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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOHN GIBBS et al., Plaintiffs and Appellants, v. CALIFORNIA FISH & GAME COMMISSION et al., Defendants and Respondents.	B252392 (Los Angeles County Super. Ct. No. NC043367)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Vicencia, Judge. Affirmed.

International Law Offices of San Diego and Peter H. Flournoy for Plaintiff and Appellant John Gibbs.

Weil & Associates, David Weil and Geoffrey W. Gill for Plaintiff and Appellant James Bunn.

Kamala D. Harris, Attorney General, Robert W. Byrne, Assistant Attorney General, Eric M. Katz, Kurt Weissmuller and Allan S. Ono, Deputy Attorneys General, for Defendants and Respondents.

INTRODUCTION

Two long-time fishermen, John Gibbs and James Bunn, appeal from a judgment denying their petition for a writ of ordinary mandate (Code Civ. Proc., § 1085) by which they sought to invalidate regulations governing the issuance of certain permits to fish for California squid. They contend that the trial court relied on the incorrect statute as authority for the regulations that created non-transferable market squid vessel permits. They also challenge the rulemaking process. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The statutory scheme for California market squid*

In 1997, the Legislature enacted article 9.7 of the Fish and Game Code section 8420 et seq.[1] In section 8420, the Legislature announced its findings and declarations that market squid, the state's largest fishery by volume, was at risk of significant overfishing. The demand for California's market squid was escalating because of declining global squid production, larger and more efficient vessels, and increased processing capacity. The Legislature was concerned that the overfishing and lack of research would damage the resource and associated marine life while financially harming fishermen, processors, and sellers who were dependent on the state's market squid fishery. (*Id*., subds. (a)-(c).) The Legislature declared, "*it is necessary to adopt and implement a fishery management plan for the California market squid fishery that sustains both the squid population and the marine life that depends on squid*." (*Id*., subd. (d), italics added.)[2]

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[1] All further statutory references are to the Fish & Game Code, unless otherwise noted.

[2] Section 8420 reads, "(a) The Legislature finds and declares that the fishery for market squid (Loligo opalescens) is the state's largest fishery by volume, generating millions of dollars of income to the state annually from domestic and foreign sales. In addition to supporting an important commercial fishery, the market squid resource is important to the recreational fishery and is forage for other fish taken for commercial and recreational purposes, as well as for marine mammals, birds, and other marine life. The growing international market for squid and declining squid production from other parts of the world has resulted in an increased demand for California market squid, which, in turn,

Toward that end, the Legislature delegated oversight and management authority for the market squid fishery to the Fish and Game Commission (the Commission). (§ 8420, subd. (e).) The Legislature "urge[d] that *any limited entry component of a fishery management plan, if necessary, should be adopted for the primary purpose of protecting the resource and not simply for the purpose of diminishing or advancing the economic interests of any particular individual or group*." (*Ibid*., italics added.) A "limited entry fishery" is a fishery in which the number of people who may participate, or the number of vessels that may be used in taking a particular species of fish, is limited by statute or regulation. (§ 8100.)

Pending adoption of a squid fishery management plan, the Legislature enacted various statutes governing market squid permits to limit exploitation of the resource. (Former §§ 8421-8423.5 & 8427, repealed by Stats. 2001, ch. 381, § 9, p. 92, operative

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has led to newer, larger, and more efficient vessels entering the fishery and increased processing capacity.

"(b) The Legislature finds that the lack of research on market squid and the lack of annual at-sea surveys to determine the status of the resource, combined with the increased demand for, and fishing effort on, market squid could result in overfishing of the resource, damaging the resource, and financially harming those persons engaged in the taking, landing, processing, and sale of market squid.

"(c) The Legislature further finds that some individuals, vessels, and processing plants engaged in the market squid fishery have no other viable alternative fisheries available to them and that a decline or a loss of the market squid resource would cause economic devastation to the individuals or corporations engaged in the market squid fishery.

"(d) The Legislature declares that to prevent excessive fishing effort in the market squid fishery and to develop a plan for the sustainable harvest of market squid, it is necessary to adopt and implement a fishery management plan for the California market squid fishery that sustains both the squid population and the marine life that depends on squid.

