

FISH AND GAME COMMISSION
STATEMENT OF FACTS CONSTITUTING NEED FOR EMERGENCY ACTION

Emergency Action to Amend Section 632, Title 14, California Code of Regulations
Re: Blue Cavern (Catalina Island) State Marine Conservation Area

I. INTRODUCTION

The Marine Life Protection Act (MLPA) provides the authority for the California Fish and Game Commission (Commission) to establish a programmatic framework for designating Marine Protected Areas (MPAs) in the form of a statewide network [Fish and Game Code (FGC) Sections 2850-2863]. Pursuant to FGC Section 240, if the Commission is made aware of a situation where preservation of public peace, health and safety, or general welfare is jeopardized, it may adopt or repeal a regulation after at least one hearing where such a finding can be made.

Beginning January 1, 2012, the south coast component of the statewide network of MPAs, defined as state waters between Point Conception in Santa Barbara County and the California/Mexico border, including offshore islands, was implemented. Following implementation, the Department of Fish and Game (Department) has received numerous inquiries and concerns from the general public and enforcement agencies about a “no anchoring” provision in the newly created Blue Cavern State Marine Conservation Area (SMCA) [Section 632(b)(102), Title 14] which encompasses the existing Catalina Marine Science Center Marine Life Refuge (FGC Section 10932). The “no anchoring” provision is an unintended carryover from the existing Refuge provisions. Anchoring and mooring are restricted in the Refuge area to protect ongoing scientific studies and study sites. The Director of the Catalina Marine Science Center Marine Life Refuge can authorize anchoring, mooring or take of marine life for scientific purposes, under the conditions prescribed in a scientific collecting permit issued by the Department (FGC Sections 10655 and 10502.8). However, it was not the intention of the MPA planning process to extend the “no anchoring” provision beyond the Refuge boundaries into the larger Blue Cavern SMCA. The increased “no anchor” area creates an unnecessary public safety risk for divers and small boat operators who commonly use the north, or lee side, of the island for diving activities and as protection from wind and swells. Thus, the Commission finds it necessary to implement an emergency action to protect the health, safety, and general welfare of those that use this area of Catalina Island for recreation.

II. FACTS CONSTITUTING THE NEED FOR EMERGENCY ACTION

The Administrative Procedure Act (APA) defines an “emergency” as “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare” [Section 11342.545, California Government Code (CGC)]. To make a finding of emergency, the agency must describe the specific facts supported by substantial evidence that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation (Section 11346.1(b)(2), CGC). Some of the factors an agency may consider in determining whether an emergency exists include: (1) the magnitude of the

Statement of Facts Constituting Need for Emergency Action

March 22, 2012

Page 2 of 6

potential harm, (2) the existence of a crisis situation, (3) the immediacy of the need, i.e., whether there is a substantial likelihood that serious harm will be experienced unless immediate action is taken, and (4) whether the anticipation of harm has a basis firmer than simple speculation.

The Commission has considered all of these factors and the definition of an emergency provided in the APA, as well as pertinent authority in FGC Section 240. Under this latter authority, notwithstanding any other provision of the FGC, the Commission may adopt an emergency regulation where doing so is necessary for the immediate preservation of the public peace, health and safety, or general welfare. The Commission finds that such necessity exists in the present case.

The Blue Cavern SMCA was intended to expand the “no take” zone afforded by the existing Catalina Marine Science Center Marine Life Refuge. This was accomplished through the regular MPA regulation process, but the new regulation also unintentionally expanded the “no anchoring” area into an area that is frequently used for anchoring by the public. The issue was not immediately recognized by the public and Department during the planning process. Now that the regulation has been implemented and many are planning their fair weather activities, the problem with the regulation is now widely recognized by user groups, government enforcement agencies, and the nearby Catalina Marine Science Center.

