

OFFICE OF THE SECRETARY OF STATE
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Attachment 2

ARCHIVES DIVISION
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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 635
DEPARTMENT OF FISH AND WILDLIFE

FILED

07/07/2020 7:51 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Commercial Crab Whale Entanglement Risk Reduction Measures

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/11/2020 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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4304 Fairview Industrial Dr SE
Salem, OR 97302

Filed By:
Michelle Tate
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 09/11/2020

TIME: 8:00 AM - 5:00 PM

OFFICER: ODFW Commission

ADDRESS: Oregon Department of Fish
and Wildlife

4034 Fairview Industrial Dr SE
Salem, OR 97302

SPECIAL INSTRUCTIONS:

Because of the rapidly changing
situation with COVID-19, all or
portions of this hearing may be
conducted electronically. Information
will be posted on our website at
[https://www.dfw.state.or.us/agency/c
ommission/minutes/](https://www.dfw.state.or.us/agency/commission/minutes/)

NEED FOR THE RULE(S):

Due to a 6-year elevated level of ESA-listed marine life entanglements in commercial Dungeness crab fishing gear across the West Coast (including gear from Oregon waters), these amended rules are needed to reduce the risk of whale entanglement in crab gear and improve identification of fishing gear in future whale entanglement events.

Housekeeping amendments are needed to achieve consistency with recently adopted Oregon Department of Agriculture rules regarding biotoxin monitoring and management responses.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

1. Staff report prepared for the Oregon Fish and Wildlife Commission hearing on 9/11/2020.

A copy of the rules and the other documents relied upon for this rulemaking [the above document(s)] are available from the Oregon Department of Fish and Wildlife, Fish Division, 4034 Fairview Industrial Drive SE, Salem, Oregon 97302-1142, between the hours of 8:00 a.m. and 4:00 p.m., on normal working days, Monday through Friday.

FISCAL AND ECONOMIC IMPACT:

This package of whale entanglement mitigation measures will result in economic and fiscal impacts as described below. These moderate regulatory steps are expected to maintain fishery activity, have minor economic impacts, and avoid more extreme measures such as a fishery closure, which was implemented in the commercial Dungeness crab fishery in California in 2019.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) The Oregon Department of Fish and Wildlife (ODFW) and Oregon State Police (OSP) could experience fiscal impacts, as implementation and enforcement of measures may result in adjustments to staff time allotted to specific activities. While these staff time impacts cannot be estimated in monetary terms, it can be determined that these effects are not expected to be significant enough to affect the net number of agency staff. The maximum potential reduction to ODFW ad valorem revenues can be estimated at \$13,346 per year for three years totaling a maximum loss of \$40,038. This number comes from an estimated overall impact to ex-vessel values of \$567,895 per year. Since our ad valorem rate is 0.235%, \$13,346 would represent the lost ODFW revenue, as this is the foregone collected ad valorem relating to the 20% pot limit reduction. While these are the maximum potential impacts to agency revenue, we expect the actual revenue impacts to ODFW from these rules to be minimal.

There are no expected direct economic impacts to local governments. However, it should be noted that port communities could be affected by indirect or induced economic effects of the measures discussed below.

Implementation of the full set of measures will have economic impacts to all Dungeness commercial crab fishers, although there will be a larger economic impact to participants that typically continue crabbing later into the season (after April). This regulatory package would implement three key measures to reduce risk of whale entanglement, each of which has a potential economic impact of reducing catch and hence potentially resulting in foregone revenue:

- A 20% reduction of pot limits across all ocean Dungeness crab permits.
- Prohibition on commercial crabbing outside of 30 fathoms.
- Requirement for an additional "late season" buoy tag after the start date of provisions (measure aimed to identify derelict or abandoned gear not in use).

These measures would be implemented from May 1 through the end of the season on August 14th for three years (2021 through 2023). After three years, the rules would be vacated unless the Commission extends or modifies them, so any impacts are limited to this timeframe absent additional Commission action. The sunset date will allow evaluation of the

conservation effectiveness of the management measures, as well as, the economic effects of these measures.

