

CALIFORNIA FISH AND GAME COMMISSION
FINDING OF EMERGENCY AND
STATEMENT OF PROPOSED EMERGENCY REGULATORY ACTION

Second Re-adoption of Emergency Action to
Amend Sections 29.20 and 29.80,
Title 14, California Code of Regulations
Re: 2021 Recreational Clam, Sand Crab, and Shrimp Gear Emergency Rule

Date of Statement: January 25, 2022

I. Emergency Regulations in Effect to Date

The California Fish and Game Commission (Commission) approved an emergency rulemaking amending sections 29.20 and 29.80, Title 14, CCR that became effective March 8, 2021. The emergency prohibits the use of hydraulic hand pumps to harvest clams, sand crabs, and shrimp, clarifies permissible methods for the take of those species, and requires each individual partaking in clamming to store their catch separately from those of others for ease of enforcement of individual bag and possession limits.

The rule was adopted in response to observational and scientific data indicating the potential for hydraulic hand pumps to facilitate overharvesting of clams and cause damage to the estuarine environment where recreational clamming occurs.

II. Request for Approval of Readoption of Emergency Regulations

The current emergency rule, sections 29.20 and 29.80, Title 14, CCR will expire on April 11, 2022 unless it is readopted for an additional 90 days. This re-adoption would be the second of two 90-day extensions, the first of which was approved at the October 2021 meeting.

California Department of Fish and Wildlife (Department) staff are developing a regular rulemaking that will prohibit the use of hydraulic hand pumps in pursuit of clams, sand crabs, and shrimp, clarify permissible methods of take, and require individuals to store their clamming catch separately from those of others. In order to develop the necessary information to inform that rulemaking and protect resources while it is promulgated, the current emergency rule will need to be extended. The permanent rulemaking is currently being considered by the Commission and is scheduled for a discussion hearing at the February 16-17 meeting, and an adoption hearing at the April 20-21 meeting.

III. Statement of Facts Constituting the Need for Readoption of the Emergency Regulation.

Prior Commission Actions

On August 8, 2019, the Commission referred petition 2019-012 requesting the amendment of Section 29.20, Title 14, CCR to ban the use of hydraulic pumps in clamming to the Department for review and recommendation.

On February 10, 2021, the Commission adopted the emergency regulation to amend sections 29.20 and 29.80, Title 14, CCR related to authorized gear for recreational take of clams, sand crabs, and shrimp.

Existence of an Emergency and Need for Immediate Action

The Commission considered the following factors in determining whether an emergency exists: The magnitude of potential harm; the existence of a crisis situation; the immediacy of the need; and whether the anticipation of harm has a basis firmer than simple speculation.

Clams are an important ecological, cultural, and recreational resource in the State of California. The use of hydraulic pumps to harvest clams has greatly increased the efficiency of clam harvesting and allow greater access to clam beds. These factors, combined with increasing participation in the fishery due to the COVID-19 pandemic, are likely causing a significant increase in take, and it is unknown whether the stock can support this increase. Further, illegal commercial sale of gaper clams facilitated by the use of hydraulic pumps poses a public health risk, as these catches are not subject to normal shellfish safety inspections. Consumers may believe they are purchasing geoduck clam from legitimate fisheries or be unaware of the risks posed by consuming wild-caught shellfish. Finally, the increased disturbance of sensitive and ecologically important eelgrass habitat is causing unknown disruption to estuarine environments in the state.

These conditions still exist, constituting the need for a re-adoption of the emergency regulations. Allowing the emergency to lapse while a regular rulemaking is developed would cause confusion for clambers and wildlife officers, as well as leave the emergency conditions unaddressed until the regular rulemaking becomes effective. Wildlife officers report the emergency rule has been effective at reducing the use of hydraulic pumps, and the requirement to keep individual bag limits separate has improved enforcement and discouraged illegal commercialization. COVID-19 remains a concern, and the relative safety of outdoor activities is likely to continue to increase interest and participation in the fishery. During creel surveys conducted by Department staff in June and July 2021, 45% of groups surveyed reported they had gone clamming for the first time in 2020 or 2021, or that they clammed more in 2020/21 than in previous years. The emergency regulation was supported by 55% of clambers surveyed, compared to 19% who did not support the regulation. The balance did not have an opinion on the issue. Seventy five percent (75%) of participants reported they were satisfied with current bag limits, and many commented that pumps are not necessary to harvest a limit of gaper clams. During surveys, Department staff observed approximately 130-200 clambers on summer weekends with a tide of -0.5 feet or lower, at both Lawson's Landing and Bodega Bay. Despite the high participation in the fishery, preliminary analysis shows no significant change in the mean length of gaper clams harvested at Lawson's Landing compared to 2015, though this analysis is ongoing and a full comparison of the size structure of the population will provide greater insight into the sustainability of the fishery.

A re-adoption of the emergency action is necessary to continue to protect the clam resource and estuarine environment while permanent regulations to prohibit the use of hydraulic pumps are considered and potentially implemented. The increased interest in the fishery due to COVID-19 is likely to persist through the duration of this emergency action, and protecting the resource and consumers from the actions of groups harvesting clams for illegal sale remains a top priority.

