

State of California
Fish and Game Commission
Initial Statement of Reasons for Regulatory Action

Amend Sections 163 and 163.1
Title 14, California Code of Regulations

Re: Commercial Use of Small-Scale Lampara Gear by Humboldt Bay Herring Permittees

I. Date of Initial Statement of Reasons: April 19, 2023

II. Dates and Locations of Scheduled Hearings

(a) Notice Hearing

Date: June 14 and 15, 2023

Location: Sacramento, CA

(b) Adoption Hearing

Date: August 22 and 23, 2023

Location: Fortuna, CA

III. Description of Regulatory Action

(a) Statement of Specific Purpose of Regulatory Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary

Unless otherwise specified, all section references in this document are to Title 14 of the California Code of Regulations.

BACKGROUND

The purpose of these proposed regulatory amendments is to allow limited commercial take of Pacific herring (*Clupea pallasii*) via small-scale lampara gear by Humboldt Bay herring permit holders. The proposed regulatory change is in response to petition 2020-015 AM1, dated October 14, 2020, and received by the Fish and Game Commission (Commission) on November 3, 2020, by a Humboldt Bay herring permit holder to allow commercial use of lampara gear. At its February 10, 2021 meeting, the Commission referred the petition to the Department of Fish and Wildlife (Department) for review and recommendation to amend Pacific herring regulations to exempt lampara bait nets from gear restrictions, allowing the petitioner to take small quantities of Pacific herring in Humboldt Bay. As the petitioner had previously demonstrated intended use of the proposed gear by assisting Department scientists with herring sampling in Humboldt Bay using the requested small-scale lampara gear, the Department was able to evaluate the potential impacts highlighted by the California Pacific Herring Fishery Management Plan (Herring FMP; see section IIIe of this document) for consideration when exploring alternative gear types. This evaluation formed the basis of the Department's recommendation to the Commission concerning the petition.

The Commission received and adopted the Department's recommendation at its October 14, 2021 meeting to grant the petition in concept, with details of a proposal to be developed by the Department with the petitioner and interested parties and schedule for a future rulemaking to allow for limited commercial take of Pacific herring by lampara gear. The Department has worked with the petitioner to develop definitions of the requested gear, and has considered

bounds on use, including spatial and temporal limits. The Department does not anticipate resource concerns related to gear selectivity and the reproductive health of the Pacific herring stock, or potential habitat concerns due to the small-scale nature of the proposed request. Due to the specifics of how target fish are removed by dip net from the lampara net, while others are released unharmed, the Department does not consider there to be a high risk of bycatch.

CURRENT REGULATIONS

Current regulations in Sections 163 and 163.1 implement the Herring FMP by establishing commercial permit structure and regulating commercial take of Pacific herring in California, including restrictions on allowable gear types. Currently, only gill nets of specified size and construction are authorized for take of adult fish in the herring permit sector across the four commercial management areas in the state (Crescent City Harbor, Humboldt Bay, Tomales Bay, and San Francisco Bay). However, the Herring FMP allows for the Commission to adopt regulation changes to allow for future flexibility and market access, including alternative gear types, without an FMP amendment (see Herring FMP sections 7.8.3 and 9.1).

PROPOSED REGULATORY CHANGES FOR COMMERCIAL HERRING FISHING

The regulatory changes the Commission is proposing are described below by subsection.

Amend Subsection 163(b)(3)

Proposed Changes

Subsection 163(b)(3) currently establishes the Humboldt Bay herring permit as a class of commercial Pacific herring permit and allows Humboldt Bay herring permit holders to fish up to 150 fathoms of gill net in Humboldt Bay. The proposed amendment to Subsection 163(b)(3) will include a single small-scale lampara net as an allowable gear type for Humboldt Bay herring permittees.

Necessity and Rationale

By including lampara nets as an allowable gear type for Humboldt Bay herring permittees, the proposed regulations will make the requested alternative gear allowable for an existing permit type, thereby maintaining existing permit structure and adhering to quota setting procedures established by the Herring FMP's management strategy. By only including lampara gear as allowable under a Humboldt Bay herring permit, use of the new gear type will be limited geographically to the area where Department scientists were able to evaluate its use and potential impacts to habitat, target species, and potentially vulnerable non-target species.

