

CALIFORNIA FISH AND GAME COMMISSION
STATEMENT OF PROPOSED EMERGENCY REGULATORY ACTION
FOR RE-ADOPTION OF EMERGENCY REGULATIONS

Emergency Action to Re-adopt Amendments to Section 29.85,
Title 14, California Code of Regulations
Re: Emergency closure of recreational Dungeness and rock crab fisheries
due to elevated levels of domoic acid

I. Statement of Facts Constituting Need for Emergency Regulatory Action

The Fish and Game Commission (Commission) is re-adopting amendments to Section 29.85, Title 14, California Code of Regulations (CCR) [Office of Administrative Law (OAL) file numbers 2015-1105-01E and 2016-0421-02EE].

The Commission submitted an emergency rulemaking that was approved by the Office of Administrative Law (OAL) and filed with the Secretary of State on November 5, 2015, after samples of Dungeness and rock crabs were found to contain high domoic acid levels. The emergency rulemaking closed the recreational rock crab fishery north of the Ventura/Santa Barbara county line and delayed the opening of the recreational Dungeness crab fishery statewide.

In April 2016 the Commission re-adopted the substantially equivalent emergency regulations, which were filed with OAL on April 21, after samples of Dungeness and rock crabs in some areas were found to still contain high domoic acid levels.

The Office of Environmental Health Hazard Assessment (OEHHA), in cooperation with the California Department of Fish and Wildlife (Department), has continued to regularly monitor domoic acid levels in rock crab and Dungeness crab along the California coast since the emergency regulations were filed. Pursuant to the emergency regulations adopted in November 2015 and re-adopted in April 2016, the following state waters have been reopened for recreational fishing based on the recommendations of OEHHA in consultation with the director of the California Department of Public Health (CDPH):

1. On December 31, 2015, the recreational Dungeness crab and rock crab fisheries were reopened in state waters south of 35° 40' N. Latitude (near Piedras Blancas Light Station).
2. On February 11, 2016, the recreational Dungeness crab fishery was reopened in state waters south of 38° 00' N. Latitude (near Point Reyes).
3. On March 18, 2016, the recreational Dungeness crab fishery was reopened in state waters south of the Mendocino/Sonoma county line (near Gualala).
4. On March 28, 2016, the recreational rock crab fishery was reopened in the Channel Islands, with the exception of state waters between Santa Cruz and Santa Rosa islands.
5. On April 22, 2016 state waters were reopened for the recreational rock crab fishery south of Sand Hill Bluff in Santa Cruz County (36° 58.72' N. Latitude) and the recreational Dungeness crab fishery was opened south

of the northern jetty of Humboldt Bay in Humboldt County (40° 46.15' N. Latitude).

6. On May 2, 2016 the recreational Dungeness crab fishery was reopened statewide except for one area within Humboldt County; the area north of 40°46.15' N. Latitude (a line extending due west from the west end of the north jetty at the entrance of Humboldt Bay) and south of 41° 17.60' N. Latitude (a line extending due west from the mouth of Redwood Creek, Humboldt County) remained closed.
7. On May 19, 2016, the recreational Dungeness crab fishery was reopened statewide.
8. On June 3, 2016, state waters were reopened for the recreational rock crab fishery around the Channel Islands between Santa Cruz and Santa Rosa Islands.
9. On July 6, 2016, the recreational rock crab fishery was reopened in state waters south of Pigeon Point in San Mateo County (37° 11' N. Latitude).

Past history with such situations suggested that the emergency would resolve itself within the original 180 days as domoic acid levels naturally subsided. However, high domoic acid levels are persisting in some areas of the state as indicated by ongoing sampling. Therefore, the Commission re-adopted the emergency regulations for an additional period of 90 days following the first re-adoption 90-day effective time period, which ends on August 3. The second re-adoption is necessary to continue the emergency closures in those ocean waters of the state with persistently high levels of domoic acid.

Consuming crab from areas with persistently high levels of domoic acid poses a significant risk to public health as determined by the Director of OEHHA, in consultation with the Director of CDPH. Thus readopting the emergency closure for an additional period of 90 days beyond the initial 180-day period and the first re-adoption 90-day period is necessary for the preservation of public health and safety.

Identification of Reports or Documents Supporting Factual Emergency

The Commission relied on the following documents in proposing this emergency rulemaking action:

- Office of Environmental Health Hazard Assessment, Memorandum to Charlton H. Bonham, Director, California Department of Fish and Wildlife, and Sonke Mastrup, Executive Director, California Fish and Game Commission, *Recommendations on Opening Dungeness and Rock Crab From Mainland Coasts of San Luis Obispo County and Counties to the South*, dated December 31, 2015.
- Office of Environmental Health Hazard Assessment, Memorandum to Charlton H. Bonham, Director, California Department of Fish and Wildlife, and Michael Yaun, Interim Executive Director, California Fish and Game Commission, *Recommendation Regarding Opening of Dungeness Crab Fishery in State Waters South of 38° 00' N Latitude*, dated February 11, 2016.