It is difficult to measure the exact economic impact of these measures as there are many moving biological and behavioral variables. In regards to collective fishery costs resulting from reduced pot limits in the later portion of the season, this is particularly difficult to predict, as some participants may find ways to be more efficient with fewer pots or move their gear more often. The state of Washington implemented a pot limit reduction of 33% from July 1 – September 15 in 2019, and assessed the resulting economic impacts as part of a permanent rule-making action in January, 2020. Washington Department of Fish and Wildlife staff compared catch data from the reduced pot limits to the same timeframe in other seasons and did not note any differences. For context, the average ex-vessel value of the Oregon fishery in the past five crab seasons from May through the end of the season on August 14 is 2.8 million dollars or 5% of the total season value. Approximately 34% of the 424 permittees participate in the fishery during this time period. It is reasonable to assume that the maximum ex-vessel revenue loss, absent any behavioral changes or inherent biological responses, would be equal to the percent reduction in allowable pots under the proposed measures. Twenty percent of the 5-year average ex-vessel value from May through the end of the season would represent an estimated \$567,895, or 1% annual loss of ex-vessel revenue to the fishery as a whole. Only \$554,549 of this will directly impact crab fisherman, as the other \$13,346 will be impacts to ODFW ad valorem. Impacts to the public would not be distributed evenly across participants because patterns of participation (i.e., time of year) vary greatly across the fleet. This also does not account for potential downstream impacts to other businesses that buy and sell crab or provide services to the fleet. There has been additional economic impact work by The Research Group on behalf of the Oregon Dungeness Crab Commission (ODCC). The Research Group used an existing bio-economic crab fishery model to evaluate economic impacts of early season closures and effort reductions of 10, 20, and 30 percent starting in April, May and June. The report on that work is available on the ODCC website here: <https://oregondungeness.org/wp-content/uploads/2020/04/ODCC-final-report-and-presentation-ec-impact-ODFW-proposed-measures-whale-entanglement-avoidance-Mar-2020-ver-6.pdf>

When comparing the economic impacts of these measures they are less severe than the regulatory alternative of a fishery closure, which occurred in California during the 2018-2019 season in response to increased whale entanglements. ODFW is pursuing management measures aimed to mitigate economic impacts where possible while effectively reducing the risk of whale entanglements to keep the commercial Dungeness fishery open.

Other measures not subject to the three year sunset date include a requirement to keep buoy lines taut, a prohibition on using buoy line markings that are required in any other West Coast fishery, the elimination of the two week “gear clean-up period”, the elimination of replacement tags (except in extraordinary circumstances or when due to a catastrophic loss), and reduction of the meat yield criteria for opening the season south of Cascade Head from 25% (rounding allowed) to 24% (no rounding).

The requirement to keep buoy lines taut and the prohibition on using buoy line markings required in another fishery are not expected to impact vessel revenues but may cause minor increases to operational costs as discussed below.

Elimination of the two week gear clean-up period and replacement tags are expected to have similar effects on revenue as the late-season pot limit reduction since both functionally reduce the number of pot-days (1 pot day equals 1 pot fished for 1 day) available to fishery participants. In contrast to the late-season measures, eliminating replacement tags

could affect any vessel participating after the first 30 days of the season, which is the date that vessels may currently apply for replacement tags (up to 10% of their pot limit). However, the industry wide impact of this measure on vessel revenue is expected to be minor because behavioral changes to increase efficiency (pulling and/or moving available pots more often) are more likely to be effective early in the season during the highest revenue months for most vessels. When implementation of the original pot limit program was reviewed after five years, the Department found pot limits had not appreciably changed the amount, rate, or distribution of harvest and revenue, and attributed the lack of any discernable economic impact to behavioral changes that increased efficiency. Provisions to issue replacement tags due to a catastrophic loss or an extraordinary event will remain in place.

Elimination of the two week post-season gear clean-up period is expected to have an economic impact on vessels that continue to fish through the end of the season. Many of these vessels are smaller and require several trips to remove all of their pots at the end of the season. Some of these vessels will likely need to begin removing their gear earlier in the season (presumably by about two weeks) to comply with the regulation. In order to mitigate the economic impact of this measure, the proposed regulations contain a provision to allow another crab permitted vessel to assist in removal of gear during the last two weeks of the season under a waiver issued by the Department. However, there is typically a cost associated with this type of assistance, so it is unknown how widely this mechanism may be used or how the cost of assistance compares with the cost of removing gear earlier in the season.