Several prime dive sites that are highly valued for perfect combinations of depth and underwater terrain are found within the Blue Cavern SMCA. Two different types of divers regularly use this area (experienced divers and inexperienced divers in scuba classes) and the use of this area increases dramatically during spring and summer. “Live-boating” is a technique sometimes used by dive boats in areas where they cannot anchor (usually very deep or drop off areas). This technique requires that the captain deploy the divers into the water and keep the vessel constantly moving to remain within sight and easy access of the divers. Because the vessel is moving frequently it is very difficult for others to determine just where divers may be located. Dive boats that are anchored and displaying a dive flag send a message to everyone in the area to expect divers in the immediate area. A live-boat operation does not provide the same reference point, and diver safety could be compromised when several boats are conducting live-boat operations in a relatively small area. Live-boat operations would be the only type allowed by the current regulation. Scuba classes are regularly held within Blue Cavern SMCA because of the great diversity offered for gaining dive experience and for scuba class testing purposes. Live-boat diving is difficult and could also create a significant safety issue for those inexperienced divers. In addition, the dive sites at this location are very close to emergency services, something of great consideration for inexperienced divers. The Island’s only hyperbaric chamber is located at nearby Two Harbors as well as first responders from the Los Angeles County Lifeguards and Sheriff’s Department. The increased “no anchor” area

creates a situation where unnecessary public safety risk for divers, both experienced and inexperienced, now exists.

In addition to the dive community, the loss of this area to anchoring limits the places where small private boats can go to escape typical offshore weather patterns that can create high winds and waves, hence the high use for recreation. As weather improves and summer approaches, the number of non-consumptive users in this area is historically very high. Immediate action is needed to protect the health, safety, and general welfare of those that use this area of Catalina Island for recreation and for a safe harbor from inclement weather. In addition, enforcement of an unintended “no anchor” zone will likely place an unnecessary burden on local and state enforcement assets.

In reviewing available records and discussing the issue, this oversight occurred during the MPA planning process resulting in unintended safety issues. The general rule and regulations for Marine Protected Areas (MPA) states (Section 632, Title 14, CCR): “Anchoring. Vessels shall be allowed to anchor in any marine protected area or marine managed area with catch onboard unless otherwise specified in subsection 632(b), areas and special regulations for use. Fishing gear shall not be deployed in the water while anchored in a state marine reserve. Fishing gear, except legal fishing gear used to take species identified as allowed for take in subsection 632(b), shall not be deployed in the water while anchored in a state marine recreational management area, state marine park or state marine conservation area. Anchoring regulations shall be consistent with federal law and allowances made for anchoring required by emergency or severe weather.”

III. EXPRESS FINDING OF EMERGENCY

Pursuant to the authority vested in the Commission by Fish and Game Code Section 240, and for the reasons set forth above, the Commission expressly finds that the adoption of this emergency regulation is necessary for the immediate preservation of the health and safety and general welfare. The Commission specifically finds that the amendment of the current regulation will avoid serious harm to the health and safety and general welfare of the public by allowing vessels safe anchorage during diving and other non-consumptive activities.

IV. AUTHORITY AND REFERENCE CITATIONS

Sections 200, 202, 203.1, 205(c), 219, 220, 240, 1590, 1591, 2860, 2861 and 6750, Fish and Game Code; and Sections 36725(a) and 36725(e), Public Resources Code. Reference: Sections 200, 202, 203.1, 205(c), 219, 220, 240, 1580, 1583, 2861, 5521, 6653, 8420(e) and 8500, Fish and Game Code; and Sections 36700(e), 36710(e), 36725(a) and 36725(e), Public Resources Code.

V. **INFORMATIVE DIGEST**

A. Laws Related to the Emergency Regulation

The MLPA provides the authority for the Commission to establish a programmatic framework for designating MPAs in the form of a statewide network (FGC Sections 2850-2863). Under existing regulations [Section 632(a)(7), Title 14, CCR], vessels shall be allowed to anchor in any MPA or marine managed area with catch onboard unless otherwise specified in subsection 632(b), areas and special regulations for use. Fishing gear shall not be deployed in the water while anchored in a state marine reserve.

