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California's Marine Life Protection Act: A Review of the Marine Protected Areas Proposal Process for the North Central Coast Region

Katherine M. Malloy

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CALIFORNIA’S MARINE LIFE PROTECTION ACT: A REVIEW OF THE MARINE PROTECTED AREAS PROPOSAL PROCESS FOR THE NORTH CENTRAL COAST REGION

KATHERINE M. MALLOY*

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* J.D. Candidate, University of South Carolina School of Law and Masters Candidate, Vermont Law School, Masters of Environmental Law and Policy. I am grateful to all the SELJ editors and members for their time and effort on this article. I would also like to thank Professor Josh Eagle for his guidance on this topic.

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I. INTRODUCTION

This note will examine the process of identifying and designating marine protected areas (MPAs)¹ under California's Marine Life Protection Act (MLPA).² A marine protected area is similar to a terrestrial park or wildlife refuge which has been set aside by the state or federal government.³ An MPA, just like a park or refuge, can be used to "preserve habitat" and "manage [] ecosystems,"⁴ using a variety of restrictions to provide varying levels of protection to the flora and fauna within.⁵ "General purpose reserves," that regulate extraction of natural resources, remain the most common type of MPA.⁶ California has identified creation of MPAs as a tool for "protect[ing] and conserv[ing] marine life and habitat" in the coastal waters within their jurisdiction.⁷ In using MPAs to this end, California must involve "interested parties" in

¹ There are many types of marine protected areas (MPAs) with varying levels of protection, which has led to MPAs being defined in many ways. One widely accepted definition, coming from the World Conservation Union, describes MPAs as: "any area of the intertidal or sub-tidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment." Executive Order 13,158 broadly defines MPAs as "any area of the marine environment that has been reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein." U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin. & U.S. Dep't of Interior, Marine Protected Areas of the United States, <http://mpa.gov/> (last visited Oct. 28, 2008). See also Kim Diana Connolly et al., *Marine Protected Areas*, in OCEAN AND COASTAL LAW AND POLICY 535-70 (Donald C. Baur et al. eds., 2008) [hereinafter OCEAN AND COASTAL LAW AND POLICY].

² Marine Life Protection Act, CAL. FISH & GAME CODE §§ 2850-63 (2009).

³ Sylvia Quast and Michael A. Mantell, *Role of the States*, in OCEAN AND COASTAL LAW AND POLICY, *supra* note 1, at 72.

⁴ Kristen M. Fletcher, *Managing Coastal Development*, in OCEAN AND COASTAL LAW AND POLICY, *supra* note 1, at 170.

⁵ Quast & Mantell, *supra* note 3, at 72.

⁶ *Id.* at 73.

⁷ Marine Life Protection Act, *supra* note 2, § 2852(d); Patrick A. Parenteau et al., *Legal Authorities for Ecosystem-Based Management in U.S. Coastal and Ocean Areas*, in OCEAN AND COASTAL LAW AND POLICY, *supra* note 1, at 630.

“the establishment, modification, or abolishment of existing MPAs or new MPAs.”⁸

California currently has divided the MLPA initiative into five geographical areas.⁹ California has so far successfully defined MPAs for one of five regional initiatives, and is on the brink of agreeing upon MPAs for its second regional iteration of the MLPA, the North Central Coast region.¹⁰ This note will closely examine the proposal process for the North Central Coast region, in an effort to determine if and how the various stakeholder and interest groups affected the MPA designation process. Many previous constituent (or interest group) driven marine protection efforts have either failed to reach consensus or have had tremendous difficulty in achieving their goals.¹¹ California's protection effort could provide valuable lessons for future state or national development of MPAs.

The first section of this note will briefly introduce the background of a growing trend: national concern for marine protection. The second section will focus on the trend at the state level, specifically California's enactment of the MLPA. The third and final section will provide an in-depth analysis of the MPA selection process for the North Central Coast Region. It will also assess how the ultimate structure of MPAs, under a stakeholder process such as that adopted by California, is shaped by the constituent involvement. This note concludes by considering the factors that may have made the North Central Coast Region effort successful, as opposed to other similar MPA programs that have failed or encountered serious obstacles.

⁸ Marine Life Protection Act, *supra* note 2, § 2853(c). *See also* OCEAN AND COASTAL LAW AND POLICY, *supra* note 1, at 552.

⁹ Marine Life Protection Act, *supra* note 2, § 2857.

¹⁰ The California Fish and Game Commission will make its final decision on the marine protected areas for the North Central Coast region in February 2009. Currently, the proposals are still available for public comment on the Commission's website: <http://www.fgc.ca.gov/regulations/new/2008/proposedregs08.asp> (last visited Feb. 5, 2009). *See infra* note 112 (Pre-Publication of Notice Statement).

¹¹ Donald C. Baur et al., *Putting "Protection" Into Marine Protected Areas*, 28 VT. L. REV. 497, 501 (2004).

II. MARINE PROTECTED AREAS: A TOOL FOR MARINE CONSERVATION AND MANAGEMENT

MPAs are a potentially valuable tool for marine protection, as recognized in three recent marine protection initiatives.¹² In May, 2000, President William Jefferson Clinton issued Executive Order 13,158, for the purposes of “strengthening and expanding the Nation’s system of marine protected areas . . .”¹³ The Order declared that such efforts are necessary to “enhance the conservation of our Nation’s natural and cultural marine heritage and the ecologically and economically sustainable use of the marine environment for future generations.”¹⁴ The goals of the Order were to:

- (a) strengthen the management, protection, and conservation of existing marine protected areas and establish new or expanded MPAs;
- (b) develop a scientifically based, comprehensive national system of MPAs representing diverse U.S. marine ecosystems, and the Nation’s natural and cultural resources; and
- (c) avoid causing harm to MPAs through federally conducted, approved, or funded activities.¹⁵

This directive from the Executive Office called on relevant federal agencies to take action, by establishing or managing MPAs.¹⁶ The Order included existing state protected areas within its definition of an MPA.¹⁷

The Pew Oceans Commission,¹⁸ formed and funded by the Pew Charitable Trusts in 2000,¹⁹ also recommends the use of regional marine

¹² See *infra* notes 13, 20, 27 (consisting of Exec. Order No. 13,158, Pew Report, and USCOP).

¹³ Exec. Order No. 13,158, 3 C.F.R. 273, 274 (2001), *reprinted in* 16 U.S.C. § 1431 (2000). This Order was endorsed under the administration of President George W. Bush in 2001. NOAA, *Statement of Secretary of Commerce Donald L. Evans Regarding Executive Order 13158, Marine Protected Areas* (June 4, 2001), *available at* http://www.commerce.gov/opa/press/Secretary_Evans/2001_Releases/June_04_Evans_Marine_Areas.html (last visited April 4, 2009).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *id.*

¹⁷ *Id.*

reserves for the protection and management of our ocean and coastal resources in their final Report: *America's Living Oceans: Charting a Course for Sea Change*.²⁰ The Pew Report²¹ suggests several goals for achieving sustainable ocean governance.²² Specifically, one of the primary goals is to establish a national system of marine reserves.²³ The Pew Report suggests that a new national oceans agency should be established to manage the marine reserves, and this agency should coordinate with "states and regional ecosystem councils to co-manage reserves that contain federal and state waters."²⁴

The U.S. Commission on Ocean Policy (USCOP)²⁵ was born out of the Oceans Act of 2000.²⁶ In the USCOP Report,²⁷ *An Ocean Blueprint*

¹⁸ The Pew Oceans Commission was formed to conduct a thorough review of ocean policy and make recommendations to guide future federal policy decisions. See The Pew Charitable Trusts, Pew Oceans Commission, http://www.pewtrusts.org/our_work_detail.aspx?id=130 (last visited Jan. 9, 2009). The Pew Oceans Commission has produced numerous reports on marine protection, available at www.pewtrusts.org. The final report and ultimate recommendations were made in *America's Living Oceans: Charting a Course for Sea Change*, *infra* note 20.

¹⁹ Josh Eagle, *Regional Ocean Governance: The Perils of Multiple-Use Management and the Promise of Agency Diversity*, 16 DUKE ENVTL. L. & POL'Y F. 143, 170 n.1 (2006).

²⁰ PEW OCEANS COMMISSION, *AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE* 126 (2003) [hereinafter PEW REPORT], available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/env_pew_oceans_final_report.pdf.

²¹ See *id.*

²² *Id.* at 122-28. The detailed recommendations of the Pew Oceans Commission include five major goals: 1) develop a new national ocean policy, 2) implement regional ocean governance (regional ocean ecosystem councils), 3) establish a national system of marine reserves, 4) establish an independent ocean agency, and 5) establish a permanent national oceans council within the executive office.

