



Finding of Emergency and Statement of Proposed Emergency Regulatory Action to Amend Section (§) 132.2, Title 14, California Code of Regulations

Re: Expand Retrieval of Lost or Abandoned Commercial Dungeness Crab Traps

February 22, 2024

I. FINDING OF EMERGENCY

(Gov. Code, § 11346.1, subd. (b); Cal. Code Regs., tit. 1, § 50)

Pursuant to Government Code §11346.1, subdivision (b), and California Code of Regulations, Title 1, §50, a state agency may adopt emergency regulations if the agency makes a finding that the adoption of a regulation is necessary to address a situation calling for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

Specific Facts Demonstrating the Existence of an Emergency and Need for Immediate Action (Gov. Code, § 11346.1, subd. (b)(2))

The California Department of Fish and Wildlife (Department) proposes an emergency action that will allow permitted Dungeness crab vessels to retrieve an unlimited number of lost, damaged, abandoned, or otherwise derelict traps (hereafter “lost or abandoned traps”) as authorized by the Department Director pursuant to §132.8(f), Title 14, CCR, as well as clarifying that activities under the amended subsection are notwithstanding the general prohibitions established by Fish and Game Code §9002.

After the 2023-24 commercial Dungeness crab season closes, it is imperative that every effort be taken to quickly find and remove as many lost or abandoned traps as possible. Without swift action, entanglements could follow a similar pattern to that observed in 2023. Last year, all six of the entanglements with California commercial Dungeness crab traps were reported after the statewide closure of the fishery, precluding the Department from taking further actions other than encouraging trap retrieval.

During the past four calendar years (2020-2023) at least 11 humpback whales and one leatherback sea turtle have been entangled with California commercial Dungeness crab traps, with an additional 13 humpback whales reported as entangled in unidentified gear which could have originated from the California commercial Dungeness crab fishery. This is despite the Department’s management under the Risk Assessment and Mitigation Program (RAMP; §132.8, Title 14, CCR), through which the Department has imposed season delays, early closures, depth constraints, and reductions in allowable traps to limit entanglements of endangered species. The high number of recent entanglements also hinders progress towards California’s goal of zero entanglement mortality and could jeopardize future issuance of an Incidental Take Permit under the

federal Endangered Species Act for the commercial Dungeness crab fishery, which would further reduce fishing opportunities for coastal communities.

The Department and the California Dungeness Crab Fishing Gear Working Group have therefore identified a need to improve and expand retrieval of lost or abandoned commercial Dungeness crab traps following the close of the 2023-24 fishing season to prevent entanglements of endangered species, including humpback whales, blue whales, and leatherback sea turtles.

Necessity

The Department finds the adoption of these proposed regulations is necessary to avoid serious harm to the public peace and general welfare. Initial findings from bi-weekly reports required pursuant to §132.8(g)(1), Title 14, CCR indicate that over 75,000 traps may be deployed during the 2023-24 fishing season. Assuming loss rates similar to those from recent seasons, this translates to an estimated loss of 3,000 traps which will persist in the marine environment if not removed. Each trap remaining in the water after the close of the fishing season poses a risk of entangling marine life, including endangered species such as humpback whales, blue whales, and leatherback sea turtles. Entanglements of any type, including those in lost or abandoned traps, result in harm to both the entangled animal (and broader marine ecosystem) as well as the commercial Dungeness crab fishery, which will then be subject to lost fishing opportunity due to additional restrictions during future seasons.

Implementing regulations (§132.7, Title 14, CCR) for the Trap Gear Retrieval Program required by Fish and Game Code §9002.5 provide an additional avenue for retrieval of lost or abandoned Dungeness crab traps. This Section was effective as of fall 2019, with retrieval operations beginning in 2020. Under the program, up to 14% of lost or abandoned traps have been recovered annually; however, waning interest and low participation (only two permits were issued and less than 120 traps retrieved in 2023) has reduced the effectiveness of this program. CDFW is in the early stages of scoping revisions to §132.7, Title 14, CCR which are expected to enhance participation. In the interim, changes to §132.2, Title 14, CCR are needed to avoid further harm to endangered species.

The current exceptions stipulated by subsection (a) of §132.2, Title 14, CCR were intended to allow fishery participants to retrieve lost or abandoned traps while still allowing the Department to effectively enforce the mandated trap limit program and were crafted in close consultation with the Dungeness Crab Task Force as required by Fish and Game Code §8276.5 (CDFW 2012). However, the existing language in this subsection is insufficient to safeguard against endangered species entanglements in lost or abandoned traps and revisions are urgent and necessary to meaningfully address the current emergency situation.

