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February 22, 2023

by: Fallon Lim
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California Department of Fish and Wildlife
Notice of Preparation of an Environmental Impact Report Supplement:

Regulatory Amendments Allowing Incidental Take During Work on Preexisting Artificial Structures
in Marine Protected Areas: Supplement to the MPA Region EIRs

Date: February 23, 2023

To: Responsible Agencies, Trustee Agencies, and Interested Persons

RE: Notice of Preparation of a Draft Environmental Impact Report Supplement: Regulatory Amendments Allowing Incidental Take During Work on Preexisting Artificial Structures in Marine Protected Areas: Supplement to the MPA Region EIRs

To comply with the Marine Life Protection Act (MLPA) (Fish and Game Code Sections 2850-2863), planning for a comprehensive statewide network of marine protected areas (MPAs) along the 1,100-mile California coast occurred through a series of regional public planning processes. The MPAs were organized into four planning regions: the North Coast (California/Oregon border to Alder Creek near Point Arena), North Central Coast (Alder Creek near Point Arena to Pigeon Point), Central Coast (Pigeon Point to Point Conception), and South Coast (Point Conception to the California/Mexico border). The California Fish and Game Commission (Commission) certified an environmental impact report (EIR) for each of the four regions (collectively referred to hereafter as the MPA Region EIRs).

In accordance with the provisions of the California Environmental Quality Act (CEQA), the California Department of Fish and Wildlife (CDFW) is preparing a Draft EIR Supplement to the four MPA Region EIRs on behalf of the Commission, which is the lead agency under CEQA per Public Resources Code (PRC) (Sections 21000-21177) and the State CEQA Guidelines (California Code of Regulations [CCR], Title 14, Division 6, Chapter 3, Sections 15000-15387). The Commission has determined that the operation and maintenance of preexisting artificial structures within MPAs and associated regulatory changes to CCR, Title 14, Division 1, Subdivision 2, Chapter 11, Section 632 (CCR 14, Section 632) (project) will require preparation of a Supplement to the four MPA Region EIRs.

The purpose of this Notice of Preparation (NOP) is to provide an opportunity for the public, interested parties and public agencies to comment on the scope and proposed content of the EIR Supplement. This NOP initiates the CEQA scoping process. Documents related to this EIR Supplement will be available for review on CDFW's website at: <https://wildlife.ca.gov/Notices/CEQA>.

NOP Public Comment Period: February 23, 2023, to March 24, 2023

1 PROJECT BACKGROUND

The four MPA Region EIRs evaluated the environmental impacts of proposed MPA designations and adopted the MPA regulations for all MPAs in each region during the period 2007 to 2012. Ultimately, a total of 124 individual MPAs across the four planning regions were adopted by the Commission, thereby establishing California's MPA Network (California's Network). California's Network includes three MPA designations (State Marine Reserve [SMR], State Marine Conservation Area [SMCA], State Marine Park [SMP]) which are a subset of Marine Managed Areas (MMAs), one MMA specific designation (State Marine Recreational Management Area [SMRMA]), and special closures. The more common term "MPA" is used throughout as an umbrella to refer to all types of protected areas in California's Network.

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Notice of Preparation – Draft EIR Supplement for Regulatory Amendments Allowing Incidental Take During Work on Preexisting Artificial Structures in Marine Protected Areas: Supplement to the MPA Region EIRs

Existing leases for artificial structures are recognized in current MPA regulations. MPAs encompass sovereign tidelands and submerged lands within the jurisdiction of the California State Lands Commission (CSLC). Tidelands occur between the ordinary high water and ordinary low water mark of tidal waters. Submerged lands reach from the ordinary low water mark out to the state-federal fixed boundary three miles offshore. The following structures and uses on sovereign lands, including tidelands and submerged lands, are subject to authorization through issuance of a lease, permit, or entitlement by CSLC:

- ▶ Riprap, seawalls, groins, jetties, breakwaters, deflectors, and bulkheads
- ▶ Recreational docks, piers, and buoys
- ▶ Commercial piers and facilities, docks, moorings, and buoys
- ▶ Commercial marinas, restaurants, and clubhouses
- ▶ Helicopter pads, decks, and fuel service facilities
- ▶ Oil terminals, piers, wharves, warehouses, and storage sites
- ▶ Power line, pipeline, intake, and outfall line rights of way
- ▶ Bridges

During the process in the North Coast and South Coast regions, it was recognized that many of the MPAs included within them artificial structures and facilities with existing entitlements, the continued operation and maintenance of which could result in incidental take of marine resources. As a result, in these two regions the MPA regulations were written to specifically allow incidental take associated with some existing entitlements for artificial structures and facilities.

