

STATE OF CALIFORNIA  
FISH AND GAME COMMISSION  
FINAL STATEMENT OF REASONS FOR REGULATORY ACTION  
Amend Sections 27.60 and 28.60;  
Add Section 28.62; Add Article 6, Sections 55.00, 55.01 and 55.02;  
Amend Sections 163, 163.1, 163.5, 164, and 705;  
Title 14, California Code of Regulations.

Re: California Pacific Herring Fishery Management Plan Implementing Regulations

- I. Date of Initial Statement of Reasons: May 15, 2019
- II. Date of Pre-adoption Statement of Reasons memo: October 1, 2019
- III. Date of Final Statement of Reasons: November 27, 2019
- IV. Dates and Locations of Scheduled Hearings
  - (a) Notice Hearing:           Date:     June 13, 2019  
  Location: Redding, CA
  - (b) Discussion Hearing:     Date:     August 8, 2019  
  Location: Sacramento, CA
  - (c) Adoption Hearing:       Date:     October 10, 2019  
  Location: Valley Center, CA

V. Update

On October 10, 2019 the Fish and Game Commission (Commission) adopted the California Pacific Herring Fishery Management Plan (Final Herring FMP), and adopted the implementing regulations:

- Section 28.62, Title 14, CCR was adopted with a bag limit of ten (10) gallons, which is within the range presented by the Department, and is equivalent to approximately 100 pounds of Herring, or 520 fish.
- Subsection 163.1(d) was revised to reflect the no-change alternative, effectively defining the required 'immediate proximity' vessels must be within of gill nets being fished as a distance of 'three nautical miles'.
- Subsection 164(d)(1) was revised to reflect the no-change alternative, allowing HEOK participants to utilize two rafts and/or two lines while fishing.

UPDATE: 15-DAY CONTINUATION NOTICE, ADDITIONAL CHANGES, AND ADOPTION

Following a 15-day notice period, minor changes to the Herring FMP and regulatory text were adopted:

- The Final Herring FMP includes Appendix S: Public Comments Received, Responses, and Changes to the Draft California Pacific Herring Fishery Management Plan.
  - FMP section 7.8.7 establishes that a recreational possession limit be adopted through regulation that is "clear and easily enforceable."
- Section 705, Title 14, CCR has been further revised to update all fees per the annual Implicit Price Deflator, as set forth in Section 713, Fish and Game Code, effective January 1, 2020.

- Forms DFW 327, DFW 1377, and DFW 1406 have been further revised, including:
  - All forms indicating the cost of fees have been amended per the Implicit Price Deflator, as set forth in Section 713, Fish and Game Code, effective January 1, 2020.
  - All amended forms are re-dated from (NEW 4/11/2019) to (NEW 10/30/2019) to visibly differentiate the former proposed forms from the amended forms which are the subject of this notice.
  - An addition of clarifying text to forms DFW 1406 and DFW 1377 regarding the deadline for submittal of renewals for permits in the 2020 license year, which is one month later than it will be in future years.
  - Update to the text regarding Permit Late Fees, which clarifies when the penalties apply.

VI. Summary of Primary Considerations Raised in Support of or Opposition to the Proposed Actions and Reasons for Rejecting Those Considerations

A total of 69 comments from 19 commenters were received from the public on the proposed regulatory amendments and additions to the recreational and commercial Pacific Herring (Herring) fishing regulations, including the Herring FMP, which is incorporated by reference. These comments fit into five general categories:

- recreational take limit is too low,
- proposed content corrections and clarification,
- environmental/resource concerns,
- commercial Herring Eggs on Kelp regulation issues, and
- support for the Herring FMP and implementing regulations.

All written and verbal comments received by the Commission on the proposed regulatory changes are summarized and responded to in Attachment 1 Public Comments. The regular noticed public comment period closed with the adoption of the regulations at the October 10, 2019 Commission meeting, except:

- Minor regulatory changes were given a continued 15-day comment period ending November 21, 2019.
- The Commission did not receive any additional public comment during this period.

