

CALIFORNIA FISH AND GAME COMMISSION
FINDING OF EMERGENCY AND
STATEMENT OF PROPOSED EMERGENCY REGULATORY ACTION
FOR RE-ADOPTION OF EMERGENCY REGULATIONS

Emergency Action to
Re-adopt subsection (b)(91.2) of Section 7.50,
Title 14, California Code of Regulations
Re: Upper Klamath-Trinity spring Chinook Salmon sport fishing emergency regulations

Date of Statement: February 24, 2020

I. Emergency Regulation in Effect to Date

The California Fish and Game Commission (Commission) approved an emergency rulemaking adding subsection (b)(91.2) of Section 7.50, Title 14, California Code of Regulations (CCR) that became effective June 26, 2019. The emergency regulation opened the lower Klamath River between July 1 and August 14 and the upper Trinity River and New River between July 1 and August 31 for spring Chinook Salmon fishing to reduce adverse impacts to local economies resulting from California Endangered Species Act (CESA) protections for upper Klamath-Trinity spring Chinook Salmon (UKTSCS).

On December 11, 2019, the Commission re-adopted the emergency regulations for an additional 90-day period, extending the effective period to March 23, 2020. That rulemaking was approved by the Office of Administrative Law on December 23, 2019.

II. Request for Approval of Re-adoption of Emergency Regulations

On February 21, 2020, the Commission re-adopted the emergency regulations for a second time. The Commission has initiated a certificate of compliance rulemaking to permanently adopt the limited fishing opportunity in most of the above described reaches. Upon the completion of the certificate of compliance rulemaking (anticipated June 2020), the permanent (non-emergency) regulations would be effective in time for the season to open July 1, 2020.

The emergency circumstances remain unchanged since the initial adoption of the emergency regulations that became effective June 26, 2019.

III. Statement of Facts Constituting the Need for Emergency Regulatory Action

Background

Regulations concerning the take of spring Chinook Salmon (where catch and release, or harvest, constitute take) in the Klamath River Basin are codified in subsection (b)(91.1) of Section 7.50, Title 14, CCR.

On July 23, 2018, the Commission received a petition to list UKTSCS as endangered under CESA. The petition cited declining population trends evident of extremely low UKTSCS abundance compared to historical status and how current low numbers make UKTSCS vulnerable to extinction.

The Commission referred the petition to the Department of Fish and Wildlife (Department) for an evaluation of the merits of the petition. In November 2018, the Department submitted its evaluation report and recommended that the Commission accept and consider the petition.

On February 6, 2019, the Commission considered the Department's evaluation report and public comments received and found that there is sufficient information to indicate that the petitioned action may be warranted, after which the Commission then accepted the petition for consideration. Acceptance of the petition initiates a one-year review by the Department for determining the species status, which includes either a recommendation to the Commission that the petitioned action is not warranted, or a recommendation that the species be listed as threatened or as endangered. During the status review period, the species is considered a "candidate" species, which automatically confers CESA take prohibition measures (Fish and Game Code Section 2085).

At the February 6, 2019 meeting, the Department recommended that the Commission adopt emergency regulations to help protect UKTSCS from take by minimizing confusion by sport anglers who may not have been aware of the UKTSCS candidacy protections. The Commission adopted the emergency regulation on February 6, 2019 (effective February 28 through August 27, 2019) to close salmon fishing in the Trinity and Klamath rivers to make Klamath River Basin spring Chinook Salmon sport fishing regulations consistent with CESA protections.

In response to the closure, the Commission received testimony and letters from the Del Norte County and Siskiyou County boards of supervisors and other members of the public requesting that the Commission consider shortening the closed periods, or otherwise allow some sport fishing take during the spring Chinook Salmon fishing season. The concern expressed was that a complete closure would create economic harm to businesses (i.e., local tourism, fishing guides, motels, restaurants, and other infrastructure).

