

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

Add Sections 29.17 and 127
Title 14, California Code of Regulations
Re: Kellet's Whelk

- I. Date of Initial Statement of Reasons: October 17, 2011
- II. Date of Final Statement of Reasons: December 20, 2011
- III. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: September 15, 2011
Location: Redding, CA
 - (b) Discussion Hearing: Date: November 17, 2011
Location: Santa Barbara, CA
 - (c) Adoption Hearing Date: December 15, 2011
Location: San Diego, CA
- IV. Update:

No modifications were made to the originally proposed language of the Initial Statement of Reasons

The Commission voted to adopt Options 1 and 2, a seasonal closure and total allowable catch (TAC). The seasonal closure adopted by the Commission corresponds with the start of the closed season for lobster (the day after the first Wednesday after the 15th of March) and concludes on June 30th. In the interest of clarity, and consistency with the lobster season specified in Fish and Game Code Section 8251, the regulatory text has been modified to specify an open season that begins on July 1 and ends on the first Wednesday after the 15th of March, but is still consistent with the closure dates originally proposed in the Initial Statement of Reasons. During the seasonal closure no Kellet's whelk shall be possessed aboard, or landed from, any commercial fishing vessel and any Kellet's whelk taken during the seasonal closure shall be immediately returned to the water. Recreational take of Kellet's whelk during the seasonal closure is prohibited. The TAC adopted by the commission is 100,000 pounds. When the TAC is reached, or projected to be reached, prior to the end of the fishing year, the department will close the commercial fishery by giving fishermen, the commission and the public no less than 10 days notice.

V. Summary of Primary Considerations Raised in Opposition and in Support:

1. Mr. Mike Kenny (commercial fisherman), email received by Commission November 14, 2011

- Strongly opposes option 3
- Supports the use of biomass surveys, peer review and development of a FMP to inform management that may include a TAC or a season

Commission Response: Option 3 was rejected by the Commission. The fishery for Kellet's whelk is low volume and low value and does not have any specific permits or fees associated with it. The total revenue for the fishery from landing taxes in 2010 was below \$2000.00 which is insufficient to cover the costs of biomass surveys, peer review, development of a FMP, or other resource intensive management approaches.

2. Mr. John Law (commercial fisherman and fish receiver), email received by Commission December 2, 2011

- Supports option 1 with seasonal closure beginning on April 1.
- Opposes Options 2 and 3
- Implementation of MPAs in southern California will offer additional protection for Kellet's whelk

Commission Response: Option 1 was adopted with a seasonal closure that corresponds with start of the lobster closed season to simplify enforcement (the day immediately following the first Wednesday after the 15th of March). Option 3 was rejected by the Commission. Option 2, a total allowable catch (TAC) of 100,000 pounds was adopted as a precautionary measure to ensure a sustainable fishery until more information is available to more accurately evaluate the status of the stock and efficacy of gear and effort limitations. The pending network of MPAs was considered, however, there are currently no scientifically robust tools or data that can be used to quantify the benefit of MPAs to the population of Kellet's whelk. The Commission requested that an adaptive management approach be taken. As new scientific tools and MPA monitoring data become available it may be possible to re-evaluate the fishery within the context of the MPA network.

3. Mr. Bob Bertelli (commercial fisherman, California Fisheries Coalition Southern California Trustee), email received by Commission December 5, 2011

- Oppose option 3
- Supports development of transferable dive endorsement available to all divers who hold a valid sea urchin or sea cucumber permit or grandfathered to anyone with whelk landings by diving in the last three years for a fee of \$80, requirement of hookah equipment for all divers, logbooks, removal of the tidal invertebrate zone, and implementation of

a no-take zone north of Point Conception.

Commission Response: See response to comment 1. The development of a Kellet's whelk permit was considered but rejected. Due to the small size and low value of the fishery, it would be cost prohibitive to develop and manage specific permits and gear types for this fishery. The proposed fee of \$80 would have generated revenue of \$560 from the 7 divers who landed whelk in 2010 which is insufficient to cover the costs of the development and implementation of the specific permit. Addition of Kellet's whelk to the list of species allowed for take under a tidal invertebrate permit was considered, but rejected due to the complexity of addressing only one species allowed to be taken under a Tidal Invertebrate Permit and not making a comprehensive assessment of all species allowed, or not allowed, under the Permit. In addition, the prohibition of take within the tidal invertebrate zone allows for a shallow water depth refuge that will help ensure a sustainable fishery. The suggestions for the designation of a specific gear type for take by diving and a no-take zone north of Pt. Conception were not addressed at this time due to the very low percentage of overall take by diving (<3% in the last five years) or of whelk landed north of Pt. Conception (<0.5% in the last five years).