²³ *Id.* at 126.

²⁴ *Id.*

²⁵ U.S. Commission on Ocean Policy, <http://www.oceancommission.gov/> (last visited Jan. 8, 2009). On September 20, 2004, "the U.S. Commission on Ocean Policy fulfilled its mandate to submit recommendations for a coordinated and comprehensive national ocean policy to the President and Congress." As a result, the U.S. Commission on Ocean Policy expired on December 19, 2004, as provided under the terms of the Oceans Act of 2000. *Id.*

²⁶ Oceans Act of 2000, Pub. L. No. 106-256, § 2, 114 Stat. 644 (2000) (codified as amended at 33 U.S.C. § 857-19 (2006)). The Oceans Act of 2000 was created for the purpose of establishing "a commission to make recommendations for coordinated and comprehensive national policy to promote" eight goals which include: "responsible stewardship, including use, of fishery resources and other ocean and coastal resources" and "the protection of the marine environment and prevention of marine pollution." *Id.*

for the 21st Century: Final Report of the U.S. Commission on Ocean Policy, the USCOP made recommendations for coordination of management in federal waters, one of which was to “create effective and enforceable marine protected areas.”²⁸ In order to do this, the USCOP suggested that “regional ocean councils and appropriate federal, regional, state, and local entities should work together on marine protected area design, implementation, and evaluation.”²⁹ The USCOP Report encouraged “active[] solicit[ation] of stakeholder input and participation.”³⁰

These three recent marine protection initiatives demonstrate a growing national concern for preservation of the health of our oceans, and illustrate an increased focus on the use of MPAs as a marine protection tool.³¹ Much of the action called for in these documents has yet to come to fruition.³² While the “use of MPAs has been recognized as one tool for managing and conserving coastal and ocean resources,”³³ “the MPA concept remains virtually meaningless in the context of federal action.”³⁴

²⁷ U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT OF THE U.S. COMMISSION ON OCEAN POLICY (2004) [hereinafter USCOP REPORT], available at http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf.

²⁸ *Id.* at 522.

²⁹ *Id.*

³⁰ *Id.*

³¹ See *Marine Protected Areas*, *supra* note 1, at 537 (“Experts increasingly recognize MPAs and particularly marine reserves as effective tools for protecting and conserving valuable ocean resources.”).

³² See generally Robin Kundis Craig, *Protecting International Marine Biodiversity: International Treaties and National Systems of Marine Protected Areas*, 20 J. LAND USE & ENVT. L. 333, 360 (2005) (“Neither international law nor the popular imagination has quite caught up with science in promoting MPAs, however. According to UNEP only about one percent of the oceans are currently protected through MPAs or marine reserves.”).

³³ Baur, *supra* note 11, at 503.

³⁴ *Id.* at 501. See *Marine Protected Areas*, *supra* note 1, at 538 (discussion of all the federal legal mechanisms for marine protection and management).

A. Federal Marine Protection Efforts

There have been many federal marine protection and management efforts.³⁵ The most prominent effort, and arguably the most successful,³⁶ was established in 1972 by the National Marine Sanctuaries Act.³⁷ The National Marine Sanctuaries Program (NMSP)³⁸ was established to “identify and designate as national marine sanctuaries areas of the marine environment which are of special national significance” and “to maintain the natural biological communities . . . and, where appropriate, restore and enhance natural habitats, populations, and ecological processes.”³⁹ NMSP national marine sanctuaries are designated by the Secretary of Commerce,⁴⁰ and the designation process is “complex and lengthy.”⁴¹ The sanctuaries generally favor management of compatible uses over the outright ban of a use within a particular sanctuary, such as a prohibition on fishing.⁴² The existing national marine sanctuaries have faced significant legal and political obstacles in their creation.⁴³ One scholar

³⁵ *Marine Protected Areas*, *supra* note 1, at 540. In addition to the National Marine Sanctuaries Program (NMSP), there have been recent efforts by the various regional fishery management councils under the Magnuson-Stevens Act to utilize MPAs in order to rebuild fish stocks. *See id.* at 542-44.

³⁶ *Id.* *See* Baur, *supra* note 11, at 508-12.

³⁷ National Marine Sanctuaries Act, 16 U.S.C. § 1431 (2000).

³⁸ *Id.* § 1431. *See* Marine Conservation Biology Inst., National Marine Sanctuaries, <http://www.mcbi.org/what/sanctuaries.htm> (last visited Jan. 2, 2009) (overview of the Federal National Marine Sanctuaries program).

³⁹ *Id.*

⁴⁰ *Id.* § 1433.

⁴¹ *Marine Protected Areas*, *supra* note 1, at 540-42.

⁴² *See, e.g., Marine Protected Areas*, *supra* note 1, at 541; Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 *ECOLOGY L. Q.* 71, 104-15 (2002) [hereinafter *Zoning the Oceans*]. Brax analyzes the National Marine Sanctuaries Act, the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. §§ 1801-1883 (1996)), state law (the MLPA), and Executive Order 13,158 and finds them all insufficient, because “this is simply not an area of law and policy in which seeking compromise, negotiation, and consensus with local interests is likely to consistently produce meaningful results.” *Zoning the Oceans*, *supra*, at 123. Brax proposes that the Antiquities Act may be the solution to this problem because it bypasses the “unanimity requirement,” by allowing the President to “unilaterally establish marine reserves.” *Id.* at 123-24. Although, it should be noted that this article was written in 2002 before California’s Marine Life Protection Act had any real success with the development of MPAs.

⁴³ *Zoning the Oceans*, *supra* note 42, at 113-18.

described the major political issue facing the NMSP, and more broadly other areas of environmental law and policy, as “how to build a strong consensus and establish a feeling of local ownership over a novel regulatory program in the face of pre-existing, politically powerful user groups that will surely face short-term economic losses if any conservation program is enacted.”⁴⁴

III. CALIFORNIA’S MARINE LIFE PROTECTION ACT: INNOVATIVE STATE LEGISLATION ADDRESSING MARINE CONSERVATION AND MANAGEMENT

Prior to discussing the MLPA, it may be helpful to consider what jurisdiction states have over coastal and marine areas. Coastal states have authority over coastal waters from their coastline out to three nautical miles and generally hold title to lands located below the mean high-tide line.⁴⁵ These lands are held by each state in trust for the public “who has the right, subject to reasonable limitations, to use public trust lands and associated waters for a wide variety of commercial and recreational purposes.”⁴⁶ As a general rule, coastal states have authority to regulate fishing activities within three miles of the coast,⁴⁷ while the federal government exercises exclusive authority over fishing that takes place beyond the three mile limit and up to two-hundred miles out.⁴⁸ State management authority over coastal waters is subject to federal preemption.⁴⁹

⁴⁴ *Id.* at 114-15. As discussed above, in this article the author suggests that one potential solution to these problems inherent in the constituent group process would be to use the Antiquities Act to create marine protected areas. In fact, this has been the action that President Bush has taken recently to protect wide swathes of deep ocean territory. See Editorial, *Mr. Bush's Blue Legacy*, N.Y. TIMES, Sept. 2, 2008, available at http://www.nytimes.com/2008/09/03/opinion/03wed2.html?_r=1&scp=1&sq=Bush%27s%20Blue%20Legacy&st=cse&oref=slogin.

⁴⁵ JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW: CASES AND MATERIALS 2 (2006).

⁴⁶ *Id.*

⁴⁷ OCEAN AND COASTAL LAW AND POLICY, *supra* note 1, at 275 and 69.

⁴⁸ *Id.* at 69. “The primary exceptions to the three-mile rule are Texas, Florida, Puerto Rico, the Great Lakes States, and the Commonwealth of Northern Mariana Islands (CNMI). Due to historical circumstances, Texas, Florida (with respect to its Gulf Coast), and Puerto Rico hold title to the three marine leagues, or approximately nine miles, seaward of their coastlines.”

⁴⁹ *Id.* at 276.

California was the first state to undertake a comprehensive regional marine protection effort of this scale.⁵⁰ California's extensive coastline (1,000 miles⁵¹) provides the state with a "rich natural heritage of marine and coastal resources"⁵² on which its economy is built.⁵³ In the 1990's, the state's "ocean economy"⁵⁴ suffered "dramatic declines" in "living marine resources[,] due primarily to the failure of resource management practices to prevent anthropogenic damage (over fishing, habitat destruction, pollution, etc.)."⁵⁵

With the enactment of the Marine Life Protection Act (MLPA) in 1999, the California legislature recognized a need to protect and secure the state's marine resources for future generations.⁵⁶ The MLPA states that a "process for the establishment, modification, or abolishment of existing MPAs or new MPAs established pursuant to this program, that involves interested parties" is necessary.⁵⁷ The California legislature did not specify how much or what level of protection should be provided to the state's coastal waters through this program.⁵⁸ At the time the MLPA was passed, existing marine reserves protected only fourteen square miles off the coast of California;⁵⁹ further, the state had an array of

⁵⁰ While other states have undertaken ocean and coastal protection efforts, California is the first to conduct a marine protected area program using stakeholders in the process. Massachusetts is one state that has acted to protect areas in its state waters under the Massachusetts Ocean Sanctuary Act. See Baur, *supra* note 10, at 498-500, 517-18.

