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

Amend subsections (a), (b), and (c) of Section 165 and Section 165.5
Title 14, California Code of Regulations
Re: Commercial Harvest of Kelp

I. Date of Initial Statement of Reasons:       July 18, 2013

II. Dates and Locations of Scheduled Hearings:

   (a) Notice Hearing:             Date:  August 7, 2013
                                   Location: San Luis Obispo, CA

   (b) Discussion/Adoption Hearing: Date:  October 2, 2013
                                   Location: Ventura, CA

   (c) Adoption Hearing:           Date:  November 6, 2013
                                   Location: La Quinta, CA

III. Description of Regulatory Action:

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

       Existing regulations in subsections (a), (b), and (c) of Section 165 and Section
       165.5, Title 14, California Code of Regulations (CCR) define procedures for
       the commercial harvest of kelp, as well as the exclusive right to harvest in
       leased Administrative Kelp Beds (kelp beds). Each of the existing 87 kelp
       beds fall within one the following management categories: open, closed,
       leasable, and lease only. These designations were designed for optimal
       harvest while ensuring sustainable management of the resource and the
       species that depend upon kelp.

       Current kelp bed boundaries are defined by landmarks and compass
       headings and outdated kelp bed maps that are referenced in the regulations
       [subsection 165.5(j), Title 14, CCR]. A Fish and Game Commission
       (Commission) approved harvest plan is required only for mechanical
       harvesters in non-leased kelp beds north of Santa Rosa Creek, San Luis
       Obispo County [subsection 165(c)(4)(C), Title 14, CCR]. A detailed
       development plan is required prior to the approval of a kelp bed lease
       anywhere within state waters [subsection 165.5(b)(3), Title 14, CCR]. To
       improve management and enforceability, the proposed regulation will revise
       subsections (a), (b), and (c) of Section 165 and Section 165.5. These
       revisions are needed to:
1) Redefine the existing kelp bed boundaries by using spatially explicit points of latitude and longitude;

2) Remove reference to outdated kelp bed maps;

3) Require a Commission approved kelp harvest plan for the mechanical harvest of kelp in all kelp beds where harvesting is allowed;

4) Remove requirement of a Commission-approved development plan for lessees and replace with a Commission-approved kelp harvest plan;

5) Specify information required in kelp harvest plans for mechanical harvesters and potential lessees;

6) Repeal regulatory text which is inconsistent with statute; and

7) Improve clarity and consistency of the regulations with editorial changes.

Currently, landmarks and compass headings interject subjectivity into boundary descriptions. The proposed change to spatially explicit points of latitude and longitude is needed to improve clarity and reduce the potential for subjectivity or error regarding boundary locations. Appendix 1 graphically shows the proposed boundary changes for kelp beds. The primary differences between the historic and proposed kelp bed maps are a change in the offshore boundaries from statute miles to nautical miles, consistent with Fish and Game Code (FGC) Section 55, and an explicit definition of the inshore boundary as the mean high tide line. These changes will improve identification of kelp bed boundaries and will modernize the regulations for consistency with other marine boundary information found within Title 14, CCR. Additionally, the proposed regulations will specifically exclude San Francisco Bay from the boundary of kelp bed 301 in order to take into account the Office of Spill Prevention and Response Marine Facility and Small Marine Fueling Facility Plans (sections 817.02 and 817.03, Title 14, CCR).

Antiquated hand drawn kelp bed maps from the 1960s are the current official reference for public use [subsection 165.5(j), Title 14, CCR]. The existing maps would no longer be relevant with adoption of the proposed boundary definitions so their reference would be deleted. The Department of Fish and Wildlife (Department) will continue to provide updated maps when licenses are issued and to the public upon request.

Existing regulations require a Commission-approved kelp harvest plan for mechanical harvesters of giant kelp in non-leased kelp beds north of Santa Rosa Creek, San Luis Obispo County, and a development plan for all leased beds [subsections 165(c)(4)(C) and 165.5(b)(3), Title 14, CCR]. The proposed regulation requires a Commission-approved kelp harvest plan for all mechanical harvesters of kelp, regardless of the location. In addition, the proposed regulation removes the requirement of a Commission-approved development plan for lessees and replaces it with a Commission-approved
kelp harvest plan. The proposed regulation will require that kelp harvest plans be updated and resubmitted every five years. This change would standardize the harvest plan requirement, and thus improve the Department’s management of kelp taken by the mechanical harvest method, resulting in greater protection of kelp resources and species which depend upon them.

