

TITLE 14. Fish and Game Commission Notice of Proposed Changes in Regulations

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), pursuant to the authority vested by sections 713, 1050, 6651, 6653, 6653.5, 6700 and 6701 of the Fish and Game Code and to implement, interpret or make specific sections 51, 713, 1050, 6650, 6651, 6652, 6653, 6653.5, 6654, 6656, 6700, 6701, 6701.5, 6702, 6703, 6704, 6705, 6706, 6707 and 6680 of said Code, proposes to amend sections 165, and 165.5, and Appendix A, and add Section 705.1, Title 14, California Code of Regulations (CCR), regarding the commercial harvesting of kelp and other aquatic plants.

Informative Digest/Policy Statement Overview

Bull kelp (*Nereocystis luetkeana*) is a species of marine algae which forms the foundational physical structure of diverse marine habitats that provide a variety of ecosystem services and support numerous fisheries, cultural and ceremonial traditions, and diving and fishing tourism. Bull kelp is an annual species, meaning the individuals live and reproduce within a lifetime of one year, although some individuals may live into a second year. The reproductive material of a bull kelp individual is located on its blades, near the surface of the water.

Historically, bull kelp populations on the north coast have exhibited natural interannual spatial and temporal variability. However, beginning in 2014, bull kelp populations in Mendocino and Sonoma counties declined dramatically outside of the range of normal variability due to elevated sea surface temperature, poor nutrient availability and drastic increases in purple sea urchin (*Strongylocentrotus purpuratus*) populations. Maximum annual bull kelp canopy area has remained below the 1984-2013 average from 2014 through the fourth quarter of 2020.

Current uses for harvested bull kelp are for human consumption and to feed aquacultured abalone. Existing commercial harvest regulations allow those harvesting for human consumption to take the entire individual, and harvesters taking kelp for other purposes are allowed to cut up to four feet below the surface of the water. Because bull kelp reproductive material is on the part of the individual nearest to the surface, all harvest methods result in less available reproductive material. This has the potential to affect the number of future generations of bull kelp.

Due to the dramatic reduction in the north coast bull kelp population and the lack of scientific data to explain whether commercial harvest does or does not have an impact on the current kelp population, the California Department of Fish and Wildlife (Department) has determined that a precautionary management approach is warranted and is recommending amendments to harvest regulations in the interest of maintaining the bull kelp population that remains. The Department recommends temporarily amending commercial harvest regulations to limit bull kelp take on the north coast. These harvest limits would sunset in three to five years, as determined by the Commission, to allow for the drafting and potential adoption of a comprehensive, statewide Kelp Restoration and Management Plan (KRMP).

Additionally, the Department recommends regulations which apply to all commercial marine algae harvesters regardless of the species harvested, to update harvest logs, improve enforceability, and overhaul existing regulatory language to make corrections and better describe specific harvesting requirements. These regulations will not have a sunset date.

Current commercial harvest regulations

Section 165, Title 14, CCR, outlines the licensing and harvesting provisions for the commercial harvest of kelp and other aquatic plants. Relevant to this rulemaking, Section 165 includes the Kelp Harvesting License and associated fee, harvest royalty fee requirements, requirements for harvest reporting, geographical limitations for giant and bull kelp harvest, and prohibitions on the disturbance of certain aquatic plants.

Current regulations Section 165.5, Title 14, CCR, define the procedures to lease administrative kelp beds for the exclusive right to harvest kelp. Section 165.5 also spatially describes the 87 administrative kelp beds under the following management categories: open, closed, leasable, and lease only. The designations were designed for optimal harvest while ensuring sustainable management of the resource and the species that depend upon kelp.

Proposed temporary commercial harvest regulations

The Department is recommending temporary prohibitions or limits to kelp harvest in four north coast counties: Sonoma, Mendocino, Humboldt, and Del Norte. The interim management measures are intended to protect the bull kelp resource while allowing for the Department, Tribes, industry, and interested stakeholders to collaboratively work towards developing the KRMP, a comprehensive management framework for giant and bull kelp.