Proposed Regulations

Subsection 132.2(a)(2) is amended to clarify the relationship between activities authorized under this subsection and Fish and Game Code §9002. With limited exceptions Fish and Game Code §9002 makes it “unlawful to willfully or recklessly disturb, move, or damage any trap that belongs to another person,” thereby establishing a general prohibition against retrieval of lost or abandoned traps. Explicitly adding the language “[n]otwithstanding Fish and Game Code Section 9002” to this subsection removes the potential conflict and clarifies the previously implied ability for commercial fishermen to remove lost or abandoned traps pursuant to this subsection.

Subsection 132.2(a)(2)(E) is amended to expand the period of time during which an unlimited number of lost or abandoned commercial Dungeness crab traps can be retrieved. The current period is July 16 to October 31, which falls within the period of time when the commercial Dungeness crab season is closed pursuant to Fish and Game Code §8276. However, in recent years the fishery has closed up to three months early under the RAMP. Historic migration patterns suggest humpback whales begin returning to areas used by the Dungeness crab fishery in April, with some arriving as early as March. In order to reduce entanglement risk, the Department could conceivably implement a closure in one or more Fishing Zones as early as March 15. Under current regulations, this would create a 4.5-month period where vessels would be limited to retrieving six lost or abandoned traps at a time (under §132.2, Title 14, CCR) or participating in the formal Trap Gear Retrieval Program (under §132.7, Title 14, CCR). Allowing the Department Director to extend the period during which an unlimited number of traps can be retrieved when implementing RAMP management actions mirrors the approach taken for the Trap Gear Retrieval Program, and ensures the maximum rate of trap recovery during periods of elevated entanglement risk.

Technical, Theoretical, and/or Empirical Studies, Reports, or Documents Relied Upon (Gov. Code, § 11346.1, subd. (b)(2))

- California Ocean Protection Council Strategic Plan, February 26, 2020: https://www.opc.ca.gov/webmaster/ftp/pdf/agenda_items/20200226/OPC-2020-2025-Strategic-Plan-FINAL-20200228.pdf
- Dungeness Crab Task Force Meeting Summary, October 2022: https://opc.ca.gov/wp-content/uploads/2009/04/DCTF_MeetingSummary_20221025.pdf
- Dungeness Crab Task Force Meeting Summary, October 2023: https://opc.ca.gov/wp-content/uploads/2023/12/DCTF_-DRAFT_Meeting-Summary_Nov2-3_2023_508.pdf
- Working Group Management Recommendation, January 10, 2024: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=218636&inline>

The Proposed Regulation Does Not Differ or Conflict with Federal Law

The proposed regulation does not differ substantially or conflict with an existing comparable federal regulation or statute. There are no federal regulations governing retrieval of lost or abandoned traps in the commercial Dungeness crab fishery.

The Proposed Regulation is Not Inconsistent Nor Incompatible with Existing State Regulations

The Legislature may delegate to Department such powers relating to the protection and propagation of fish and game as the Legislature sees fit. Department staff has searched the California Code of Regulations and has determined that other state regulations that apply to retrieval of lost or abandoned commercial Dungeness crab traps are not inconsistent nor incompatible with the proposed regulations. The Department therefore finds that the proposed regulations are neither inconsistent nor incompatible with existing state regulations.

Benefits of the Proposed Regulation

The Department anticipates this regulation will have immediate positive impacts on endangered species which forage off California (including humpback whales, blue whales, and leatherback sea turtles), as well as the California commercial Dungeness crab fishery and coastal communities. Prompt and widespread removal of lost or abandoned commercial Dungeness crab traps, particularly in areas which have been closed due to elevated entanglement risk, will reduce entanglement risk and prevent harm to endangered species. Fewer entanglements in lost or abandoned traps will also benefit the California commercial Dungeness crab fishery, which would otherwise be subject to strict restrictions during future fishing seasons.

II. AUTHORITY AND REFERENCE

Authority cited: Sections 8276.5 and 9002.5, Fish and Game Code.

Reference: Sections 8276.5 and 9002.5, Fish and Game Code.