The Department held public meetings in March 2019 with affected stakeholders to help inform regulatory options for some level of limited take of spring Chinook Salmon during its candidacy period. The Department reported back to the Commission options to mitigate economic hardship. At its April 17, 2019 meeting, the Commission adopted emergency regulations that allow limited take at the end of the traditional spring season, while also providing substantial protection to UKTSCS, consistent with Fish and Game Code Section 2084. These are the regulations in subsection (b)(91.2) of Section 7.50, Title 14, CCR, effective June 26, 2019 – March 23, 2020 that are proposed for re-adoption.

Emergency Regulation Re-adoption

The proposed action is to re-adopt for another 90 days the emergency regulation subsection (b)(91.2) of Section 7.50, Title 14, CCR, with no change from the previous emergency rulemaking (Table 1, Figure 1). The regulations in subsection (b)(91.2) supersede the spring Chinook Salmon fishing regulations in subsection (b)(91.1) of Section 7.50, Title 14, CCR.

Table 1. Summary of regulatory changes in response to Commission acceptance of the UKTSCS petition.

Reach	Subsection 7.50(b)(91.1) Regulations to be Superseded	June 2019 Emergency Regulations Subsection 7.50(b)(91.2)	Re-adoption of Emergency Regulations Subsection 7.50(b)(91.2)
Klamath (Iron Gate Dam to Weitchpec) 7.50(b)(91.1)(E)2.a.	0 salmon bag and possession limit from Jan. 1-Aug.14	Closed to salmon fishing through Aug. 14	No change
Klamath (Weitchpec to Klamath River mouth) 7.50(b)(91.1)(E)2.b.	2 salmon bag and possession limit from Jan. 1-Aug. 14	1 salmon bag limit; 2 salmon possession limit Jul. 1 – Aug 14	No change
Trinity (Old Lewiston Bridge to Hwy 299 bridge at Cedar Flat) 7.50(b)(91.1)(E)6.b.	2 salmon bag and possession limit from Jan. 1- Aug. 31	1 salmon bag limit; 2 salmon possession limit Jul. 1 – Aug 31	No change
Trinity (Hwy 299 bridge at Cedar Flat to Denny Road bridge at Hawkins Bar) 7.50(b)(91.1)(E)6.c.	2 salmon bag and possession limit from Jan. 1- Aug. 31	1 salmon bag limit; 2 salmon possession limit Jul. 1 – Aug 31	No change
New River (confluence of the East Fork to confluence w/ Trinity) 7.50(b)(91.1)(E)6.d.	Closed to salmon fishing	1 salmon bag limit; 2 salmon possession limit Jul. 1 – Aug 31	No change
Trinity (Denny Road bridge at Hawkins Bar to mouth of the South Fork Trinity) 7.50(b)(91.1)(E)6.e.	2 salmon bag and possession limit from Jan. 1- Aug. 31	1 salmon bag limit; 2 salmon possession limit Jul. 1 – Aug 31	No change
Trinity (from the mouth of the South Fork Trinity to confluence w/ Klamath River) 7.50(b)(91.1)(E)6.f.	0 salmon bag and possession limit from Jan.1- Aug. 31	Closed to salmon fishing through Aug. 31	No change