"(e) The Legislature finds that a sustainable California market squid fishery can best be ensured through ongoing oversight and management of the fishery by the commission. With regard to the market squid fishery, the Legislature urges that any limited entry component of a fishery management plan, if necessary, should be adopted for the primary purpose of protecting the resource and not simply for the purpose of diminishing or advancing the economic interests of any particular individual or group."

Sept. 28, 2005.) The Legislature provided for a market squid vessel permit that was only transferable if given to another permitholder and if the permitted vessel was lost, stolen, destroyed, or suffered a major mechanical breakdown. (Former § 8427, subd. (a).)

2. *The Squid Advisory and the Squid Research Scientific Committees*

The Department of Fish and Game (the Department) formed two committees pursuant to former section 8426 to conduct research and make recommendations for squid conservation and management. The Squid Fishery Advisory Committee consisted of resource stakeholders, and the Squid Research Scientific Committee was comprised of many of the world's leading squid fishery scientists, including biologists, environmental scientists, and marine scientists. The Department's report to the Legislature in March 2001 (former § 8426, subd. (c)) recommended among other things, the creation of a limited entry squid fishery following the guidelines and policies established by the Commission for restricted access to other commercial fisheries. A limited entry squid program would be a starting point for creating a sustainable resource, and a viable fishery for both participants and any future program necessary to further reduce harvest capacity, the Department explained. The Department recommended that the criteria for initial, limited entry into the squid fishery be based on prior catch history in the industry.

Also as a part of its report to the Legislature, the Department recommended that the plan include provisions to make senior California fishermen eligible to fish for squid pursuant to section 8101. Section 8101, entitled "Eligibility for participation," was enacted 15 years earlier to ensure that commercial fishermen who had been licensed in California for at least 20 years and had participated in a particular fishery for at least one of those 20 years (20-year fishermen) were "eligible for inclusion during the initial year of a limited entry fishery which is established . . . by regulation . . . ." (§ 8101, subd. (a).) Section 8101 provided that 20-year fishermen who participated in a limited entry fishery were "subject to conditions of continuing eligibility established by statute or regulation if

those fishermen desire[d] to maintain their eligibility." (*Id*., subd. (b).)[3] Twenty-year fishermen were made a part of the Department's recommendations for a limited entry market squid fishery.

3. *The Squid Fishery Management Plan (SMP) and the Market Squid Fishery Restricted Access Program regulations*

In 2001, the Legislature enacted section 8425 establishing permanent Commission management authority over market squid fishery and instructing the Commission to adopt an SMP "and *regulations* to protect the squid resource and manage the squid fishery at a level that sustains healthy squid populations . . . ." (§ 8425, subd. (a), italics added.) Implementation of the SMP would render inoperative the various statutes concerning permits for market squid fishing, e.g. former sections 8421 through 8423.5 and 8427. (§ 8429.7.)

In 2003, the Department released a draft SMP. After public comment and hearings before the Commission, and in consultation with scientists, the Department released a revised draft plan in April 2004. Following public comment over the course of 2004, the Commission adopted the Department's proposed plan in 2005. As enacted, the SMP included a limited entry or "Restricted Access Program," by instituting a fleet-based capacity goal of 107 vessels, and criteria for qualifying, in the initial year, for the issuance of various types of squid fishing permits to meet that capacity goal.

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[3] Section 8101 states, "(a) *Any licensed fisherman* shall be eligible for inclusion during the *initial year of a limited entry fishery* which is established by statute that becomes operative after January 1, 1982, or by regulation that becomes operative after January 1, 1999, regardless of the prescribed conditions for entry into the fishery, if the fisherman presents to the department satisfactory evidence that he or she has been *licensed as a California commercial fisherman for at least 20 years and has participated in the fishery for at least one of those 20 years*, with qualifying participation in the fishery to be determined by the commission based on landings or other appropriate criteria. [¶] (b) Fishermen who have established eligibility to participate in a limited entry fishery under this section are subject to conditions of continuing eligibility established by statute or regulation if those fishermen desire to maintain their eligibility." (Italics added.)

