SUPPLEMENTAL STATEMENT OF REASONS

TITLE 14. NATURAL RESOURCES
DIVISION 1. FISH AND GAME COMMISSION – DEPARTMENT OF FISH AND
WILDLIFE
SUBDIVISION 1. FISH, AMPHIBIANS AND REPTILES
CHAPTER 6. FISH, COMMERCIAL

ADDING SECTIONS 132.1-132.5 TITLE 14, CALIFORNIA CODE OF REGULATIONS (DUNGENESS CRAB TRAP LIMIT PROGRAM)

SPECIFIC PURPOSE OF THE REGULATION

A Dungeness Crab Trap Limit Program was passed by the legislature and signed by the Governor in 2011, adding Section 8276.5 to the Fish and Game Code (FGC). This program imposes limits on the number of traps that Dungeness crab vessel permitholders can operate during the season. While the statute outlines the trap limit program, the Department of Fish and Wildlife (Department) is authorized by statute to implement the program, which requires new regulations be adopted in Title 14, California Code of Regulations (CCR). The rulemaking process will be conducted by the Department, and the regulations must be established under authority of the Director by March 31, 2013. (Note: As of January 1st, 2013 California's Department of Fish and Game has been changed to the Department of Fish and Wildlife).

The website containing all the information pertaining to the Dungeness Crab Trap Limit Program including this notice can be found at this link: http://dfq.ca.gov/marine/invertebrate/traplimit.asp

The Dungeness Crab Task Force meeting summaries and Oregon's Department of Fish and Wildlife's regulations referred to in this document are linked from the above website as well.

The website for this notice can be found at this link: http://dfg.ca.gov/marine/invertebrate/traplimit012012.asp

PURPOSE OF THE SUPPLEMENT

The purpose of this supplement is to more fully explain the necessity of the proposed regulations and the new fees that were introduced in the Initial Statement of Reasons (ISOR) in the first notice, published in the California Regulatory Notice Register by the Office of Administrative Law on July 6th, 2012 (File No. Z2012-0626-09), The proposed

regulations have also been updated to reflect changes to crab statutes relating to appeals of trap tier allocations mandated by the passage and chaptering of emergency AB 2363 in September 2012. This bill amended Section 8276.5 and added Section 9002.5 to the FGC. The regulations have also been revised since the ISOR to improve clarity and consistency. The affidavit forms for the In-Season Replacement (FG 1303) and Between-Season Replacement (FG 1302) of buoy tags referenced in the regulations have also been modified to be consistent with the regulation revisions.

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NECESSITY

Section 132.1

The proposed CCR Title 14 regulations 132.1(b)(3)(A) & (B) address Dungeness crab permitted vessels that either have a rock crab permitholder on board and/or also have a Commercial Passenger Fishing Vessel (CPFV) license in order to limit instances where fishing over the permitted vessel's trap allocation may occur. There is a large incentive to place crab trap gear in the water by these types of vessels prior to the start of the season in order to gain unfair advantage over the other Dungeness crab permitted vessels. FGC Section 8276.5 provides authority to regulate traps aboard all Dungeness crab permitted vessels.

Those Dungeness crab permitted vessels that also have a rock crab permitholder on board can take rock crab and Dungeness crab, and traps that are used to fish for rock crab can also fish for Dungeness crab in-season. Prior to the opening of the Dungeness crab season, these dual permitholders can set rock crab traps to fish for rock crab, but these traps could potentially catch Dungeness crab although this incidental catch cannot be retained. In effect, they are being used as a method to test fishing grounds prior to the season opening creating an unfair advantage in both placement of traps on preferred grounds and the amount of "fishing time." As soon as Dungeness crab season opens, the traps could simply be "tagged" with the appropriate permitholder's buoy tag. By prohibiting those dual permitholders from rock crab fishing for 30 days prior to opening of the Dungeness crab season, the regulation prevents unauthorized early fishing and gear setting.