Amend Subsection 163.1(c)

Proposed Changes

Current regulations in Subsection 163.1(c) establish gear requirements for the commercial harvest of Pacific herring. The proposed amendment includes small-scale lampara nets as an allowable gear type, with specific construction and dimension requirements to follow in the subsection, in addition to gill nets.

Necessity and Rationale

The proposed amendment is necessary to establish gear requirements for the new gear type in the ensuing subsections of 163.1(c).

Amend Subsection 163.1(c)(1)

Proposed Changes

Subsection 163.1(c)(1) currently simply states 'Net Length' and introduces subsequent subsections (A) and (B), which establish allowable quantities and dimensions of gill nets that may be fished by permittees among the management areas. The proposed change inserts the word 'Gill' in front of the existing text to clarify that requirements subsequent subsections refer specifically to gill nets.

Necessity and Rationale

The proposed change is a necessary organizational amendment to establish that the existing requirements in the ensuing subsections of 163.1(c)(1) do not refer to the newly proposed lampara gear type requirements, regarding which will be inserted into new proposed subsection 163.1(c)(5) et seq.

Amend Subsection 163.1(c)(2)

Proposed Changes

Subsection 163.1(c)(2) currently simply states 'Mesh Length' and introduces subsequent subsections (A) and (B), which establish allowable mesh sizes for gill nets that may be fished by permittees among the management areas. The proposed change inserts the phrase 'Gill Net,' modifying the existing text to clarify that requirements in subsequent subsections refer specifically to gill nets.

Necessity and Rationale

The proposed change is a necessary organizational amendment to establish that the existing requirements in the ensuing subsections of 163.1(c)(2) do not refer to the newly proposed lampara gear type requirements, regarding which will be inserted into new proposed subsection 163.1(c)(5) et seq.

Add Subsection 163.1(c)(5)

Proposed Changes

Current gear requirements in 163.1(c) only pertain to gill nets. Proposed additional subsection 163.1(c)(5) would allow for the establishment of lampara gear requirements pertaining to Humboldt Bay herring permittees alongside existing gill net gear requirements.

Necessity and Rationale

Adding 163.1(c)(5) is necessary to introduce lampara gear requirements for Humboldt Bay herring permittees and lead into the ensuing proposed subsection that would describe the specific requirements for this proposed gear type.

Add Subsection 163.1(c)(5)(A)

Proposed Changes

This proposed additional subsection of 163.1(c)(5)(A) would introduce language to limit the allowable quantity of lampara nets that may be fished to one net. Proposed language would also specify the allowable construction of the lampara nets, requiring that nets consist of two wings and a single central bag constructed of smaller mesh than and distinct from the wings, with no rings along the lead line or any method of pursing the net. Additionally, the dimensions of the net's wings would be limited to no more than 55 fathoms in length measured along the cork line and 10 fathoms in height measured from the lead line to the float line at the mid-point of the wing, and the length of the bag's cork line would be limited to no more than 18 fathoms.

Finally, proposed language would prohibit use and possession of lampara nets onboard any vessel using or possessing gill nets in the fishery.

Necessity and Rationale

In evaluating potential commercial use of the proposed lampara nets, Department scientists determined that avoidance of negative resource effects related to gear selectivity and potential impacts to the reproductive health of the Pacific herring spawning stock and habitat was possible by regulating the scale of use of the new gear type. Proposed gear requirements in 163.1(c)(5)(A) therefore are necessary to help ensure this small scale of use. The proposed net dimensions, construction details, limits on quantity of nets allowed to be fished, and prohibition of possession alongside Humboldt Bay herring gill nets being used in the fishery are consistent with the those evaluated by Department scientists in collaboration with the petitioner and their use is not anticipated to cause negative resource impacts.

Add Subsection 163.1(h)(2)

Proposed Changes

Current regulations in 163.1(h) detail retention and discard requirements for commercial herring permittees statewide, including the requirement that all fish taken by gill net be retained except sturgeon, halibut, salmon, steelhead, and striped bass, which may not be taken or possessed by any commercial herring permittee operating under the authority of commercial herring regulations and must be returned to the water immediately if caught. Proposed additional subsection 163.1(h)(2) introduces the requirement that commercial permittees fishing lampara nets under the authority of a Humboldt Bay herring permit may only retain herring, and that all other fish wrapped by lampara net shall be immediately released and may not be removed from the water or retained. The proposed regulations also impose the necessary use of hand-operated brail or dipnet to remove fish from the water and retain on board the vessel.