The change to the season opening meat yield criteria has the potential to negatively affect the ex-vessel price per pound of crab at the beginning of the season. It is not possible to estimate the potential impact, but it is expected to be minor. The criteria change itself is small (0.5%meat yield), and many other factors affect season start price. Retrospective analysis by the Department indicates the change would have only potentially affected the opening date, and therefore meat yield at the beginning of the season, in one of the last seven seasons. This change may also reduce retesting of areas that have not met criteria, which would reduce costs for the Department and the volunteer vessels that carry out the tests.

Housekeeping changes related to biotoxin management measures are not expected to have any fiscal or economic impacts.

(2)(a)There are 424 commercial Dungeness crab permit holders which will be subject to the rules.

(b)The type of small businesses most affected is commercial Dungeness crab fishers that fish later into the season. The majority of the harvest occurs during the first eight weeks of the season, and the smaller subset of those who continue to participate later in the season are more likely to be affected. This smaller subset is estimated to be 143 permit holders based on the 5-year average of crab permits that made landings in the "late season" (May-Aug).

(b) Additional compliance costs relating to reporting, recordkeeping and administrative activities are not anticipated at this time.

(c) The prohibition on using buoy lines with line markings that are required in another West Coast fishery may result in additional costs to crab fishers that participate in those fisheries, since they would not be allowed to use line with marks in the Oregon crab fishery and may need to purchase additional line. There may also be minor labor costs associated

with switching lines. The Washington coastal Dungeness crab fishery is currently the only West Coast fishery that has a line marking requirement, and that requirement only applies to line with one fathom (six feet) of the main buoy and the pot. Since crab gear is typically rigged so that short sections of line ("shots") can be added or removed as gear is moved to different depths, it is unlikely that any Oregon crab fishers who also fish in Washington would need to purchase all new line to comply with this measure, rather they could comply by purchasing only new top and bottom "shots". Other West Coast fisheries may implement require line marking requirements in the future, which could result in additional costs at that time.

Those who continue to participate in the late-season fishery will need to purchase a late season buoy tag at a cost of \$1.15 each. Permit holders will be allowed to purchase any amount of tags they choose to continue fishing within their reduced pot limit and will not be required to purchase the full allotment of late-season tags.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

These rules were developed with extensive public input from 2017-present, including representatives of small businesses. The Oregon Whale Entanglement Working Group (OWEWG) convened from 2017-2019 with Department and crab industry representation, to make preliminary and general recommendations on management measures for the Department to consider. The Department held a series of public meetings targeted to the commercial Dungeness crab industry in both 2018 (during the OWEWG process) and in 2019 (following the OWEWG process) in each of the coastal ports of Brookings, Coos Bay, Newport and Astoria. In the 2018 meetings the Department described the issue, it's relevance to Oregon commercial fisheries, and potential regulatory actions at a high level. In the 2019 meetings, the Department described a suite of detailed management options and alternatives, and received input on these from the public. The majority of over 170 attendees at the 2019 public meetings were owners or employees of small businesses. The Department has also met regularly with the Department's Oregon Dungeness Crab Advisory Committee (ODCAC) to discuss management approaches and details of the regulations. Membership of ODCAC was expanded in 2019 to include all Commissioners from the Oregon Dungeness Crab Commission and members of the OWEWG, and representatives of any other type of crab association in Oregon specifically to gain wider input on these regulations. The vast majority of ODCAC members are owners or employees of small businesses. The prohibition on using line markings required in another fishery and the change to season opening meat yield criteria were discussed and agreed upon through the Tri-State Dungeness Crab Committee, which includes a subset of ODCAC members as industry representatives.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

These rules were developed with extensive public input including the OWEWG process from 2017-2019, eight public meetings sponsored by the Department and held over two years (2018 and 2019), and regular consultation with the Department's Oregon Dungeness Crab Advisory Committee (ODCAC).

RULES PROPOSED:

635-005-0405, 635-005-0460, 635-005-0465, 635-005-0466, 635-005-0480, 635-005-0485

AMEND: 635-005-0405

RULE SUMMARY: This regulatory package implements a suite of management measures to reduce the risk of whales becoming entangled in commercial crab fishing gear.