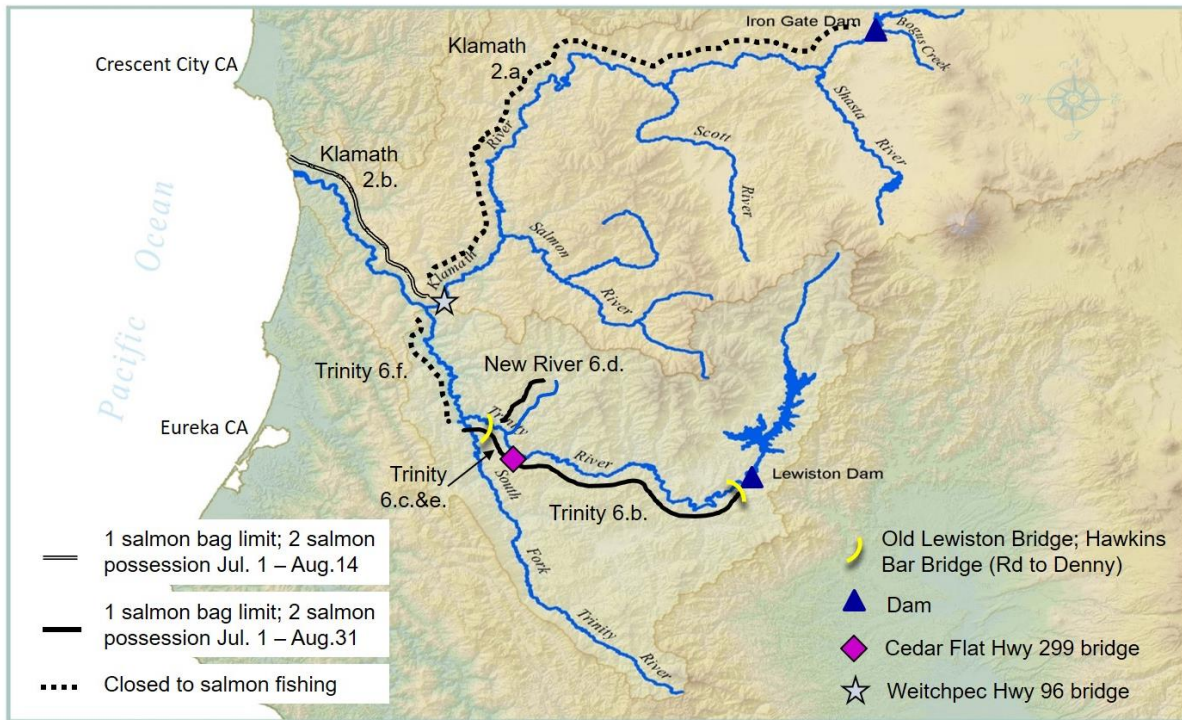


Figure 1. Map of proposed re-adoption of emergency regulations

Emergency Finding

The proposed re-adoption of the emergency regulations is necessary to continue the alleviation of the anticipated economic hardship of the February 2019 spring Chinook Salmon closure to local communities, while still providing protections to wild origin UKTSCS. As a resource-based economy, both Siskiyou and Del Norte counties articulated their reliance on fishing, tourism, and other recreational opportunity as vital components of their economies. This emergency regulation continues to align with the recommendation by the Del Norte County Board of Supervisors to provide a level of protection of UKTSCS that balances the local economic pulse that the summer months of salmon fishing bring to the region. As evidenced from creel surveys, the latter months (May, June, July) are the most commonly fished months for salmon, and the July 1 opening date was selected to include fishing during the Independence Day (July 4) weekend for local and out-of-area anglers to have that angling opportunity. Some anglers stay in the area following the spring salmon season to also participate in the Klamath River fall-run Chinook Salmon season.

IV. Impact of Regulatory Action

The potential for significant statewide adverse fiscal impacts that might result from the proposed 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:

None. The proposed emergency regulation would result in a return closer to the pre-February 2019 baseline for spring Chinook Salmon fishing. The re-adoption of the emergency regulation will maintain fishing on certain reaches of the Klamath, Trinity

and New rivers for a limited duration of July 1-August 14 (Klamath River) and July 1-August 31 (Trinity River and New River). Protections under CESA would be maintained from the period of January 1 to June 30 (a closure of six months), with no new program costs or savings compared to the emergency regulations expiring March 24, 2020.

(b) Nondiscretionary Costs/Savings to Local Agencies:

The proposed re-adoption of the emergency regulation is expected to continue a return to increased spring Chinook Salmon angler spending. The open periods are proposed over historically high angler visitation periods that should optimize the potential for increased visitor expenditures, sales tax and transient occupancy tax revenue to the affected areas [see the Addendum to the Economic and Fiscal Impact Statement (STD 399) for more detail].

(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.

V. Authority and Reference

The Commission proposes this emergency action pursuant to the authority vested by sections 200, 205, 265, 270, 315, 316.5, 399 and 2084 of the Fish and Game Code, and to implement, interpret, or make more specific sections 200, 205, 265, 270, 316.5 and 2084 of the Fish and Game Code.

VI. Section 399 Finding

Pursuant to Section 399 of the Fish and Game Code, the Commission finds that the adoption of this regulation is necessary for the immediate preservation of the public peace, health and safety, or general welfare.

