

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
FINAL STATEMENT OF REASONS FOR REGULATORY ACTION

Amend Sections 163 and 164
Title 14, California Code of Regulations
Re: Harvest of Herring and Harvesting of Herring Eggs

- I. Date of Initial Statement of Reasons: May 28, 2013
- II. Date of Final Statement of Reasons: August 26, 2013
- III. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: May 22, 2013
Location: Los Angeles, CA
 - (b) Discussion/Adoption Hearing: Date: August 7, 2013
Location: San Luis Obispo, CA

IV. Update:

No modifications were made by the Commission to the originally proposed language of the Initial Statement of Reasons. In Section 163(g)(4), the Commission set the San Francisco Bay quota at 3,737 tons; this was based on the Department’s recommendation of 4.7 percent of the 2012-2013 San Francisco Bay spawning biomass estimate for Pacific herring.

Corrections to regulatory text:

After reviewing the published regulatory text it was determined that there were two minor editorial errors in the new text requiring correction.

- The new text in subsection 164(j)(4) on page 10 of the published text, adds “Each herring eggs on kelp permittee is allocated a quota equal to approximately 0.79 percent of the remaining quota.” The word ‘remaining’ is incorrect and has been removed from the text.
- The new text in subsection 164(k)(8)(B) on page 12 of the published text, specifies the use of the “Release of Property form FG-MR-674 (Rev. 5/02)”. That form is proposed for revision with a date of 5/13. The new text has been corrected to delete the old date and add the new date. The revised form was correctly referenced in subsection 163(e)(5) and published on the Commission website for the 45 day Notice period.

These are minor corrections without any regulatory effect.

V. Summary of Primary Considerations Raised in Support of or Opposition to the Proposed Actions and Reasons for Rejecting Those Considerations:

Geoff Shester, Oceana, Testimony at Fish and Game Commission Notice Hearing, May 22, 2013

Comments:

- 1) Supports the Department's effort to integrate ecological considerations of herring's importance as a forage species into management decisions, and requested that the Department develop a harvest control rule into herring management.
- 2) Requests that the Department include cast-netting as an allowable gear type in the fresh fish fishery.

Response:

- 1) A "harvest control rule" is outside the scope of this rulemaking. The Department is currently working with the Centre for Environment, Fisheries and Aquaculture Science to develop a population model for Pacific herring. This model will help address many of the questions posed by the conservation community regarding biological reference points and harvest control rules.
- 2) Allowing cast-netting as a commercial gear type would create enforcement issues due to the difficulty in identifying commercial versus recreational activities during fishing operations. The Department considers that new regulations permitting cast-netting would require a more comprehensive review than is provided by the current proposed amendments to Sections 163 and 164. Consequently, further consideration of cast nets would need to be thoroughly explored under a separate rulemaking.

Debra Johnson, email form letter received July, 25, 2013 (attached) (Audubon Form Letter – 995 form letters received)

Comments:

- 1) Requests that the Commission approve a commercial fishing program for Pacific herring for the coming year that reflects the critical importance of herring to dozens of species of birds, fish, whales and pinnipeds.
- 2) Requests that the Commission set a zero harvest quota for Tomales Bay, Humboldt Bay and Crescent City Harbor because no stock assessment has taken place in these areas for many years, and allowing fishing to occur here with no information on the health or size of the stock could damage these stocks that are so vital for supporting marine wildlife.

Response:

- 1) The Final Supplemental Environmental Document acknowledges the importance of herring as a food source for a variety of other species.
- 2) The Department did not provide the Commission with a proposal to change existing quotas for Tomales Bay, Humboldt Bay or Crescent City Harbor for the 2013-14 fishing season. Since there has been no commercial fishing effort in these fisheries, and the Department has reduced staffing and budget constraints, survey efforts continue only in San Francisco Bay. At the request

of the Commission, the Department will be preparing a rulemaking package at a later date with a quota option range of 0-350, 0-60 and 0-30 respectively for these fishing areas.