VII. Location and Index of Rulemaking File

A rulemaking file with attached file index is maintained at:

California Fish and Game Commission  
 1416 Ninth Street, Room 1320  
 Sacramento, California 95814

VIII. Location of Department Files

Department of Fish and Wildlife  
 Marine Region  
 3633 Westwind Blvd.  
 Santa Rosa, California 95403

## IX. Description of Reasonable Alternatives to Regulatory Action

### (a) Alternatives to Regulation Change:

During the development of the Herring FMP a number of alternatives to the individual changes presented in the Herring FMP were considered. The discussion of alternatives in this document will focus primarily on feasible management actions that could be modified to either improve the economics of the participants in the fishery or reduce environmental effects by modifying the Harvest Control Rule (HCR). However, these alternatives were considered during the Herring FMP development and were found to be less effective at jointly meeting both environmental and economic goals and objectives for this fishery. Based on the available science as well as feedback from environmental and industry stakeholders and the general public, the Department recommends the management approach detailed in the Herring FMP and the New Regulatory Language included in this Final Statement of Reasons.

#### 1. A HCR with a 25,000 ton cut-off for San Francisco Bay

Under this alternative, the HCR for San Francisco Bay would be structured to have a cutoff at 25,000 tons versus the 15,000 tons in the HCR that the Steering Committee (SC) came to consensus on and recommended. Under this alternative HCR, in years where the Spawning Stock Biomass (SSB) was estimated to be below the 25,000 ton cutoff, no commercial fishing would occur and the quota for the coming season would be zero. Above the 25,000 ton cutoff, the harvest rate would ramp up from 5% to 10% until the SSB reaches 40,000 ton. After that point, the quota would be capped at 4,000 tons.

The HCR with a higher cutoff threshold was designed to provide a more conservative approach to managing the fishery and ensure that more Herring would be available to predators within the California Current Ecosystem during low biomass years. However, based on analysis of HCR performance using Management Strategy Evaluation (MSE), the higher cutoff resulted in only marginal improvements in the projected SSB in the long term, with considerable decreases in average catch and increases in the probability of zero quota years. One of the key performance metrics considered in the MSE simulations was the probability of being above a critical low biomass threshold (defined as 10% of unfished biomass) in the last 10 years of a 50-year simulation. The recommended HCR with a 15,000 ton cutoff had a 96% probability of the stock size being above this critical threshold, while a 25,000 ton cutoff only increased that probability by 1%. Additionally, the HCR with a 25,000 ton cutoff had only a slightly higher probability of reaching the target biomass than the agreed upon HCR (64% vs 60%). In summary, while the HCR with a 25,000 ton cutoff is designed to provide more forage for predators in years with low biomass, it only minimally improves the long term size of the Herring SSB.

The HCR with a 25,000 ton cutoff also had significant negative impacts on economic performance metrics. This HCR had an average catch that was 30% lower than the recommended HCR and the highest variability in catch of any HCR analyzed, and was projected to cause fishery closures 38% of the time. As a result, the relatively modest gains in terms of meeting the stock size objectives were deemed to come at too high of an economic cost by the SC, and the consensus was that the recommended HCR should be used to set quotas.

#### 2. Alternative fishing gear.

This alternative would allow additional fishing gear to be permitted for the commercial sector besides gill net gear with the prescribed mesh size. Round haul gear was previously

used in the fishery until 1994, when the Commission adopted regulations stating that all round haul permittees had five years to convert their permit to a gill net permit. At the time, the rationale behind this change was that round haul gear caught smaller, younger, lower value fish, and it was suspected that seiners increased mortality in the fishery by catching and releasing Herring during roe percentage testing (Attachment 1; Appendix K of the Herring FMP for a full history of the round haul conversion process). Round haul gear is also more efficient than the gill net gear and can take considerably more fish in a shorter time period. This can mean that Herring schools that spawn early in the season make up a disproportionate amount of the catch each year, and thus may contribute less spawning each year.