Under existing statute (FGC Section 10655), anchoring and mooring are restricted in the Catalina Marine Science Center Marine Life Refuge to protect ongoing scientific studies. The Director of the Refuge can authorize anchoring, mooring or take of marine life for scientific purposes, under the conditions prescribed in a scientific collecting permit issued by the Department.

B. Effect of the Emergency Action

This amendment of Section 632 will allow anchoring within the Blue Cavern SMCA, except within the Catalina Marine Science Center Marine Life Refuge. The provision for the director of the refuge to authorize anchoring, mooring, or take of marine life for scientific purposes, under the conditions prescribed in a scientific collecting permit issued by the Department (FGC Section 10655) is unchanged.

C. Policy Statement Overview

The objective of this emergency regulation is to avoid serious harm to the health and safety and general welfare of the public by allowing vessels safe anchorage for recreational diving activities in a portion of the Blue Cavern SMCA and to afford vessel protection from weather. It will not compromise the existing no anchoring provisions of the Catalina Marine Science Center Marine Life Refuge

D. Benefit of the Regulation

The emergency regulation will result in non-monetary benefits related to public health and safety.

The emergency regulation is neither inconsistent nor incompatible with existing state regulation. This regulation will re-open an area to anchoring that was unintentionally closed. Prior to January 1, 2012 it was legal to anchor and moor in the area.

VI. Specific Agency Statutory Requirements

The Commission has complied with the special statutory requirements governing the adoption of emergency regulations pursuant to FGC Section 240.

VII. Impact of Regulatory Action

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

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

Some unknown level of cost savings will be realized by not having to invest as much time in enforcement of confusing and potentially dangerous regulations.

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

None.

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

None.

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

None.

- (e) Effect on Housing Costs:

None.

VIII. PROPOSED REGULATION CHANGE

Subsection 632(b)(102), Title 14, CCR, is amended to read:

(102) Blue Cavern (Catalina Island) State Marine Conservation Area.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed:

33° 25.96' N. lat. 118° 27.00' W. long.;

33° 27.50' N. lat. 118° 27.00' W. long.;

33° 27.50' N. lat. 118° 29.30' W. long.; and

33° 26.64' N. lat. 118° 29.30' W. long.

(B) Take of all living marine resources is prohibited except for take pursuant to activities authorized under subsections 632(b)(102)(D) and 632(b)(102)(E).

(C) Except as pursuant to Federal law, emergency caused by hazardous weather, or as provided in ~~this section~~ subsection 632(b)(102)(D), it is unlawful to anchor or moor a vessel in the ~~Blue Cavern State Marine Conservation Area~~ Catalina Marine Science Center Marine Life Refuge (Section 10932, Fish and Game Code).

(D) The director of the ~~Blue Cavern State Marine Conservation Area~~ Catalina Marine Science Center Marine Life Refuge, or any person that the director of the ~~conservation area~~ refuge has authorized may anchor or moor a vessel or take, for scientific purposes, any fish or specimen of marine life under the conditions prescribed in a scientific collecting permit issued by the department.

(E) Maintenance of artificial structures inside the conservation area is allowed pursuant to any required federal, state and local permits, or as otherwise authorized by the department.

Note: Authority cited: Sections 200, 202, 203.1, 205(c), 219, 220, 240, 1590, 1591, 2860, 2861 and 6750, Fish and Game Code; and Sections 36725(a) and 36725(e), Public Resources Code. Reference: Sections 200, 202, 203.1, 205(c), 219, 220, 240 1580, 1583, 2861, 5521, 6653, 8420(e) and 8500, Fish and Game Code; and Sections 36700(e), 36710(e), 36725(a) and 36725(e), Public Resources Code.