VII. Studies, Reports, or Documents Supporting Factual Emergency

Klamath River Basin spring creel surveys are performed by the Department and its partners. These surveys inform the Department of angler fishing effort in the number of trips, and hours spent. The creel data (preliminary) gathered during the late period of the 2019 spring season (which begins May 5) suggest that the maintenance of fishing on the lower Klamath River and the upper Trinity River during the month of July (where the creel survey ended August 5) appears to have been successful at maintaining angler trips for the river reaches, and thus appears to have a minor economic benefit relative to 2018 (see Figure 2 below, and the Addendum to the STD 399 for more detail).

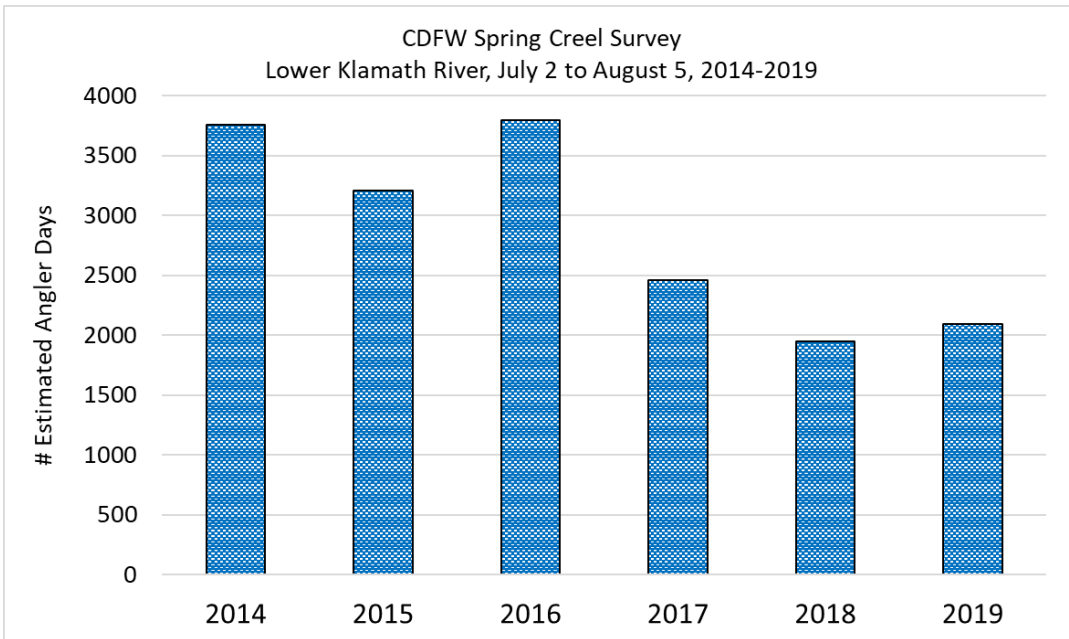


Figure 2. CDFW spring creel survey, Lower Klamath River, July 2 to August 5, 2014-2019.

VI. Re-adoption Criteria

(a) Same or Substantially Equivalent

Pursuant to subdivision (h) of Section 11346.1 of the Government Code, a re-adoption may be approved only if the text is “the same as or substantially equivalent to an emergency regulation previously adopted by that agency.” The language proposed for this re-adoption rulemaking is the same as the language of the original emergency regulation.

(b) Substantial Progress

Subdivision (h) of Section 11346.1 of the Government Code, specifies “Readoption shall be permitted only if the agency has made substantial progress and proceeded with diligence to comply with” standard rulemaking provisions.

- (1) The Commission has complied with this requirement by proceeding with due diligence to determine whether or not listing UKTSCS as a threatened or endangered species is warranted.

Laws Related to the Emergency Regulations - Listing under CESA

A. Petition and Acceptance

Fish and Game Code Section 2070 requires the Commission to establish a list of endangered species and a list of threatened species. Any interested person may petition the Commission to add a species to the endangered or threatened list by following the requirements in Fish and Game Code sections 2072 and 2072.3. If

a petition is not factually incomplete and is on the appropriate form, it is forwarded to the Department for evaluation.