The regulation, the Market Squid Fishery Restricted Access Program, title 14 of the California Code of Regulations, section 149.1 (hereinafter, CCR 149.1), at issue here, requires a permit to fish for market squid. (CCR 149.1, subd. (a).) CCR 149.1 divides permits into classes, one of which is the market squid vessel class. (*Id*., subd. (b).) Subdivision (c) of CCR 149.1 establishes the initial issuance criteria for two types of squid fishery permits: transferable, and non-transferable (i.e. not salable) to reduce fleet capacity by attrition. *Transferable* market squid vessel permits were available to fishermen with, among other things, at least 50 landings of market squid between January 1, 2000 and March 31, 2003. (CCR 149.1, subd. (c)(1)(C).) *Non-transferable* market squid vessel permits were available to 20-year fishermen who had made at least 33 landings of market squid for the 2004-2005 permit year. (*Id*., subd. (c)(2)(C)-(D).) The Commission created this latter permit program by following section 8101, so as to enable 20-year fishermen to continue in the squid fishery if they participated in one or more prior years. (Amended Statement of Reasons for Regulatory Action, Sept. 20, 2004, pp. 3-4.)

4. *Petitioners*

Gibbs and Bunn had been licensed as California fishermen for at least 20 years and had participated in a variety of fisheries throughout the Pacific Ocean. Their participation in the market squid fishery in particular however, was limited during the 2004-2005 permit year. Hence, unlike more active squid-fishermen, Bunn and Gibbs did not meet the threshold criteria for the initial issuance of *transferable* permits under CCR 149.1, subdivision (c)(1), but did qualify for *non-transferable* permits. (CCR 149.1, subd. (c)(2); § 8101, subd. (a).)

Gibbs and Bunn filed this action seeking, inter alia, to invalidate the non-transferability provisions of section 149.1. They alleged that section 8101 was the enabling statute for CCR 149.1. Hence, promulgation of the non-transferable permit regulations (CCR 149.1, subds. (b)(1) & (c)(2)) violated the Administrative Procedure Act (Gov. Code, §§ 11342.1 & 11342.2) because the regulations fell outside the scope of the Commission's authority conferred by, conflicted with, and were not reasonably

necessary to effectuate the purpose of, section 8101. They sought a writ of mandate compelling the Commission to repeal CCR 149.1, subdivisions (b)(1) and (c)(2) and to make all non-transferable squid permits transferable. The trial court denied the writ petition. Gibbs and Bunn filed timely appeals. Additional facts will be addressed in the relevant portion of the discussion.[4]

DISCUSSION

1. *Legal framework under the Administrative Procedure Act* (*Gov. Code, §§ 11342.1 & 11342.2*)

An administrative agency's authority to adopt regulations is circumscribed by its enabling legislation. An administrative regulation must "be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." (Gov. Code, § 11342.1.)

"[J]udicial review of quasi-legislative administrative action is well settled. [Citations.] . . . [The Supreme Court has] long recognized, of course, that 'the construction of a statute by officials charged with its administration, including their interpretation of the authority invested in them to implement and carry out its provisions, is entitled to great weight . . . .' [Citation.] Nevertheless, '[w]hatever the force of administrative construction, . . . final responsibility for the interpretation of the law rests with the courts.' [Citations.]" (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390-391, fn. omitted.) " '[T]he issue of statutory construction is a question of law on which a court exercises independent judgment.' [Citations.]" (*PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1303, quoting from *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415-416 (*Western States*); accord, *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, fn. 4 (*Yamaha*).)

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[4] Both Bunn and Gibbs set forth numerous facts in their appellate briefs without citation to the record. We disregard those facts that are unsupported by record citation. (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003, fn. 2.)

Once the agency's authority to adopt regulations to implement a legislative scheme is established, the Administrative Procedure Act requires that any ensuing regulations be "consistent and not in conflict with the [enabling] statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321; accord, *Bearden v. U.S. Borax, Inc*. (2006) 138 Cal.App.4th 429, 435-436.)[5]

When reviewing the regulation's consistency with its enabling authority our standard "is one of 'respectful nondeference.' [Citations.]" (*Mineral Associations Coalition v. State Mining & Geology Bd*. (2006) 138 Cal.App.4th 574, 583.) When reviewing the regulation's reasonable necessity to effectuate the enabling statute's purpose, " ' " 'the court will not 'superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision.' " ' [Citations.]" (*Ibid.*, quoting from *Yamaha, supra,* 19 Cal.4th at pp. 16-17 (conc. opn. of Mosk, J.).) Thus, review of reasonable necessity is " 'confined to whether the rule is arbitrary, capricious, or without rational basis.' [Citation.]" (*PaintCare v. Mortensen*, *supra*, 233 Cal.App.4th at p. 1304, citing *Western States, supra,* 57 Cal.4th at p. 415.)