Greg Helms, Ocean Conservancy and Karen Garrison, Natural Resources Defense Council, letter received August 2, 2013 (attached)

Comments:

- 1) States that under existing authority and without delay associated with re-noticing, the Commission may set a quota of between 0-350 tons for Tomales Bay, 0-60 tons for Humboldt Bay, and 0-30 tons for Crescent City, and recommends the Commission set a quota of zero for these areas for the upcoming fishing year.
- 2) Herring is an economically vital California fishery, and supports a broad array of wildlife and human needs.
- 3) California has built the techniques necessary to meet these challenges through effective and collaborative assessment techniques, an engaged and active community of fishery participants, and an adaptive, evolving annual harvest policy process that rests on a solid framework of long range planning.
- 4) Pleased with recent progress in sustainable management of herring, and appreciates the active engagement of Department staff and the Director's Herring Advisory Committee.
- 5) Herring biomass in Tomales Bay, Humboldt Bay and Crescent City has not been estimated for seven years or more, with the most recent assessment occurring in 2006.
- 6) Recommends corroborating the assumption that herring stock conditions outside San Francisco Bay have recovered from the documented poor conditions observed in the most recent years in which fishing and biomass estimates occurred with the customary herring biomass estimate prior to setting a harvest quota above very minimum levels.
- 7) Supports the proposed harvest level of 4.7% in San Francisco Bay and the proposed changes to the fresh fish market.
- 8) Requests that the Commission conduct biomass estimates for fishing areas outside San Francisco Bay before setting harvest targets in those areas.
- 9) California herring fisheries are the subject of active annual management based on solid fishery planning, obtainable and reliable stock status information, and evolving management of herring for its exceptional value to the ecosystem. Requests that harvest areas elsewhere be brought into better alignment with this approach and to the Commission's Forage Policy, by performing biomass estimates prior to setting harvest quotas greater than zero there.

Response:

- 1) The Department did not provide the Commission with a proposal to change existing quotas for Tomales Bay, Humboldt Bay or Crescent City Harbor for the 2013-14 fishing season. Since there has been no commercial fishing effort in these fisheries, and the Department has reduced staffing and budget constraints, survey efforts continue only in San Francisco Bay. At the request

of the Commission, the Department will be preparing a rulemaking package at a later date with a quota option range of 0-350, 0-60 and 0-30 respectively for these fishing areas.

- 2) The Department concurs with this statement.
- 3) The Department accepts this comment.
- 4) The Department accepts this comment.
- 5) The Department accepts this comment.
- 6) See response 1.
- 7) The Department accepts this comment.
- 8) The Department accepts this comment.
- 9) See response 1.

Jenn Eckerle, Natural Resources Defense Council, Testimony at Fish and Game Commission Discussion and Adoption Hearing, August 7, 2013

Comments:

- 1) Supports harvest level of 4.7 percent of previous season's biomass for San Francisco Bay.
- 2) Recommends a zero ton harvest quota for Tomales Bay, Humboldt Bay and Crescent City Harbor until biomass surveys can be completed. States that in the absence of evidence that herring populations in these areas have recovered sufficiently to support fishing effort, taking the precautionary measure of setting a zero quota until updated biomass estimates have been conducted is appropriate and warranted.
- 3) Supports Marine Protected Areas and their use for protecting herring spawning areas. States that protected areas are not a substitute for fisheries management measures and for now we must rely primarily on the herring management program and your decision today to protect these resources.
- 4) Commends the Department and all who participated in the process for proposing sound measures for San Francisco Bay.

Response:

- 1) The Department accepts this comment.
- 2) The Department did not provide the Commission with a proposal to change existing quotas for Tomales Bay, Humboldt Bay or Crescent City Harbor for the 2013-14 fishing season. Since there has been no commercial fishing effort in these fisheries, and the Department has reduced staffing and budget constraints, survey efforts continue only in San Francisco Bay. At the request of the Commission, the Department will be preparing a rulemaking package at a later date with a quota option range of 0-350, 0-60 and 0-30 respectively for these fishing areas.
- 3) The Department accepts this comment. The Marine Life Protection Act (MLPA, Stats. 1999, ch. 1015) sets goals focusing on improving the connectivity and effectiveness of California's existing array of Marine Protected Areas to protect the State's marine life, habitats, and ecosystems.
- 4) The Department accepts this comment.

Tom Rudolf, Pew Charitable Trusts, Testimony at Fish and Game Commission Discussion and Adoption Hearing, August 7, 2013

Comments:

- 1) Supports Commission's proactive work on a forage policy and the adoption of the proposed 2013-14 regulations; including the 4.7 percent quota for San Francisco Bay and the streamlining of regulations to promote the fresh fish fishery.
- 2) Requests that the Commission proceed to set the 2013-14 quota at zero tons for the three sub-stocks north of San Francisco Bay in Tomales Bay, Humboldt Bay and Crescent City Harbor. Zero tons is within the range in the DSED and is appropriate for these stocks which lack any current biomass estimate and for which the last estimates were indicative of poor stock status, it is not necessarily safe to assume resource recovery in the absence of directed fishing.