Fish and Game Code Section 2073.5 sets out the process for accepting or rejecting a petition to list a species, and if the petition is accepted, a process for actually determining whether listing of the species as threatened or endangered is ultimately warranted. The first step toward petition acceptance involves a 90-day review of the petition by the Department to determine whether the petition contains sufficient information to indicate that the petitioned action may be warranted. The Department prepares a report to the Commission that recommends rejection or acceptance of the petition based on its evaluation.

Fish and Game Code Section 2074.2 provides that, if the Commission finds that the petition provides sufficient information to indicate that the petitioned action may be warranted, the petition is accepted for consideration and the species that is the subject of the petition becomes a "candidate species" under CESA. CESA prohibits unauthorized take of a candidate species, just as it prohibits such take of threatened and endangered species, from the time the Commission notifies interested parties and the public generally of its acceptance of the petition. Fish and Game Code Section 88, defines "Take" as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill."

Once a petition is accepted by the Commission, all activities, whether new or ongoing, that cause take of the candidate species are in violation of the prohibition on unauthorized take of listed or candidate species found in Fish and Game Code Section 2080, unless:

- the take is authorized in regulations adopted by the Commission pursuant to Fish and Game Code Section 2084;
- the Department authorizes the take through memorandums of understanding for scientific, education or management purposes, or via incidental take permits issued on a project-by-project basis pursuant to Fish and Game Code Section 2081; or
- the take is allowed under Fish and Game Code Section 2080.1.

B. Status Review Final Action on the Petition

The Commission's acceptance of a petition initiates a 12-month review of the species' status by the Department, pursuant to Fish and Game Code Section 2074.6, to determine whether the species should be listed as threatened or endangered. Unlike the Department's initial evaluation, which focuses largely on the sufficiency of information submitted in the petition, the 12-month status review involves a broader inquiry into, and evaluation of, available information from other sources. The Commission is required to solicit data and comments on the proposed listing soon after the petition is accepted, and the Department's written status report must be based upon the best scientific information available.

Pursuant to Fish and Game Code Section 2074.6, within 12 months of the petition's acceptance, the Department must provide the Commission a written

status report that indicates whether the petitioned action is warranted. The Commission may grant an extension of up to six months if the Director determines an extension is necessary to complete independent peer review of the report, and to provide a minimum of 30 days for public review of the peer reviewed report prior to the public hearing specified in Fish and Game Code Section 2075. The Commission must schedule the petition for final consideration at its next available meeting after receiving the Department's status report (Fish and Game Code Section 2075). In its final action on the petition, the Commission is required to decide whether listing the species as threatened or endangered "is warranted" or "is not warranted." If listing is not warranted in the Commission's judgment, take of the former candidate species is no longer prohibited under CESA (Fish and Game Code Section 2075.5).

If the Commission decides that listing the species "is warranted," the former candidate species then becomes a listed species.

- (2) The Commission has complied with this requirement by proceeding with due diligence to complete the certificate of compliance rulemaking.

Department staff began preparing the rulemaking documents for the certificate of compliance rulemaking in June 2019, however, there was not sufficient time to complete the documents, hold three hearings pursuant to Section 255 of the Fish and Game Code, and prepare a final statement of reasons prior to the expiration of the 180-day period. The notice for the certificate of compliance rulemaking was published January 10, 2020. Discussion and adoption hearings are scheduled for February and April 2020.

As part of the rulemaking, the Department is evaluating creel survey results to help determine the effect of the emergency regulations on both the species and the local economic impacts the regulations are designed to address. The preliminary creel data gathered during the late period of the 2019 spring season (which begins May 5) suggest that the maintenance of fishing on the lower Klamath River and the upper Trinity River during the month of July (where the creel survey ended August 5) appears to have been successful at maintaining angler trips for the river reaches, and thus appear to have a minor economic benefit relative to 2018.

The re-adoption of the emergency regulation is needed to allow the Commission adequate time to comply with Administrative Procedure Act and Fish and Game Code provisions.