Another instance of gear being set prior to the Dungeness crab season and gear setting period can also occur for those Dungeness crab permitted vessels that are also licensed as a CPFV. Under this regulation those vessels will only be allowed to recreationally fish for Dungeness crab under the auspices of their CPFV license from the start of the commercial Dungeness crab season. Since the recreational Dungeness crab season begins before the commercial season, if CPFVs that are also Dungeness crab permitted vessels were allowed to set traps before the commercial season an unfair advantage in test fishing and trap placement would again be created. In addition, for those districts from Mendocino County north, these CPFV vessels will

be able to recreationally fish until the end of the recreational season, which extends two weeks past the commercial season.

The DCTF commented on these regulations and their response is found on page 4 of the April 2012 DCTF meeting summary, where they explained: "a vessel operating both Dungeness crab and rock crab traps could result in an operator working traps over his trap allocation" and where "(m)embers [of the DCTF] generally agreed that this language was necessary to prevent dually permitted commercial/CPFVs from taking advantages of regulatory loopholes." The provision limiting rock crab was not only requested by industry, but also by enforcement.

Section 132.2

Section 132.2 pertains to allowing retrieval of trap gear during the commercial Dungeness crab season and the removal of derelict commercial crab trap gear. This is now authorized by the recent addition of FGC Section 9002.5 that states: "...the Department in consultation with the Dungeness Crab Task Force, shall develop regulations as necessary to provide for the retrieval of lost or abandoned commercial crab traps."

Removal of derelict fishing gear is a serious and ongoing concern for the industry. However, the retrieval provisions must be balanced with the possibility of exceeding trap tier allocations. The industry had valid concerns associated with unforeseen catastrophic events that are encountered in commercial fishing operations and the need for waivers in these cases. Therefore, a waiver will be instituted during the season for traps to be retrieved by another permitholder in order to prevent trap gear from becoming lost or abandoned. The DCTF approved these regulations with their recommendations which were incorporated into the text, and this is referenced on page 7 of the March 2012 and page 8 and 12 of the April 2012 meeting summaries.

Section 132.4

Section 132.4 proposes a limit on the number of replacement tags during the season and the timing for disbursement of these tags. This was modeled after Oregon Department of Fish and Wildlife's regulation (OAR Section 635-005-0480(1)(g)(A)) that allows a ten percent tag replacement rate 30 days after the season begins. The intent is simply to limit the ways an individual permitholder can exceed the number of tags assigned to them, which would allow permit holders to fish more traps than is allowed by their permit. The time delay of 30 days was set to prevent permitholders from trying to get replacement tags at the start of the commercial season when they would be less likely to have lost gear and thus be able to fish above their permit tier. Industry was consulted regarding approximate loss and/or operational damage that occurs each season and they approved the ten percent replacement rate. This is referenced on page 7 of the March 2012 and page 8 of the April 2012 DCTF meeting summaries.

The Department's buoy tags will be purchased on a biennial basis. In-season replacement tags will be generically assigned to permitholders and can only be used in the season in which they are fished (e.g. 2013/14, 2014/15) and not for the entire biennial period. The between-season replacement of buoy tags can be replaced at the permitholder's discretion.

In order to replace tags that are lost with the in-season or between-season replacement tags, the cost per tag will be \$1 (\$0.73 + sales tax + postage fees).

<u>Section 132.5</u>

Section 132.5 specifies the appeal of trap allocations process including the fees and timeline for appeals. FGC 8276.5 as amended by AB 2363 states that any Dungeness crab permitholder may submit to the Department a request to appeal their trap tag allocation for the purpose of revising upward or downward the trap tag allocation. An appeal to revise an allocation upward shall be heard and decided by an administrative law judge of the Office of Administrative Hearings (OAH), whose decision shall constitute the final administrative decision. Any appeal request must include a required statement by the permitholder that the administrative law judge's decision is permanent and cannot be revoked. This is to avoid repetitive appeals and to help ensure an orderly fishery by maintaining the original total fishery trap allocation as much as possible. A Dungeness crab permitholder requesting an appeal to revise upward the permitholder's trap tag allocation shall pay all expenses, including a nonrefundable filing fee, as determined by the department, to pay for the department's reasonable costs associated with the appeal process described in this paragraph. In making the determination to appeal upward, the administrative law judge may only consider medical hardship or military service occurring during the tier qualifying window period of November 15, 2003, through July 15, 2008. An appeal to revise downward a trap tag allocation shall be decided by the Department which must justify its reasonable costs.