2. *CCR 149.1 falls within scope of section 8420 et seq. enabling it, and the regulation does not conflict with that legislation.*[6]

Bunn contends that the trial court erred in ruling that section 8420 et seq. authorized the Commission to promulgate CCR 149.1. Acknowledging that section 8420 "generally regulates and creates the framework for the management of the *entire squid*

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[5] Government Code section 11342.2 reads: "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."

[6] Bunn concedes that CCR 149.1 is reasonably necessary to effectuate the purpose of sections 8420 et seq. He states in his opening brief: "it could *easily be argued* that the non-transferable permit regulations . . . are 'reasonably necessary to effectuate the purpose of the statute.' " (Italics added.)

fishery," Bunn nonetheless contends that section 8101 was the enabling statute. (Italics added.) He reasons that 20-year fishermen "would not have received a squid permit at all, ***but for*** the provisions of § 8101." He cites from the legislative history indicating that section 8101 requires that 20-year fishermen be "given consideration when [the Legislature] limit[s] fisheries." Thus, he argues, section 8101 "*must have been* the enabling statute for" CCR 149.1 because it was enacted in anticipation of future implementation of restricted access as a fisheries management tool. (Italics added.) In contrast, he argues, the later-enacted section 8420 was designed to "create[] an entirely functional regulated fishery." We are not persuaded.

Section 8420 et seq. are manifestly the enabling authority, as that legislation is directly on point. Located in article 9.7 -- the market squid portion of the Fish and Game Code -- section 8420 et seq. created a market squid fishery management scheme to "prevent excessive fishing effort in the market squid fishery" and to "sustain[] both the squid population and the marine life that depends on squid." (§ 8420, subd. (d).) Sections 8420, 8425, and 8426 patently authorized the promulgation of limited entry permitting regulations. Section 8420 announced the Legislature's findings and declarations and placed oversight and management of the market squid fishery with the Commission (§ 8420, subds. (a)-(e)) and section 8425 *specifically directed the Commission to* "*adopt a market squid fishery management plan and regulations to protect the squid resource and manage the squid fishery*" (*id*., subd. (a), italics added). Section 8426 directed the Department to gather scientific information and to recommend a squid conservation and management plan. (*Id*., subds. (a) & (c).) The Legislature then repealed its own statutory provisions for permits with limited transferability (former §§ 8421 – 8423.5) as of six months after the Commission took over squid-fishery oversight and promulgated an SMP and its own regulations that would render the repealed statutes obsolete. (§ 8429.7.) In short, sections 8420 et seq. created a comprehensive scheme specifically to protect the squid resource and, as CCR 149.1 implements section 8420 et seq., it is consistent with that legislation.

By contrast, section 8101, advocated by Bunn as the enabling authority, is located in article 9 of the Fish and Game Code, which article addresses limited entry fisheries in general. Section 8101 concerns "*any*" fishermen, not only market squid fishermen, and makes 20-year fishermen "*eligible* for inclusion during the initial year of *a* limited entry fishery," not a particular limited entry fishery. (§ 8101, subd. (a), italics added.) Section 8101 directs the Commission to devise the qualifying participation criteria (*ibid.*) and leaves the conditions of continuing eligibility for 20-year fishermen to a statute or *regulation* adopted later. (*Id*., subd. (b).) Enacted to protect certain interests of 20-year fishermen in any later-created limited entry fishery, section 8101 does not address market squid fishery in particular or direct the Commission or Department to take any specific action. Meanwhile, section 8420 et seq. explicitly address market squid fishery and direct the Department and Commission to take specific action to protect that resource. Thus, article 9.7 (§ 8420 et seq.), not section 8101, constitutes the enabling legislation for CCR 149.1. (Gov Code, § 11342.1.)