⁵¹ CAL. DEP'T OF FISH & GAME, CALIFORNIA MARINE LIFE PROTECTION ACT: MASTER PLAN FOR MARINE PROTECTED AREAS 2 (2008) [MASTER PLAN], available at <http://www.dfg.ca.gov/mlpa/pdfs/revisedmp0108.pdf>. The master plan was approved in February of 2008; as a living document, it is meant to be continuously updated after each study region is completed. See The Department of Fish & Game's Marine Life Protection Act Master Plan, available at <http://www.dfg.ca.gov/mlpa/masterplan.asp> (updates to the master plan as available).

⁵² Deborah A. Sivas & Margaret R. Caldwell, *A New Vision for California Ocean Governance: Comprehensive Ecosystem-Based Marine Zoning*, 27 STAN. ENVTL. L.J. 209, 213 (2008).

⁵³ *Id.*

⁵⁴ *Id.* at 214. The authors define "ocean economy" as "those activities that derive at least some portion of their value from the ocean and its resources."

⁵⁵ *Id.* at 215.

⁵⁶ Marine Life Protection Act, *supra* note 2.

⁵⁷ *Id.* § 2853(c)(5).

⁵⁸ See *id.* §§ 2850-63.

⁵⁹ *Id.* § 2851(g).

“marine managed areas (MMAs), such as refuges, reserves, and state reserves”⁶⁰ that were the “result of over 50 years of designations . . . which [had] led to 18 classifications and sub-classifications of these areas.”⁶¹

The California legislature enacted the Marine Managed Areas Improvement Act (Managed Areas Act) in 2001 to address this problem, and establish a new classification system for all marine managed areas.⁶² The Managed Areas Act created six classifications of MMAs (from highest level of protection to lowest): state marine reserves, state marine parks, state marine conservation areas, state marine cultural preservation areas, state marine recreational management areas, and state water quality protection areas.⁶³ The Managed Areas Act specifies that the first three categories, the most protective, are “marine protected areas” consistent with the MLPA.⁶⁴

⁶⁰ Marine Managed Areas Improvement Act, CAL. PUB. RES. CODE § 36601(a)(3) (2009).

⁶¹ *Id.* § 36601(a)(4).

⁶² *Id.* § 36601(b).

⁶³ *Id.* § 36602(d)(1)-(6).

⁶⁴ *Id.* § 36602(e). This section refers to § 36700 to define each of these MPAs. A state marine reserve:

is a nonterrestrial marine or estuarine area that is designated so the managing agency may achieve one or more of the following: (1) Protect or restore rare, threatened, or endangered native plants, animals, or habitats in marine areas. (2) Protect or restore outstanding, representative, or imperiled marine species, communities, habitats, and ecosystems. (3) Protect or restore marine gene pools. (4) Contribute to the understanding and management of marine resources and ecosystems by providing the opportunity for scientific research in outstanding, representative, or imperiled marine habitats or ecosystems.

A state marine park is:

a nonterrestrial marine or estuarine area that is designated so the managing agency may provide opportunities for spiritual, scientific, educational, and recreational opportunities, as well as one or more of the following: (1) Protect or restore outstanding, representative, or imperiled marine species, communities, and habitats, and ecosystems. (2) Contribute to the understanding and management of marine resources and ecosystems by providing the opportunity for scientific research in outstanding representative or imperiled marine habitats or ecosystems. (3) Preserve cultural objects of historical, archaeological, and scientific interest in marine areas. (4) Preserve outstanding or unique geological features.

A state marine conservation area:

is a nonterrestrial marine or estuarine area that is designated so the managing agency may achieve one or more of the following: (1) Protect or restore rare, threatened, or endangered native plants, animals, or habitats in marine areas. (2)

A. *The Initial Failed Marine Life Protection Act Efforts*

The first MLPA efforts began with the formation of a Master Plan Team “to advise and assist in the preparation of the master plan”⁶⁵ to guide the MLPA program.⁶⁶ The MLPA directed the composition of the team, the components of the Master Plan, and a timeline for completion.⁶⁷ The MLPA specified that the California Department of Fish and Game (Department) and the Master Plan Team were to “take into account relevant information from local communities, and . . . solicit comments and advice for the master plan from interested parties.”⁶⁸ Thus, the MLPA adopted a “science-based regional approach” to marine conservation, “bring[ing] together stakeholders, agency missions, budgets, and in-kind efforts in a way that produces a sum that is greater than [sic] its parts.”⁶⁹

In 2001, the Department began to send informational letters to commercial and recreational fishers to notify them of the MLPA process, and invite their participation by requesting information about their areas of primary use.⁷⁰ The Department received little response, which was “of limited value to the Master Plan Team.”⁷¹ The team then devised an initial set of proposals, largely based on the recommendations of the team scientists, and with “little input from constituent user groups.”⁷² The team planned ten regional public workshops throughout the state to

Protect or restore outstanding, representative, or imperiled marine species, communities, habitats, and ecosystems. (3) Protect or restore diverse marine gene pools. (4) Contribute to the understanding and management of marine resources and ecosystems by providing the opportunity for scientific research in outstanding, representative, or imperiled marine habitats or ecosystems. (5) Preserve outstanding or unique geological features. (6) Provide for sustainable living marine resource harvest.

Marine Managed Areas Improvement Act, CAL. PUB. RES. CODE § 36700(a)-(c) (2009).

⁶⁵ Marine Life Protection Act, CAL. FISH & GAME CODE § 2855(b)(1) (2009).

⁶⁶ *Id.* § 2855(a).

⁶⁷ *See id.* §§ 2855-59.

⁶⁸ *Id.* § 2855(c).

⁶⁹ Brian E. Baird & Amber J. Mace, *Regional Ocean Governance: A Look at California*, 16 DUKE ENVTL. L. & POL'Y F. 217, 218 (2006).

⁷⁰ MASTER PLAN, *supra* note 51, app. at C-1, available at <http://www.dfg.ca.gov/mlpa/pdfs/revisedmp0108c.pdf>.

⁷¹ *Id.*

⁷² *Id.*

receive public input.⁷³ The workshops were attended by approximately 2500 people, and over 3000 comments were received and reviewed by the team.⁷⁴

Implementation of the MLPA was “off to a rocky start” because of “[d]istrust and bad blood between fishermen and scientists.”⁷⁵ The initial draft MPAs “discusse[d] as many as seventeen potential reserves totaling more than seventy-five nautical miles, and included several popular sport and commercial fishing grounds.”⁷⁶ The team determined that more public input was necessary and held over sixty small group meetings with constituent representatives.⁷⁷ In response, the deadline for the proposed Master Plan then had to be extended by an additional year.⁷⁸ It appeared that attempting to reach compromise between all interested parties was not only difficult and time consuming but was unrealistic within the original time limits.⁷⁹

The Department’s Director then decided to change the direction of the MLPA process, by creating seven regional working groups to come up with MPA proposals for their regions.⁸⁰ More workshops were held, and the deadline was again extended; the delays, and subsequent costs, were so substantial that the whole MLPA process was put on hold due to a lack of funding.⁸¹ Many observed that the MLPA process would be “marked by the same intensive opposition and agency delay that has doomed reserve proposals almost everywhere else in the United States.”⁸²

⁷³ *Id.* at C-2. (The workshops were publicized by letters mailed to constituents, press releases, notices to Marine Region offices and postings on the MLPA website.).

⁷⁴ *Id.*

⁷⁵ *Zoning the Oceans*, *supra* note 42, at 120.

⁷⁶ *Id.*

⁷⁷ MASTER PLAN, *supra* note 51, app. at C-2, available at <http://www.dfg.ca.gov/mlpa/pdfs/revisedmp0108c>.

⁷⁸ *Id.* at C-3.

⁷⁹ *Zoning the Oceans*, *supra* note 42, at 120.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 119.