During the public scoping and public comment periods of the Herring FMP, the Herring FMP Project Management Consultant Team received a few requests to consider allowing the use of alternative gear types to take Herring. In addition to one comment asking the Department to re-allow purse seine gear, there were other requests to consider other types of gear with smaller mesh than the currently used gill nets, including lampara gear and cast nets. The Department and the SC considered the pros and cons of these various options. It was decided that a return to round haul gear would not be considered due to the concerns listed above. However, lampara and cast net gear types were discussed because stakeholders have expressed an interest in facilitating a fresh fish fishery for a local market, and feel these gears would allow for smaller catches of higher quality fish necessary to fulfill fresh fish market orders, which could evolve into a lucrative market for Herring.

However, any consideration of new gear types needs to examine the potential impact of smaller sized mesh on the health of the resource. One of the management objectives outlined in the Herring FMP is that all Herring are able to spawn at least once prior to becoming vulnerable to the fishery. Herring mature between their second and third year, and the current restrictions on gill net mesh sizes have resulted in the consistent take of Herring that are primarily four years of age and older (Attachment 1; Section 7.8.3 of the Herring FMP). Any allowance of new gear types would need to carefully consider the age of Herring targeted by that gear and whether it is compatible with the management objectives for this fishery. It is important to note that it is possible to take Herring of a quality compatible with the fresh fish market by using the currently approved gill net gear with different handling practices.

(b) No Change Alternative:

Under the “No Change” alternative, the Herring FMP implementing regulations and proposed commercial and recreational regulatory changes would not be adopted. Instead, the fishery would continue to be managed without a comprehensive management plan under current regulations. This alternative does nothing to promote a comprehensive management plan for the Herring fisheries and does not bring Herring management into conformance with the MLMA through adoption of implementing regulations as directed by the Legislature. While this alternative is not expected to result in immediate adverse impacts to the Herring resource and fisheries, due to the generally conservative nature of current regulations (e.g. quotas, gear restrictions, temporal and spatial restrictions, etc.), it would forego the greater opportunity for sustainable management under a comprehensive FMP as required by the MLMA. The proposed commercial and recreational changes will clarify and improve enforcement of existing regulations and provide for a more orderly fishery.

The implementing regulations were adopted to include the no-change alternative, as described in the Initial Statement of Reasons for Regulatory Action (ISOR), for subsection 163.1(d) and subsection 164(d)(1). Subsection 163.1(d) is corrected based on feedback received by the Department from commercial industry members and is proposed to retain the former language of the replaced regulations. The correction to 164(d)(1) fixes an inadvertent error in the proposed regulatory text and also reflects no change to the former language of the replaced regulations, as described in the ISOR.

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

(d) Description of Reasonable Alternatives That Would Lessen Adverse Impact on Small Business:

Most commercial Herring industry participants are small businesses (as defined under California Government Code Section 11342.610). In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the proposed regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

X. Impact of Regulatory Action

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

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. Individuals and businesses will not incur any increase in compliance costs. The decrease in the fleet size may result in more profitable catch per unit effort for individuals. However, harvest volume and fishing intensity will continue to be highly influenced by market prices and many other factors unrelated to Commission regulations.

(b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California; Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:

The proposed action is not anticipated to impact the creation or elimination of jobs, the creation of new business, the elimination of existing businesses, or the expansion of businesses in California because the proposed regulations will not impose new compliance costs or adversely impact fishing activity in the state.

The proposed action is not anticipated to benefit the health and welfare of California residents or worker safety, but benefits to the State's environment are anticipated through the improved management of Herring resources.

(c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

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

None.

(e) Nondiscretionary Costs/Savings to Local Agencies:

None.

(f) Programs Mandated on Local Agencies or School Districts:

None.

(g) 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.

(h) Effect on Housing Costs:

None.

## UPDATED Informative Digest/Policy Statement Overview

The purpose of these proposed amendments to regulations is the implementation of the *California Pacific Herring Fishery Management Plan* (Herring FMP). This Fishery Management Plan (FMP) has been produced pursuant to the Marine Life Management Act (MLMA). The amendments are further necessary to improve management of the existing commercial and recreational Pacific Herring fisheries and to support the orderly use of this natural resource.