We necessarily reject Bunn's next contention that the non-transferability provisions of CCR 149.1 are invalid insofar as they conflict with section 8101, in violation of Government Code section 11342.2. Section 8101 is not the enabling statute. Even so, CCR 149.1 is consistent with section 8101. Fully cognizant of the older, general statute, the Commission promulgated CCR 149.1, subdivision (c)(2) allowing 20-year fishermen to be, in the words of section 8101, subdivision (a), "eligible for inclusion during the initial year of a limited entry fishery." Section 8101 is otherwise silent about whether fishing permits for 20-year fishermen should be transferable, instead leaving to the Commission the power to develop qualifying participation criteria (*id*., subd. (a)). Section 8101 contains no guarantee of continuing participation in any limited entry fishery, as it made 20-year fishermen "subject to *conditions of continuing eligibility established* by statute *or regulation* . . . ." (*Id*., subd. (b), italics added.) CCR 149.1 did more than simply "*give*[] *consideration*" to 20-year fishermen when restricting the squid fishery, as requested by section 8101's sponsor. (Italics added.) The regulations made 20-year fishermen "eligible" for market squid permits. Our analysis harmonizes articles

9 and 9.7 and gives concurrent effect to both sections 8420 et seq. and 8101, where section 8420 et seq. specifically address squid and direct promulgation of regulations to implement limited-entry market squid fishing, and section 8101 applies generally to protect 20-year California fishermen in all limited entry fisheries. (See *Schmidt v. Superior Court* (1989) 48 Cal.3d 370, 383 [later enacted and more specific provisions of statute relating to adults-only rules in mobilehome parks prevails over more general provisions of the Unruh Act]; *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 420 [above rule applies " ' "whether it was passed before or after such general enactment." ' "].)

3. *The Commission's rulemaking was not arbitrary, capricious, or lacking in evidentiary support.*

The Commission's promulgation of CCR 149.1 was a quasi-legislative act, which is reviewed via a petition for ordinary mandate under Code of Civil Procedure section 1085. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com*. (2008) 164 Cal.App.4th 1, 13.) It has long been the law in California that when a Commission's rulemaking is challenged in an ordinary mandamus proceedings such as this one, our review " 'is limited to an examination of the proceedings before the [Commission] to determine whether [its] action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether [it] has failed to follow the procedure and give the notices required by law.' [Citations.]" (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 833.) " 'Courts exercise such limited review out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority. [Citation.] However, the agency must act within the scope of its delegated authority, employ fair procedures, and be reasonable. "A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." [Citation.] The appellate court reviews the trial court's decision de novo under the same

standard.' [Citation.]" (*City of San Marcos v. Loma San Marcos, LLC* (2015) 234 Cal.App.4th 1045, 1053-1054 (*San Marcos*).)

Gibbs contends that we should not apply the arbitrary and capricious standard of review here because the Commission's individual members had no scientific expertise in "fisheries management." Gibbs cites to no authority requiring the commissioners to have particular expertise in fisheries management at the time the Commission promulgated CCR 149.1, and makes no claim that the commissioners otherwise failed to meet the legal qualifications for membership on the Commission extant at that time.[7] Individual commissioners' resumes do not dictate our standard of review. Rather, with respect to " 'technical matters requiring the *assistance of experts* and the study of scientific data, courts will permit agencies to work out their problems with as little judicial interference as possible.' " " 'in deference to the separation of powers.' " (*San Marcos, supra,* 234 Cal.App.4th at p. 1053, italics added.)

The Commission relied on the Department's expertise in fashioning the restricted access program (CCR 149.1) as part of the SMP. Recognizing the "lack of research on market squid and the lack of annual at-sea surveys to determine the status of the resource" (§ 8420, subd. (b)), the Legislature assigned to the Department the responsibility for establishing the Squid Research Scientific and Squid Fishery Advisory Committees, developing research protocols, and making recommendations for a market squid conservation and management plan (§ 8426, subds. (a)-(c)). The Legislature directed that the oversight and management of the market squid fishery be placed in the Commission (§ 8420, subd. (e)), who "after consideration of the report and recommendations prepared by the department . . . and, after public hearings, [would] adopt market squid fishery management plan and regulations." (§ 8425, subd. (a).) By

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[7] Gibbs argues that no minimum required qualifications existed for commissioners until enactment of section 101.5, effective January 1, 2013. Surely Gibbs does not suggest therefore that everything promulgated by the Commission prior to January 1, 2013 is suspect.

relying on the Department's expertise, the Commission acted exactly as authorized by the Legislature. (*San Marcos*, *supra*, 234 Cal.App.4th at p. 1053.)

