34. TIDAL WATERS

Today's Item **Information** ☒ **Action** ☐

Discussion regarding intent to amend regulations regarding definitions for tidal waters and finfish gear restrictions in San Francisco and San Pablo bays.

Summary of Previous/Future Actions

- Notice hearing — Apr 13-14, 2016; Santa Rosa
- **Discussion hearing** — **June 22-23, 2016; Bakersfield**
- Adoption hearing — Aug 24-25, 2016; Folsom

Background

In Dec 2015, FGC adopted changes to sportfish regulations, including a general clean-up to clarify San Francisco and San Pablo bay tidal boundaries. Since adoption, DFW has identified that the regulation change resulted in some unintended consequences related to the definition of San Francisco and San Pablo Bays. The proposed amendment will clarify the meaning of "inland waters" versus "Ocean and San Francisco Bay District" in order to facilitate compliance and enforcement of the gear restrictions and seasons that apply in those waters.

Significant Public Comments (N/A)

Recommendation (N/A)

Exhibits

1. ISOR

Motion/Direction (N/A)

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Sections 1.53 and 27.00 and
subsection (a) of Section 28.65,
Title 14, California Code of Regulations (CCR)
Re: Definitions for tidal waters and finfish gear restrictions in
San Francisco and San Pablo bays

I. Date of Initial Statement of Reasons: March 10, 2016

II. Dates and Locations of Scheduled Hearings:

(a) Notice Hearing: Date: April 14, 2016
Location: Santa Rosa

(b) Discussion Hearing: Date: June 23, 2016
Location: TBD

(c) Adoption Hearing: Date: August 25, 2016
Location: Folsom

III. Description of Regulatory Action:

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

The Department of Fish and Wildlife (Department) recommended, and the Fish and Game Commission (Commission) adopted, changes to sections 1.53 and 27.00, Title 14, CCR on December 10, 2015 in order to clarify definition of boundaries of “Inland Waters” in relation to San Francisco and San Pablo bays.

Section 1.53, Title 14, CCR, was amended as follows:

§ 1.53. Inland Waters.
Inland waters are all the fresh, brackish and inland saline waters of the state, including lagoons and tidewaters upstream from the mouths of coastal rivers and streams. Inland waters exclude the waters of San Francisco and San Pablo bays downstream from <u>the</u> <u>west</u> Carquinez Bridge, ~~the tidal portions of rivers and streams flowing into San Francisco and San Pablo Bays,~~ and the waters of Elkhorn Slough, west of Elkhorn Road between Castroville and Watsonville. Also see Section 27.00.

Section 27.00, Title 14, CCR, was amended as follows:

§ 27.00. Definition.
The Ocean and San Francisco Bay District consists of the open seas adjacent to the coast and islands or in the waters of those open or enclosed bays contiguous to the ocean, and including San Francisco and San Pablo bays ~~plus all their tidal bays, tidal portions of their rivers and streams, sloughs and estuaries~~ between Golden Gate Bridge and the west Carquinez Bridge~~, and the waters of Elkhorn Slough, west of Elkhorn Road between Castroville and Watsonville~~. Also see Section 1.53.

In summary, the effects of these two regulation changes made inland waters begin upstream of the mouth of any coastal river or stream, including all streams, rivers, and sloughs flowing into San Francisco and San Pablo bays west of the Carquinez Bridge. The original purpose of these amendments was to solve an enforcement issue on the Napa River caused by regulation ambiguity between sections 1.53, 27.00, and 28.65 (a).