B. Marine Life Protection Act Revival

Initial efforts under the MLPA failed, but “a revival in 2005” led to the creation and implementation of the MLPA Initiative and, finally, the production of a Master Plan.⁸³ This latest, successful⁸⁴ attempt to implement the MLPA was launched by the Department, the California Resources Agency, and the Resources Legacy Fund Foundation (Legacy Foundation).⁸⁵ In this public-private partnership, the Legacy Foundation was used “to obtain, coordinate and administer philanthropic investments to supplement public funding for the MLPA Initiative.”⁸⁶ Similar to the first initiative, this second iteration of the MLPA faced political opposition from the fishing community and others who felt the restrictions of the MPAs were too severe.⁸⁷

The MLPA Initiative takes a regional approach to assembling a statewide network of MPAs by 2011.⁸⁸ The Initiative “identified five study regions: the north coast region, the north central coast region, the San Francisco Bay region, the central coast region, and the south coast region.”⁸⁹ The North Central Coast region is the second region of the five region initiative to identify MPAs for California’s entire coastline.⁹⁰ The first MLPA area, the Central Coast region, was completed in April

⁸³ Ocean & Coastal Law Journal, *A Review of Recent Developments in Ocean and Coastal Law*, 13 OCEAN & COASTAL L.J. 143, 146 (2007) (hereinafter *Recent Developments*).

⁸⁴ See *id.* at 146-57 (“Success” here means that the MLPA began to create MPAs, but this process is not yet complete for all areas of California.).

⁸⁵ MASTER PLAN, *supra* note 51, at ii.

⁸⁶ *Id.* at 16.

⁸⁷ See Glen Martin, *State Wildlife Officials to Create Marine Preserves*, S.F. CHRON., Apr., 13, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/13/BAGM5P892J12.DTL&hw=Marine+Life+Protection+Act&sn=017&sc=230>. The Coastside Fishing Club, a nonprofit recreational fishermen’s organization, brought suit against the California Resources Agency, the Department of Fish & Game, and the Resources Legacy Foundation. The organization’s goal was to impede the MLPA process and prevent the fishing restrictions that would result from the creation of marine protected areas. One of the leaders of the Coastside Fishing Club continued to participate in the MPA process as a member of the Stakeholder Group, while maintaining this legal action against the groups and agencies facilitating the initiative. *Coastside Fishing Club v. Ca. Res. Agency*, 158 Cal. App. 4th 1183 (2008).

⁸⁸ MASTER PLAN, *supra* note 51, at iii.

⁸⁹ *Id.*

⁹⁰ *Id.* at 14.

2007.⁹¹ The North Central Coast region is in the final stages of completion.⁹² The Commission held a notice hearing in October 2008 to provide notice to the public of intent to amend the California Code of Regulations to include the new North Central Coast region MPAs.⁹³ The next section of this paper will consider the constituent group-based process used to determine the final MPAs for this region.

IV. DEVELOPMENT OF THE MARINE PROTECTED AREAS: HOW THE MARINE LIFE PROTECTION ACT STAKEHOLDER/WORKING GROUP PROCESS WORKS

A. Roles in the MLPA Initiative: Statewide Groups

A variety of groups are participating in and completing the work of the MLPA Initiative.⁹⁴ The California Fish and Game Commission (Commission)⁹⁵ is “the ultimate decision making authority” for the initiative, although “not involved in the day-to-day work.”⁹⁶ The California Resources Agency,⁹⁷ the “parent” administrative agency of the Department of Fish and Game, “provides general oversight and public leadership,” mainly assisting with personnel and funding.⁹⁸ The Department serves as the “lead agency,” with its Director “select[ing] the members of the science team in consultation with the Resources Agency secretary, the Commission president, and the task force chair.”⁹⁹ The

⁹¹ MASTER PLAN, *supra* note 51, at 14.

⁹² See Cal. Dep’t of Fish & Game, Marine Life Protection Act Initiative, <http://www.dfg.ca.gov/mlpa/index.asp> (last visited April 1, 2009) [hereinafter MLPA Initiative Home Page]. The amended MPAs will likely be adopted in summer 2009 with an effective date of January 2010.

⁹³ See CAL. FISH AND GAME COMM’N, INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION, PRE-PUBLICATION OF NOTICE STATEMENT (2008), available at <http://www.fgc.ca.gov/regulations/new/2008/632isor.pdf>.

⁹⁴ *Id.* at 17 fig.1 (for a flowchart of the players in the MLPA Initiative).

⁹⁵ *Id.* at 15.

⁹⁶ See MASTER PLAN, *supra* note 51, at 15 (detailed description of the roles of the various groups).

⁹⁷ *Id.* at i.

⁹⁸ *Id.* at 15. See California State Government Organization Chart, http://www.cold.ca.gov/Ca_State_Gov_Orgchart.pdf (last visited Feb. 5, 2009) (distribution of agencies and departments).

⁹⁹ MASTER PLAN, *supra* note 51, at 15.

Department also “assists with the development of the draft master plan framework and proposals for MPAs.”¹⁰⁰ “The MLPA Statewide Interests Group is composed of members from key interest groups” to “provide[] a forum for enhanced communication between the task force and stakeholders regarding the MLPA Initiative and statewide policy issues,” as well as “provide[] outreach to constituent groups regarding opportunities for involvement.”¹⁰¹

B. Regional Roles

In addition to the groups discussed, which act on the state level, there are also regional groups that coordinate the work of the MLPA Initiative.¹⁰² The Blue Ribbon Task Force (Task Force),¹⁰³ is “composed of distinguished, knowledgeable, and highly credible public leaders,” who are “selected by the secretary of the [California Resources Agency].”¹⁰⁴ The Task Force’s primary responsibility is to “oversee regional projects to develop alternative MPA proposals to present to the Commission.”¹⁰⁵ They also “prepare information and recommendations for coordinating management of MPAs with federal agencies, and provide direction for expenditure of initiative funds.”¹⁰⁶

Each region also has a Master Plan Science Advisory Team (Science Team), composed of the required members under the MLPA.¹⁰⁷ The Science Team’s primary tasks are to “review[] alternative MPA proposals [and] review[] draft master plan documents.”¹⁰⁸ The Science

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 17.

¹⁰² *Id.*

¹⁰³ *Id.* The Blue Ribbon Task Force oversees the entire MLPA process and is “composed of five to seven distinguished, knowledgeable and highly credible public leaders selected by the secretary for resources.” These positions serve at the pleasure of the secretary and ultimately make the final recommendation on which marine protected areas should be adopted. CAL. DEP’T OF FISH & GAME, CHARTER OF THE MLPA BLUE RIBBON TASK FORCE, 2007-2008 (2007), available at <http://www.dfg.ca.gov/MLPA/pdfs/btrfcharter070331.pdf>.

¹⁰⁴ MASTER PLAN, *supra* note 51, at 17.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 15.

¹⁰⁷ *Id.* at 16. See CAL. FISH & GAME CODE § 2855(b)(3) (2009) (listing of required team members).

¹⁰⁸ MASTER PLAN, *supra* note 51, at 16.

Team is also responsible for “reviewing and commenting on scientific papers relevant to the implementation of the MLPA . . . addressing scientific issues presented by those documents, and addressing scientific questions raised by the task force or stakeholders.”¹⁰⁹

Finally, the Regional Stakeholder Group (Stakeholder Group), selected as a result of a nomination process, is composed of people from the study region that will develop the alternative MPA site proposals.¹¹⁰ The Stakeholder Group members are allowed to designate an “alternate” that could participate in the process on their behalf, although the alternate and primary members are limited to just one vote in voting matters.¹¹¹

C. The North Central Coast Region

The North Central Coast study region (North Central) began with the creation of the three main groups that would direct the MPA process, starting with the Task Force in February, 2007.¹¹² In May, the North Central Stakeholder Group was formed, followed a little over a month later by the North Central Science Team.¹¹³ Public workshops were held in March, 2007 and in February, 2008 to inform and update the public on the MLPA process.¹¹⁴

The Stakeholder Group held eight formal meetings and three work sessions over ten months in order to develop the three final MPA proposals.¹¹⁵ The meetings were led by Department staff working on the MLPA Initiative.¹¹⁶ Often, representatives from the Science Team, Task

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ CAL. DEP'T OF FISH & GAME, NORTH CENTRAL COAST REGIONAL STAKEHOLDER GROUP, RECOMMENDATIONS TRANSMISSION BINDER 3: PROCESS RECORDS FOR DEVELOPING MPA PROPOSALS, MEETING AGENDAS, AND KEY OUTCOMES MEMOS 122 (2007) [hereinafter MEETING AGENDAS & MEMOS], available at <http://www.dfg.ca.gov/mlpa/pdfs/binders/b3dd.pdf>.