Necessity and Rationale

These proposed retention and discard requirements address potential bycatch and related selectivity concerns surrounding the use of lampara-type nets in the herring fishery. When being fished by lampara nets, groups of fish(es) are initially encircled or 'wrapped' by the net while remaining in the water, and then removed from the lampara bag in the water in order to retain catch onboard the vessel. By allowing only herring to be retained and requiring non-target and sensitive species to be released from the lampara gear without being removed from the water, these proposed regulations work to reduce bycatch in the Humboldt Bay commercial herring fishery. By requiring the use of hand-operated nets to remove herring from the water, these proposed regulations will help prevent take in excess of daily vessel/landing limits and impose a certain level of selectivity on use of the lampara gear, reducing bycatch and retention of sub-optimal herring.

Add Subsection 163.1(h)(3)

Proposed Changes

Along with the previous subsection, proposed regulations in 163.1(h)(3) further specifies retention and discard requirements for permittees using the proposed lampara net gear. Specifically, this subsection would require that any herring wrapped in the lampara bag be released that, if retained and/or landed, would result in exceeding an established seasonal quota or daily vessel limit established by proposed additional subsection 163.1(j)(7).

Necessity and Rationale

The purpose of this proposed change is to work with the previous proposed subsection 163.1(h)(2) to ensure that herring are not taken in excess of established limits, thereby ensuring adherence with the management strategy established by the Herring FMP and consistency with current regulation, and that any excess fish wrapped in a lampara net bag be released to prevent excess take and potential fishery mortality.

Amend Subsection 163.1(j)(5)

Proposed Changes

Current regulation in 163.1(j)(5) describe the process by which the Department communicates official notice of termination of fishing activity as commercial take approaches established quotas, and how the Department may establish temporary closures in the commercial herring fishery to prevent take exceeding established quotas. The proposed amendment to this subsection is to replace a single instance of the phrase 'gill net' with the word 'herring.'

Necessity and Rationale

Current regulations describe the process of announcing termination of fishing operations and/or temporary closures within the context of current gill net use in the herring sector of the fishery. The proposed changes are necessary to clarify that regulations in this subsection apply to the herring sector of the commercial fishery regardless of gear type employed, gill net, or small-scale lampara net.

Add Subsection 163.1(j)(7)

Proposed Changes

Existing regulations in Section 163.1(j) establish landing requirements in the herring sector of the fishery. The proposed addition of new subsection 163.1(j)(7) would introduce a daily 2,000-pound limit on possession and landings of herring taken by lampara gear in Humboldt Bay that would count, along with any take by permittees fishing gill nets, toward any Humboldt Bay herring sector quota established by Section 55.02(d).

Necessity and Rationale

This proposed landing requirement was developed in consultation with the Humboldt Bay herring permittee who filed the petition to allow commercial use of lampara nets to ensure an appropriately small scale of take with the proposed new gear, while also considering the economic needs of the fishery to supply market demand for lampara-caught herring.

The Herring FMP establishes an annual 11-ton, highly precautionary Tier 1 and Tier 2 quota for Humboldt Bay herring permittees, with a potential for increase up to 14 tons if an estimate of Spawning Stock Biomass is produced by the Department and recent spawning performance warrants the small increase. The Humboldt Bay herring sector additionally has a cap of four commercial permits established by the Herring FMP in the sector. There is no Harvest Control Rule for Humboldt Bay herring in the Herring FMP, which would be required to establish quotas for Tier 3 under the tiered management strategy featured in Chapter 7 of the Herring FMP. While the entire 11-ton precautionary quota would theoretically be available to permittees fishing lampara and/or gill-net gear types, the 2,000-pound proposed limit on daily landings would likely hinder the ability of those utilizing lampara to take the entire precautionary quota with that gear, especially when the Humboldt Bay fleet operates below the

4-permit cap. This is due to the limited number of spawning schools that enter Humboldt Bay annually.

