

California Fish and Game Commission
1416 Ninth Street
Sacramento, CA 95814

VI. Location of Department Files

Department of Fish and Wildlife
3637 Westwind Boulevard
Santa Rosa, CA 95403

VII. Description of Reasonable Alternatives to Regulatory Action

(a) Alternatives to Regulation Change

The discussion of alternatives in this document will focus on feasible HEOK management actions that could be modified to either improve HEOK fisheries management or the economics of the participants in the fishery.

- **Amend subsections 163(c)(4)(B), 163(c)(6)(B), 164(h)(6) and add new subsection 163(e)(3)(C), Reinstate individual HEOK permit quotas.**

The existing regulation of subsection 163(c)(4)(B) states that no more than one HEOK permit may be held per permittee, and there is no allocation of any HEOK quota established pursuant to Section 55.02 to individual permittees, effectively giving participants equal access to the quota for this sector of the commercial fishery. This proposed alternative would establish permit allocations by increasing the number of HEOK permits that may be held per permittee to two in subsection 163(c)(4)(B), allowing up to four permits to be fished at a time per vessel in subsection 163(c)(6)(B), allocating the total HEOK quota among permittees in new subsection 163(e)(3)(C), and adjusting 'product landed in excess' language in subsection 164(h)(6).

The Herring FMP and implementing regulations, which were adopted by the Commission in October 2019, eliminated individual permit quotas in the HEOK sector as part of a larger overhaul of the permitting system in the commercial Herring fishery, one of the stated goals of the Herring FMP. This overhauled permitting system streamlines permitting, gear requirements, and management of the fishery, as well as standardizes and clarifies regulatory language. It also ensures that commercial Herring regulations are consistent with those used in other fisheries in California, and that permit fees paid by HEOK-sector participants are consistent with those paid by gill net-sector participants. Additionally, subsection 55.02(d) of the Herring FMP implementing regulations gives the Director of the Department authority to set annual quotas for all fishery sectors, including HEOK. This section of the Herring FMP implementing regulations rendered Fish and Game Code sections 8389 and 8550, which had authorized the Commission to prescribe commercial Herring regulations, permits, and set quotas, inoperative.

The Department does not recommend that this alternative be adopted, as it would re-introduce regulations that were eliminated during the permit overhaul with the express purpose of implementing goals of the Herring FMP. Additionally, adoption of this alternative would require reassessment of permit fees in the HEOK sector, could restrict potential

participants from achieving equal access to any quotas established for this sector, and may be difficult to enforce without further changes to gear marking requirements.

(b) No Change Alternative

Under the “No Change” alternative, the Herring FMP implementing regulations in sections 163 and 164 related to the HEOK fishery would not be modified. As a result, HEOK fishery participants would still be required to comply with the burdensome and unnecessary regulations that have been identified in this document and proposed for change.

(c) Consideration of Alternatives

In view of information currently possessed, no 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.

VIII. 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 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, as the proposed regulatory changes are intended to simply provide clarification to accommodate HEOK permittee requests. The proposed regulations will support the viability of the fishery, help improve the quality of the product, and remove or update burdensome or unnecessary regulations that are not applicable to the HEOK fishing sector.

(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 Commission does not anticipate any impact on the creation or elimination of jobs, the creation of new businesses, the elimination of existing businesses or the expansion of businesses in California. The Commission also does not anticipate any benefits to the health and welfare of California residents or worker safety. The proposed regulatory changes are intended to simply provide clarification to accommodate HEOK permittee requests. The proposed regulations will support the viability of the fishery, help improve the quality of the product, and remove or update burdensome or unnecessary regulations that are not applicable to the HEOK fishing sector.

The Commission anticipates some benefit to the state's environment through the sustainable management of herring egg harvest and of kelp forest habitats to foster and support a diverse balance of species.

(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

At its October 10, 2019 meeting, the California Fish and Game Commission (Commission) adopted the California Pacific Herring Fishery Management Plan (Herring FMP) and implementing regulations, which included sections 163 and 164, Title 14, California Code of Regulations (CCR). Under those regulations, Pacific Herring (Herring) and Herring eggs on kelp (HEOK) may be taken for commercial purposes under a revocable permit, subject to such regulations as the Commission shall prescribe. Current regulations in sections 163 and 164, Title 14, CCR specify the number of permits that may be held by an individual, fishing areas, seasons, gear restrictions, and notification requirements for the HEOK fishery.