Operation and maintenance activities for some preexisting structures and facilities take place on a monthly or annual basis, with regular communication occurring between managing agencies. However, many preexisting artificial structures and facilities, once installed, are managed or used occasionally, on an irregular, as-needed basis, rather than a regularly scheduled basis. While some artificial structures and facilities that received regular maintenance were identified in the North and South Coast regions and authorized for incidental take of marine resources by their individual MPA regulations, artificial structures and facilities in other regions were not, and some within the North and South Coast regions also were not identified, prior to implementation of the MPA regulations. Consequently, throughout California's Network, continued operation and maintenance of artificial structures and facilities with entitlements established prior to approval of the MPAs may not be authorized for take of marine resources by their individual MPA regulations.

The EIR Supplement will add to environmental information and analysis in the four MPA Region EIRs and evaluate the potential environmental impacts associated with implementation of the proposed regulatory amendments to CCR 14, Section 632.

2 PROJECT LOCATION

The project location includes four coastal planning regions: North Coast, North Central Coast, Central Coast, and South Coast (Figure 1). The North Coast region covers approximately 1,027 square miles of state waters from the California/Oregon border south to Alder Creek near Point Arena (Mendocino County). This region includes 20 MPAs (19 MPAs and one SMRMA). The North Central Coast region, the smallest of the four regions, covers approximately 763 square miles of state waters from Alder Creek near Point Arena south to Pigeon Point (San Mateo County). This region includes 25 MPAs (22 MPAs and three SMRMAs). The Central Coast region covers approximately 1,144 square miles of state waters from Pigeon Point, south to Point Conception (Santa Barbara County). This region includes 29 MPAs (28 MPAs and one SMRMA). The South Coast region, the largest of the four regions, covers approximately 2,351 square miles of state waters from Point Conception south to the California/Mexico border, including state waters around the Channel Islands. This region includes 50 MPAs (50 MPAs and no SMRMAs).



Source: Kirlin, J. 2012; adapted by Ascent Environmental in 2023.

Figure 1 California's Marine Protected Area Regions

3 PROJECT DESCRIPTION

3.1 PROJECT OBJECTIVES

Consistent with, and in furtherance of the MLPA, the objectives of the proposed regulatory amendments are to:

- ▶ address operations and maintenance needs of preexisting artificial structures in place prior to MPA designation without seeking individual take prohibition exemptions on a case-by-case basis;
- ▶ maintain the overall take prohibitions in MPAs to the extent feasible while allowing take incidental to operation and maintenance of preexisting artificial structures; and
- ▶ align MPA regulations with the original intention of California's Network to consider existing leases, permits, and any other legal entitlements that current regulations may impair.

3.2 PROPOSED REGULATORY AMENDMENTS ALLOWING INCIDENTAL TAKE DURING WORK ON PREEXISTING ARTIFICIAL STRUCTURES IN MARINE PROTECTED AREAS

The proposed revisions to Subsections 632(a)(1) and the addition of Subsections 632(a)(13), 632(a)(14), and 632(a)(15) of the regulations as they apply to preexisting artificial structures in MPAs are explained below.

3.2.1 Purpose of Subsection 632(a)(1) Amendments

Subsection 632(a)(1) provides definitions and allowable uses for each designation type. Existing definitions for SMPs, SMCAs, and SMRMAs would be amended to allow for operation, maintenance, repair, removal, and replacement of "preexisting artificial structures," pursuant to any required federal, state, and local permits. The existing definition for SMR would also be amended to specify that any area within an SMR that surrounds a preexisting artificial structure is excluded from the SMR definition when the structure is being actively maintained, repaired, or operated by the leaseholder(s), permittee(s) or their agent(s).

Current regulations allow for the operation and maintenance of preexisting artificial structures within a limited number of individually specified MPAs. This amendment would update all designation definitions to allow for incidental take of a marine resource in discrete areas related to the operation, maintenance, repair, removal, and replacement of a preexisting artificial structure located within an MPA, without having to amend individual MPA designations and take regulations.