Under existing regulations, prior Commission approval of a kelp harvest plan is necessary before a harvester may use a mechanical harvester to harvest giant kelp in non-leased kelp beds north of Santa Rosa Creek, San Luis Obispo County. The kelp harvest plan must identify how a mechanical harvester will be used while avoiding:

1) Repetitive harvest from individual giant kelp plants;

2) Harvest of bull kelp from those portions of kelp beds that contain both giant kelp and bull kelp; and

3) Harvest of giant kelp near sea otter rafting sites used by female sea otters with dependent pups;

Existing regulations require kelp bed lessees to provide the following information in a development plan as part of their application to lease a kelp bed, beds or part thereof:

1) Intended use of kelp;

2) Amount of kelp proposed to harvest during each of the next five years;

3) Manner of harvesting; and

4) Manner of transporting the kelp.

To improve management of the resource, the proposed regulations will remove the harvest plan geographic requirements and require all mechanical harvesters statewide and all kelp lessees to provide the information below in a kelp harvest plan:

1) Kelp bed number(s) where harvesting will occur; description of kelp bed or portion thereof; and designated number of square miles in each kelp bed or portion thereof;

2) Intended use of kelp;

3) Amount of kelp proposed to harvest on a monthly and annual basis during the next five years;

4) Estimated frequency of harvesting activities for each kelp bed;

5) Number of harvest boats, maximum kelp holding capacity in wet tons for
each boat, including the operating vessel gross tonnage and fuel tank capacity;

6) Harvest methodology (harvest operation description);

7) All locations (addresses) where kelp landing and weighing will take place;

8) Specific details of wet kelp weighing equipment and methods to be used at the landing sites for accurate reporting;

9) Name, address, phone number, and license number of kelp processor, and method of transporting kelp to the processing location.

In addition to the items listed above, when using a mechanical harvester, the kelp harvest plan must identify how a mechanical harvester will be used while avoiding:

1) Repetitive harvest from individual giant kelp plants;

2) Harvest of bull kelp from those portions of kelp beds that contain both giant kelp and bull kelp; and

3) Harvest of giant kelp near sea otter rafting sites used by female sea otters with dependent pups.

The proposed regulations will incorporate by reference the form 2013 Kelp Harvesting License Application (MRD 658 New 7/13) in subsection 165(a)(1), Title 14, CCR. Approved applications will be returned to the applicant as the permit.

Subsections 165(c)(4) and 165(c)(4)(E) are proposed to be repealed due to inconsistency with statute. The Department may recommend alternate harvest control area restrictions, consistent with statute, in a future rulemaking. The proposed regulation also corrects typographical errors and other inaccuracies, and makes other non-substantive changes for clarity and consistency.

State policy is to ensure the conservation and sustainable use of California’s living marine resources for the benefit of all the citizens of the State. The proposed regulatory changes will benefit the environment by improving the sustainable management of commercial kelp harvest.

In addition, the proposed regulatory changes will improve the enforcement of kelp harvest regulations by more accurately identifying kelp bed boundaries.

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

Authority: Sections 6653, 6653.5, 6700, and 6701, Fish and Game Code.
Reference: Sections 6650, 6651, 6652, 6653, 6653.5, 6654, 6656, 6680, 6700, 6701, 6701.5, 6702, 6703, 6704, 6705, 6706, and 6707, Fish and Game Code.

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

None.

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

Economic Impact Analysis

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

Marine Resource Committee meeting, September 27, 2011, Monterey, California.

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

No alternatives were identified.

(b) No Change Alternative:

The no-action alternative would retain the current, antiquated kelp bed descriptions, leaving boundary locations vague and left to subjectivity, resulting in less precision and clarity in their meaning. Additionally, no action on the proposed regulations would continue to leave open the possibility that kelp forest canopies and associated organisms could be impacted by mechanical harvesters operating without a Commission-approved harvest plan in non-leased areas south of Santa Rosa Creek, San Luis Obispo County, with little initial oversight from the Department.

