California to reevaluate all existing marine protected areas (MPAs), which were at that time largely ineffective and disconnected, and design new MPAs that together function as a comprehensive statewide network. While MPAs are a subset of marine managed areas (MMAs) throughout this informative digest the more common term “MPA” is used as an umbrella to refer to all types of protected areas, and include three MPA classifications (state marine reserve [SMR], state marine conservation area [SMCA], state marine park [SMP]) and one MMA classification (state marine recreational management area [SMRMA]). Planning for California’s Statewide MPA Network occurred through a sequential series of four regional public planning processes from 2004 to 2012.

During the designation process in the north and south coast regions it was recognized that some MPAs being considered for designation had pre-existing artificial structures within them. The continued operation and maintenance of these pre-existing artificial structures would result in incidental take of marine resources, so regulations were specifically written to allow for their continued operation and maintenance as an allowed take activity within these specific MPAs.

However, following implementation the MPA Network, it was learned that not all structures were identified at the time of regional MPA planning. As such, there remain pre-existing artificial structures throughout the statewide MPA Network requiring operation and maintenance activities that conflict with their current individual MPA regulations.

To allow for continued operation, maintenance, repair, removal, and replacement of pre-existing artificial structures that existed prior to establishment of MPAs, the Department is proposing to add three new subsections to section 632: 1) define what qualifies as a pre-existing artificial structure, 2) define what is an incidental take buffer zone around pre-existing artificial structures for maintenance and repair, and 3) identification and permit or lease requirements for pre-existing artificial structure activities. In addition, the Department is proposing to designate areas within SMRs where pre-existing artificial structures occur and accompanying buffer zone will exist as SMCAs to allow for incidental take during maintenance activities. The Department is also proposing to add a single subsection to reference when citing any MPA take violation.

The following is a summary of the proposed language change for Section 632:

- Current subsections 632(a)(1)(A) through 632(a)(1)(D) provide definitions and allowable uses for each designation type, which will be amended as follows:
  - Proposed language for SMRs will now include: “Notwithstanding the designation specified in this section, the boundaries of all state marine reserves exclude any pre-existing artificial

structure when that structure is being actively maintained, repaired, or operated by the leaseholder(s), permittee(s), or their agent(s).”

- Proposed language for SMPs, SMCAs, and SMRMAs will now include: “Take of marine resources incidental to the operation, maintenance, repair, removal, and replacement within the existing footprint of pre-existing artificial structures is allowed in [*corresponding designation*] pursuant to any required federal, state, and local permits and leases or if otherwise authorized through any applicable federal, state, and local law. This subsection does not authorize retention or possession of any marine resource taken pursuant to this subsection.”
  - Proposed language for SMCAs will also include: “Any area within a state marine reserve that is excluded from the boundaries of the state marine reserve pursuant to subsection 632(a)(1)(A)(1) is a state marine conservation area.”
- New subsection 632(a)(1)(E) will provide a single code section for wildlife officers to cite violations:
  - Proposed language is as follows: “It is unlawful to injure, damage, take, retain, or possess any living, geological, or cultural marine resource in any marine managed area except as otherwise specified in subsections 632(a)(1)(A)-(D).”
- New subsection 632(a)(13) will define what qualifies as a pre-existing artificial structure:
  - Proposed language is as follows: “For the purpose of this section, “pre-existing artificial structure” refers to any structure manufactured, created, installed, or constructed in state waters pursuant to any required federal, state, and local permits, leases, or other authorizations, including an incidental take buffer zone as defined in subsection 632(a)(14). Any structure constructed and installed pursuant to public safety concerns as defined in subsection 632(a)(10) will be considered a pre-existing artificial structure.”
- New subsection 632(a)(14) will define what is considered an incidental take buffer zone:
  - Proposed language is as follows: “Incidental Take Buffer Zone for Pre-Existing Artificial Structures (Incidental Take Buffer Zones). For the purpose of this section, an “incidental take buffer zone” is established in the peripheral area surrounding a pre-existing artificial structure as defined in subsection 632(a)(13). The incidental take buffer zone shall include the entirety of the surrounding water column within 250 linear feet in any direction from the pre-existing artificial structure, not including areas above the mean high tide line.”
- New subsection 632(a)(15) will define identification and permit or lease requirement for pre-existing artificial structure activities:
  - Proposed language is as follows: “At all times, when conducting any operation, maintenance, repair, removal or replacement activity of a pre-existing artificial structure authorized by a federal, state, or local permit or lease, the leaseholder(s), permittee(s), and their agent(s) shall carry in their possession a valid government-issued form of identification, and a digital or printed copy of the permit or lease. The only acceptable forms of identification are driver's licenses or other photo identification cards issued by a U.S. state, a valid photo identification card issued by a federally recognized tribe as specified in subsection 632(a)(11), or an international passport. Valid identification and a copy of the lease or permit shall be exhibited immediately upon demand by any person authorized by the department to enforce this

regulation.”

## Benefits of the Proposed Regulation

The proposed amendments and subsection additions to Section 632 will allow for incidental take of marine resources in discrete areas related to the operation, maintenance, repair, removal, and replacement of a pre-existing artificial structure located within an MPA, without having to amend MPA designations and take regulations within specific MPAs statewide. These proposed changes would align MPA regulations with original design intention to consider existing leases, permits, and any other legal entitlements that current regulations may impair. These proposed changes would also simplify citing process for wildlife officers enforcing MPA regulations. This proposed regulatory amendment would not affect fishing regulations in MPAs.