Add Subsection 163.1(j)(7)(A)

Proposed Changes

The addition of this proposed subsection would prevent landing of lampara-caught herring after noon on February 14, or the Friday immediately preceding February 14, should it fall on a weekend, annually.

Necessity and Rationale

The commercial herring sector season statewide runs from January 2 to March 15 annually. This proposed addition would effectively truncate the herring season by a month for permittees electing to use small-scale lampara nets, thereby allowing escapement of the smaller, younger fish that typically compose later-season spawning schools. While commercial herring gill nets are of a set construction that allows for escapement of smaller fish, lampara nets are comparatively non-selective, as all fish targeted in a school are wrapped by the gear. The proposed requirement in 163.1(j)(7)(A) would work along with the proposed hand dip net requirement in 163.1(h)(2) to increase the selectivity of the lampara fishing mode.

Repeal Form FG MR 674 (Rev. 5/13)

Proposed Changes

Repeal Release of Property form FG MR 674 (Rev. 5/13), which was incorporated by reference in subsection 163(c)(2)(C).

Necessity and Rationale

FG MR 674 has been superseded by the existing Release of Property Form DFW 1108 (NEW 07/01/22), which is currently incorporated by reference in subsection 705.1(c).

Non-Substantive Changes throughout Sections 163 and 163.1

Proposed Changes

Throughout Section 163 and 163.1, non-substantive changes have been made to correct typographical errors, increase consistency with other sections of Title 14, and to use inclusive pronouns. Additionally, Section 8550 has been removed from the Authority and Reference of Section 163.1, as it is inoperative.

Necessity and Rationale

Accurate, clear, and consistent regulatory text ensures the highest level of understanding and compliance.

(b) Goals and Benefits of the Regulation

The changes to commercial herring regulations in 163 and 163.1 proposed by this rulemaking will allow Humboldt Bay herring permittees limited use of small-scale lampara nets to land small quantities of herring to reach potential small emerging local markets for high-bait and human consumptive use.

(c) Authority and Reference Sections from Fish and Game Code for Regulation

Authority: Section 7071 Fish and Game Code

Reference: Section(s) 7056, 7071, 7078, and 7087 Fish and Game Code

(d) Specific Technology or Equipment Required by Regulatory Change

None.

(e) Identification of Reports or Documents Supporting Regulation Change

The Herring FMP (<https://wildlife.ca.gov/Fishing/Commercial/Herring/FMP>) specifies that the Commission may adopt regulation changes to allow for future flexibility and market access, including alternative gear types, without an FMP amendment (see Herring FMP sections 7.8.3 and 9.1).

(f) Public Discussions of Proposed Regulations Prior to Notice Publication

The Commission received petition 2020-015 AM1 (<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=199339&inline>) on November 3, 2020 and referred it to the Department for review and recommendation at the Commission's February 10, 2021 meeting. The Commission received and adopted the Department's recommendation to grant the petition in concept at the October 14, 2021 Commission meeting. The Department provided an update on the proposed rulemaking at the March 14, 2023 meeting of the Commission's Marine Resources Committee.

IV. Description of Reasonable Alternatives to Regulatory Action

(a) Alternatives to Regulation Change

None identified.

(b) No Change Alternative

If the proposed amendments are not adopted, gill nets would continue to be the only allowable gear type for commercial take of herring by Humboldt Bay herring permit holders.

(c) Description of Reasonable Alternatives that Would Lessen Adverse Impact on Small Business

None identified.

V. Mitigation Measures Required by Regulatory Action

The proposed regulatory action will have no significant adverse effect on the environment, and therefore, no mitigation measures are needed.

VI. 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 regulation 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. This regulatory action will not impose cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulation.

(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 anticipates impacts on the creation of jobs (1-8 part-time jobs) within the state, the creation of new business, and/or the expansion of businesses (1-4 herring permit holders) in California. The Commission does not anticipate impacts on the elimination of jobs within the state, or the elimination of existing businesses in California because this regulatory action allows for a new gear type to be used to fish herring in Humboldt Bay that is anticipated to spur economic activity.

The Commission does not anticipate direct benefits to the general health and welfare of California residents, the environment, or to worker safety.

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

There are no cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulation.