Gibbs next argues that the Commission acted arbitrarily and capriciously by failing to consider all relevant factors (see *San Marco*, *supra*, 234 Cal.App.4th at p. 1053) because it "completely ignored" certain recommendations made by the Department. He argues that the non-transferable permits are inconsistent with a Departmental program goal to "accommodate[] the existing fishery segments who have made substantial investment to participate in the fishery" because the value of his investment fell when he was unable to sell his permit. But, there was no guarantee that the limited entry fishery program would protect or enhance Gibbs' investment. The Legislature specifically "urge[d] that any limited entry component of a [squid] fishery management plan, if necessary, should be adopted for the *primary purpose of protecting the resource* and *not simply for the purpose of diminishing or advancing the economic interests of any particular individual or group*." (§ 8420, subd. (e), italics added.) More important, the Commission did not "ignore" the Department's recommendations. The Department proposed a range of options to meet the goals for a sustainable market squid resource and fishery, which included numerous methods of structuring the restricted access program regulations. After consulting with the Squid Fishery Advisory Committee, and considering the resource and social and economic impacts, the Department "preferred" option I-1, which contained both transferable and non-transferable vessel permits. Rather than to ignore those recommendations, the Commission adopted option I-1 in CCR 149.1, subdivisions (c)(1) and (c)(2). The record shows that the Commission considered the relevant factors. (*San Marcos*, *supra*, 234 Cal.App.4th at p. 1053.)

Gibbs nonetheless argues that the Commission ignored its own policy contained in the statement that it "expects that the *trend* will be toward transferability." (Italics added.) But, that "trend" does not foreclose the issuance of non-transferable permits in restricted access fisheries. To the contrary, tasked with creating an SMP to sustain the squid resource (§ 8420., subd. (d)), the Commission recognized the utility of non-transferable permits in meeting the goals of limited access fisheries because such permits

"should be used as part of the mechanism for reducing capacity in a fishery that is above its capacity goal . . . [and] allow[] for new entry into a restricted access fishery, particularly for younger fishermen or crew." And, as noted, the Commission has already utilized restricted access in other commercial fisheries. Thus, the record shows a rational connection between the need to accommodate 20-year fishermen on the one hand, and the statutory mandate of protecting the squid fishery by achieving, through attrition, the capacity goals recommended by the Department.

Gibbs also argues that the Commission failed to use the best scientific information available. He cites statements by Department scientists that little is known about the ecology and biology of market squid. That may be so, but an objective of the Marine Life Management Act (§ 7050 et seq.) is to "[m]anage marine living resources on the basis of the best *available* scientific information and other relevant information that the commission or department possesses or receives." (*Id*., subd. (b)(6), italics added.) Toward that end, the Commission, Department, and consulting scientists recommended additional study. But lack of more specific scientific information does not mean ipso facto that the Department failed to use the best scientific information *available* at the time.

Rather, the administrative record shows that the Department followed current, established scientific practices, and consulted with the Squid Research Scientific Committee, along with National Oceanographic and Atmospheric Administration, and other expert scientists, and used techniques set forth in the Marine Life Management Act to generate its recommendations. These recommendations were then submitted by the Department to a separate peer review panel for evaluation of the scientific basis. (§ 7062, subds. (a) & (c).) The final recommendations were the product of extensive scientific vetting. As is clear from the 3,540 pages of administrative record, the Commission properly considered the recommendations of the Department, the Squid Research Scientific Committee, and the Squid Fishery Advisory Committee.

4. *The trial court did not abuse its discretion in denying Gibbs' motion to compel discovery*.

The administrative record was lodged on January 3, 2013. That record consisted of 3,540 pages and recordings of 14 days of Commission meetings. The Commission's Deputy Executive Director certified under penalty of perjury that to the best of his knowledge the documents and compact disc of the recording constituted the administrative record.