In response to permittee feedback on the HEOK regulations set forth in sections 163 and 164, Title 14, CCR, the Department of Fish and Wildlife (Department) is proposing several regulatory changes with the intent of providing for the efficient harvest and orderly conduct of the HEOK fishery. These proposed regulatory changes include 1) permittee on board requirements, 2) adding rinsing in the definition of processing, 3) gear marking requirements, 4) noise reduction measures, 5) marine mammal deterrent devices, and 6) weekend landings requirements. No changes are proposed to the Herring FMP itself, and of the Herring FMP implementing regulations adopted by the Commission in October 2019, only sections 163 and 164, Title 14, CCR are proposed for amendment.

The following is a summary of the changes proposed for sections 163 and 164, Title 14, CCR:

1. Amend subsection 163(e)(3)(B) to modify language regarding the requirement of a permittee or authorized agent to be aboard any vessel engaged in fishing HEOK by changing the requirement to 'immediately present during' while harvesting, processing or transporting HEOK.
2. Amend subsection 164(a) to modify language to clarify that the definitions in this section apply only to the HEOK fishery.
3. Amend subsection 164(a)(1) to add "the period during which kelp is suspended in anticipation of harvesting" to the definition of fishing, as well as itemize subsections of the definition for clarity.
4. Amend subsection 164(a)(3) to add "rinsing" to the definition of processing.
5. Amend subsection 164(d)(1)(E) to modify light marking requirements so they only apply while lines are fishing, exclusive of suspending and harvesting kelp.
6. Amend subsection 164(d)(1)(F) to add language to clarify the buoy marking requirement and that the Department registration number of the designated vessel is listed on the HEOK permit.
7. Amend subsection 164(f) to modify language regarding the noise reduction rule by eliminating language that applies to gill net gear.
8. Amend subsection 164(g) to remove "marine mammal deterrent devices", thus allowing for reasonable action by HEOK permittees to protect marketable product.
9. Amend subsection 164(h)(4) to reinstate weekend landings of HEOK product.

Editorial changes are also proposed to sections 163 and 164, Title 14, CCR, to remove the dates associated with forms DFW 1322-2, DFW 1377, and DFW 1406, as the current date of each form is already indicated in Section 705, Title 14 CCR.

Additionally, the authority and reference citations in sections 163 and 164, Title 14, CCR will be updated to remove Fish and Game Code sections 8389 and 8550, which became inoperative following the Commission's adoption in October 2019 of the Herring FMP (per Fish and Game Code Section 7071).

Benefits of the Proposed 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. The objectives of this policy include, but are not limited to, recognize the importance to the economy and the culture of California of sustainable sport and commercial fisheries and the development of commercial aquaculture consistent with marine living resource conservation policies, manage marine living resources on the basis of the best available scientific information and other relevant information that the Commission or Department possesses or receives, and to involve all interested parties, including, but not limited to, individuals from the sport and commercial fishing industries, aquaculture industries, coastal and ocean tourism and recreation industries, marine conservation organizations, local governments, marine scientists, and the public in marine living resource management decisions.

In consideration of the above policy, the proposed regulatory action will benefit fishermen, processors, and the State's economy in the form of a healthy sustainable fishery, future harvestable Herring populations, and the removal of burdensome or unnecessary regulations that are not applicable to the HEOK fishing sector.

Consistency and Compatibility with Existing Regulations

The proposed regulations are neither inconsistent nor incompatible with existing State regulations. Section 20, Article IV, of the State Constitution specifies that the Legislature may delegate to the Commission such powers relating to the protection and propagation of fish and game as the Legislature sees fit. The Legislature has delegated to the Commission the power to regulate the commercial take of Herring (Fish and Game Code Section 8550), and the power to adopt fishery management plan implementing regulations (Fish and Game Code sections 7071 and 7078). No other State agency has the authority to promulgate regulations concerning commercial take of Herring and fishery management plan implementation. The Commission has reviewed its own regulations and finds that the proposed regulations are neither inconsistent nor incompatible with existing State regulations. The Commission has searched the California Code of Regulations and finds no other State agency regulations pertaining to the commercial take of Herring and fishery management plan implementation.

UPDATE:

On June 24, 2020, the Commission adopted the amendments as proposed by the Department to sections 163 and 164, Title 14, CCR for the Herring FMP implementing regulations concerning the HEOK fishery.

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action.

Attachment 1

163 and 164 – Responses to Public Comments: Herring Eggs on Kelp

Responses to comments received at the April 16, 2020 Fish and Game Commission meeting.