¹¹² CAL. DEP'T OF FISH & GAME, MARINE LIFE PROTECTION ACT IMPLEMENTATION UPDATE 1 (2008), available at <http://www.dfg.ca.gov/mlpa/pdfs/update2007.pdf>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See MEETING AGENDAS & MEMOS, *supra* note 111, at 2 (These staff members are often referred to in the MLPA documents as the “I-Team” to signify their role on the Marine Life Protection Act Initiative.).

Force, and Commission would also attend.¹¹⁷ All of the formal meetings were two day workshops held in varying locations within the region.¹¹⁸ An agenda was set by Department staff prior to each meeting, and memos were prepared following each meeting detailing the process and results.¹¹⁹

1. Meeting One: May 2007

The first meeting introduced the Ground Rules of the MPA designation process and provided an opportunity for stakeholders to express their interest in the process.¹²⁰ During this first meeting, the Stakeholder Group was introduced to the North Central Coast Regional Goals and Objectives,¹²¹ which the Stakeholder Group was asked to edit and tailor to their specific region.¹²² These goals and objectives were meant to provide guidance throughout the MPA proposal process.¹²³ In successive meetings, the Stakeholder Group continued to work on the goals and objectives to prepare them to be submitted to the Science Team for their input.¹²⁴

2. Meeting Two: July 2007

At the second meeting, the Stakeholder Group received initial guidance on the MPA designation process, as well as an introduction to the Internet Mapping Service¹²⁵ they were to use in developing maps depicting proposed MPAs.¹²⁶ The Department staff also presented their information gathering efforts to the Stakeholder Group.¹²⁷ These

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 3.

¹¹⁹ *Id.*

¹²⁰ *See id.* at 1-12.

¹²¹ CAL. DEP'T OF FISH & GAME, NORTH CENTRAL COAST REGIONAL GOALS AND OBJECTIVES (2008), available at <http://www.dfg.ca.gov/mlpa/pdfs/binders/b4da.pdf>.

¹²² MEETING AGENDAS & MEMOS, *supra* note 111, at 1-12.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See* MarineMap, <http://www.marinemap.org/mlpa/> (last visited Apr. 1, 2009). The Internet Mapping Service (IMS) was set up for the use of the MLPA Initiative to allow anyone working on the MPA proposal process to access the public data layers in a web-based format.

¹²⁶ MEETING AGENDAS & MEMOS, *supra* note 111, at 1-12.

¹²⁷ *Id.* at 32.

included a contract with Ecotrust for socioeconomic data on commercial fisheries as well as a timeline for receiving data from the California Recreational Fisheries Survey.¹²⁸ These data were used to inform the Stakeholder Group's decisions.¹²⁹

3. Meeting Three: August 2007

At the third meeting, held in August, 2007,¹³⁰ the Stakeholder Group was introduced to the multi-stakeholder work group process, which would be used to come up with the cross-interest MPA proposals.¹³¹ Group members were asked "to share 'what is important to them' in the study region."¹³² The Group members were also given presentations on the features of the region, science guidelines from the MPA Master Plan, and the Central Coast region's process.¹³³

Additionally, the Department staff divided the Group members into three work groups, with a goal to balance group composition based on interest and expertise.¹³⁴ Learning from the Central Coast region's MPA process, the Department staff made the work group assignments with an

¹²⁸ *Id.*

¹²⁹ *Id.* See also ECOTRUST, COMMERCIAL AND RECREATIONAL FISHING GROUNDS AND THEIR RELATIVE IMPORTANCE OFF THE NORTH CENTRAL COAST OF CALIFORNIA (2008), available at http://www.ecotrust.org/mlpa/Ecotrust_FinalReport_NCCSR_080701.pdf (more information on the methods used and data gathered by Ecotrust). At many of the meetings, the Stakeholder Group viewed various presentations on information that could be helpful to the MPA process, including the socioeconomic data provided by EcoTrust. For example, the July 2007 meeting presentations were on a variety of topics: "Habitats and Ecosystems of the North Central Region," "Seabirds and Marine Mammals of the North Central Coast Area," "Marine Invertebrate Fisheries, Marine Aquaculture," and "Commercial Fisheries in the North Central Study Region: Perspectives from Fishermen." MEETING AGENDAS & MEMOS, *supra* note 111, at 25.

¹³⁰ See MEETING AGENDAS & MEMOS, *supra* note 111, at 46-51 (brief description of the DORIS Tool, a key decision support tool to assist in MPA planning). At this third meeting, in addition to being introduced to the multi-stakeholder process, the Group was presented with informational briefings; they completed some additional work on the Regional Goals and Objectives, and were given an introduction to the DORIS tool. The DORIS tool is a web-based application that allowed the Stakeholder Group members (with a password) to view the same data as that available from IMS and to draw potential MPAs, share them with others, and package them or put them in report format. *Id.*

¹³¹ MEETING AGENDAS & MEMOS, *supra* note 111, at 46-47.

¹³² *Id.* at 46.

¹³³ *Id.* at 48-49.

¹³⁴ *Id.*

aim to “ensure cross-interest dialogue and full participation in the initial phases of MPA proposal development . . . [and to] generate a range of options.”¹³⁵ The work groups were encouraged to meet independently and communicate freely between the formal Stakeholder Group meetings.¹³⁶ The groups (named Emerald, Turquoise, and Jade)¹³⁷ were asked to prepare initial MPA proposals for presentation at the October, 2007 meeting, and following the meeting and adequate time for revisions, to transmit them to the Science Team and Task Force.¹³⁸

4. Meeting Four: October 2007

By the fourth meeting, each of the work groups had created two optional MPA proposals for the North Central Coast region.¹³⁹ Presentations were also received on four external proposals that were developed outside of the work group process but were “co-developed by at least one [Stakeholder Group] member acting in concert with outside stakeholders.”¹⁴⁰ External proposal A was created by the Fisherman’s Marketing Association of Bodega Bay,¹⁴¹ a group representing commercial fishing industry interests.¹⁴² External proposal B was presented on behalf of a coalition of recreational fishers.¹⁴³ A coalition with conservation interests presented external proposal C.¹⁴⁴ External proposal D was presented on behalf of Oceana, a global ocean protection

¹³⁵ *Id.*

¹³⁶ *Id.* at 48 (email list-serves and communication).

¹³⁷ MEETING AGENDAS & MEMOS, *supra* note 111, at 46-47.

¹³⁸ *Id.* at 52.

¹³⁹ *Id.* at 77. These initial work group maps were divided into two options (“A” and “B”) and into six subregions, resulting in twelve maps per work group. These initial draft “arrays” are available online. See Cal. Dep’t of Fish & Game, Work Group Draft Options for an MPA Array and Draft MPA Proposals Generated Externally to the NCCRSR Work Group Process, <http://www.dfg.ca.gov/mlpa/nccrsg-options.asp> (last visited Nov. 21, 2008).

¹⁴⁰ MEETING AGENDAS & MEMOS, *supra* note 111, at 79.

¹⁴¹ *Id.*

¹⁴² See Bodega Bay Fisherman’s Marketing Association, <http://www.fnabb.org> (last visited Nov. 21, 2008).

¹⁴³ MEETING AGENDAS & MEMOS, *supra* note 111, at 79. The groups that contributed to external proposal B as the “coalition of recreational fishers” were: Coastside Fishing Club, American Sportfishing Association, United Anglers of Southern California, Sportfishing Association of California, Southern California Marine Association, and Nor-Cal Kayak Anglers (http://www.dfg.ca.gov/MLPA/pdfs/nccrsg-options/extb_description_071022.pdf).

¹⁴⁴ *Id.*

organization.¹⁴⁵ All ten (six Stakeholder Group-generated and four externally-generated) MPA proposals were submitted to the Science Team for evaluation.¹⁴⁶

5. Meeting Five: November 2007

In November, a month after developing their new proposals, the Stakeholder Group met for their fifth formal meeting and discussed feedback on the MPA proposals.¹⁴⁷ The proposals had been reviewed by the Science Team, and the Department had conducted a feasibility analysis on each of them.¹⁴⁸ The Task Force requested that the Stakeholder Group trim the existing proposals down to a maximum of three to five proposals for their December meeting.¹⁴⁹ The Task Force also requested that all Science Team and Department guidelines be incorporated into the next round of proposals, as well as any socioeconomic data.¹⁵⁰ The Stakeholder Group discussed ideas on how to narrow down the first round of proposals, but no agreement was reached on a particular process for accomplishing this.¹⁵¹

6. Meeting Six: December 2007

One of the primary objectives at the December meeting was to go to “the next round” with no more than five draft proposals.¹⁵² The Stakeholder Group succeeded in narrowing down the ten proposals to just four by using a “mixed work group and plenary (‘poster session’) format.”¹⁵³ The Emerald work group was able to combine both of their

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 77.