Response:

- 1) The Department accepts this comment.
- 2) The Department did not provide the Commission with a proposal to change existing quotas for Tomales Bay, Humboldt Bay or Crescent City Harbor for the 2013-14 fishing season. Since there has been no commercial fishing effort in these fisheries, and the Department has reduced staffing and budget constraints, survey efforts continued only in San Francisco Bay. At the request of the Commission, the Department will be preparing a rulemaking package at a later date with a quota option range of 0-350, 0-60 and 0-30 respectively for these fishing areas.

Jordon Wellwood, Richardson Bay Audubon, Testimony at Fish and Game Commission Discussion and Adoption Hearing, August 7, 2013

Comments:

- 1) Stated that Audubon California and their NGO partners have described in comment letters to the Department and Commission over the past year the foundational importance of herring in California to salmon, other large fish, seabirds, sea ducks, shorebirds, and marine mammals on the west coast.
- 2) Supports the harvest quota for San Francisco Bay at a rate of 4.7 percent for the 2012-13 estimated biomass, and supports the sale of fresh herring to local markets by making the sale of fresh fish in the gillnet fishery legal for the entire fishing season.
- 3) Asks the Commission to select the option of a 2013-14 harvest quota of zero in Tomales Bay, Humboldt Bay and Crescent City, stating that they do not agree with the Department's statement that these stocks which were at low levels when last assessed have recovered in the absence of fishing pressure.

Response:

- 1) The Final Supplemental Environmental Document acknowledges the importance of herring as a food source for a variety of other species.
- 2) Supports proposal for San Francisco Bay.
- 3) The Department did not provide the Commission with a proposal to change existing quotas for Tomales Bay, Humboldt Bay or Crescent City Harbor for the 2013-14 fishing season. Since there has been no commercial fishing effort in these fisheries, and the Department has reduced staffing and budget constraints, survey efforts continue only in San Francisco Bay. At the request of the Commission, the Department will be preparing a rulemaking package at a later date with a quota option range of 0-350, 0-60 and 0-30 respectively for these fishing areas.

Doug Tate, Morro Coast Audubon, Testimony at Fish and Game Commission Discussion and Adoption Hearing, August 7, 2013

Comments:

- 1) States that the conservation of Pacific herring aligns with their mission statement of promoting the conservation and restoration of ecosystems focusing on the biological diversity of birds, other wildlife, and their habitat. States that they support Audubon California's efforts and program focused on conserving herring in California and in the Pacific flyway.
- 2) Supports freezing the gillnet harvest quota for San Francisco Bay at a rate of 4.7 percent and the sale of fresh herring to local markets
- 3) Supports the quota of zero for areas outside of San Francisco Bay that are open to fishing, Tomales Bay, Humboldt Bay, and Crescent City.

Response:

- 1) The Final Supplemental Environmental Document acknowledges the importance of herring as a food source for a variety of other species..
- 2) Supports proposal for San Francisco Bay.
- 3) The Department did not provide the Commission with a proposal to change existing quotas for Tomales Bay, Humboldt Bay or Crescent City Harbor for the 2013-14 fishing season. Since there has been no commercial fishing effort in these fisheries, and the Department has reduced staffing and budget constraints, survey efforts continue only in San Francisco Bay. At the request of the Commission, the Department will be preparing a rulemaking package at a later date with a quota option range of 0-350, 0-60 and 0-30 respectively for these fishing areas.

Greg Helms, Ocean Conservancy, Testimony at Fish and Game Commission Discussion and Adoption Hearing, August 7, 2013

Comments:

- 1) States that he is sincerely pleased with where herring management is in California and is pleased to support San Francisco Bay management recommendations which feature a very precautionary 4.7 harvest rate based on not just biomass estimates but really looking at EFI and forage dynamics

and describing those forage dynamics for herring has been another super-big achievement that should not go un-noticed here, and supports fresh fish market changes.

- 2) Commends Department staff and the Director's Herring Advisory Committee on its efforts to manage the herring fishery.
- 3) Requests that the Commission set a zero ton harvest quota for Tomales Bay, Humboldt Bay and Crescent City Harbor.