Commenter Name, Format, Date	Comment	Department Response
1. Daniel Yoakum Commercial fisherman, Herring Eggs on Kelp (HEOK) representative to the Director's Herring Advisory Committee	1-a. Supports proposed regulatory changes as presented at the April 16, 2020 Fish and Game Commission meeting.	1-a. Support for the adoption of these regulations is appreciated.
1. Daniel Yoakum Cont.	1-b. Allow individual quotas and two permits per permittee for the HEOK fishery.	1-b. Regulations in Title 14, California Code of Regulations (CCR), Section 55.02(d) state that the Director of the Department shall set quotas for all sectors of the Pacific herring fishery, according to Chapter 7 of the California Pacific Herring Fishery Management Plan (Herring FMP). The individual HEOK permit quotas were eliminated by the Herring FMP and implementing regulations to streamline permitting and management of the fishery, as well as standardize and clarify regulatory language, and ensure the regulations are consistent with those used in other fisheries in California. Allowing two permits to be owned by a single permittee could reduce access to this limited entry fishery from ten to as few as five individuals, and the amount of gear allowed per permit would need to be reconsidered.
1. Daniel Yoakum Cont.	1-c. Specify penalties less severe than suspension or revocation of permits	1-c. A decision was made during the preparation of the Herring FMP to do away with the point system for determining penalties. According to Department Law Enforcement Division staff, options for penalties less severe than permit suspension or revocation already exist and do not need to be spelled out in the regulations.

Attachment 1

163 and 164 – Responses to Public Comments: Herring Eggs on Kelp

Commenter Name, Format, Date	Comment	Department Response
1. Daniel Yoakum Cont.	1-d. Allow anchoring corklines.	1-d. The expansion of anchoring in San Francisco Bay is likely to be controversial and would require going through public notice. Title 14, CCR, Section 164(a)(5), defines lines as being tied to a permanent structure. Allowing anchoring of lines could introduce navigation hazards in high-use boating areas in San Francisco Bay due to their length, and could also result in damage to sensitive benthic habitat. Allowing anchoring of lines would require changes to multiple subsections of Title 14, CCR, Section 164 that are outside the scope of this rulemaking.

Attachment 1

163 and 164 – Responses to Public Comments: Herring Eggs on Kelp

Responses to oral comments received at the June 24, 2020, Fish and Game Commission meeting. No written comments were received for this rulemaking.

Commenter Name and organization	Comment Summary	Department Response
1. Daniel Yoakum Commercial fisherman, Herring Eggs on Kelp (HEOK) representative to the Director's Herring Advisory Committee	1-a. The failure to reinstate permit quotas will result in increased competition, wastage, and inferior quality HEOK product.	1-a. The Pacific Herring Fishery Management Plan (Herring FMP) establishes a HEOK sector quota equal to 1% of the most recent Spawning Stock Biomass egg deposition (see Chapter 7 and Appendix N of the Herring FMP, and Section 55.02 of Title 14, California Code of Regulations [CCR]). A single quota available to all permitted participants is consistent with the gill net sector of this fishery, as well as other California commercial fisheries, and ensures equal potential access to all participants. Additionally, subsection 164(h)(6) of Title 14, CCR provides a mechanism to appropriately process HEOK landings that exceed quota without waste. It is the responsibility of the permittee to follow regulations regarding waste of product.
1. Daniel Yoakum Cont.	1-b. The allowance of ownership of two permits does not necessarily have to be in the regulations.	1-b. Support for the current permit ownership limit is appreciated.
2. Geoff Shester, Oceana.	2-a. Glad to see this package moving forward to tie up loose ends in the Herring FMP regulations.	2-a. Support for adoption of the Herring FMP implementing regulations HEOK cleanup package is appreciated.

Attachment 1

163 and 164 – Responses to Public Comments: Herring Eggs on Kelp

Commenter Name and organization	Comment Summary	Department Response
2. Geoff Shester Cont.	2-b. Wants clear specification of which marine mammal deterrent devices would be allowed, to ensure that they will not harm marine mammals.	2-b. The proposed change removes a general prohibition on use of marine mammal deterrent devices, while maintaining prohibition of seal bombs and explosives. While no specific allowances are indicated, this change will allow HEOK sector participants to take reasonable action to protect marketable product by discouraging seal and sea lion disturbance of HEOK gear and Herring spawning on that gear. However, fishery participants are still subject to any applicable local, state, and/or federal laws.