On April 3, 2013, Gibbs filed a "Motion to Compel the Filing of a Complete Administrative Record" seeking information from computers, cell phones, recoverable electronic media, and other locations. Gibbs "believe[d]," as he stated in a letter to the Attorney General, "that electronically stored information . . . is an important and irreplaceable source of discovery and/or evidence in connection with the dispute . . . ." Gibbs asked the deputy attorney general to ask the Commission whether any emails or "electronically stored information" existed. The deputy attorney general inquired and reported back to Gibbs that he "was told that they don't have emails [Gibbs] wanted (if ever they existed). This is not surprising given that they had a 3 yr retention policy back then (it is 90 days now)." The Commission opposed Gibbs' motion on the grounds that (1) he was not entitled to discovery in a traditional mandamus proceeding (Code Civ. Proc., § 1085), (2) the additional information he sought did not exist, and (3) the Commission certified that the administrative record was complete, and Gibbs had not demonstrated that the Commission failed to perform its duty. Gibbs replied that, on the recording of the March 17, 2013 Commission meeting, the Chief of the Department's Fisheries Programs Branch stated that the Department had received many e-mails, phone calls, and other communication. This was evidence, Gibbs argued, that electronically stored information had in fact existed.

The trial court construed Gibbs' motion as a motion to compel discovery and denied it on the ground that the administrative record had been certified as complete and Gibbs had failed to identify missing information. The court noted that while Gibbs thought there should be e-mails, he failed to demonstrate that any such e-mails existed.

On appeal, Gibbs contends that the trial court erred. He argues that his motion, although styled as a discovery request, actually sought a complete administrative record. Acknowledging receipt of paper copies of e-mails, he argues that written versions are "not nearly as productive or meaningful as electronic copies." He argues: "We know [electronically stored information] was available because we have paper copies of emails and the electronic recordings of Commission meetings. However, we have none in electronic form. Without a complete [administrative record], any subsequent hearing is meaningless." The contention is unavailing.

The administrative record was certified as complete by the Commission's Deputy Executive Director, *under penalty of perjury*. "There is a rebuttable presumption that 'official duty has been regularly performed.' [Citations.] This applies to administrative hearings. [Citation.]" (*Old Santa Barbara Pier Co. v. State of California* (1977) 71 Cal.App.3d 250, 257, citing Evid. Code, §§ 606 & 664.)[8] The burden fell on Gibbs to rebut the presumption. His task was to demonstrate -- notwithstanding the deputy attorney general's certification and later unsuccessful attempt on Gibbs' behalf to locate additional material from the Commission -- that electronically stored information indeed existed but was omitted from the administrative record. Instead, Gibbs merely surmises from the presence in the administrative record of paper copies of e-mails and recordings of Commission meetings, that other electronically stored information was available and not included. The e-mails were included in the administrative record albeit in written form; Gibbs simply dislikes that version. Nonetheless, Gibbs failed to point to any absent material to rebut the administrative record's certification and so the trial court did not err in denying his motion, regardless of whether it was styled as a motion to compel discovery or a request to complete the administrative record.

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[8] Evidence Code section 606 reads: "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." Evidence Code section 664 reads in part, "It is presumed that official duty has been regularly performed."

5. *The trial court did not abuse its discretion in awarding the costs of preparing the administrative record*.

Gibbs contends that the trial court erred in awarding the Commission $1,013.81 in costs of preparing the administrative record. He cites the court's statement during oral argument, "I don't think I have an administrative record," as evidence that the court did not consider it and quotes from *Ladas v. California State Auto. Assn*. (1993) 19 Cal.App.4th 761 at page 775 (trial exhibit expenses), that therefore the record was " 'not reasonably helpful to aid the trier of fact.' "

However, the judgment states that "[t]he rulemaking record was received into evidence and examined by the Court." Gibbs did not object in the trial court to that statement as being inaccurate and so he has forfeited the challenge here. (*City of San Marcos v. Coast Waste Management, Inc*. (1996) 47 Cal.App.4th 320, 328 [failure to object to language of proposed written order effectively waived objection].) Also, notwithstanding the court's early comment about the administrative record, it later cited to that record when it noted that the Commission had the benefit of expert scientists, and again when it recognized that economics were not part of the record. The trial court rejected this same failure-to-review-the-administrative-record argument in connection with Gibbs' motion to tax costs, further bolstering the judgment's statement that the court had examined the administrative record. Finally, Gibbs was the one who moved to compel additions to the administrative record and so he is the party who utilized the deputy attorney general's time and money to collect and assemble the record. We perceive no error in awarding to the Commission the costs of the administrative record.

DISPOSITION

The judgment is affirmed. Respondents are to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.