4. Mr. Chris Miller (commercial fisherman), email received by Commission December 12, 2011
- Opposes the utilization of the precautionary principle without a mechanism to gather more information.
 - Supports the use of MPAs as references for sustainability and collaborative research with fishermen to collect data needed to inform management decisions.

Commission Response: See responses to comments 1 and 2. The small scale and low value of the fishery result in insufficient resources to actively engage in collaborative data collection and management programs.

5. Mr. Pete Halmay (commercial fisherman, San Diego Fisherman's Working Group), email received December 14, 2011, public testimony December 15, 2011
- Supports community fisheries co-management approach that manages from the bottom up, development of an advisory committee to make recommendations, development of a data collection and management system, setting of closed seasons during times of breeding aggregations, setting of bag limits if it is desirable to maintain the fishery as by-catch only, and integrate MPAs into fisheries management.

Commission Response: See response to comments 1, 2, 3, and 4. Comments noted.

6. Mr. Paul Weakland (commercial fisherman), public testimony November 17 and December 15, 2011

- Opposes option 3
- Supports size limits
- Concerns with list of species allowed under Tidal Invertebrate Permit

Commission Response: Option 3 was rejected by the Commission. See response to comment 3. Size limits were evaluated but were not included as an option for Commission consideration due to the complexity of setting a size limit that would be appropriate for the species across its entire range as well as concerns from Law Enforcement Division and participants in the fishery over the viability of reliably measuring large numbers of whelk.

VI. Location and Index of Rulemaking File:

A rulemaking file with attached file index is maintained at:
California Fish and Game Commission
1416 Ninth Street
Sacramento, California 95814

VII. Location of Department files:

A rulemaking file with attached file index is maintained at:
California Fish and Game Commission
1416 Ninth Street, Room 1320
Sacramento, California 95814

VIII. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

Development of a commercial fishing permit specific to Kellet's whelk was considered, but deemed infeasible at this time. Due to the small size and low value of the fishery, it would be cost prohibitive to develop and manage specific permits and gear types for this fishery. As markets continue to develop and more scientific information describing life history characteristics of the species become available, it may be reasonable to consider a specific permit at that time.

An alternative to limit take in the fishery is to impose a size limit to protect a portion of the breeding population from harvest. This is not desirable at this time due to the complexity of setting a size limit that would be appropriate for the species across its entire range as well as concerns from Law Enforcement Division and participants in the fishery over the viability of reliably measuring large numbers of whelk.

An alternative to limit the percentage of catch of Kellet's whelk caught incidentally in lobster and crab traps was considered. This alternative was dismissed due to difficulties setting an appropriate percentage, added enforcement burdens and the possibility that it could artificially increase the take of target species to allow for higher relative catch of Kellet's whelk.

The use of cumulative trip limits to limit take in the fishery was explored. This option was not deemed viable at this time due to difficulties setting the appropriate trip limits, allocation issues, and increased enforcement burdens.

A depth refugia to protect a portion of the population from harvest was examined, but dismissed due to difficulties related to implementation and enforcement.

(b) No Change Alternative:

If the proposed regulations are not adopted the fishery for Kellet's whelk will continue to be essentially unmanaged. What little life history information that is available indicates that this species is slow growing, long lived and forms spawning and egg laying aggregations making it vulnerable to overexploitation. The recent designation of southern rock crab traps as transferable permits allows for a relatively inexpensive point of entry for new participants wishing to retain whelk caught incidentally in crab traps. New participants, coupled with possible expanded markets could result in unsustainable levels of harvest of Kellet's whelk.

(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 or would be as effective as and less burdensome to the affected private persons than the proposed regulation.

IX. 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:

Option 1: Season where take is prohibited

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.

Implementation of a season where take is prohibited would allow individuals to continue to catch and sell Kellet's whelk during other parts of the year. As the majority of Kellet's whelk are caught incidentally in lobster and crab traps, this species does not make up the primary part of any individuals income. Any revenue lost during the closed season could be regained by additional effort during the open season. In addition, the implementation of a closed season may result in a price premium at certain times of the year during the open season, providing a possible positive economic impact. Finally, any short-term negative economic impacts are expected to be offset by the anticipated positive long-term economic returns that will result from a sustainable fishery.

Option 2: Total Allowable Catch

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.

A reduction in total annual catch would have a corresponding reduction in revenue. However, relative to other fisheries, the volume and value of Kellet's whelk are extremely low so the total estimated statewide economic impact is expected to be insignificant. In addition, any short-term negative economic impacts are expected to be offset by the anticipated positive long-term economic returns that will result from a sustainable fishery.