As stated in the "Final Statement of Reasons:"

"Currently there are three sections dealing with the Ocean and San Francisco Bay District which describe regulations in different manners causing confusion for anglers and making enforcement of the regulations more difficult:

- *Section 27.00 defines the Ocean and San Francisco Bay District as waters of the open coast and includes San Francisco and San Pablo bays "plus all their tidal bays, tidal portions of their rivers and streams, sloughs and estuaries" between the Golden Gate Bridge and the Carquinez Bridge.*

- *Section 1.53 defines inland waters as all fresh, brackish and inland saline waters of the state, including lagoons and tidewaters upstream from the mouths of coastal rivers and streams. Inland waters exclude the waters of San Francisco and San Pablo Bays downstream from the Carquinez Bridge, the tidal portions of rivers and streams flowing into San Francisco and San Pablo bays, and the waters of Elkhorn Slough, west of Elkhorn Road between Castroville and Watsonville.*

- *Subsection 28.65(a) (which describes gear restrictions for fin fish) defines the area as San Francisco and San Pablo bays between the Golden Gate Bridge and the west Carquinez Bridge, where only one line with not more*

than three hooks may be used.

The different definitions of the same geographic area cause confusion as to applicable method of take as well as which set of regulations apply to the waters being fished.

An angler is allowed to use any number of hooks and lines in ocean waters (Section 28.65). In Inland waters only one closely attended line with no more than three hooks may be used (Section 2.00). Under the current regulations, a person could argue that tidal portions of the Napa River were not Inland Waters since subsection 28.65(a) did not include the tidal portions of river flowing into San Francisco and San Pablo bays. Under this interpretation, they could use any number of lines and hooks to fish in the Napa River. This would restrict waters of San Francisco and San Pablo bays to one line, then allow unlimited lines in the Napa River waters which were tidally influenced even though all inland waters are restricted to one line.

In addition, fishing regulations for Ocean Waters defined in Section 27.00 are different from Inland Waters as defined in Section 1.53. Since tidal influence cannot easily be determined, it is almost impossible to know which set of regulations apply in the tidally influenced waters. For instance is an undersized sturgeon caught in the Napa River a violation of Section 5.80 or Section 27.90?"

While the Department proposed the regulation change in a good faith effort to clarify regulations, it unfortunately created some unintended consequences making it difficult to enforce regulations in other portions of San Francisco and San Pablo bays. An example of a consequence of enacting the aforementioned changes is as follows: The tidal portion of Coyote Creek is located in the southern portion of San Francisco Bay and for much of this section is split approximately down the middle between Alameda and Santa Clara Counties. With the adoption of the December 2015 changes, this portion would be controlled by two different regulations (sections 7.00 (e)(3) and 7.50 (b)(50.8)) which would impose the season of "Last Saturday in April through November 15th" on the entire creek and on the Santa Clara County side would enact an additional restriction of artificial lures with barbless hooks. Both of these restrictions are unreasonable for the described area and thus would necessitate further regulation changes to correct the issue. There are other areas which would be burdened with similar de facto restrictions which are similarly unreasonable and were unintended consequences of the amended regulations.

In addition, the December 10, 2015, regulations deleted reference to Elkhorn Slough in Section 27.00, but not in Section 1.53, which created inconsistency.

A regulation change is necessary to correct the original problem with the Napa River and related gear restriction regulations, correct the inconsistency related to Elkhorn Slough between sections 27.00 and 1.53, and to avoid other unintended

consequences of the amendments adopted on December 10, 2015.

Under California law (Fish and Game Code sections 200 and 205), the Commission adopts regulations for the recreational fishery three miles out from the coast of California and in all bays, through the tidal waters and into freshwater.

Proposed Regulation Changes

(a) The Department proposes changes to Title 14 sections 1.53, 27.00, and 28.65 (a) to clarify the meaning of “inland waters” and the “Ocean and San Francisco Bay District” in order to facilitate compliance and enforcement of the gear restrictions and seasons that apply in those waters. In Section 27.00, the proposed changes would include addition of physical landmarks on the Napa River, Sonoma Creek, and the Petaluma River to delineate between “inland waters” and “San Francisco Bay” on those waterways. For Section 28.65 (a), there would be an added reference to the San Francisco Bay definition under Section 27.00.

By reverting back to language similar to pre-December 2015, for sections1.53 and 27.00, adding boundaries for specific waterways to Section 27.00, adding a needed clarification to Section 28.65 (a), and making other minor language corrections to all sections, the proposed amendments would effectively alleviate the concerns outlined in the original regulation change proposal while avoiding the unintended enforcement challenges from the current regulation.