- Office of Environmental Health Hazard Assessment, Memorandum to Charlton H. Bonham, Director, California Department of Fish and Wildlife, and Michael Yaun, Interim Executive Director, California Fish and Game Commission, *Recommendation on Opening of Dungeness Crab Fishery in State Waters South of the Sonoma/Mendocino County Line*, dated March 18, 2016.
- Office of Environmental Health Hazard Assessment, Memorandum to Charlton H. Bonham, Director, California Department of Fish and Wildlife, and Michael Yaun, Interim Executive Director, California Fish and Game Commission, *Recommendation on Opening Rock Crab Fishery near Channel Islands, with the Exception of One Area*, dated March 28, 2016.
- Office of Environmental Health Hazard Assessment, Memorandum to Charlton H. Bonham, Director, California Department of Fish and Wildlife, and Michael Yaun, Interim Executive Director, California Fish and Game Commission, *Recommendation on Opening of Dungeness Crab Fishery in State Waters of Mendocino and Portions of Humboldt Counties*, dated April 22, 2016.
- Office of Environmental Health Hazard Assessment, Memorandum to Charlton H. Bonham, Director, California Department of Fish and Wildlife, and Michael Yaun, Interim Executive Director, California Fish and Game Commission, *Recommendation on opening of Dungeness Crab Fishery in State Waters Between the California/Oregon Border and 41° 17.60' N Latitude*, dated May 2, 2016
- Office of Environmental Health Hazard Assessment, Memorandum to Charlton H. Bonham, Director, California Department of Fish and Wildlife, and Michael Yaun, Interim Executive Director, California Fish and Game Commission, *Recommendation on Opening of the Last Remaining Area Closed to Dungeness Crab Fishing*, dated May 19, 2016
- Office of Environmental Health Hazard Assessment, Memorandum to Charlton H. Bonham, Director, California Department of Fish and Wildlife, and Valerie Termini, Executive Director, California Fish and Game Commission, *Recommendation on Opening of Rock Crab Fishery Near Channel Islands*, dated June 3, 2016
- Office of Environmental Health Hazard Assessment, Memorandum to Charlton H. Bonham, Director, California Department of Fish and Wildlife, and Valerie Termini, Executive Director, California Fish and Game Commission, *Recommendation of Opening of Rock Crab Fishery in Portions of San Mateo County*, dated July 6, 2016

II. Regulatory Proposal

In response to the high domoic acid levels persisting in some areas of state ocean waters as indicated by continued sampling, the Commission re-adopted the emergency closure for an additional period of 90 days beyond the initial 180-day period and first re-adoption 90-day period as it is necessary for the preservation of the public health and safety.

Emergency recreational fishing closures would remain in effect for rock crabs caught in state waters north of 37° 11' N. Latitude at Pigeon Point in San Mateo County.

Closure of the recreational fishery shall remain in effect until the director of OEHHA, in consultation with the director of CDPH, determines that domoic acid levels in rock crab no longer pose a significant risk to public health and no longer recommends the fishery be closed.

The Department shall maintain a list of closed ocean waters of the state and update that list on Wednesday of each week by 1:00 pm. It shall be the responsibility of any person taking rock crab to call the Department's hotline or visit the Department's website to obtain the current status of any ocean water.

III. 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) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

(b) Nondiscretionary Costs/Savings to Local Agencies:

None.

(c) Programs Mandated on Local Agencies or School Districts:

None.

(d) 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.

(e) Effect on Housing Costs:

None.

IV. Re-adoption Criteria

Pursuant to Government Code Section 11346.1(h), the text of a re-adopted regulation must be the "same or substantially equivalent" to the text of the original emergency regulation. The language for the re-adopted regulatory

amendment is substantially equivalent to the language of the original emergency regulation.

In addition, Government Code Section 11346.1(h) specifies that the emergency rulemaking agency must demonstrate that it is making “substantial progress and has proceeded with due diligence” to comply with standard rulemaking provisions. At its July 19, 2016 meeting, the Commission received an update on testing and sampling levels and an overview of state ocean waters that have been reopened as well as those that remain closed due to elevated levels of domoic acid. Past history with such situations suggested that the emergency would resolve itself within the original 180 days as domoic acid levels naturally subsided. However, the Commission determined that an emergency situation still exists and re-adopted the emergency closure for an additional period of 90 days beyond the initial 180-day period and first 90-day extension, as it is necessary for the preservation of public health and safety. Given this unique situation, a state interagency task force that includes the Commission has been created to proactively address harmful algal blooms that result in high levels of domoic acid and is working to identify solutions for more quickly addressing public health and safety. In addition, legislation has been introduced to grant authority for immediately closing fisheries due to harmful algal blooms.

V. Authority and Reference

The Commission proposes this emergency action pursuant to the authority vested by sections 200, 202, 205, 220, and 240 of the Fish and Game Code and to implement, interpret, or make specific sections 200, 202, 205, 206, 220, and 240 of said code.

VI. Section 240 Finding

Pursuant to Section 240 of the Fish and Game Code, the Commission finds that the adoption of this regulation is necessary for the immediate protection of public health and safety from elevated levels of domoic acid detected in samples of Dungeness and rock crab in ocean waters of the state.

Informative Digest (Plain English Overview)

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Regulatory Action: Following the initial 180-day effective time period, the Commission re-adopted emergency regulations for an additional period of 90 days, which ends on August 3. The second re-adoption is necessary to continue the emergency closures in those state ocean waters with persistently high levels of domoic acid as it is necessary for preserving public health and safety.

The Department shall maintain a list of closed ocean waters of the state and update that list on Wednesday of each week by 1:00 pm. It shall be the responsibility of any person taking Dungeness or rock crab to call the Department's hotline or visit to the Department's website to obtain the current status of any ocean water.

Benefits: The regulation will protect public health and safety by prohibiting possession of Dungeness and rock crab containing elevated levels of domoic acid.

The adopted regulations are neither inconsistent nor incompatible with existing state regulations. The Legislature has delegated authority to the Commission to promulgate sport fishing regulations (sections 200, 202, 205, 220, and 240, Fish and Game Code).