COST ANALYSIS

The crab trap bill specifies the number of trap tags to be issued to each permitholder based on the volume of crab landed during the window period established by this bill. It would require permitholders to pay a maximum of \$5 per crab trap tag fee and a maximum \$1,000 crab trap limit permit fee, on a biennial basis. The funds generated by these fees are to be deposited in a Dungeness Crab Account and used for administering and enforcing the trap program. The program would sunset on April 1, 2019.

A trap limit and tag mandate would require the Department to develop a new program, including implementation of a new tag procurement and issuance process, an extensive regulatory program, enforcement of the trap limits, and monitoring and reporting on the pilot program. This effort is expected to cost approximately \$702,000 per year.

License and Revenue Branch Costs

The Department estimates an administrative cost of approximately \$225,000 per year to issue and manage the trap tags. This includes the cost of procuring the tags, as well as staff time to educate the public on the new requirements and to respond to requests for information about historical landings. The Department may need to order and procure the tags in advance prior to the fishing season and pay for the tags prior to the permitholder paying for the tags.

This bill would authorize the Department to collect fees to cover the cost of the program, which would be deposited in a new Dungeness crab dedicated account within the Fish and Game Preservation Fund. The new account would be continuously appropriated to the Department to implement the program. The Department anticipates issuing 175,100 trap tags associated with current Dungeness crab Vessel Permits (DCVP) plus tags for replacement purposes.

Tier	Trap Allocation	Vessels	Total Traps
1	500	55	27,500
2	450	55	24,750
3	400	55	22,000
4	350	55	19,250
5	300	55	16,500
6	250	161	40,250
7	175	142	24,850
		578	175,100

A trap limit with tags would require the Department to procure tags and manage and enforce the trap tagging system, which would incur a cost. The Department can absorb the costs to set up and administer the dedicated account. It takes approximately three months to place the order for crab trap tags to be delivered to the Department. The minimum cost of each tag is 73 cents as of June 2011. The Department estimates approximately 175,100 trap tags would need to be ordered. The tax on the procurement of tags would be in excess of \$10,000.

Item	Quantity	Cost
Crab Buoy Tags (Cost Per Tag = 73 cents per tag from vendor)	175,100	\$ 127,823
CA State Tax		\$ 10,000

Total \$ 137,823

In addition to overhead, annual costs to the Department's License and Revenue Branch (LRB) are estimated to be \$87,220 for administration of the program. Workload includes tracking the trap tag fees collected, and corresponding with fishermen regarding the new requirements of a trap tag.

Annual costs to process downward trap allocation appeals are difficult to estimate since the number requesting such appeals is expected to be low. An estimate of LRB costs on an individual case basis is outlined in the Trap Allocation Appeals Costs section.

Law Enforcement Costs

We estimate annual enforcement costs of approximately \$351,000 for warden time at sea and in the air, as well as dock side to ensure that vessels are in compliance with the trap limit and tag requirements. The Department believes that full enforcement of the trap limit and tagging requirement is appropriate and necessary to compel compliance.

The State of Oregon's Department of Fish and Wildlife adopted crab trap limits in their commercial crab fishery several years ago. The first year the crab trap limits were in place, Oregon issued over 200 citations dealing with a variety of commercial crab violations including using too many traps, using unmarked traps, possession of traps belonging to other fishermen, and trap construction violations. Oregon enforcement officers are now faced with not only ensuring that the crab traps are being fished legally, and are properly constructed, but have to manage these trap limits which have proven to be difficult and time consuming for their limited enforcement resources.

The establishment of crab trap limits in the commercial Dungeness crab fishery off California will present similar challenges to those faced by Oregon. There will need to be a significant increase in enforcement effort to ensure compliance with trap limit restrictions and a continued effort enforcing the other laws and regulations currently regulating this commercial fishery. This enforcement effort comes in three forms: at sea boat patrols, air services patrols, and dockside inspections. The results of these three enforcement efforts could lead to lengthy investigations, vessel and gear seizures, and time in court.