SMRs do not allow for take except under a scientific collecting permit issued by CDFW pursuant to Section 650 or specific authorization from the Commission for research, restoration, or monitoring purposes. However, a preexisting artificial structure within an MPA could be actively maintained if it is located within a SMCA, SMP, or SMRMA, and has specific regulatory allowances for incidental take related to maintenance, repair, and operations activities. Thus, excluding the immediate area around a preexisting artificial structure within a SMR while it is being actively maintained, repaired, or operated, is necessary to allow incidental take of marine resources related to those activities for the lease duration without specific authorization from the Commission. The area of operation, maintenance, repair, removal, or replacement surrounding the structure would become an incidental take buffer zone for the duration of the work.

New Subsection 632(a)(1)(E) is also proposed to clarify that take of marine resources for any purposes other than what is specified in the preceding subsections of Subsection 632(a)(1) for each MPA designation type would be unlawful. There is currently no consistent method for wildlife officers to cite MPA violations. In some cases, a specific MPA is listed in the violation, while in other cases, the general MPA designation is cited. The proposed incidental take buffer zone definition may add an additional layer of citing complexity because the area within an SMR where a

preexisting artificial structure exists would be considered an SMCA when that structure is being maintained. Adding this proposed subsection would simplify issuing citations to violators.

3.2.2 Purpose of New Subsections 632(a)(13), 632(a)(14) and 632(a)(15)

Proposed new Subsection 632(a)(13) would add a definition for what qualifies as a “preexisting artificial structure” within California’s Network. Any structure that was manufactured, created, installed, or constructed in state waters pursuant to federal, state, and local authorizations prior to the MPA implementation date; or constructed and installed after MPA implementation pursuant to public health and safety concerns; and including an incidental take buffer zone surrounding the structure, as defined in new Subsection 632(a)(14), would meet the definition of a “preexisting artificial structure.”

For certain MPAs, current regulations do not provide a mechanism to maintain, operate, repair, remove, or replace, artificial structures that were in place prior to MPA implementation statewide. In these areas, maintenance of preexisting artificial structures is only permitted in the case of a structural emergency and for health and safety considerations. Specific definitions for what qualify as preexisting artificial structures and an associated incidental take buffer zone are needed to allow routine maintenance within certain MPAs, without needing to constantly approve work on a case-by-case basis.

Because the MPA designation process intended to account for existing leases, grants, and any other legal entitlements, any structure that existed prior to MPA implementation should be allowed to operate per the lease conditions without limitation due to MPA regulations. Additionally, artificial structures constructed or modified due to public health and safety concerns would be considered preexisting artificial structures regardless of installation date under the amended regulations.

Proposed new Subsection 632(a)(14) would add a definition for the “incidental take buffer zone” for preexisting artificial structures. Within a maximum distance of 250 feet in any direction from an artificial structure, not including areas above the mean high tide line, incidental take due to the operation, maintenance, repair, removal, and replacement of a preexisting artificial structure located within an MPA would be allowed.

To limit incidental take of marine resources protected within an MPA, changes to current take prohibitions would only occur within a buffer zone established around the preexisting artificial structure. This buffer zone would allow incidental take related to operation and maintenance work on the artificial structure to occur while still maintaining the integrity of the regulations applied to the surrounding MPA. The buffer zone would include only the immediate area surrounding a preexisting artificial structure but would not include areas above the mean high tide line, where the onshore MPA boundary ends. California law provides that the State owns all land below the “ordinary high-water mark” (California Civil Code Section 670). The “ordinary high-water mark” is determined by the average height of all high tides at a given location over a period of 18.6 years (Borax Consolidated, Ltd. V. Los Angeles, 296 U.S. 10, 1935) — this is referred to as the mean high tide line.

Recognizing that piers comprise the largest structures located within MPAs, a buffer zone that would meet the maintenance and operations requirements of piers means smaller structures should also have sufficient space for similar work. Barges are frequently used for maintenance of large piers, and a typical barge size is around 250 feet by 70 feet (Chakrabarti et al. 2005). Therefore, a buffer zone of 250 feet in all directions should be adequate for typical operations and maintenance work on piers and other artificial structures. Thus, the intent of using the 250-foot distance around preexisting artificial structures is to create sufficient space for maintenance and operation of preexisting artificial structures while maintaining the integrity of take prohibitions within the rest of the MPA area outside of this distance.