## Consistency and Compatibility with Existing State Regulations

The proposed regulations are consistent with regulations concerning sport and commercial fishing found in Title 14, CCR. The State Water Resources Control Board may designate State Water Quality Protection Areas and the State Park and Recreation Commission may designate SMRs, SMCAs, SMRMAs, SMPs and State Marine Cultural Preservation Areas; however, only the Commission has authority to regulate commercial and recreational fishing and any other taking of marine species in MMAs. Department staff has searched the CCR and has found no other regulations pertaining to authorized activities in marine protected areas and therefore has determined that the proposed amendments are neither inconsistent, nor incompatible, with existing state regulations.

## Public Participation

### Comments Submitted by Mail or Email

It is requested, but not required, that written comments be submitted on or before **November 30, 2023** at the address given below, or by email to [FGC@fgc.ca.gov](mailto:FGC@fgc.ca.gov). **Written comments mailed, or emailed to the Commission office, must be received before 12:00 noon on December 8, 2023.** If you would like copies of any modifications to this proposal, please include your name and mailing address. Mailed comments should be addressed to Fish and Game Commission, PO Box 944209, Sacramento, CA 94244-2090.

### Meetings

**NOTICE IS GIVEN** that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held in River Lodge Conference Center, 1800 River Walk Drive, Fortuna, California, which will commence at **8:30 a.m. on Tuesday August 22, 2023**, and may continue at **8:30 a.m. on Wednesday August 23, 2023**. This meeting will also include the opportunity to participate via webinar/teleconference. Instructions for participation in the webinar/teleconference hearing will be posted at [www.fgc.ca.gov](http://www.fgc.ca.gov) in advance of the meeting or may be obtained by calling 916-653-4899. Please refer to the Commission meeting agenda, which will be available at least 10 days prior to the meeting, for the most current information.

**NOTICE IS ALSO GIVEN** that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held in San Diego, California, which will commence at **8:30 a.m. on Wednesday December 13, 2023**, and may continue at **8:30 a.m. on Thursday December 14, 2023**. The exact location of this meeting has not yet been determined. As soon as this information is available but not less than thirty days before the hearing, a continuation notice will be sent to interested and affected parties providing the exact location. The continuation notice will also be published in the California Regulatory Notice Register and will be published on the Commission's

website. This meeting will also include the opportunity to participate via webinar/teleconference. Instructions for participation in the webinar/teleconference hearing will be posted at [www.fgc.ca.gov](http://www.fgc.ca.gov) in advance of the meeting or may be obtained by calling 916-653-4899. Please refer to the Commission meeting agenda, which will be available at least 10 days prior to the meeting, for the most current information.

### **Availability of Documents**

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulation in underline and strikeout format can be accessed through the Commission website at [www.fgc.ca.gov](http://www.fgc.ca.gov). The regulations as well as all related documents upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, Melissa Miller-Henson, Executive Director, Fish and Game Commission, 715 P Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct requests for the above-mentioned documents and inquiries concerning the regulatory process to Melissa Miller-Henson or Maurene Trotter at [FGC@fgc.ca.gov](mailto:FGC@fgc.ca.gov) or at the preceding address or phone number. **Amanda Van Diggelen, Environmental Scientist, Department of Fish and Wildlife, [R7RegionalMgr@wildlife.ca.gov](mailto:R7RegionalMgr@wildlife.ca.gov) and/or (562) 522-390. has been designated to respond to questions on the substance of the proposed regulations.**

### **Availability of Modified Text**

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from the agency program staff.

### **Impact of Regulatory Action/Results of the Economic Impact Assessment**

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The proposed amendments provide existing lease holders permission for incidental take of marine resources in accordance with operation, maintenance, and repair of their pre-existing structure within an MPA, pursuant to other required federal, state, and local permits. Absent the proposed amendments, pre-existing artificial structures may not have been able to fully sustain their original uses, and more quickly depreciate. This regulatory action minimizes an impediment to the operation, maintenance, and repair of pre-existing structures. It does not impose nondiscretionary compliance costs on affected leaseholders (or parties) and

has no effect on any costs incurred by businesses nor other agency's permitting processes. The ability of California businesses to compete with businesses in other states is not affected as the affected businesses are specific to their California location.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California; Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:

The Commission does not anticipate any direct impacts on the elimination of jobs or the elimination of existing businesses. While the proposed amendment will not increase or decrease recreational or commercial opportunities, it has the potential to spur the creation of new businesses and jobs or the expansion of existing businesses related to the maintenance and repair of pre-existing artificial structures within MPAs.

The Commission anticipates potential indirect benefits to the health and welfare of California residents, worker safety, and the State's environment as this action removes an impediment to the provision of necessary maintenance and repairs that could lessen potential harm to the public, workers, and to the environment.

- (c) Cost Impacts on a Representative Private Person or Business:

The Commission is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. The proposed regulations are anticipated to minimize the potential for less cost-effective means to handle potential limitations on operations that lease holders may have encountered in the future.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

- (e) Nondiscretionary Costs/Savings to Local Agencies:

None.

- (f) Programs Mandated on Local Agencies or School Districts:

None.

- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code:

None.

- (h) Effect on Housing Costs:

None.

## **Effect on Small Business**

It has been determined that the adoption of these regulations may affect small business. The Commission has drafted the regulations in Plain English pursuant to Government Code Sections 11342.580 and 11346.2(a)(1).

## **Consideration of Alternatives**

The Commission must determine that no reasonable alternative considered by the Commission, or that has otherwise been identified and brought to the attention of the Commission, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

FISH AND GAME COMMISSION

Dated: July 18, 2023

Melissa Miller-Henson  
Executive Director