¹⁴⁷ *Id.* at 95-96.

¹⁴⁸ MEETING AGENDAS & MEMOS, *supra* note 111, at 95-96.

¹⁴⁹ *Id.* at 97.

¹⁵⁰ The socioeconomic data was provided under a contract with Ecotrust. In particular, Ecotrust provided the Stakeholder Group with data on the socioeconomic effects of the proposals on the recreational and commercial fishing industries. *See* MEETING AGENDAS & MEMOS, *supra* note 111, at 98.

¹⁵¹ *Id.* at 99.

¹⁵² *Id.* at 101.

¹⁵³ *Id.* at 104. A plenary poster session can be described as the portion of a conference or meeting where all parties gather to present their data and findings in a poster format, so that all

Options (A and B) into one proposal (now numbered 1), and the Turquoise work group was also able to combine their Options (A and B) into a single proposal (numbered 3).¹⁵⁴ The Jade group split into two subgroups, which then each combined external proposals with their options (see Figure 1 below for a depiction of how all of the above work groups and external proposals were merged).¹⁵⁵ External proposal A (XA) was given an extension, to update and modify that proposal with the Science Team and Departments guidelines.¹⁵⁶

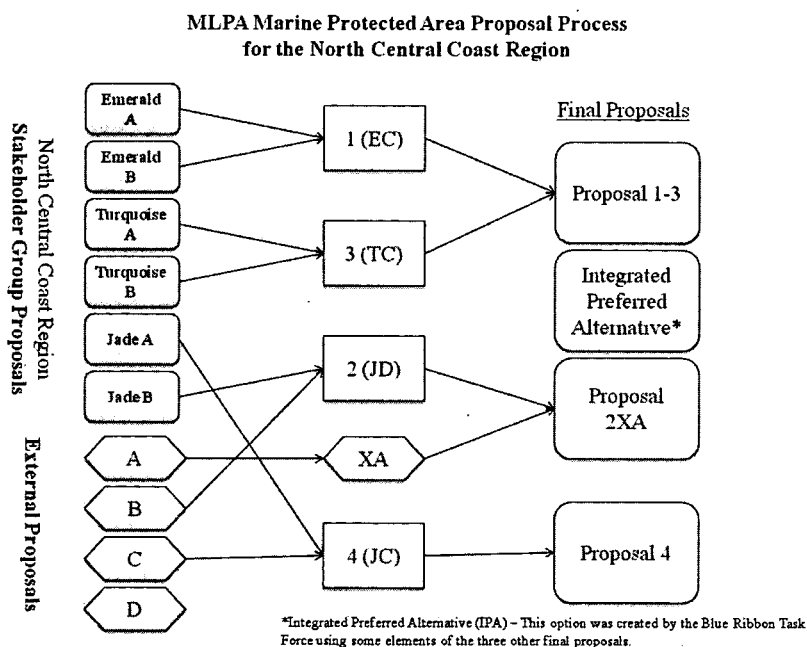


Figure 1. Diagram of the MPA proposal process.

participants can evaluate and gauge the data and findings of all other parties at the conference or meeting.

¹⁵⁴ *Id.* at 106.

¹⁵⁵ *Id.* It appears that a revised External Proposal D was not submitted by the December 2007 meeting. *Id.* at 104-5.

¹⁵⁶ MEETING AGENDAS & MEMOS, *supra* note 111, at 106-07.

7. Meeting Seven: February 2008

The Stakeholder Group met to consider how the remaining proposals could be narrowed down to just three final proposals for submission to the Task Force.¹⁵⁷ The Group looked at side-by-side comparisons, in both table and GIS map¹⁵⁸ formats, demonstrating the areas of overlap in the proposals.¹⁵⁹ The Group was also provided with an overview of public comments that were received at the series of public workshops held in early February.¹⁶⁰ The Department staff decided to allow each “seat” to vote¹⁶¹ for its top three proposals, and the proposals receiving a majority vote were subsequently used as the starting place for the next round of proposals.¹⁶² Work sessions, separate from the formal meetings, were then planned for March to finalize work on the three platform proposals.¹⁶³

8. Meeting Eight: March 2008

At the last formal meeting of the Stakeholder Group, the Group developed three final MPA proposals to forward to the Science Team and Task Force for consideration.¹⁶⁴ Much work was done in advance of the meeting to come to the final proposals, which were presented on the first day of the meeting to the full Stakeholder Group.¹⁶⁵ Feedback from

¹⁵⁷ *Id.*

¹⁵⁸ Geographic Information Systems (GIS) were used throughout the MLPA process in the presentation of scientific data, geographic information, and socioeconomic information. *See* MEETING AGENDAS & MEMOS, *supra* note 111. The MPA process was greatly aided by the use of GIS tools, such as the Integrated Mapping Service (IMS) and the DORIS tool. These applications help to determine where the MPAs should be located and help to delineate accurate boundaries to protect the resources they are intended to conserve. *See supra* notes 112-130 and accompanying text. The MLPA Initiative Staff also included several GIS specialists to assist in the process. MEETING AGENDAS & MEMOS, *supra* note 111, at 54.

¹⁵⁹ *Id.* at 120.

¹⁶⁰ *Id.* at 122.

¹⁶¹ *Id.* at 126. The Stakeholder Group members were allowed to designate an “alternate” that would fill in for them at meetings and represent their interests. Voting was limited to just one vote per seat; the alternate members could not participate in the vote if their primary was voting. *Id.*

¹⁶² *Id.* at 126.

¹⁶³ *Id.*

¹⁶⁴ MEETING AGENDAS & MEMOS, *supra* note 111, at 133.

¹⁶⁵ *Id.* at 134.

the Group and public comments were taken into account by the work teams, and revisions were made to the proposals on day two of the meeting.¹⁶⁶ Following these revisions, each Group member was asked to affiliate with one proposal for the final round.¹⁶⁷ It was noted that “affiliation” did not necessarily mean that the member was supporting that particular proposal,¹⁶⁸ although it could be surmised that most members would have desired to affiliate with the proposal they supported and favored.

D. Public Input and the Marine Protected Area Proposal Process

Each Stakeholder Group meeting provided an opportunity for public comment in front of the Group.¹⁶⁹ The meetings were web-cast live so that anyone with internet access could listen and view.¹⁷⁰ After the meetings, the Department staff posted audio and video archives of the meetings on the MLPA site for public access.¹⁷¹ Public workshops were held to introduce the public to the second round MPA proposals, and public comments were transmitted back to the Stakeholder Group by the Department staff.¹⁷² The MLPA web-based resources were central to the public's access into and involvement with the MPA proposal process.¹⁷³ Resulting meeting schedules, agendas, and Key Outcome Memos were all accessible to the public via the MLPA website.¹⁷⁴

The initial MLPA effort began in 2001 with ten public workshops, in which the public, in general, was asked to comment and voice their opinions on proposed MPAs.¹⁷⁵ These first draft MPAs were “primarily based on the recommendations of the Master Plan Team scientists” and “little input from constituent user groups” was considered.¹⁷⁶ The

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 135.

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ MEETING AGENDAS & MEMOS, *supra* note 111, at 114 (Final Ground Rules).

¹⁷¹ *Id.*

¹⁷² *Id.* at 115.

¹⁷³ MLPA Initiative Home Page, *supra* note 92.

¹⁷⁴ *Id.*

¹⁷⁵ MASTER PLAN, *supra* note 51, app. at C-2.

¹⁷⁶ *Id.* at C-1.

Department received a lot of feedback, the majority of it being negative.¹⁷⁷ Seemingly very little progress was made, and the deadlines for creating a Master Plan had to be postponed multiple times throughout the process.¹⁷⁸

The National Marine Sanctuary Program has faced similar issues with public opposition.¹⁷⁹ However, the most recent MLPA initiative changed how the Department received public input, and how such input was utilized.¹⁸⁰ The Department found out the hard way that taking into account the views of “interested parties” could be costly and time consuming.¹⁸¹ Utilizing a Stakeholder Group to represent interested parties made a defined group of decision-makers accountable for MPA development.¹⁸² The Stakeholder Group essentially became the buffer between the Department of Fish & Game staff and the general public. Public feedback was given directly to the Stakeholder Group during the MPA process and this shifted the responsibility for addressing and incorporating the desires of the public from the Department staff to the Stakeholder representatives. This will be discussed further in the next section.