Response:

- 1) Supports proposal for San Francisco Bay.
- 2) The Department accepts this comment.
- 3) The Department did not provide the Commission with a proposal to change existing quotas for Tomales Bay, Humboldt Bay or Crescent City Harbor for the 2013-14 fishing season. Since there has been no commercial fishing effort in these fisheries, and the Department has reduced staffing and budget constraints, survey efforts continue only in San Francisco Bay. At the request of the Commission, the Department will be preparing a rulemaking package at a later date with a quota option range of 0-350, 0-60 and 0-30 respectively for these fishing areas.

Dennis Fox, Testimony at Fish and Game Commission Discussion and Adoption Hearing, August 7, 2013

Comment:

- 1) Requests that Department staff provide an explanation of correlation between herring and salmon and the impacts of water supply.

Response:

- 1) The comment is noted but is outside the scope of the current rulemaking.

There were no other speakers, and no other written comments submitted.

VI. Location and Indexing of Rule Making File:

A rulemaking file with attached file index is maintained at:

California Fish and Game Commission
1416 Ninth Street, Room 1320
Sacramento, California 95814

VII. Location of Department Files:

Department of Fish and Wildlife
5355 Skylane Blvd, Suite B
Santa Rosa, California 95403

VIII. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

No alternatives were identified or brought to the attention of the Commission.

(b) No Change Alternative:

A no change alternative would maintain the present quota of 2,854 tons for the 2013-2014 fishing season.

(c) Consideration of Alternatives:

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

IX. Forms Incorporated by Reference and not published in CCR:

Existing Sections 163 and 164 include two forms previously “incorporated by reference.” Forms FG 143 HR and FG-MR-674 are updated and revised in this rulemaking. The revised forms remain incorporated by reference and will be readily available on the Department website, or at Department offices around the state, for the herring fishers that must use the forms.

X. Mitigation Measures Required by Regulatory Action:

A Final Supplemental Environmental Document was prepared to review and analyze the proposed regulations for the commercial harvest of Pacific herring throughout the State’s estuarine waters. At the August 7, 2013, meeting the Commission moved to adopt the findings of the FSED. By selecting within the recommended range (zero to 10% of the previous year’s spawning biomass) a fishing quota of 4.7% in San Francisco Bay, no further mitigation measures are required for this regulatory action.

XI. 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 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 Department provided the Commission analyses on three potential 2013-2014 quota options for San Francisco Bay ranging from zero to 10 percent of the 10-year average biomass estimate of 46,000 tons. The potential incremental

changes to total State economic output for these three options, zero, 2,300, or a 4,600 ton quota, are \$(3,784,000), \$(659,000), and \$2,473,000, respectively, relative to 2012-2013 season's 2,854 ton quota and the ex-vessel price/ton. Thus any quota over 2,854 tons could potentially generate incremental increases in ex-vessel landing revenues to the fishermen and increases to total economic output for the State. Conversely, an allowable quota less than 2,854 tons could result in adverse incremental impacts to Statewide economic output of \$3,784,000 and \$659,000 (in 2012 dollars), for zero and 2,300 ton 2013-2014 quotas, respectively. This is based on a total economic output multiplier of 1.899 used in calculating total economic output effects (direct, indirect, and induced) from California commercial herring fishery activity. There is a relationship between quota and economic impact which can be calculated for any quota amount by using the following formula:

$$\frac{[(\text{Proposed Quota } \$) - (\text{Prior Quota } \$)] \times 1.8996}{\text{impact in } \$} = \text{“total economic output impact in } \$\text{”}$$

No adverse incremental economic impacts to businesses in California would occur under a quota allocation of 2,854 tons or more. Moreover, given the overriding market conditions for herring roe (declining demand overseas and lower prices), an allocation of 2,854 tons or more is not expected to affect the ability of California businesses to compete with businesses in other states.

No commercial herring fishing activity has taken place in Tomales Bay since 2007, in Humboldt Bay since 2005 and in Crescent City Harbor since 2002; thus no adverse incremental economic impacts to businesses would occur under a quota allocation of zero (0) to 30 tons, zero (0) to 60 tons, and zero (0) to 350 tons for Crescent City Harbor, Humboldt Bay, and Tomales Bay, respectively.

No adverse incremental economic impacts to fresh fish businesses in California would occur with a change to existing fresh fish regulations for herring.