<u>Proposal: Amend Section 1.53, Inland Waters, Section 27.00, Ocean and San Francisco Bay Definition, and subsection 28.65 (a), Line and hook restrictions within San Francisco and San Pablo bays.</u>

Amend the two regulations that define San Francisco Bay and Inland waters. Amend one regulation which addresses line and hook restrictions within San Francisco Bay. These changes will provide greater consistency among the sections, reduce the potential for confusion, and improve clarity.

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

Authority Sections: 200, 202, 205, 215, 220, and 240, Fish and Game Code.
Reference Sections: 200, 202, 205, 206, 215, 220, 240 and 8585.5, Fish and Game Code.

(c) Specific Technology or Equipment Required by Regulatory Change:

None.

(d) Identification of Reports or Documents Supporting Regulation Change:

None.

(e) Public Discussions of Proposed Regulations Prior to Notice Publication:

No public meetings are being held prior to the notice publication. The 45-day comment period provides adequate time for review of the proposed amendments.

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

No alternatives were identified by or brought to the attention of Commission staff that would have the same desired regulatory effect.

(b) No Change Alternative:

Not changing the regulation as written will allow inconsistent regulations to persist and perpetuate the unintended consequences of the regulations adopted on December 10, 2015.

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the proposed regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; 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 action 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.

There are no businesses that are expected to be impacted by the proposed regulatory changes to clarify definition of boundaries of “Inland Waters” in relation to San Francisco and San Pablo bays.

(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 does not anticipate any significant impacts on the creation or elimination of jobs, the creation of new business, the elimination of existing businesses or the expansion of businesses in California because the proposed definition changes will not affect angling effort.

The Commission anticipates benefits to the health and welfare of California residents. Participation in sport fishing opportunities fosters conservation through education and appreciation of California’s wildlife.

The Commission does not anticipate any benefits to worker safety because the proposed changes do not address worker safety.

The Commission anticipates benefits to the environment by the sustainable management of California’s sport fishing resources.

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

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

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

None.

(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

The regulation changes adopted on December 10, 2015 made inland waters begin upstream of the mouth of any coastal river or stream, including all streams, rivers, and sloughs flowing into San Francisco and San Pablo bays west of the Carquinez Bridge. The original purpose of these amendments was to solve an enforcement issue on the Napa River caused by regulation ambiguity between sections 1.53, 27.00, and subsection 28.65 (a), Title 14, CCR.

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

The Commission does not anticipate any significant impacts on the creation or elimination of jobs within the State as a result of this regulatory change.

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

The Commission does not anticipate significant statewide adverse economic impact directly affecting business, including the creation of new businesses or the elimination of existing businesses.

There are no businesses that are expected to be impacted by the proposed regulatory changes clarify definition of boundaries of “Inland Waters” in relation to San Francisco and San Pablo bays.

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

The Commission does not anticipate any expansion of businesses currently doing business in California as a result of the proposed changes. The proposed amendments merely clarify the boundaries of “Inland Waters” in relation to San Francisco and San Pablo bays.

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

The Commission anticipates benefits to the health and welfare of California residents. Participation in sport fishing opportunities fosters conservation through education and appreciation of California’s wildlife.

(e) Benefits of the Regulation to Worker Safety:

The Commission does not anticipate benefits to worker safety because this regulatory action does not address worker safety.

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

The Department anticipates benefits to the environment through the better management of toxic lead substances that can be deleterious to wildlife, including threatened and/or endangered species.

(g) Other Benefits of the Regulation:

None.

Informative Digest/Policy Statement Overview

Summary of Proposed Amendments

The Commission proposes to amend Title 14 sections 1.53, 27.00, and 28.65 (a) to clarify the meaning of “inland waters” and the “Ocean and San Francisco Bay District” in order to facilitate compliance and enforcement of the gear restrictions and seasons that apply in those waters. In Section 27.00, the proposed changes would include addition of physical landmarks on the Napa River, Sonoma Creek, and the Petaluma River to delineate between “inland waters” and “San Francisco Bay” on those waterways. For Section 28.65 (a), there would be an added reference to the San Francisco Bay definition under Section 27.00. These changes will provide greater consistency among the sections, reduce the potential for confusion, and improve clarity.