E. The Marine Protected Area Process and Stakeholder Interests

As mentioned, the members of the Stakeholder Group were nominated by the public and subsequently asked by the Department to join.¹⁸³ It is not clear how the Department initially attempted to balance the diversity of interests and create a group that would be on relatively equal footing. The Stakeholder Group member list was limited to twenty-four seats with each primary member allowed to have an alternate.¹⁸⁴

¹⁷⁷ *Id.* at C-2.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* See Robin Kundis Craig, *Taking Steps toward Marine Wilderness Protection? Fishing and Coral Reef Marine Reserves in Florida and Hawaii*, 34 MCGEORGE L. REV. 155, 204 (2003) (“[T]he National Marine Sanctuaries Act displays an uneasy tension between ecosystem protection and fishing interests.”).

¹⁸⁰ See MASTER PLAN, *supra* note 51, app. at C-2.

¹⁸¹ See *supra* notes 65-82 and accompanying text.

¹⁸² MASTER PLAN, *supra* note 51, app. at C-2.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

The MLPA website provides a list of primary members and alternates with their occupation or affiliation.¹⁸⁵

Attached to the Key Outcomes Memo for the August, 2007 meeting is a listing of the "identified interests" of the stakeholders.¹⁸⁶ Most of the members present stated the interest group they were representing and what was important to them about the study region.¹⁸⁷ Of the twenty-four Stakeholder Group members, five of them could be classified as representing commercial fisheries, five as representing recreational interests, seven as representing conservation or education interests,¹⁸⁸ one person particularly concerned about cultural issues, and the remaining (six) either with multiple interests or no particular specified interest.¹⁸⁹ This rough estimation appears to show a fairly equal distribution, with the exception of slightly more conservation or education interest representation. Based on these rough estimates, each member can generally be classified into one of five interests groups: commercial fisheries, recreational interests (fishing, diving, etc.), conservation or education, cultural, and the undefined or multi-interest.¹⁹⁰

At the final formal Stakeholder Group meeting, each member was asked to affiliate with one of the final three proposals (either Proposal 1-3, 2XA, or 4).¹⁹¹ Proposal 1-3 garnered the most support; twenty-six out of forty-four attending members (both primary and alternates were allowed to affiliate) affiliated with Proposal 1-3.¹⁹² Proposal 2XA was next with eleven of the forty-four members, while Proposal 4 had the least amount of member affiliation with only seven members.¹⁹³ Using

¹⁸⁵ See Cal. Dep't of Fish & Game, North Central Coast Project, <http://www.dfg.ca.gov/mlpa/northcentralcoast.asp> (last visited Feb. 5, 2009).

¹⁸⁶ MEETING AGENDAS & MEMOS, *supra* note 111, at 62-64.

¹⁸⁷ *Id.*

¹⁸⁸ It seems logical to group education and conservation interest groups, as the "educators" frequently expressed conservation interests.

¹⁸⁹ The author realizes that this is a rough estimate of where each member's interests may lie based on the brief statements that each member made and their occupations and, therefore, may be inaccurate. However, for the purposes of this article, the assumption is made that each Stakeholder Group participant may be classified based on the statements they made.

¹⁹⁰ MEETING AGENDAS & MEMOS, *supra* note 111, at 62-64.

¹⁹¹ *Id.* at 135.

¹⁹² *Id.*

¹⁹³ *Id.*

the above rough categorizations of the members, Proposal 1-3 has approximately ten conservation or education interested members, seven undefined or multi-interest members, six recreational interest members, and three commercial fisheries interest members.¹⁹⁴ Proposal 2XA appears to be primarily representative of commercial fisheries interests, with seven of the eleven affiliated members espousing fisheries interests.¹⁹⁵ Proposal 4, the least affiliated, is largely representative of the conservation and education category of members.¹⁹⁶

The element of restrictiveness is of particular note to this analysis of interest group support.¹⁹⁷ In general, the more restrictive an MPA is the more it prohibits activities that adversely affect the "natural ecological functions of the area."¹⁹⁸ The most protective or restrictive MPA, often called a marine reserve, "would be maintained to the extent practicable in an undisturbed and unpolluted state."¹⁹⁹ In order to adequately protect California's ocean resources and achieve the goals of the MLPA, the MPAs need to protect biological diversity, as it "is a key to ecosystem productivity, complexity, and resilience"²⁰⁰

The Department staff determined "the percentage of the study area captured within each of the MPA classifications – e.g., State Marine Reserves, State Marine Conservation Areas, State Marine Parks, and State Marine Recreational Management Area[s]."²⁰¹ Proposal 4 was the most restrictive of the three because it had the highest percentage of State Marine Reserves in addition to the highest percentage of State Marine Conservation Areas, resulting in a total protected area of 26.9%.²⁰² Proposal 2XA was the least restrictive with a total protected area of only 18%.²⁰³ Proposal 1-3 took the middle ground with 21.6% protected

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ MEETING AGENDAS & MEMOS, *supra* note 111, at 135.

¹⁹⁷ *Id.* at 62-64.

¹⁹⁸ Marine Life Protection Act, CAL. FISH & GAME CODE § 2852(d) (2000).

¹⁹⁹ *Id.*

²⁰⁰ Sivas & Caldwell, *supra* note 52, at 217.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ MEETING AGENDAS & MEMOS, *supra* note 111, at 135.

area.²⁰⁴ The amount of support (or affiliation) could be explained by this element of restrictiveness.²⁰⁵ The majority of the members affiliated with the middle ground of protection, while the fewest number of people affiliated with the most restrictive proposal.²⁰⁶

F. The Final North Central Coast Marine Protected Areas

The Task Force was required to review and consider the three proposals (Proposals 1-3, 2XA, and 4) and determine what recommendations should be made to the Commission.²⁰⁷ The Task Force decided to forward all three Stakeholder Group proposals (1-3, 2XA, and 4) as well as the no-action alternative (Proposal 0) to the Commission; it also created the Integrated Preferred Alternative (Preferred Alternative).²⁰⁸ The Preferred Alternative is a “consensus recommendation” that is “derived directly from the [Stakeholder Group] proposals, with the intent of bridging some of the gaps.”²⁰⁹ The Preferred Alternative, with a total of 20% MPA protected area, is just slightly more restrictive than Proposal 2XA and slightly less restrictive than Proposal 1-3.²¹⁰ Generally, the Preferred Alternative keeps the same boundaries as the three proposals but in three areas does not include an MPA where the others may.²¹¹ Because of the lightened restrictions the Preferred Alternative proposed, it is difficult to understand what sort of “gaps” the Task Force may have been trying to fill.

²⁰⁴ *Id.*

²⁰⁵ Sivas & Caldwell, *supra* note 52, at 217-18.

²⁰⁶ *Id.*

²⁰⁷ MEETING AGENDAS & MEMOS, *supra* note 111, at 138. See Memorandum from the MLPA Blue Ribbon Task Force on Integrated Preferred Alternative Marine Protected Area Proposal for the MLPA North Central Coast Study Region (2008), <http://www.dfg.ca.gov/mlpa/pdfs/binders/b4di2.pdf>, [hereinafter MEMORANDUM] (findings of the Blue Ribbon Task Force and resulting recommendations to the California Fish & Game Commission).

²⁰⁸ MEMORANDUM, *supra* note 207, at 2.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 2-3.

²¹¹ *Id.* at 3. In three locations, the Integrated Preferred Alternative does not include an MPA where one or more of the stakeholder proposals proposed an MPA; the southern part of Tomales Bay, the northern part of Duxbury reef, and the area adjacent to San Gregorio State Beach.

The Task Force stated that the Preferred Alternative was "intended to meet science guidelines, achieve the goals of the MLPA, and address feasibility issues identified by the California Department of Fish and Game, while also bridging some of the remaining areas of divergence and making a final set of tradeoffs among the [Stakeholder Group] proposals."²¹² It appears that the Task Force felt a need to err on the side of less protection because of political pressure from the commercial and recreational fisheries. If there were valid reasons, scientific or otherwise, for this proposal being less restrictive than the majority-supported Proposal 1-3, the Task Force did not state them clearly.

V. CONCLUSIONS

The Marine Life Protection Act suffered a rough start,²¹³ but through concerted public-private efforts,²¹⁴ the program of regional marine protected area designation has had some success.²¹⁵ The North Central Coast region had the good fortune to be second in the process and learn from the experiences of the Central Coast region.²¹⁶ The Department's facilitation of the entire process appears to have been crucial to the success of the meetings and the work group process.²¹⁷

While the initial phases of the MLPA were plagued with too much public input,²¹⁸ the identification of a Regional Stakeholders Group with members nominated by the public allowed for the interested parties to be involved, through representation by the members of their particular interest group that had the greatest level of expertise.²¹⁹ This also made the stakeholders responsible for the creation of the proposed MPAs and took the pressure off of the Department staff.²²⁰ The Stakeholder Group's meetings, being over a two day period, likely provided ample

²¹² *Id.*

²¹³ Recent Developments, *supra* note 83.