Regulations pertaining to California's herring fisheries are currently in multiple sections (sections 163, 163.1, 163.5 and 164) of Title 14 of the California Code of Regulations (CCR). Section 163 regulates the commercial harvest of herring. Section 163.1 regulates the transfer of herring permits. Section 163.5 stipulates penalties and Section 164 regulates the harvesting of herring eggs. The recreational fishery is not regulated.

It is the policy of the State to ensure the conservation, sustainable use, and, where feasible, restoration of California's marine living resources for the benefit of all the citizens of the State (Fish and Game Code (FGC) Section 7050(b)). To achieve this goal, the MLMA of 1999 (FGC Sections 7050-7090) contemplates the use of FMPs developed by the Department of Fish and Wildlife (Department) and adopted by the Fish and Game Commission (Commission) (FGC sections 7072, 7075 and 7078) to guide fishery management. FGC subsection 7071(b) also provides authority for the Commission to adopt regulations that implement an FMP or plan amendment.

In accordance with these provisions, the Department has developed a Draft Herring FMP to ensure the long-term sustainability of the resource and the fisheries that rely on it. The Herring FMP includes a proposed overhaul of the limited entry permit system, a Harvest Control Rule (HCR) for the San Francisco Bay fishery, a tiered management framework for setting quotas in all areas, collaborative research protocols, and a proposed daily bag limit for the recreational fishery. Along with the Herring FMP, the Department has also prepared proposed implementing regulations that create new recreational restrictions and deletes or amends existing commercial requirements.

The proposed regulations are divided into four parts: 1) new recreational fishing regulations, 2) regulations to implement the Herring FMP, 3) amendments and additions to the commercial fishing regulations, and 4) provision of forms and fees. The following is a summary of the proposed changes to Title 14, CCR:

1. Add new recreational herring regulations to Section 28.62, Title 14, CCR, and amend existing regulations in sections 27.60 and 28.60, Title 14, CCR. The proposed regulations will:
  - Establish a bag limit within the range of zero to ten (0-10) gallons, which is approximately 0 to 100 pounds, or 0-520 fish. The Department is recommending a daily bag limit of five (5) gallons.
  - Remove "Pacific Herring" from the list of species with no recreational bag limit.
  - Clarify the species (Pacific Herring) in the existing bag limit on recreational take of herring eggs on kelp.
2. Add Article 6 of Chapter 5.5 of Subdivision 1 of Title 14, CCR; California Pacific Herring Fishery Management Plan, and add new Sections 55.00, 55.01, and 55.02. The proposed new sections will:
  - Describe the purpose and scope of the Herring FMP;

- Provide relevant definitions used in the Herring FMP;
  - Describe the management process and HCR.
3. Delete and redraft all existing commercial regulatory language and associated subsections in Sections 163, 163.1, 163.5, and 164 Title 14, CCR.
- The new language in Section 163 includes all regulations related to permits (both herring and herring eggs on kelp (HEOK)), including permit transfers and revocation conditions.
    - A continued requirement that herring or HEOK taken in excess of the quota be released to the Department using the Release of Property form FG-MR 674.
  - The new language in Section 163.1 describes methods of commercial take for herring, and
  - Section 163.5 provides regulations for the Herring Buyer's permit.
  - Section 164 is amended regarding the landing of HEOK, with a new requirement that anyone receiving HEOK must have a Herring Buyer's Permit.
    - The royalty fee of \$500 per ton of herring eggs on kelp will no longer be required.
    - The Herring-Eggs-on-Kelp Monthly Landings and Royalty Report (DFW 143 HR (REV. 06/04/15)), will be repealed and no longer required.
    - Authorized Agent form MRD 164 is repealed, however, agents may be designated on form 1406 Herring Eggs on Kelp Application.
4. Amend Section 705 Commercial Fishing Applications, Permits, Tags, and Fees. Because of the adoption of the Herring FMP, and the adoption of the amendments to the herring fishery regulations as described herein, it is necessary to amend the forms, provide fees to recover reasonable Department costs, and to make the forms consistent with current regulations. The following forms, to be Incorporated by Reference, are attached to the Regulatory Text:
- DFW 327 (New 4/11/19) HERRING BUYER'S PERMIT APPLICATION
  - FG-329 Herring Fresh Fish Market Permit is deleted
  - DFW 1406 (New 4/11/19) HERRING-EGGS-ON-KELP PERMIT APPLICATION
  - DFW 1322-2 (New 4/11/19) SEASON REQUEST FOR CHANGES TO HERRING PERMITS
  - DFW 1377 (New 4/11/19) COMMERCIAL HERRING PERMIT WORKSHEET
    - A new drawing fee of \$4.50 for Applications for New Herring Permits

