

**Marine Life Protection Act Initiative
Public Comments Submitted
through January 11, 2011**

MESSAGE FROM YUROK LEGAL

From: Robert Tennyson [mailto:leytyn@gmail.com]
Sent: Tuesday, January 11, 2011 5:04 PM
To: Melissa Miller-Henson
Cc: John Corbett; Alicia Mcquillen; Kelly Sayce
Subject: Re: Language

Melissa,

It was great talking with you. Here's the latest consolidated version. Look forward to talking more soon.

Best,

Robert

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Robert Tennyson

Visiting Scholar
Center for the Study of Law & Society
University of California, Berkeley School of Law

MESSAGE FROM YUROK LEGAL

----- Forwarded message -----

From: Robert Tennyson <leytyn@gmail.com>
Date: Tue, Jan 11, 2011 at 9:09 AM
Subject: Language
To: kelly@strategicearth.com

Hi Kelly,

I spoke with John Corbett this morning and he is uncertain whether he sent out a second draft language change to you folks yesterday. Since I have a copy, I thought I'd forward it along for your perusal. Keep me apprised of anything I need to know.

Best,
Robert

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Robert Tennyson

Visiting Scholar
Center for the Study of Law & Society
University of California, Berkeley School of Law

COMPARATIVE SITES ASSUMPTION REVISED LANGUAGE

PROPOSED CHANGES:

Remove the following assumption language from the level of protection conceptual language discussion in the *Draft Methods Used to Evaluate Marine Protected Area Proposals in the North Coast Study Region*:

“For the purpose of comparison, an unharvested system is a marine reserve....”

And replace it with either:

(1) “For the purpose of comparison, an unharvested system is an actual marine reserve that has many of the same functional features as the proposed marine protected area and that has very little or no ~~is successful in eliminating~~ fishing ~~and~~ or other extractive uses ~~within the MPA~~”

or,

(2) “For the purpose of comparison, an unharvested system is a hypothetical marine reserve within the same region as the marine protected area with the same relevant features as the MPA and with the assumption that some disallowed fishing or extractive uses occur within the MPA”

or,

(3) “For the purpose of comparison, an unharvested system is a hypothetical marine reserve within the same region as the marine protected area with the same relevant features as the MPA and that is presumed successful in eliminating fishing and other extractive uses within the MPA, subject to and rebuttable by evidence to the contrary.”

DISCUSSION

In applying the conceptual model for determining the level of protection (LOP) for a marine protected area (MPA), the science advisory team (SAT) has made the following assumption:

The perfect reserve assumption: For the purpose of comparison, an unharvested system is a marine reserve that is successful in eliminating fishing and other extractive uses within the MPA.

California MPLA Master Plan Science Advisory Team (2010, November 16). *Draft Methods Used to Evaluate Marine Protected Area Proposals in the North Coast Study Region*, 9 (Sacramento, CA: Marine Life Protection Initiative). This assumption presumably results from a necessary trade-off between the practical applicability of the LOP conceptual model and its refinement. Potentially, however, the trade-offs in favor of practicality have left the model worryingly unrefined. Specifically, it is unclear to the Yurok Tribe what the parameters of the hypothetical marine reserve might be or whether, in the analysis, any comparison

between the actual proposed MPA and a particular unharvested system is required by the model.

The Tribe believes that the hypothetical marine reserve generally utilized by the SAT is that defined by the proposed MPA with perfectly-enforced no-take restrictions. The Tribe's concern with this understanding --- and resulting request for a change in the language of the assumption --- is that in performing the comparison, the SAT may not compare the effects of take allowances within the proposed MPA to take allowances within a marine reserve with similar features. Rather, it may engage in a purely generalized activity-based approach, assuming the comparison valid without regard to local factors affecting the comparison. If so, it would not matter if a proposed MPA was sited off the Santa Monica pier or at Palmer's Point: if certain activities might result a significant deviation from the hypothetical reserve anywhere, they are *de facto* considered to result in a significant deviation from the reserve everywhere. In many cases, this would result in a plain sacrifice of the recreational goal of the MPLA (Goal 2) with at best marginal advancement of the Act's protective goals (Goals 1, 2 & 4), a result the SAT has strived carefully to avoid.

The Yurok Tribe believes that a further potential difficulty with this assumption also exists as relates to evasion of take restrictions. First, a comparison of an MPA with a reserve with no-take may exaggerate the benefits of an actual marine reserve relative to an MPA. Second, in certain circumstances, there is the potential that a marine reserve perceived as providing unnecessary protection at high social costs will provide less protection than a marine reserve permitting some take. That is, harvesters will be inclined to evade a variety of take restrictions in a no-take reserve, rather than complying with a narrower range of restrictions that would reduce social costs are put in place.¹

The Yurok Tribe proposes that the appropriate comparison is with an actual reserve that shares the relevant characteristics with the proposed MPA. A change in the assumption reflecting this would allow the consideration of the physical, population and socioeconomic characteristics of the proposed MPA in discerning the extent of potential deviation from the reserve resulting from permitted take. If the circumstances of the proposed MPA are such that the take allowances would have little impact by comparison from a similar marine reserve, they would be appropriately considered as providing a moderate to high level of protection, not a moderate to low level of protection. For instance, studies have shown that marine reserves in low population areas perform little better in the protection of mussels than unprotected low population areas --- the low population and lack of access result in marginal gains from a marine reserve.² Under the proposed change in the comparative assumption, take of mussels in a proposed MPA in a low population area would be compared with a marine reserve in a low population area. Because the harm to mussels would not be significant, the appropriate level of protection afforded mussels in the proposed MPA would likely be considered moderate-high to high. (Similarly, if access increased the disparity between the functioning of a proposed MPA and a marine reserve, that would be taken into account.) Ultimately, if reasonably applied, it would make

¹ This may be a question about intensity versus breadth of activity one expects in a sited MPA or reserve.

² Smith, J. R., P. Fong and R. F. Ambrose. 2008. The Impacts of Human Visitation on Mussel Bed Communities Along the California Coast: Are Regulatory Marine Reserves Effective in Protecting These Communities? *Environmental Management*. 41:599-612.

allowances for local conditions on deviations from activity in the reserve while preserving the goals of the Marine Life Protection Act.³

The Yurok Tribe would also support a change that would continue to allow the current hypothetical approach, if that approach was better tailored to the specific areas in which the proposed MPAs are to be sited. While concerns of abstraction would still exist if a hypothetical reserve approach is employed, tailoring the analysis to consider local circumstances relevant to issues of take would reduce concerns that the conceptual model does not take account of local features.

³ Thereafter, issues involving take can be dealt with through monitoring and use of the MPA amendment process outlined in the MLPA.