²¹⁴ *Id.*

²¹⁵ See *supra* note 10 and accompanying text.

²¹⁶ See *supra* notes 90-91 and accompanying text.

²¹⁷ MASTER PLAN, *supra* note 51.

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ *Id.* at 16.

opportunity for the various stakeholders to get to know one another and potentially develop better working relationships.²²¹

In contrast, the multi-interest work group division early in the process forced people into a negotiation position and possibly cut down on the formation of alliances.²²² At the start of the second iteration of proposals, it became necessary for people to stake a claim on their preferred alternative, and it appears that at this point the battle lines were drawn.²²³ The commercial fisheries stakeholders could be predicted to go with the least restrictive option.²²⁴ Similarly, the conservationists could also be predicted to go with the most restrictive proposal.²²⁵

The real success story appears to be the middle proposal (1-3), which garnered not only the most support, but also support from a variety of interest groups.²²⁶ It is curious that the Task Force chose to break from this middle group and develop a Preferred Alternative, which was less restrictive than the alternative that the majority of the stakeholders would have supported (Proposal 1-3).²²⁷ Possibly, they believed that their Preferred Alternative represented more of a "middle ground" between what the proponents of 1-3 suggested and what the majority of the fisheries' constituents proposed (2-XA).²²⁸ It is also possible that the Task Force felt pressure to adopt alternative MPAs that would not affect California's commercial and recreational fishing industries as negatively as the more restrictive proposals would. After all, the Task Force is largely a political group, as members are chosen by and serve at the pleasure of the California Secretary of Resources; therefore, it stands to reason that their decision to support a less restrictive alternative could be the result of political advocacy.²²⁹

²²¹ See MEETING AGENDAS & MEMOS, *supra* note 111. The meeting agendas reflect the two-day schedule that was followed.

²²² See *supra* notes 131-138 and accompanying text.

²²³ MEETING AGENDAS & MEMOS, *supra* note 111, at 135.

²²⁴ *Id.* Although, unpredictably, some of the commercial fisheries stakeholders supported the multi-interest proposal that was most favored.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See MEMORANDUM, *supra* note 207, at 2-3.

²²⁸ See MEETING AGENDAS & MEMOS, *supra* note 111, at 138.

²²⁹ See *supra* notes 103-104 and accompanying text.

One of the major improvements that could be made to the MLPA process, and other similar initiatives that may follow, would be for a body of authority (the state legislature or the federal Congress) to identify a minimum level of protection that the program should accomplish.²³⁰ Any process that relies on constituent group participation runs the risk of submitting to the pressures from resources users "for whom the[] change[s] will reduce their extractive use" (such as recreational and commercial fishermen).²³¹ Such pressures may "result in an MPA array that provides less overall resource protection."²³² In the MLPA process, the Task Force, as a group with an authoritative role, could function to mediate some of the concerns about certain resource users swaying the Stakeholder Group proposal process in their own favor.²³³

The Task Force has the ability to act independent of the Stakeholder group process to create its own alternative MPA proposal.²³⁴ This ability could, theoretically, bring some level of detachment and objectivity to counter any susceptibility of the Stakeholder Group to excess pressures from interested parties.²³⁵ If there were a situation where the Stakeholder Group was imbalanced and the results of their efforts to create MPAs did not adequately reflect what "interested parties" desired, then the Task Force could correct that imbalance with their own proposal. This sort of check and balance element could be very useful. Where it appears, as here, that the Task Force holds more power and sway than the Stakeholder Group, then the concerns about Task Force mutability come into play. The Task Force may be susceptible to political pressure

²³⁰ Sivas & Caldwell, *supra* note 52, at 289. The authors suggest another alternative: "to establish a minimum required percentage for high level protection in the enabling statute itself." The authors ultimately go on to suggest a management option for ocean governance which includes "No Impact Districts." These "No Impact" zones would be required, under the enabling statute, to encompass a certain percentage of state waters. It should be noted that one of these authors, Caldwell, participated in the North Central Coast MLPA process as a member of the Blue Ribbon Task Force.

²³¹ *Id.* at 248-49 (The authors point out that this is one key difference between the MLPA and the Great Barrier Reef; the Great Barrier Reef Marine Park Authority determined a conservation goal before drawing lines on a map.).

²³² *Id.*

²³³ *See id.* at 251.

²³⁴ MASTER PLAN, *supra* note 51, at 21.

²³⁵ *See id.*

because of the discretion and power they hold in the final recommendation of MPAs and because they are politically appointed.

The Task Force has the potential to take the decision of where and how much protection California's marine environment will eventually enjoy out of the hands of the stakeholders.²³⁶ If the Task Force members were publicly nominated and then served for the term of the MLPA process, free from the will of a state agency, then they could act independent of political pressures.²³⁷ Under such an approach, the best Task Force members would be those that are politically immutable and capable of overseeing the Stakeholder process and translating the needs and desires of the "interested parties" to the agency head making the final MPA decision. The Task Force would not need to be as reflective of the interested parties as the Stakeholder Group and could accept the findings and proposals of the Stakeholder Group, only being concerned with the effects of any potential imbalances. This appears to be the goal of the California MPA process. When the Task Force proposal differs from the majority supported Stakeholder proposal, then the Task Force should explain why they differ. By not deferring to the majority supported proposal, the Task Force risks generating a feeling that participants' contributions and recommendations were ultimately not heeded.

California's MLPA process provides a model for other states to follow in designating their own MPAs.²³⁸ As one scholar writes, "[i]f other states adopt this approach, they would establish a foundation for the state component of a national system of MPAs."²³⁹ If marine protection at a national scale is to ever be realized, then the process for creating these protected areas must be honed, perfected, and flexible to regional needs.²⁴⁰ "[T]he process that is used to involve [stakeholders]

²³⁶ See *supra* notes 103-104 and accompanying text.

²³⁷ See Josh Eagle, *The Practical Effects of Delegation: Agencies and the Zoning of Public Lands and Seas*, 35 PEPP. L. REV. 835, 888 (2008). Essentially, agencies are not the best groups to be in charge of any sort of state or federal marine zoning effort and that such a task requires more legislative involvement. These decisions, such as the MLPA process in California, require "political decisions about how resources should be allocated among user groups." Agencies are not fully equipped for such political decision-making. *Id.*

²³⁸ Baur, *supra* note 11, at 524.

²³⁹ *Id.*

²⁴⁰ See *id.* at 566.

and the public in designating new MPAs . . . is critical to its success.”²⁴¹ Much can be learned from California’s process and applied to state and federal marine protection efforts.

VI. EPILOGUE

During the final stages of preparing this article for publication a *Report on Lessons Learned from the Marine Life Protection Act Initiative: North Central Coast Study Region* was published on October 31, 2008, and subsequently posted on the Department of Fish and Game’s MLPA website.²⁴² This Report was produced by an independent consulting company, Harty Conflict Consulting & Mediation. The Report deems the MPA process for the North Central Coast region a “success” and finds that the MPA alternatives produced “provided a reasonable foundation for decision making by the Commission.”²⁴³ The Report polled Stakeholder Group members about their satisfaction with the many elements of the entire MLPA process.²⁴⁴ Consistent with the conclusions stated above, the Report found that Stakeholder Group members exhibited “substantial dissatisfaction” with the Blue Ribbon Task Force’s final decision meeting where the Task Force appeared to have made “an abrupt change in direction for MPA location.”²⁴⁵ The Report describes that there is some “tension” between the structure of the MLPA and the value of consensus based decision making.²⁴⁶ Such tension seems to result from the fact that the Stakeholders, who are required to make difficult decisions in order to reach consensus, are motivated by the incentive that a “decision maker will accept the tradeoffs and overall solution developed.”²⁴⁷ The Report suggests that it is possible that the decision making power of the Task Force and the

²⁴¹ *Id.*

²⁴² J. MICHAEL HARTY, HARTY CONFLICT CONSULTING & MEDIATION, *Report on Lessons Learned from the Marine Life Protection Act Initiative: North Central Coast Study Region* (2008), available at http://www.dfg.ca.gov/MLPA/pdfs/agenda_110408a.pdf [hereinafter *Report on Lessons Learned*].

²⁴³ *Id.* at iii.

²⁴⁴ See *id.* The polls were used to determine the success of various elements of the process and to identify potential problem areas.

²⁴⁵ *Id.* at 44.

²⁴⁶ *Id.* at 45.

²⁴⁷ *Id.*

Commission may not trust the Stakeholders and the consensus building process enough.²⁴⁸

²⁴⁸ *Report on Lessons Learned*, *supra* note 242, at 45.