Enforcement costs

ltem Cost

Large Boat	\$ 154,800
Small Boat	\$ 104,000
Aircraft	\$ 18,560
Dockside/Shoreside	\$ 6,000
Admin/Overhead 24%	\$ 68,006
Total Additional Enforcement Costs	\$ 351,366

Fishery Management Costs

In addition, the Department's Marine Region anticipates this bill would incur the necessity of dedicating approximately 25% of a Senior Environmental Scientist staff time, as well as additional State Managed Species Program staff time including overhead, (\$25,000 annually) for participation in the Dungeness Crab Task Force as an ex-officio member, which includes attending meetings, preparing for meetings, and providing follow-up support to the industry as a result of actions taken in the meetings. This cost could be higher or lower, depending on the number of meetings and the number and kind of actions taken. In addition, monitoring the effectiveness of the trap program is a requirement of the legislation and, depending on the extent of the evaluation, costs could be much higher. Based upon the experiences of Oregon where a trap-limit program has been implemented, the Department anticipates that one new full-time Environmental Scientist PY will be needed to implement and manage the crab fishery as a result of this bill, at a cost of approximately \$100,000 per year for salary, overhead and benefits. MR total is \$125,000.

Trap Allocation Appeal Costs

It is expected that fees for trap allocation appeals authorized by statute will cover the agencies costs associated with processing those appeals – as per the following:

<u>Explanation of Agency fees for an appeal to revise trap allocation upward</u> Department of Fish and Wildlife

8 hours* x \$70 (hourly pay including benefits for Staff Counsel III attorney) + 21% (overhead) = \$677.60

Total Department costs: \$677.60

*The time estimate is based on the average number of hours Department of Fish and Wildlife attorneys have spent on hearings of similar complexity, and includes time spent creating a statement of issues and other pleadings and preparing for and attending the hearing.

Office of Administrative Hearings Costs

12 hours* x \$188 (hourly fee for an administrative law judge for 2012-2013) = \$2256 \$80 filing fee per case

\$30 daily electronic recording fee

Total OAH Costs: \$2366

*The time estimate is based on the total amount of hours a judge spent on a hearing of similar complexity, and includes time spent preparing for and conducting the hearing and writing a decision.

<u>Total Costs for upward Trap Allocation appeal</u>
Department of Fish and Wildlife Costs + OAH Costs = \$3044

<u>Explanation of Agency fees for an appeal to revise trap allocation downward</u>
Appeals to revise a trap allocation downward are expected to be rare and likely administrative in nature. License and Revenue Branch will process these downward appeals and the cost will be \$250. License and Revenue Branch anticipates no involvement with legal staff on appeals to revise downward.

License and Revenue Branch Summary of Work to Process Downward Appeal

- Program Technician verifies returned tags.
- Material and Store Specialist verifies new tags and ships to customer.
- Office Technician finalizes letter to appellant.
- AGPA reviews request, responds to written correspondence and provides customer support when needed. Updates information in the Automated License Data System, issues new permit, and orders new tags.
- Staff Services Manager I reviews and edits all written correspondence for approval.
- Staff Services Manager II reviews for final approval.

Downward Appeal for Trap Tags Fee Worksheet

Downward Appeal for Trap Tags Fee Worksheet					
Program Technician	1 hour @ \$16.96	\$16.96			
Material & Stores Specialist	1 hour @ \$18.51	\$18.51			
Office Technician	1 hour@ \$20.71	\$20.71			
AGPA	3 hours @ \$25.37	\$76.11			
Staff Services Manager I	1 hour @ 35.33	\$35.33			
Staff Services Manager II	1 hour @ \$38.79	\$38.79			
Subtotal		\$206.41			
Budgeted DFW Overhead 21%		\$43.45			
Total		\$249.86			

COSTS TO PUBLIC

The Dungeness Crab Trap Limit Program will impose two types of costs to Dungeness crab permitholders; these costs are either mandatory or discretionary. The mandatory costs in addition to the current licenses and permits are the purchase of the biennial Dungeness crab Trap Limit Permit and all the biennial buoy tags in their tier. The discretionary costs are the fees for purchasing In-Season replacement buoy tags, Between-Season replacement buoy tags and the appeal costs to either increase or

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decrease trap allotment tiers,

Mandatory Costs

The trap limit permit costs \$1,000 and each buoy tags costs \$5 and these fees will be paid by all permitholders every two years from the start of the program.