Proposed new Subsection 632(a)(15) would add a requirement for leaseholder(s), permittee(s), or their agent(s) to have a valid government-issued form of identification available when conducting activities around preexisting artificial structures, and define the specific types of government-issued identification that would be acceptable. This

requirement is necessary because law enforcement and/or wildlife officers need to be able to verify the identity of individuals conducting authorized activities related to operation, maintenance, repair, removal, or replacement of preexisting artificial structures. Acceptable forms of government-issued identification would include driver's licenses, US state photo identification cards, federally-recognized tribal photo identification cards, or an international passport.

3.2.3 Operations and Maintenance Activities Allowed under Proposed Regulatory Amendments

The proposed regulatory amendments would allow for continued operation, maintenance, repair, replacement, and removal of preexisting artificial structures listed in Section 1, above. All activities would occur within the incidental take buffer zone immediately surrounding the artificial structures. Artificial structures are designed to have long-term life spans, typically remaining in place between 10 and 30 years. Most of the preexisting artificial structures require little to no regular maintenance. Maintenance activities for these structures are limited to repair and replacement of the structures or portions of the structures on an as-needed basis. The proposed regulatory amendments would not result in a change in the frequency of operations, maintenance, repair, or removal of any preexisting artificial structures. In addition, any operation, maintenance, repair, removal, and replacement activities would continue to be subject to federal, state, and local permits, as applicable.

A variety of activities associated with operation, maintenance, repair, replacement, or removal of preexisting artificial structures may occur within the incidental take buffer zone. Operations and maintenance activities associated with these structures and analyzed in the Draft EIR would represent the most intensive activities that are expected to occur related to preexisting artificial structures. Other, less intensive, activities may occur that would not be described in detail.

4 POTENTIAL ENVIRONMENTAL EFFECTS

CDFW has determined based on preliminary review, in accordance with Section 15060 of the CEQA Guidelines, that an EIR should be prepared. As required by CEQA, the EIR will describe existing conditions and evaluate the potential environmental effects of the project and a reasonable range of alternatives, including the no-project alternative. It will address direct, indirect, and cumulative effects. The EIR will also discuss potential growth-inducing impacts and summarize significant and unavoidable environmental effects. The EIR will identify feasible mitigation measures, if available, to reduce potentially significant impacts. At this time, CDFW has identified a potential for environmental effects in the areas identified below.

- ▶ Archaeological and Tribal Cultural Resources;
- ▶ Marine Biological Resources; and
- ▶ Water Quality.

5 PROVIDING COMMENTS ON THIS NOTICE OF PREPARATION

Written comments on the NOP should be provided no later than 5:00 p.m. on March 24, 2023. Please send all comments to:

California Department of Fish and Wildlife
Attn: Brian Owens
3196 South Higuera Street, Suite A
San Luis Obispo, CA 93401

Or via E-mail: r7ceqa@wildlife.ca.gov (include "MPA Artificial Structures – NOP Comments" in subject line)

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If you are from an agency that will need to consider the EIR when deciding whether to issue permits or other approvals for the project, please provide the name of a contact person. Comments provided by email should include the name and mailing address of the commenter in the body of the email.

5.1 FOCUS OF INPUT

CDFW will rely on responsible and trustee agencies to provide information relevant to the analysis of resources within their jurisdiction. CDFW encourages input on the scope and content of the EIR, with a focus on the following topics:

- ▶ **Scope of Environmental Analysis.** Guidance on the scope of analysis for this EIR, including identification of specific issues that will require closer study due to the location, scale, and character of the proposed preexisting artificial structures and associated operations and maintenance activities;
- ▶ **Mitigation Measures.** Ideas for feasible mitigation, including mitigation that could potentially be imposed by CDFW and that would avoid, eliminate, or reduce potentially significant or significant impacts;
- ▶ **Alternatives.** Suggestions for alternatives to the proposed regulatory amendments that could potentially reduce or avoid potentially significant or significant impacts; and
- ▶ **Interested Parties.** Identification of public agencies, public and private groups, and individuals that CDFW should notice regarding this project and the accompanying EIR.

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