Informative Digest (Plain English Overview)

Proposed Regulatory Action

The California Fish and Game Commission (Commission) approved an emergency rulemaking adding subsection (b)(91.2) of Section 7.50, Title 14, California Code of Regulations (CCR) that became effective June 26, 2019. The emergency regulation opened the lower Klamath River between July 1 and August 14 and the upper Trinity River and New River between July 1 and August 31 for spring Chinook Salmon fishing to reduce adverse impacts to local economies resulting from California Endangered Species Act (CESA) protections for upper Klamath-Trinity spring Chinook Salmon (UKTSCS).

On December 11, 2019, the Commission re-adopted the emergency regulation for an additional 90-day period. The re-adopted regulation will expire March 24, 2020.

The Commission re-adopted the emergency regulations for a second time on February 21, 2020. If approved by the Office of Administrative Law, this final emergency regulation will be effective approximately March 24 through June 21, 2020.

The Commission has initiated a certificate of compliance rulemaking to permanently adopt the limited fishing opportunity in most of the above described reaches. Upon the completion of the certificate of compliance rulemaking (anticipated June 2020), the permanent (non-emergency) regulations would be effective in time for the season to open July 1, 2020.

The emergency circumstances remain unchanged since the initial adoption of the emergency regulations that became effective June 26, 2019.

The proposed emergency regulatory action will allow limited sportfishing take of spring Chinook Salmon consistent with Fish and Game Code Section 2084, which allows the Commission to authorize the taking of any fish by hook and line for sport that is listed as an endangered, threatened, or candidate species. The economic factors, coupled with the temporary and sudden nature of the Fish and Game Code Section 2085 protections for candidate species, constitutes an emergency that authorizes the Commission to address the matter through regulation.

The proposed emergency regulation will allow limited fishing opportunity on UKTSCS in the Klamath River downstream of the Highway 96 bridge at Weitchpec, the Trinity River from the Old Lewiston Bridge to the mouth of the South Fork Trinity River, and the New River main stem downstream of the confluence of the East Fork to the confluence with the Trinity River. Under the proposed emergency regulation, these areas will open July 1 and remain open until their regularly scheduled spring season close, after which fall season regulations will apply.

The proposed emergency regulatory action will allow for harvest of spring Chinook Salmon in areas where the majority of fish encountered will be of Trinity River Hatchery origin, including the later July 1 season opening in the lower Klamath River and the upper Trinity River (above the confluence of the South Fork Trinity River).

Benefits

The primary benefit under the proposed emergency action is to ameliorate the economic losses associated with a total closure of the spring Chinook Salmon sport fishery due to the designation of UKTSCS as a candidate species under CESA. Under this proposed emergency action, a portion of the spring Chinook Salmon season would be open to sport fishing, while the proposed July 1 opening date for spring Chinook Salmon sport fishing protects the majority of migrating wild UKTSCS. The proposed regulatory action also reduces the daily bag limit to one fish, a reduction from historical two fish daily bag limits for spring Chinook Salmon, providing additional protective measures. The July 1 proposed opening date will allow for partial economic activity in the region associated with the fishery which will enable businesses to maintain infrastructure critical to the sport fishing public.

The pursuit, catch and harvest of spring Chinook Salmon in the Klamath River Basin has a long tradition in which generations of families have participated. Maintaining this opportunity, to some degree, will ensure that these opportunities persist into the future. Additionally, spring Chinook Salmon fishing provides recreational opportunities and salmon is a desired, natural food source which contributes to a healthy diet.

Consistency and Compatibility with Existing State Regulations

Article IV, Section 20 of the State Constitution specifies that the Legislature may delegate to the Fish and Game Commission such powers relating to the protection and propagation of fish and game as the Legislature sees fit. The Legislature has delegated authority to the Commission to authorize the taking of any fish by hook and line for sport that is listed as an endangered, threatened, or candidate species (Section 2084, Fish and Game Code). The Commission has reviewed its own regulations and finds that the proposed regulations are neither inconsistent nor incompatible with existing State regulations. Commission staff has searched the California Code of Regulations and has found no other State regulations related to sport fishing in the Klamath River Basin.