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

None. The Commission does not anticipate additional Department costs to oversee the herring fishery in Humboldt Bay over what is currently in place.

(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.

VII. Economic Impact Assessment

(a) Effects of the Regulation on the Creation or Elimination of Jobs Within the State

The Commission anticipates impacts on the creation of jobs within the state (1-8 part-time jobs). There are currently two permit holders with two more permits available. Fishing with lampara nets typically involves the boat operator utilizing at least one to two deckhands

employed for part-time temporary jobs.

(b) Effects of the Regulation on the Creation of New Businesses or the Elimination of Existing Businesses Within the State

The Commission anticipates impacts on the creation of new businesses within the state because this regulatory action allows for a new gear type. There are two more permits available within the four-permit cap designated for the Humboldt Bay herring fishery.

(c) Effects of the Regulation on the Expansion of Businesses Currently Doing Business Within the State

The Commission anticipates impacts on the expansion of businesses currently doing business within the state because this regulatory action allows for a new gear type that could spur expansion of existing businesses with the use of lampara nets and those businesses that provide services related to the fishery.

(d) Benefits of the Regulation to the Health and Welfare of California Residents

The Commission does not anticipate impacts on the health and welfare of California residents.

(e) Benefits of the Regulation to Worker Safety

The Commission does not anticipate impacts to worker safety.

(f) Benefits of the Regulation to the State's Environment

The Commission does not anticipate impacts to the state's environment.

Informative Digest/Policy Statement Overview

At its October 14, 2021 meeting, the California Fish and Game Commission (Commission) received and adopted a recommendation from the California Department of Fish and Wildlife (Department) to grant petition 2020-015 AM1 in concept, with details of a proposed rulemaking to be developed by the Department with the petitioner to allow use of lampara nets by commercial herring permittees. The Department has worked with the petitioner to develop the proposed changes detailed in this document, which would amend Section 163 and Section 163.1, Title 14 of the California Code of Regulations (CCR), to allow limited commercial take of herring via small-scale lampara gear by Humboldt Bay herring permit holders.

The following is a summary of the changes proposed for Sections 163 and 163.1, Title 14 CCR:

1. Amend 163(b)(3) Classes of Permits, Humboldt Bay Herring Permit to include a single small-scale lampara net as allowable gear.
2. Amend 163.1(c) Gear Requirements to include small-scale lampara nets, and amend ensuing subsections 163.1(c)(1) and 163.1(c)(2) to specify that these apply to gill nets.
3. Add subsection 163.1(c)(5) and 163.1(c)(5)(A) to introduce lampara gear requirements specific to Humboldt Bay herring permit holders, including net dimensions, construction, a single net limit, and to prevent possession of lampara nets alongside gill nets on a vessel participating in the fishery.
4. Add subsections 163.1(h)(2) and 163.1(h)(3) to impose additional Retentions and Discards requirements specific to lampara net use, and refer to new landing requirements in 163.1(j)(7)
5. Amend subsection 163.1(j)(5) to specify that it pertains to the 'herring' sector of the commercial fishery, which may include both lampara and gill-net participants.
6. Add subsections 163.1(j)(7) and 163.1(j)(7)(A) to define maximum daily landing and possession requirements for lampara-caught herring that would count toward any Humboldt Bay herring quota set by the Department, and to set a date past which lampara-caught herring may not be landed during the fishing season.
7. Repeal form FG MR 674 from subsection 163(c)(2)(C), as it has been superseded by form DFW 1108, which is incorporated by reference in subsection 705.1(c).
8. Make non-substantive changes throughout Sections 163 and 163.1 to correct typographical errors, increase consistency with other sections of Title 14, and to use inclusive pronouns.

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. The objectives of this policy include, but are not limited to, recognizing 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; managing marine living resources on the basis of the best available scientific 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, indigenous tribes, local governments, marine scientists, and the public in marine living resource management decisions. In consideration of this policy, the proposed regulatory action will benefit fishermen, processors, consumers, and the State's economy in the form of a healthy sustainable fishery.

CONSISTENCY AND COMPATIBILITY WITH EXISTING REGULATIONS

The Commission has reviewed its own regulations and finds that the proposed regulatory action is neither inconsistent nor incompatible with existing state regulations.