The proposed regulations for Del Norte, Humboldt, Mendocino, and Sonoma counties would have a sunset date of three to five years, as determined by the Commission. The following summarize the Department-proposed options for Commission consideration:

Subsection 165(c)(9)(A):

Subsection 165(c)(9)(A) Option 1: Bull kelp harvest closure in Sonoma and Mendocino counties regardless of intended use of harvested kelp.

Subsection 165(c)(9)(A) Option 2: Annual overall bull kelp harvest quota from 1 pound to 2,000 pounds (1 ton) wet weight for Sonoma and Mendocino counties, combined, between January 1 – December 31. Harvest is limited for human consumption only.

Subsection 165(c)(9)(B): The proposed regulations include an annual overall bull kelp harvest not to exceed an annual quota of 4 tons (8,000 lbs.) wet weight for Del Norte and Humboldt counties combined.

To allow the Department to monitor the harvest and avoid exceeding the annual harvest quota, in addition to the currently required monthly harvest reports, subsection (c)(9)(C) lists options for weekly reporting via email of bull kelp harvest.

Subsection 165(c)(9)(C) Option 1: *If subsection (c)(9)(A) Option 1 is adopted by the Commission, weekly reporting of bull kelp harvest for Del Norte and Humboldt counties.*

Subsection 165(c)(9)(C) Option 2: *If subsection (c)(9)(A) Option 2 is adopted by the Commission, weekly reporting of bull kelp harvest in Del Norte, Humboldt, Mendocino, and Sonoma counties.*

Subsection 165.5(c) specifies an option for the Commission decision:

Option: Temporarily closes the three lease only administrative kelp beds 308, 309, and 312 in Mendocino, Humboldt, and Del Norte counties.

As an alternative to the temporary closure, the Department is also proposing an option for a temporary hiatus on accepting lease applications for the lease only administrative kelp beds. The hiatus would be an administrative action and as such, would not be written into regulation. The Department recommends that the temporary hiatus also have a sunset date of three to five years, to be determined by the Commission.

Additional proposed commercial harvest regulations

Additional amendments are proposed that apply to all commercial algae harvesters and will not have a sunset date. Non-substantive and structural changes are proposed throughout sections 165 and 165.5 to improve specificity of language and correct typographical errors. Additional substantive proposed amendments include:

Modifications to the Kelp Harvesting Application form (DFW 658). The application form will be modified to include a Drying Permit option to comply with subdivision 6653.5(b) of the Fish and Game Code and renamed the Kelp Harvesting License and Drying Application. Further edits to DFW 658 will include standard language used on other licenses.

The Kelp Harvester's Monthly Report will be consolidated from two separate forms, FG 113 (January 1, 1997), and FG 114 (Rev. 1/07), into a single double-sided form Commercial Kelp Harvester's Monthly Report DFW 113 (REV. 11/01/21). The new form will add reporting requirements including the number of individuals harvesting, separate weights for bull and giant kelp harvest, the central latitude/longitude coordinates of bull kelp harvest locations, and listing the business name and individual harvester name to distinguish between the business and business contact. In addition, the new form will have Department contact information so that harvesters can reach readily available Department personnel with harvest report questions. Additional minor editorial changes are being made to remove redundancy, update Department information, and ensure consistency with regulatory text.

The regulation amendment will introduce the Commercial Edible Seaweed/Agarweed Aquatic Plant Harvester's Monthly Report as form DFW 113A (New 11/01/21). This will provide a uniform way to report information already stipulated in current regulations, as well as new information similar to that required in the new version of DFW 113 (REV. 11/01/21) including the central latitude/longitude coordinates of bull kelp harvest locations.

The Release of Property form DFW 1108 (New 11/01/21) is introduced in this regulation amendment. The Release of Property form ensures that any inadvertent excess bull kelp harvested in the counties with annual quotas is not wasted.

