

State of California
Fish and Game Commission
Final Statement of Reasons for Regulatory Action

Amend Section 632(a)(1); Add subsections 632(a)(1)(E), (a)(13), (a)(14), and (a)(15)
Title 14, California Code of Regulations

Re: Incidental Take Authorization for Work on Pre-Existing Artificial Structures within
Marine Protected Areas and Marine Managed Areas

I. Dates of Statements of Reasons

- (a) Initial Statement of Reasons Date: April 11, 2023
- (b) Pre-adoption Statement of Reasons Date: November 28, 2023
- (c) Final Statement of Reasons Date: ~~January 16, 2024~~ **March 13, 2024**

Dates and Locations of Scheduled Hearings

(a) Notice Hearing

Date: June 15, 2023 Location: Sacramento, CA

(b) Discussion Hearing

Date: August 23, 2023 Location: Fortuna, CA

(c) Adoption Hearing

Date: December 14, 2023 Location: San Diego, CA

II. Update

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action.

3/13/24

Subsequent to the Notice of Proposed Action, in subsection 632 (a)(1)(A) the term “designation” was replaced by “classification” to align with correct terminology used in statute (Section 1591, Fish and Game Code).

III. Summary of Primary Considerations Raised in Support of or Opposition to the Proposed Actions and Reasons for Rejecting Those Considerations

Three public comments were received during the public comment period. These three comments were described and responded to in the Pre-adoption Memo and table of Public Comment Responses (see attached).

IV. Description of Reasonable Alternatives to Regulatory Action

(a) Alternatives to Regulation Change

No regulatory alternatives were identified by or brought to the attention of Commission staff that would have the same desired regulatory effect.

(b) No Change Alternative

The no change alternative would leave many marine protected areas (MPAs) and marine managed areas (MMAs) that currently have pre-existing artificial structures in conflict with current regulations when operation, maintenance, repair, removal, or replacement arise. Without changing the regulations either by 1) a legislative amendment to the existing definitions of MPAs and MMAs is needed and/or 2) MPA and MMA designation changes, to allow for maintenance, operation, repair, removal, and replacement of pre-existing artificial structures.

(c) Consideration of Alternatives

In view of information currently possessed, no alternative considered would be more effective in addressing the current issues, and less burdensome on the responsible parties who hold valid permits or leases for maintenance of pre-existing infrastructures than the adopted regulation, or equally effective in implementing the statutory policy or other provision of law.

(d) The Commission did not identify any alternatives to the regulation that would lessen the any adverse impact on small business.

V. Impact of Regulatory Action

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

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, 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.

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

None. No additional nondiscretionary costs, or savings are anticipated for State agencies as a result of this regulation change. The Department law enforcement costs are not anticipated to change from the existing level of monitoring and enforcement in the affected SMRMA, SMR, or MPA areas.

- (e) Nondiscretionary Costs/Savings to Local Agencies

None. No nondiscretionary costs, or savings are anticipated for local agencies as a result of this regulation change.

(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.

Updated 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, while this recognition was unique to the north and south coast planning regions, not all structures in those regions were identified at the time of MPA implementation; this is coupled with no recognition of pre-existing structures in the north central and central coast planning regions. So there remain pre-existing artificial structures throughout the statewide MPA Network requiring operation and maintenance activities that conflict with their 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 four new subsections to section 632: 1) to provide Department wildlife enforcement officers a single section to reference when citing any MPA take violation, 2) define what qualifies as a pre-existing artificial structure, 3) define what is an incidental take buffer zone around pre-existing artificial structures for maintenance and repair, and 4) identification and permit or lease requirements for pre-existing artificial structure activities. The Department is also proposing to designate areas within SMRs where artificial structures and buffer zone exist as SMCAs and allow for incidental take related to maintenance activities. This proposed regulation amendment would not affect current fishing regulations.

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

Update: On December 14, 2023, the Commission adopted the proposed regulations set forth in the Initial Statement of Reasons (ISOR) dated April 11, 2023. The adopted regulations address maintenance needs for infrastructure in place prior to MPA designation without seeking exemptions on a case-by-case basis. The adopted regulations align MPA regulations with original design intention to consider existing leases, permits, and any other legal entitlements that current regulations may impair. The adopted regulations simplify citing process for wildlife officers enforcing MPA regulations. Following the adoption hearing, subsections 632(a)(1)(A)1. and 632(a)(1)(C)1. were amended for nonsubstantial changes.

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action.

Update: On March 13, 2024, the Commission made changes to this statement as indicted in bold. The Commission also provides this explanation regarding why the Commission did not contact the State Park and Recreation Commission during its rulemaking process. The Parks Commission has not designated any areas and has not done so because the Parks and Recreation attorneys advised the California Parks Commission staff that the Parks Commission does not have authority to adopt regulations, despite the apparent authority in Public Resources Code 36725.

The language referenced earlier in Fish and Game Code 1590 and Public Resources Code 36725, states the Fish and Game Commission has an obligation to “consult with, and secure concurrence from,” the Parks Commission when modifying “areas designated by” the Parks Commission. Note the code section use of the past tense of “designate.” Since, the Parks Commission has not designated any area under the MMAIA, the Fish and Game Commission has no responsibility to consult in areas designated in 14 CCR 662.