III. OTHER MATTERS PRESCRIBED BY STATUTE

(Gov. Code, § 11346.5, subd. (a)(4))

The Department's operations are primarily prescribed by the hundreds of provisions set forth in the California Fish and Game Code and Title 14, CCR. Other bodies of law that govern the Department include, but are not limited to, the Government and Penal Codes.

IV. LOCAL MANDATE DETERMINATION

(Gov. Code, § 11346.5, subd. (a)(5))

The Department has determined that adoption of the proposed emergency regulation does not impose a new mandate on local agencies or school districts.

V. ESTIMATE OF COST OR SAVINGS

(Gov. Code, § 11346.5, subd. (a)(6) and § 11346.1, subd. (b))

The proposed Dungeness crab trap retrieval emergency rulemaking will not result in any costs or savings to local agencies, school districts, or state agencies and will not affect federal funding to the state. The Department has determined that the proposed emergency action will not affect the Department's existing level of monitoring and enforcement activities nor increase or decrease license or other fee revenue. Additionally, no other state agencies would be affected by this regulatory action.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

(Gov. Code, § 11346.5, subd. (a)(3))

Up to 4,000 commercial Dungeness crab traps are lost during each fishing season and pose a risk of entangling marine life, including endangered species such as humpback whales, blue whales, and leatherback sea turtles. In their current form, the two regulatory provisions allowing for retrieval of lost or abandoned commercial Dungeness crab traps (§§ 132.2 and 132.7, Title 14, CCR) do not provide sufficient opportunity for trap retrieval. The Department and the California Dungeness Crab Fishing Gear Working Group have identified a need to improve and expand retrieval of lost or abandoned traps to avoid entanglements of endangered species following the close of the 2023-24 fishing season.

During the past four calendar years (2020-2023) at least 11 humpback whales and one leatherback sea turtle have been entangled with California commercial Dungeness crab traps, with an additional 13 humpback whales reported as entangled in unidentified gear which could have originated from the California commercial Dungeness crab fishery. This is despite the Department's management under the Risk Assessment and Mitigation Program (RAMP; §132.8, Title 14, CCR), through which the Department has imposed season delays, early closures, depth constraints, and reductions in allowable traps to limit entanglements of endangered species. The high number of recent entanglements also hinders progress towards California's goal of zero entanglement mortality and could jeopardize future issuance of an Incidental Take Permit under the federal Endangered Species Act for the commercial Dungeness crab fishery, which would further reduce fishing opportunities for coastal communities.

After the 2023-24 commercial Dungeness crab season closes, it is imperative that every effort be taken to quickly find and remove as many lost or abandoned traps as possible. Without swift action, entanglements could follow a similar pattern to that observed in 2023. Last year, all six of the entanglements with California commercial Dungeness crab traps were reported after the statewide closure of the fishery, precluding the Department from taking further actions other than encouraging trap retrieval. The proposed emergency regulations would:

- Amend subsection 132.2(a)(2) to clarify the relationship between activities authorized under this subsection and Fish and Game Code §9002. With limited exceptions Fish and Game Code §9002 makes it "unlawful to willfully or recklessly disturb, move, or damage any trap that belongs to another person," thereby establishing a general prohibition against retrieval of lost or abandoned traps.

- Amend subsection 132.2(a)(2)(E) to expand the period of time during which an unlimited number of lost or abandoned commercial Dungeness crab traps can be retrieved.

Benefits of the Proposed Regulation

The Department anticipates this regulation will have immediate positive impacts on endangered species which forage off California (including humpback whales, blue whales, and leatherback sea turtles), as well as the California commercial Dungeness crab fishery and coastal communities. Prompt and widespread removal of lost or abandoned commercial Dungeness crab traps after the close of the fishing season, particularly in areas which have been closed due to elevated entanglement risk, will reduce entanglement risk and prevent harm to endangered species. Fewer entanglements in lost or abandoned traps will also benefit the California commercial Dungeness crab fishery, which would otherwise be subject to strict restrictions during future fishing seasons.

Consistency and Compatibility with Existing Regulations

The Legislature may delegate to Department such powers relating to the protection and propagation of fish and game as the Legislature sees fit. Department staff has searched the California Code of Regulations and has determined that other state regulations that apply to retrieval of lost or abandoned commercial Dungeness crab traps are not inconsistent nor incompatible with the proposed regulations. The Department therefore finds that the proposed regulations are neither inconsistent nor incompatible with existing state regulations.