(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 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. The proposed regulations nominally change the boundaries of the areas available to kelp harvesters and do not significantly increase harvesting costs.

(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 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. The proposed changes in boundary descriptions for existing kelp beds are minor clarifications and are unlikely to result in changes to the economics of commercial kelp harvesting. Industry costs associated with preparation of the required kelp harvest plans are minor to inconsequential. For this reason, the proposed regulations are unlikely to result either the creation of new jobs or new businesses, or the elimination of existing jobs or existing businesses, or cause the expansion of existing kelp harvesting operations.

The Commission anticipates some benefits to the health and welfare of California residents or to worker safety. Incidental benefits to health and welfare of Californians may accrue from more detailed and precise lease boundary definitions. This could lead to diminished user conflicts in areas which heretofore may not have been as well identified as the site of industrial activities.

The Commission anticipates benefits to the environment in the improved sustainable management of commercial kelp harvest.

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

Some licensed kelp harvesters may incur additional costs ranging from $80 to $400 (occurring once every five years) if they plan to use mechanical harvesters in non-leased areas or intend to lease kelp beds. Furthermore, kelp bed lessees that currently have a kelp harvest plan in place would incur additional costs of approximately $40 to $200 to amend their harvest plans with the additional required information. However, these costs are considered
negligible compared to overall business operating costs, occur only once every five years, and only affect those licensees that desire to use mechanical harvesters in non-leased kelp beds and those kelp bed lessees which must provide additional information in their harvest plans.

(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
Informative Digest/Policy Statement Overview

Existing regulations within subsections (a), (b), and (c) of Section 165, and Section 165.5, Title 14, California Code of Regulations (CCR), define procedures for the commercial harvest of kelp, as well as the exclusive right to harvest in leased Administrative Kelp Beds (kelp beds). Existing regulations define kelp bed boundaries by landmarks and compass headings, and reference outdated kelp bed maps. A kelp harvest plan approved by the Fish and Game Commission (Commission) is required only for mechanical harvesters in non-leased kelp beds north of Santa Rosa Creek, San Luis Obispo County, and a detailed development plan is required for approval of kelp bed leases. To improve management and enforceability, the proposed regulation will revise subsections (a), (b), and (c) of Section 165, and Section 165.5 by defining kelp bed boundaries using spatially explicit latitude and longitude coordinates, removing reference to antiquated kelp bed maps, requiring a Commission-approved kelp harvest plan for the mechanical harvest of kelp in all kelp beds where harvesting is allowed, removing the requirement of a Commission-approved development plan for lessees and replacing it with a Commission-approved kelp harvest plan, and specifying required details in and frequency of submittal of harvest plans. The proposed regulations will incorporate by reference the form 2013 Kelp Harvesting License Application (MRD 658 New 7/13) in subsection 165(a)(1). Subsections 165(c)(4) and 165(c)(4)(E) will be repealed. Editorial changes are also proposed to improve clarity and consistency of the regulations.

The proposed regulatory changes will benefit the environment by improving the sustainable management of commercial kelp harvest. In addition, the proposed regulatory changes will provide benefits related to regulation enforceability.

The proposed regulations are neither inconsistent nor incompatible with existing state regulations. The Legislature has delegated authority to the Commission to adopt regulations as may be necessary to insure the proper harvesting of kelp and other aquatic plants, for the leasing of kelp beds, and to prescribe information necessary on kelp lease applications (sections 6653, 6700, and 6701, Fish and Game Code). The proposed regulations are consistent with regulations that restrict or prohibit kelp harvest in marine protected areas (Section 632, Title 14, CCR), commercial herring-eggs-on-kelp regulations (Section 164, Title 14, CCR), and regulations concerning marine facility plans and small marine fueling facility plans (sections 817.02 and 817.03, Title 14, CCR). Commission staff has searched the California Code of Regulations and statutes and has found no other state regulations related to kelp harvesting and no other state agency with authority to promulgate kelp harvest regulations.