A permitholder in Tier 1 of 500 traps will pay a total of \$3,500 in these mandatory costs:

 $1,000 + 5 / tag \times 500 tags = 3,500$

Each subsequent tier (Tier 2-6) decreases in increments of 50 traps or buoy tags, for a total of $$250 (50 \times $5)$ less than the previous tier.

A permitholder in Tier 7 of 175 traps will pay a total of \$1,875 in these mandatory costs:

1,000 + 5 / tag x 175 buoy tags = 1,875

Discretionary Costs

In-Season Replacement Buoy Tags can be replaced 30 days after the season opener in the area in which a permitholder began fishing. Up to 10% of the permitholder's tier can be purchased. Each replacement buoy tag costs \$1. These replacement tags can be purchased each fishing season.

A permitholder in Tier 1 with 500 traps can purchase up to 10% of 500, 50 In-Season replacement buoy tags for a total of \$50 in these discretionary costs: $$1 / tag \times 50 tags = 50

Each subsequent tier (Tier 2-6) decreases in increments of 10% of 50 traps, 5 buoy tags, for a total of \$5 (5 x \$1) less than the previous tier.

A permitholder in Tier 7 of 175 traps will pay a total of \$18 in these discretionary costs: $$1 / tag \times 18 tags = 18

Between-Season Replacement Buoy Tags can be replaced between the fishing seasons of the biennial period. Any amount of these replacement tags can be purchased provided the permitholder details the loss and catalogues the tag numbers that were lost. They also must return each In-Season Replacement tag they received if these were purchased during the season. Each replacement buoy tag costs \$1.

If a permitholder in Tier 1 of 500 traps purchases all replacement tags, 500 Between-Season replacement buoy tags will cost a total of \$500 in these discretionary costs: $$1 / tag \times 50 tags = 500

Each subsequent tier (Tier 2-6) decreases in increments of 50 traps, so a total of $$50 (50 \times $1)$ less than the previous tier.

A permitholder in Tier 7 of 175 traps will pay a total of \$175 in these discretionary costs:

1 / tag x 18 tags = 175

The cost of these replacement fees and the number of In-Season replacement buoy tags may be waived if buoy tags are lost or destroyed due to catastrophic circumstances that can be proven by documentation that substantiates the loss.

Appeals may be filed at the discretion of the permitholder. Appeal fees will either cost a permitholder \$3,044 to increase or \$250 to decrease trap allotment tier(s). These fees may be waived if a permitholder applies to an administrative law judge of the OAH and meets certain criteria.

Summary

The bill authorizes the Department to collect fees to cover the cost of the trap program, which would be deposited in a new dedicated account within the Fish and Game Preservation Fund. The Department anticipates issuing 175,100 trap tags associated with current DCVPs. Assuming a total cost of program administration, enforcement and monitoring of \$702,000 per year, biennial tag fees (\$5 per) and new biennial trap permit fee (\$1000 per vessel) would generate \$1.440 million biennially, or about \$720,000 per year.

In addition to the costs noted above, it is likely that the bill will generate litigation by some fishermen over which tier they are assigned, based on recorded California landings, particularly those that have landed California caught crab in Oregon or Washington. Legal costs to the Department associated with this litigation could be in the range of several hundred thousand dollars.

REVISED REGULATIONS

The term "department issued" in the first notice was either replaced with "biennial" or removed for clarity throughout the text when referring to the tag that is attached to the buoy. This tag will still be issued by the department, but is referred to specifically as the biennial Buoy tag, this term and buoy tag refer to the same tag. In Section 132.1(a), Title 14, CCR, the contact information that is supplied by the owner was revised to include the trap owner's telephone phone number to make this regulation more specific. In Section 132.1(b), Title 14, CCR, the information that the Department was to mandate on the buoy tag needed to be explicitly stated in regulations. The information that will appear on the buoy tag is the Dungeness crab vessel permit number that is assigned by the Department as well as the trap tier number (1-7). The fee for each biennial buoy tag was inserted in Section 132.1(b) since Section 705 is no longer amended in this rulemaking file.