Update: By selecting the 4.7% option for San Francisco Bay, the fishing quota for 2013-2014 has been increased to 3,737 tons, or 883 tons more than the prior year of 2,854 tons. This increase will benefit the existing fishing industry. The ability of California businesses to compete with businesses in other states will not be adversely affected by this action.

- (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:

Any quota option over 2,854 tons will result in positive incremental contributions to employment for the State: for example, an increase of about 35 jobs for a quota of 4,600 tons. Conversely, a zero or 2,300 ton allowable quota could adversely impact as many as 243 or 9 jobs respectively, in the

fishing industry and related industries. This is based on an employment multiplier of 26.7 jobs per each million dollar change in direct output from herring fishing activities, and a fleet of about 190 permittees for San Francisco Bay.

Update: By selecting the 4.7% option, the fishing quota has been increased to 3,737 tons, or 883 tons more than the prior year of 2,854 tons. This increase will benefit the existing fishing industry possibly creating jobs. It is not likely that new businesses will be created or expanded, but existing business will not be eliminated by this action.

The Commission anticipates benefits to the health and welfare of California residents. Providing opportunities for a herring fishery encourages consumption of a nutritious food.

The Commission does not anticipate any benefits to worker safety.

The Commission anticipates benefits to the environment through the continued sustainable management of California's herring resources.

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

The Commission is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. There are no new fees or reporting requirements stipulated under the proposed regulations.

Impacts to Small Business: The Commission has determined that the amendments to Sections 163 and 164, which established a fishing quota of 3,737 tons and made changes to the fresh fish and herring eggs market will not adversely affect small businesses. Most of the commercial herring industry consists of small businesses which are legally required to comply with the regulation and will possibly incur a benefit from the action by the Commission to increase the quota over last year.

(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:

None.

(h) Effect on Housing Costs:

None.

UPDATED INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Sections 163 and 164, Title 14, CCR, specify that herring may be taken for commercial purposes only under a revocable permit, subject to such regulations as the Fish and Game Commission shall prescribe. Current regulations specify: permittee qualifications; permit application procedures and requirements; permit limitations; permit areas; vessel identification requirements; fishing quotas; seasons; gear restrictions; and landing and monitoring requirements.

Annual fishing quotas are necessary to provide for a sustainable fishery. The regulatory changes in Sections 163 and 164 establish the fishing quota and season dates and times that fishing operations are allowed for the 2013-2014 season in San Francisco Bay and Tomales Bay. Regulatory changes also amend regulations for the take of fresh fish herring to occur concurrently with the sac-roe fishery beginning on January 1 and ending on March 15. The Department did not recommend any change to the regulations for the Humboldt Bay or Crescent City Harbor herring fisheries.

Benefits of the Regulation

The Commission anticipates benefits to the State's environment and the health and welfare of California residents. The regulation changes are intended to set annual harvest quotas within a range that will maintain sustainable herring populations for their ecological values and commercial use. Maintaining a sustainable herring fishery encourages consumption of a nutritious food.

The Commission does not anticipate any non-monetary benefits to worker safety as a result of these regulations.

Consistency with State or Federal Regulations

The regulations are neither inconsistent nor incompatible with existing state regulations. Section 20, Article IV, of the State Constitution specifies that the Legislature may delegate to the Fish and Game Commission such powers relating to the protection and propagation of fish and game as the Legislature sees fit. The Legislature has delegated to the Commission the power to regulate the commercial take of herring (sections 8550 and 8553, Fish and Game Code). The Commission has reviewed its own regulations and finds that the proposed regulations are neither inconsistent nor incompatible with existing state regulations. The Commission has searched the California Code of Regulations and finds no other state agency regulations pertaining to the commercial take of herring. There are no comparable federal regulations for the commercial harvest of herring.

Update:

The Commission adopted the originally proposed language of the Initial Statement of Reasons. In Section 163(g)(4), the Commission set the San Francisco Bay quota at 3,737 tons; this was based on the Department's recommendation of 4.7 percent of the 2012-2013 San Francisco Bay spawning biomass estimate for Pacific herring.

Corrections to regulatory text:

After reviewing the published regulatory text it was determined that there were two minor editorial errors in the new text requiring correction.

- The new text in subsection 164(j)(4), see page 10 of the published text, adds “Each herring eggs on kelp permittee is allocated a quota equal to approximately 0.79 percent of the remaining quota.” The word ‘remaining’ is incorrect and has been removed from the text.
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