These proposed regulations were drafted to achieve the sustainability and social policy objectives enumerated in FGC sections 7050, 7055, and 7056. The amended sections would not conflict with any existing Title 14 regulations. In accordance with FGC Section 7071(b), the implementing regulations of this Herring FMP will render the following sections of the FGC inoperative once they are adopted: FGC sections 8389, 8550, 8550.5, 8552, 8552.2, 8552.3, 8552.4, 8552.5, 8552.6, 8552.7, 8552.8, 8553, 8554, 8556, 8557, 8558, 8558.1, 8558.2, 8558.3, and 8559.

### Benefit of the Regulations

It is the policy of the State to ensure the conservation, sustainable use, and, where feasible, restoration of California's marine living resources for the benefit of all the citizens of the State. To achieve this goal, the MLMA contemplates the use of FMPs developed by the Department and adopted by the Commission to guide fishery management. The Commission may adopt regulations that implement the FMP.

### Consistency with State Regulations

The Commission and Department have conducted a review of the California Code of Regulations and determined that the proposed regulations are neither inconsistent nor incompatible with existing State

regulations. No other State agency has the statutory authority to amend regulations pertaining to the herring fishery.

## **UPDATE**

**On September 5, 2019, the Commission provided notice that Appendix R was added to the California Pacific Herring Fishery Management Plan Implementing Regulations, and adopted implementing regulations:**

**Appendix R was made available on the California Fish and Game Commission (Commission) website and available for public inspection between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, except holidays at 1416 Ninth Street, Suite 1320, Sacramento, California 95814. Appendix R the harvest control rule framework development and guidance, which, during the process to develop the FMP was inadvertently left out of the Draft FMP. This notice reintroduced the harvest control rule for consideration in the Final FMP, and subsequently in the Herring FMP rulemaking, by reference.**

**Written comments were to be received in the Commission office no later than 12:00 noon on October 4, 2019; or by interested persons who attended the October 10, 2019, commission meeting and offer testimony.**

**On October 10, 2019, the Commission adopted the California Pacific Herring Fishery Management Plan, and adopted implementing regulations:**

- **Section 28.62, Title 14, CCR was adopted with a bag limit of ten (10) gallons, which is within the range presented by the Department, and is equivalent to approximately 100 pounds of Herring, or 520 fish.**
- **Subsection 163.1(d) was revised to reflect the no-change alternative, effectively defining the required ‘immediate proximity’ vessels must be within of gill nets being fished as a distance of ‘three nautical miles’.**
- **Subsection 164(d)(1) was revised to reflect the no-change alternative, allowing HEOK participants to utilize two rafts and/or two lines while fishing.**

**A 15-day Notice was provided that the Commission adopted the Herring FMP implementing regulations as proposed, except for subsections 163.1(d) and 164(d)(1), where the Commission selected the “no change” alternatives, as described in Attachment C.**

## **15-DAY CONTINUATION NOTICE dated November 6, 2019**

**Following a 15-day notice period, minor changes to the Herring FMP and regulatory text were adopted:**

- **The Final Herring FMP includes Appendix S: Public Comments Received, Responses, and Changes to the Draft California Pacific Herring Fishery Management Plan.**
  - **FMP section 7.8.7 establishes that a recreational possession limit be adopted through regulation that is “clear and easily enforceable.”**
  - **FMP section 10.5.1 (“Alternatives considered but not carried forward” - p. 10-11).**