Finally, Section 705.1, Title 14, CCR, is proposed to be added. This section will incorporate by reference the Commercial Kelp Harvesting License and Drying Application, the Commercial Kelp Harvesters Monthly Report DFW 113 (REV. 11/01/21), the Commercial Edible Seaweed/Agarweed Aquatic Plant Harvester's Monthly Report DFW 113A (New 11/01/21) and the Release of Property form DFW 1108 (New 11/01/21). The current Commercial Kelp Harvester License fee, which was established in Fish Game Code Section 6651 and is annually updated pursuant to Section 713 of the Fish and Game Code, will be listed in this section.

Benefits of the proposed regulations

The goal of the regulation change is to protect and maintain the remaining bull kelp along the north coast to the maximum extent possible, and to support ongoing restoration efforts to improve the resource in future years. This will benefit the State of California by ensuring the continuance of the ecosystem services, fisheries, cultural and ceremonial traditions, and diving and fishing tourism supported by bull kelp. In addition, the sunset date will provide time to draft and potentially adopt the KRMP that will provide a comprehensive management framework for giant and bull kelp.

Additional benefits of the proposed regulations include providing Drying Permit compliance with Fish and Game Code, providing harvesters with better defined and more precise reporting tools, and improving the Department's ability to manage this resource.

Evaluation of incompatibility with existing regulations

The proposed regulations are neither inconsistent nor incompatible with existing state regulations. 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 kelp and other marine algae, lease of kelp beds for exclusive harvest of *Macrocystis* and *Nereocystis*, Kelp Harvester's license, and monthly harvest reports. Furthermore, the proposed addition to refer harvesters for human consumption to the California Department of Public Health will ensure harvesters are aware of the regulatory agency for food manufactured and processed food for human consumption.

Public Participation

NOTICE IS ALSO GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held in Sacramento, California, on Wednesday, February 16, 2022, at 8:30 a.m., or as soon thereafter as the matter may be heard. The specific location for this meeting is still being determined. As soon as this information is available, but not less than thirty days before the hearing, a continuation notice will be sent to interested and affected parties providing an exact location. The continuation notice will also be published in the California Regulatory Notice Register and published on the Commission's website.

It is requested, but not required, that written comments be submitted on or before 5:00 p.m. on February 3, 2022, at the address given below, or by email to FGC@fgc.ca.gov. **Written comments mailed, or emailed to the Commission office, must be received before 12:00 noon on February 14, 2022.** All comments must be received no later than February 16, 2022, at the hearing in Sacramento, California. If you would like copies of any modifications to this proposal, please include your name and mailing address. Mailed comments should be addressed to Fish and Game Commission, PO Box 944209, Sacramento, CA 94244-2090.

Availability of Documents

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulation in underline and strikethrough format can be accessed through the Commission website at www.fgc.ca.gov. The regulations as well as all related documents upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, Melissa Miller-Henson, Executive Director, Fish and Game Commission, 715 P Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct requests for the above-mentioned documents and inquiries concerning the regulatory process to Melissa Miller-Henson or Sherrie Fonbuena at FGC@fgc.ca.gov or at the preceding address or phone number. **Environmental Scientist, Rebecca Flores Miller, Department of Fish and Wildlife, (via email to kelp@wildlife.ca.gov), has been designated to respond to questions on the substance of the proposed regulations.**

Availability of Modified Text

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from the agency program staff.

Impact of Regulatory Action/Results of the Economic Impact Assessment

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 Business, 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 business in other states.

The Department reviewed reported bull kelp harvest from all edible seaweed harvesters in Mendocino and Sonoma counties as well as Del Norte and Humboldt counties for all years on

record. Within a seven-year time frame prior to the 2014 bull kelp decline (2007-2013), bull kelp represented about 11% (14,084 out of 131,384 pounds) of total edible seaweed take in Mendocino and Sonoma counties combined for nine permittees. For the seven years following the decline (2014-2020), bull kelp harvest represented about 3% (4,441 out of 129,437 pounds) of the total edible seaweed harvested for the six permittees who harvested during that time frame.