Option 3: Prohibit Commercial Take of Kellet's Whelk by Diving

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.

In 2010, diving accounted for less than 1% of the total catch of Kellet's whelk, with a corresponding ex-vessel value of approximately \$1000. There are a very small number of individuals engaged in the dive fishery for Kellet's whelk (seven in 2010) so it is expected that a prohibition of diving would not have a significant economic impact.

- (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:

None

- (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 propose 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

Updated Informative Digest/Policy Statement Overview

Under existing law, Kellet's whelk, *Kelletia kelletii*, may be taken for commercial purposes by hand collecting while diving 1,000 feet beyond the low tide mark of any natural or constructed shoreline (FGC Section 8140, Title 14, CCR §123) and incidentally in lobster and rock crab traps (FGC Sections 8250.5 and 8284). There are no size limits, seasons or catch quotas when fishing for Kellet's whelk by diving or trapping. There is a recreational bag limit of 35 whelk per day, the standard recreational bag limit for species for which there is not a bag limit otherwise established and whelks cannot be taken in any tidepool or the areas between the high tide mark and 1,000 feet seaward and lateral to the low tide mark (Title 14, CCR §29.05).

California Fish and Game Code Section 7090 requires the Commission, based upon the advice and recommendations of the Department, to encourage, manage, and regulate emerging fisheries. Consistent with the policies and criteria outlined in FGC §7090 and the Commission's *Policy on Emerging Fisheries*, the Department recommended the Commission designate the fishery for Kellet's whelk, as an emerging fishery. On April 7, 2011, based on the advice and input from the Department, a recommendation the Commission's Marine Resources Committee and public testimony the Commission designated the fishery for Kellet's whelk as an emerging fishery. The proposed regulations are designed to manage take in the fishery according to the guidelines set out by the California Marine Life Management Act.

The proposed regulations would manage take in the fishery through three possible mechanisms that can be implemented independently or concurrently: a season where take is prohibited; a total allowable catch (TAC); and a restriction on the method of take.

Option 1: Season where take is prohibited

The proposed regulations would create a seasonal closure from [March 1 – May 1] through [May 31 – July 31] that would prohibit the commercial and recreational take of Kellet's whelk during that time period.

Option 2: Total Allowable Catch

The proposed regulations would create a total allowable catch (TAC) to cap the commercial landings of Kellet's whelk from the period from April 1 through March 31 of the following year. The TAC is proposed to be set at [86,000 to 173,000 pounds] which is based most conservatively on 50% of the most recent five year average landings and least conservatively on 100% of the most recent five year average landings.

When the TAC is met, or expected to be met based on anticipated landings, the fishery will be closed. The Department shall give not less than ten days notice of the fishery closure to all holders of a current and valid lobster operator permit or southern rock crab trap as well as any other individual who has landed Kellet's whelk within the previous

five years via a notification letter, and to the public and Commission via a news release.

Option 3: Prohibit Commercial Take of Kellet's whelk by Diving

The proposed regulations would prohibit the commercial taking of Kellet's whelk by diving. Unlike the take of whelk incidentally in lobster and rock crab traps, there are no limits on the number of individuals who can take Kellet's whelk by diving. Prohibiting diving for Kellet's whelk would help prevent the unrestricted growth of individuals participating in the fishery.

At its December 15, 2011 meeting, the commission voted to adopt Options 1 and 2, a seasonal closure and total allowable catch (TAC).

The seasonal closure adopted by the Commission corresponds with the start of the closed season for lobster (the day after the first Wednesday after the 15th of March) and concludes on June 30th. In the interest of clarity, and consistency with the lobster season specified in Fish and Game Code Section 8251, the regulatory text has been modified to specify an open season that begins on July 1 and ends on the first Wednesday after the 15th of March, but is still consistent with the closure dates originally proposed in the Initial Statement of Reasons. During the seasonal closure no Kellet's whelk shall be possessed aboard, or landed from, any commercial fishing vessel and any Kellet's whelk taken during the seasonal closure shall be immediately returned to the water. Recreational take of Kellet's whelk during the seasonal closure is prohibited.

The TAC adopted by the commission is 100,000 pounds. When the TAC is reached, or projected to be reached, prior to the end of the fishing year, the department will close the commercial fishery by giving fishermen, the commission and the public no less than 10 days notice.

Minor editorial changes were made to clarify that the closed season for Kellet's whelk begins concurrently with the closed season for lobster by specifying an open season as opposed to a closed season. This distinction does not alter the timing or duration of the seasonal closure that was noticed or adopted.