Proposed Action by the Commission

The Commission proposes the readoption of amendments to sections 29.20 and 29.80, Title 14, CCR that is the same as previously effective. A single addition has been made to the authority and reference for both sections 29.20 and 29.80 to include Fish and Game Code Section 399 as an authority, as the adoption of this emergency regulation and re-adoption is necessary for the immediate conservation, preservation, and protection of gaper clam stocks, and eelgrass habitat adjoining clam beds.

IV. 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) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None.
- (b) Nondiscretionary Costs/Savings to Local Agencies: None.
- (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.
- (e) Effect on Housing Costs: None.

V. Readoption Criteria

1) Same as or Substantially Equivalent

Pursuant to Government Code section 11346.1(h), the text of a readopted “emergency regulation that is the same as or substantially equivalent to an emergency regulation previously adopted by that agency.” The language proposed for this rulemaking is the same as the language of the original emergency regulation.

2) Substantial Progress

Government Code section 11346.1(h) specifies “Readoption shall be permitted only if the agency has made substantial progress and proceeded with diligence to comply with subdivision (e)” [sections 11346.2 through 11347.3, inclusive].

A rulemaking in compliance with these sections (certificate of compliance) is currently underway and was presented to the Commission for public notice in December of 2021. It was discussed at the February 16-17 meeting, and an adoption hearing is scheduled for the April 20-21 meeting.

VI. Authority and Reference

Authority cited: Sections 200, 205 and 399, Fish and Game Code.

Reference: Sections 200, 205 and 399, Fish and Game Code.

VII. Section 399 Finding

Delay in the prohibition of hydraulic pumps for recreational take of clams (i.e., six to nine months for a standard rulemaking) required to address this puts clam and marine resources at risk. Action to re-adopt these regulations is necessary now to protect the resource and estuarine environment in a timely manner, as increased recreational take participation coincides with better weather conditions in the coming spring months.

Pursuant to Fish and Game Code Section 399, the Commission finds that re-adopting this regulation is necessary for the immediate conservation, preservation, or protection of gaper clam stocks, and eelgrass habitat adjoining clam beds.

Informative Digest (Policy Statement Overview)

The California Fish and Game Commission (Commission) approved an emergency rulemaking, amending sections 29.20 and 29.80, Title 14, CCR that became effective March 8, 2021. The emergency prohibits the use of hydraulic hand pumps to harvest clams, sand crabs, and shrimp, clarifies permissible methods for the take of those species, and requires each individual partaking in clamming to store their catch separately from those of others for ease of enforcement of individual bag and possession limits.

The concerns addressed by this emergency action are:

- Use of hydraulic pumps in clamming which:
 - speed extraction of clams;
 - provide access to previously inaccessible clam beds in deeper water;
 - increases time before and after low tide clams are accessible.
- Disturbance of previously undisturbed eel grass habitat during clamming.
- Increased fishing pressure since the closure of the recreational abalone fishery, and during the Covid-19 pandemic.
- Increased illegal commercialization of gaper clams facilitated by hydraulic pumps.
- Concern for the sustainability of the resource in state waters, particularly Humboldt Bay, Bodega Bay, Tomales Bay, Drakes Estero, and Elkhorn Slough.

Clams are an important ecological, cultural, and recreational resource in the State of California. The use of hydraulic pumps to harvest clams has greatly increased the efficiency of clam harvesting and allows greater access to clam beds. These factors, combined with increasing participation in the fishery due to the COVID-19 pandemic, are likely causing a significant increase in take, and it is unknown whether the stock can support this increase. Further, the use of hydraulic pumps has corresponded with an observed increase in illegal commercial sales of gaper clams. Finally, the increased disturbance of sensitive and ecologically important eelgrass habitat is causing unknown disruption to estuarine environments in the state.

Proposed Regulatory Action:

The proposed re-adoption would extend the emergency regulation in Section 29.20, Title 14, CCR to specify the gear permitted to be used to harvest clams as hand operated spades, shovels, hoes, forks, and rakes, and specifically prohibit the use of hydraulic hand pumps. It would also require each person to keep clams they had harvested in a separate container from clams harvested by others while digging clams and returning them to shore. The proposed re-adoption would also extend sections 29.20 and 29.90, Title 14, CCR to specify the gear permitted to be used to harvest sand crabs and shrimp as hand operated spades, shovels, hoes, forks, rakes, and slurp guns and specifically prohibit the use of hydraulic hand pumps.

Benefits of the Regulation to the State's Environment:

The Commission anticipates benefits to the State's environment by sustainably managing California's living marine resources. The environmental risk arising from the proposed rule are

not regarded as significant, as the rule manages the resource more conservatively than existing regulation.

The Department conducted an evaluation of existing regulations and this regulation is neither inconsistent nor incompatible with existing state regulations.

Consistency and Compatibility with Existing State Regulations:

The Legislature has delegated authority to the Commission to promulgate sport fishing regulations (Fish and Game Code sections 200 and 205) as well as authority to promulgate corresponding emergency regulations as necessary (Fish and Game Code Section 399). No other state agency has the authority to promulgate such regulations. The Commission has conducted a search of Title 14, CCR, and determined that the proposed regulation is neither inconsistent nor incompatible with existing State regulations, and that the proposed regulation is consistent with other sport fishing regulations and marine protected area regulations in Title 14, CCR.