In Del Norte and Humboldt counties combined, bull kelp represented 12% (6,191 out of 49,758 pounds) of total edible seaweed take for three permittees between 2007-2013. In contrast, bull kelp take was 34% (23,522 out of 68,709 pounds) of the total edible seaweed harvested by two permittees from 2014 – 2020 in the same two counties. Considering bull kelp harvest in Del Norte and Humboldt counties was greater proportionally, and canopy area did not decline dramatically compared to Mendocino and Sonoma counties during that timeframe, the Department determined capping harvest in Del Norte and Humboldt counties would maintain current use and harvest post 2014. Commercial harvesters in Mendocino and Sonoma counties have indicated they would not shift harvest to Del Norte and Humboldt counties.

Commercial harvest of wild marine algae is not allowed in nearby states of Oregon and Washington. Therefore, the industry is not competing with nearby markets for harvested kelp.

Finally, all other proposed regulatory amendments, including the requirement of a GPS unit to report the central latitude and longitude coordinates of bull kelp harvest, will have no impact on California businesses, including their ability to compete with businesses in other states.

- (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 impacts on the creation or elimination of jobs, the creation of new business, the elimination of existing businesses or the expansion of businesses in California.

The Commission does not anticipate any benefits to health and welfare of California residents or worker safety.

The Commission anticipates benefits to the state's environment in the sustainable management of this resource. As a foundational species forming the physical structure of kelp forest habitats, bull kelp supports fisheries, cultural and ceremonial traditions, and tourism.

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

The proposed weekly reporting requirement for bull kelp harvest from the current monthly requirement would introduce additional time that is estimated to be about \$243.88 annually per harvester, or \$2,438 for the 10 active harvesters. Additionally, if the harvester does not already have GPS capability, the business would need to incur the costs (up to approximately \$200

one-time cost) of obtaining GPS capability to provide the central latitude and longitude locations of bull kelp harvest.

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

Weekly reporting and the reporting of harvest coordinates will require some increase in work effort for staff within the Department totaling approximately \$8,333, or \$4,268 if a closure is chosen for Mendocino and Sonoma counties. In addition, if the bull kelp harvest closure option is chosen for Mendocino and Sonoma counties, then royalty fee revenue is anticipated to decline by an estimated \$8.88. The royalty fee per wet pound is \$0.012 x 740 lbs. (2014-2020 Mendocino and Sonoma) average harvest = \$8.88.

Management of bull kelp harvest quota and reporting of harvest coordinates will result in new duties for the Department. Management tasks in counties with a harvest quota will include: weekly compiling and tracking of harvest and posting status updates on the Department webpage, comparison of weekly to monthly reporting and communications with license holders as needed if discrepancies occur in the reports, determining status of harvest toward the quota as needed, drafting and emailing notices to license holders prior to implementation of restrictions triggered by the quota, posting notice of temporary closure or closures on the Department webpage, and ensuring any harvest in excess of any established quota is forfeited to the Department through a Release of Property form. Reporting of bull kelp harvest coordinates will require the Department to modify the current harvest database and enter coordinates into the harvest database, and verify coordinates reported by harvesters to determine county of harvest.

(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.

Effect on Small Business

It has been determined that the adoption of these regulations may affect small business. The Commission has drafted the regulations in Plain English pursuant to Government Code Sections 11342.580 and 11346.2(a)(1).

Consideration of Alternatives

The Commission must determine that no reasonable alternative considered by the Commission, or that has otherwise been identified and brought to the attention of the Commission, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

FISH AND GAME COMMISSION

Dated: December 21, 2021

Melissa Miller-Henson
Executive Director