The language that states in Section 132.1(b)(2) that it is unlawful for a person who is not the owner of the trap to remove, damage, or otherwise tamper with trap tags or buoy tags was considered unnecessary and deleted. FGC Section 9002 currently prohibits a person from recklessly disturbing, moving, or damaging Dungeness crab traps that do not belong to them and this provision also applies to the buoy and the buoy tag that are tied to the Dungeness crab trap.

In Section 132.2, Title 14, every instance of "trap" was replaced with "Dungeness crab trap" to specify the type of trap referred to in the regulations. "Dungeness crab permitted vessel" was added to the text to specify the type of vessel that is prohibited from having a Dungeness crab trap that is not tagged properly. Section 132.2(a)(2)(F) was revised for clarity, but the definitions of vessel incapacitation remain unchanged. "A waiver approved by the department…" was included to specify the type of waiver that allows a Dungeness crab permitted vessel to retrieve another permitholders' traps.

In Section 132.3, Title 14, the regulation was revised to state that the biennial Dungeness Crab Trap Limit Permit and the Dungeness crab vessel permit and all the buoy tags must be purchased before the start of the first season the program is in place in order for a permitholder to fish for Dungeness crab. The text that refers to the purchase of these two permits at the same time was deleted. The fee for the biennial Dungeness Crab Trap Limit Permit was inserted in text since Section 705 is no longer amended in this rulemaking file.

Section 132.4 was revised to include both the In-Season Replacement Dungeness Crab Buoy Tag Affidavit and Between-Season Replacement Dungeness Crab Buoy Tag Affidavit that must be submitted in order to purchase replacement tags since section 705 is no longer amended in this rulemaking file. For the between season replacement tags the affidavit needs to be completed before August 15th in order to allow for the replacement tags to be processed and mailed in time for the following Dungeness crab season. The information that is required on this affidavit has been revised so that the location of the lost buoy tags and not the gear only needs to be reported while the tag number of each lost buoy tag needs to be specified (e.g. 1-500, depending on the tier). The fee for each replacement tag has also been included since Section 705 is no longer amended in this rulemaking file. It was determined that the Department has no authority to charge the processing fees for the replacement tags on the Between-Season Replacement Dungeness Crab Buoy Tag Affidavit form, FG1302, and the In-Season Replacement Dungeness Crab Buoy Tag Affidavit form, FG 1303. Both forms have been revised to reflect only the fee for each replacement buoy tag of \$1.

Section 132.4(c) was revised to specify what is required to be submitted to the Department when claiming catastrophic loss of buoy tags. The term, "Confirmation" was replaced with "A statement confirming..." to specify that the confirmation must be

submitted in the form of a statement. Again only the location of lost buoy tags not the gear needs to be reported. Also, the type of documentation to prove the loss of the buoy tags is specifically listed: "Documentation including but not limited to a report filed by the US Coast Guard, a law enforcement agency, an insurance company, or other written documentation to substantiate the loss or destruction of the buoy tags."

Section 132.5, Title 14, is revised to include changes that were made to the appeals process for the Dungeness Crab Trap Limit Program as specified in FGC §8276.5(a)(6). Any instance of "application" was replaced with "appeal" throughout this section. The appeals will be sent specifically to the department's LRB and the address has been provided. The appeal process to revise upward or downward are now in different paragraphs in this section since the responsible agency that decides these two types of appeals differs.

Appeals to move down tier(s) will be done administratively without OAH involvement and this fee will cover the processing cost of this appeal by LRB staff only (see Fiscal Analysis section for details of this fee). The appeal fee to revise a tier upward remains unchanged and this cost will pay for the administrative and legal costs incurred by the Department and the OAH (see Fiscal Analysis section for details of this fee). The appeal fees appear in this section since Section 705 is no longer amended in this rulemaking file. Also this section was included to accommodate the recent amendments to the appeals process: Any Dungeness crab permitholder requesting an appeal may apply to the administrative law judge for a waiver of the appeal fees. In making the determination, the administrative law judge may only consider medical hardship or military service occurring during the tier qualifying window period of November 15, 2003, through July 15, 2008.

The amendment to Section 705 was removed from the rulemaking file since this section can only be amended by the Fish and Game Commission's rulemaking and these regulations were added through the Department's rulemaking.