By reverting back to language similar to pre-December 2015, for sections 1.53 and 27.00, adding boundaries for specific waterways to Section 27.00, adding a needed clarification to Section 28.65 (a), and making other minor language corrections to all sections, the proposed amendments effectively alleviate the concerns outlined in the original regulation change proposal while avoiding the unintended enforcement challenges from the current regulation.

Benefits of the Regulations

The proposed regulations clarify the boundaries between inland waters and the waters of San Francisco Bay, making it easier for anglers to understand which regulations apply to the waters being fished. The proposed amendments will also make it easier for wildlife officers to enforce angling regulations in and adjacent to San Francisco Bay.

Consistency and Compatibility with Existing Regulations

The proposed regulations are neither inconsistent nor incompatible with existing State regulations. The Legislature has delegated authority to the Commission to adopt sport fishing regulations (Fish and Game Code, sections 200, 202 and 205). The Commission has conducted a search of Title 14, CCR and determined that the proposed regulations are consistent with general sport fishing regulations in Chapters 1 and 4 of Subdivision 1 of Division 1, Title 14, CCR.

Regulatory Language

Amend Section 1.53, Title 14, CCR, to read:

§ 1.53. Inland Waters.
Inland waters are all the fresh, brackish and inland saline waters of the state, including lagoons and tidewaters upstream from the mouths of coastal rivers and streams. Inland waters exclude the waters of San Francisco Bay and ~~San Pablo bays downstream from the west Carquinez Bridge, and~~ the waters of Elkhorn Slough, west of Elkhorn Road between Castroville and Watsonville. ~~Also s~~See Section 27.00 for the description of San Francisco Bay.
Note: Authority cited: Sections 200, 202, 205, 215 and 220, Fish and Game Code.
Reference: Sections 200, 202, 205, 206, 215 and 220, Fish and Game Code.

Amend Section 27.00, Title 14, CCR, to read:

§ 27.00. Definition.
The Ocean and San Francisco Bay District consists of the Ocean and San Francisco Bay, as described herein. The Ocean is the open seas adjacent to the coast and islands and ~~or in~~ the waters of ~~those~~ open or enclosed bays contiguous to the ocean, ~~and~~ including the waters of Elkhorn Slough, west of Elkhorn Road between Castroville and Watsonville. San Francisco Bay is the waters of San Francisco and San Pablo bays plus all their tidal bays, sloughs, estuaries, and tidal portions of their rivers and streams between the Golden Gate Bridge and the west Carquinez Bridge. For purposes of this section, waters downstream of the Trancas Bridge on the Napa River, downstream of the Highway 121 Bridge on Sonoma Creek, and downstream of the Payran Street Bridge on the Petaluma River are tidal portions of the Napa River, Sonoma Creek, and Petaluma River, respectively. Also see Section 1.53.

Note: Authority cited: Sections 200, 202, 205, 215 and 220, Fish and Game Code.
Reference: Sections 200, 202, 205, 206, 215 and 220, Fish and Game Code.

Amend subsection (a) of Section 28.65, Title 14, CCR, to read:

§ 28.65. General.
Except as provided in this article, fin fish may be taken only on hook and line or by hand. Any number of hooks and lines may be used in all ocean waters and bays except:
(a) San Francisco Bay, as described in Section 27.00~~and San Pablo bays between the Golden Gate Bridge and the west Carquinez Bridge~~, where only one line with not more than three hooks may be used.

…[No changes are proposed to subdivisions (b) through (g).]

Note: Authority cited: Sections 200, 202, 205, 215, 220, 240 and 7071, Fish and Game Code. Reference: Sections 200, 202, 205, 206, 215, 220, 240 and 8585.5, Fish and Game Code.