



Finding of Emergency and Statement of Proposed Emergency Regulatory Action

Readoption of Emergency Action to Amend Section (§)132.2, Title 14, California Code of Regulations

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

August 16, 2024

I. Emergency Regulations in Effect to Date

On February 22, 2024, the California Department of Fish and Wildlife (Department) approved an emergency action amending §132.2, Title 14, CCR, which:

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

Background

Between 2020 and 2024, at least 12 humpback whales and one leatherback sea turtle have been entangled with California commercial Dungeness crab traps, with an additional 18 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 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.

Last year, all six of the entanglements with California commercial Dungeness crab traps were reported after the statewide closure of the fishery. 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.

Section 132.2 Retrieval of Commercial Dungeness Crab Traps

The emergency action amended subsection (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. Explicitly adding the language “notwithstanding Fish and Game Code Section 9002” to this subsection removed the potential conflict and clarified the previously implied ability for commercial fishermen to remove lost or abandoned traps pursuant to this subsection.

The emergency action amended 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. Prior to adoption, the time when the unlimited number of lost or abandoned commercial Dungeness Crab traps can be retrieved was specified as 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. The amendment to subsection 132.2(a)(2)(E) allows the Department Director to extend the period during which an unlimited number of traps can be retrieved when implementing RAMP management actions.

II. Request for Approval of Readoption of Emergency Regulations

The current emergency will expire after six months, on September 4, 2024, unless it is adopted for an additional 90 days.

The continuation of the emergency action is necessary to minimize entanglements and for continuity until a permanent regulation can be implemented.

It is anticipated that a standard rulemaking to permanently adopt these Dungeness crab fishery changes will be approved by the Department in September 2024, at which time the Department may authorize publication of a notice of its intent to adopt the regulations. It is expected that the permanent regulations would become effective in March 2025.

III. Statement of Facts Constituting the Need for Readoption of Regulatory Action

Readoption of the emergency action would allow expanded gear retrieval effort during periods of elevated entanglement risk and would provide continuity in the regulations for the fleet and the Department. 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 recent years, in order to reduce entanglement risk, the fishery has been closed up to three months early under RAMP. 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). Readoption would continue to allow the Department Director to authorize the retrieval of an unlimited number of traps which would ensure the maximum rate of trap recovery during these periods. This past season, the emergency action was effective on March 5, 2024, just prior to an early season closure of Fishing Zones 3-6 on April 8, 2024, under RAMP. This allowed the fleet to collect an unlimited number of derelict traps three months earlier than would have been possible under existing regulations. A lapse in the regulations could cause confusion among the fleet and deter gear retrieval efforts. Readoption would allow for consistent regulations until a standard rulemaking could make them permanent in Spring 2025.

IV. Existence of an Emergency and Need for Immediate Action

The Department considered the following factors in determining that an emergency does exist at this time:

The magnitude of potential harm:

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 subsection 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 4,000 traps which will persist in the marine environment if not removed.

The existence of a crisis situation:

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.

The immediacy of the need:

It is imperative that every effort be taken to quickly find and remove as many lost or abandoned traps as possible. 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. On February 22, 2024, the Department approved an emergency action amending §132.2, Title 14, CCR, which allows permitted Dungeness crab vessels to retrieve an unlimited number of derelict traps as authorized by the Department Director. Readopting this emergency regulation is necessary to ensure that the maximum number of derelict traps can be retrieved until the Department can complete a standard rulemaking to make the regulations permanent and effective in Spring 2025. In addition,

the continuation of current derelict gear retrieval regulations provides consistency to the fleet.

Whether the anticipation of harm has a basis firmer than simple speculation:

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 has reduced the effectiveness of this program. In 2023, only two permits were issued and less than 120 traps were retrieved and as of July 2024, no potential participants have applied to the program. The Department 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)(2) 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. 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.

V. Readoption Criteria

Same as or Substantially Equivalent

Pursuant to Government Code subdivision 11346.1(h), a readoption may be approved only if the text is “the same 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.

Substantial Progress

Government Code subdivision 11346.1(h) specifies that “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 standard rulemaking is currently underway and will be noticed in September 2024.

Proposed Action by the Department

The Department proposes the readoption of the emergency amendment to §132.2 that is the same as previously effective.

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

The proposed readoption of the 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.

(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.

VII. Technical, Theoretical, and/or Empirical Studies, Reports, or Documents Relied Upon:

- 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>

VII. Authority and Reference

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

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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.

Between 2020 and 2024, at least 12 humpback whales and one leatherback sea turtle have been entangled with California commercial Dungeness crab traps, with an additional 18 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.

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. It is imperative that every effort be taken to quickly find and remove as many lost or abandoned traps as possible. Readoption of the emergency action could expand the period of time during which an unlimited number of lost or abandoned commercial Dungeness crab traps can be retrieved which could reduce the likelihood of post season entanglements. Without readoption, entanglements could follow a similar pattern to that observed in 2023. In addition, readoption would keep regulations consistent for the fleet until the Department could potentially make the regulations permanent in the Spring of 2025. The proposed readoption of the emergency regulations would preserve the amendments to:

- subsection 132.2(a)(2) which clarifies 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.

- subsection 132.2(a)(2)(E) which expands 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 continue to provide 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. In addition, readoption of the emergency regulation would maintain consistency for the fleet and the Department until the standard rulemaking is completed in Spring 2025.

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.

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

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