Changes to the proposed regulation in Section 705 are nonsubstantial or sufficiently related to the original text and the public was adequately placed on notice that these changes could result from the originally proposed regulatory action. These changes were provided in the 15-day notice mailed on November 6, 2019 and are related to the timing of the effective date of the regulation, which will be March 1, 2020. The regulations and forms were drafted in early 2019 and at this time should be updated with the correct fees for 2020 to avoid any confusion by the public and regulated persons when these regulations go into effect.

All (currently 2019) fees have been updated per the annual Implicit Price Deflator (IPD) as set forth in Section 713, Fish and Game Code, effective January 1, 2020.

Associated changes to forms DFW 327, DFW 1377 and DFW 1406 include:

All forms indicating the cost of fees have been amended per the IPD.

All amended forms are re-dated from (NEW 4/11/2019) to (NEW 10/30/2019) to visibly differentiate the former proposed forms from the amended forms which are the subject of this notice.

An addition of clarifying text to forms DFW 1406 and DFW 1377 regarding the deadline for submittal of renewals for permits in the 2020 license year, which is one month later than it will be in future years.

Update to the text regarding Permit Late Fees which clarifies when the penalties apply.

Changes as proposed in the original notice, and not affected by the non-substantial changes described, were indicated in underline for new text and strikeout for deleted text consistent with the original notice.

#### 15-DAY CONTINUATION NOTICE dated November 7, 2019

- Section 705, Title 14, CCR has been further revised to update all fees per the annual Implicit Price Deflator, as set forth in Section 713, Fish and Game Code, effective January 1, 2020.
- Forms DFW 327, DFW 1377, and DFW 1406 have been further revised, including:
  - All forms indicating the cost of fees have been amended per the Implicit Price Deflator, as set forth in Section 713, Fish and Game Code, effective January 1, 2020.
  - All amended forms are re-dated from (NEW 4/11/2019) to (NEW 10/30/2019) to visibly differentiate the former proposed forms from the amended forms which are the subject of this notice.
  - An addition of clarifying text to forms DFW 1406 and DFW 1377 regarding the deadline for submittal of renewals for permits in the 2020 license year, which is one month later than it will be in future years.
  - Update to the text regarding Permit Late Fees, which clarifies when the penalties apply.

No comments were received during the Nov. 6, 2019 and Nov. 7, 2019 15-day notice periods.

#### **CONSISTENCY AND COMPATIBILITY WITH STATE AND FEDERAL REGULATIONS**

The Fish and Game Commission, pursuant to Fish and Game Code sections 200 and 203, has the sole authority to regulate the herring fishery in California. Commission staff has searched the California Code of Regulations and has found the proposed changes pertaining to 27.60, 288.60, 28.62, 55.00, 55.01, 55.02, 163, 163.1, 163.5, 164 and 705 of Title 14. Therefore, the Commission has determined that the proposed amendments are neither inconsistent nor incompatible with existing State and Federal regulations.

#### **INCORPORATION BY REFERENCE**

The Fish and Game Commission incorporated by reference the Herring Fishery Management Plan (Herring FMP), as it would be cumbersome, unduly expensive and otherwise impractical to publish the 592-page document in the California Code of Regulations.

The Fish and Game Commission filed the Herring FMP with the Governor's Office of Planning and Research, State Clearinghouse on June 17, 2019, SCH #2018082039; where it was posted to their website, as well as posting on the Fish and Game Commission's website.

Repealed forms DFW 143, MRD 164 and FG 329; and Amended forms FG 327, FG 1406, FG 1322-2, FG 1377 were also incorporated by reference and made available on the Fish and Game Commission's website.

Minor editorial changes are made to text sections 55.02, 163(g) and 163(i), Title 14, CCR, to clarify and simplify the regulations.