CHANGES TO RULE:

635-005-0405

Requirement for Ocean Dungeness Crab Permit ¶¶

(1) It is unlawful to take, land or possess Dungeness crab from the ocean Dungeness crab fishery without first obtaining an Ocean Dungeness Crab Permit issued pursuant to ORS 508.931 or 508.941. An Ocean Dungeness Crab Permit is not required for vessels that are engaged solely in setting gear for a permitted vessel and which do not retrieve, retain or possess Dungeness crab.¶

(2) It is unlawful for a wholesaler, canner, or buyer to buy or receive Dungeness crab taken in the ocean Dungeness crab fishery from a vessel for which the permit required by this rule has not been issued.¶

(3) If the Commission establishes a vessel crab pot limitation or allocation system beyond the 2002-03 ocean Dungeness crab season, August 14, 2001 is the control date for eligibility criteria related to past participation in the ocean fishery.¶

(4) A Single Delivery License shall not be substituted for an Ocean Dungeness Crab Permit. Once a vessel has obtained an Ocean Dungeness Crab Permit, Dungeness crab may be landed by the vessel using a combination of an Ocean Dungeness Crab Permit and a Single Delivery License in lieu of a commercial fishing and boat license. However, crab may not be landed more than twice in any one ocean Dungeness crab fishing season using Single Delivery Licenses.¶

(5) Effective December 1, 2006, the amount of Dungeness crab gear allocated to a permit required under section (1) above will be determined as follows:¶

(a) The allocation will be based on documented landings of ocean Dungeness crab into Oregon, Washington (excluding landings from the Puget Sound Fishery), or California, using valid Oregon fish receiving tickets, or equivalent valid documents from the states of Washington or California, from December 1, 1995 through August 14, 2001;¶

(b) The Dungeness crab gear allocation will be the highest number of pots and rings in aggregate the vessel qualifies for during the six qualifying seasons, December 1 of one year through September 15 of the next year (except through August 14, in 2001);¶

(c) A Dungeness crab gear allocation of 200 shall be assigned to a permit with landings less than 15,020 pounds in the 1995 to 1996 season, and 4,010 pounds in the 1996 to 1997 season, and 5,170 pounds in the 1997 to 1998 season, and 7,083 pounds in the 1998 to 1999 season, and 13,160 pounds in the 1999 to 2000 season, and 8,940 pounds in the 2000 to 2001 season;¶

(d) A Dungeness crab gear allocation of 300 shall be assigned to a permit with minimum landings of 15,020 pounds in the 1995 to 1996 season, or 4,010 pounds in the 1996 to 1997 season, or 5,170 pounds in the 1997 to 1998 season, or 7,083 pounds in the 1998 to 1999 season, or 13,160 pounds in the 1999 to 2000 season, or 8,940 pounds in the 2000 to 2001 season; and¶

(e) A Dungeness crab gear allocation of 500 shall be assigned to a permit with minimum landings of 89,020 pounds in the 1995 to 1996 season, or 35,180 pounds in the 1996 to 1997 season, or 39,350 pounds in the 1997 to 1998 season, or 49,450 pounds in the 1998 to 1999 season, or 78,400 pounds in the 1999 to 2000 season, or 37,030 pounds in the 2000 to 2001 season.¶

(6) The Ocean Dungeness Crab Permit required by section (1) of this rule is in addition to and not in lieu of the commercial fishing and boat license required by ORS 508.235 and ORS 508.260.¶

(7) No vessel may hold more than one Ocean Dungeness Crab Permit at any one time.¶

(8) Unless otherwise provided, Ocean Dungeness Crab Permits must be purchased by December 31 of the year the permit is sought for renewal.¶

(9) Applications for Ocean Dungeness Crab Permits shall be in such form and contain such information as the Department may prescribe. Proof of length of a vessel may be required at the time of application.¶

(10) Notwithstanding section (5) of this rule, effective for calendar years 2021 through 2023, from May 1 through August 14 the amount of Dungeness crab gear allocated to a permit required under section (1) of this rule shall be reduced to 80 percent of the amount allocated under section (5) of this rule. A permit assigned a Dungeness crab gear allocation per section (5) of this rule of:¶

(a) 200 shall be assigned a Dungeness crab gear allocation of 160;¶

(b) 300 shall be assigned a Dungeness crab gear allocation of 240; or¶

(c) 500 shall be assigned a Dungeness crab gear allocation of 400.

Statutory/Other Authority: ORS 506.036, 506.109, 506.119, 506.129

Statutes/Other Implemented: ORS 506.109, 506.129, 506.306, 508.926, 508.931

AMEND: 635-005-0460

RULE SUMMARY: This regulatory package implements a suite of management measures to reduce the risk of whales becoming entangled in commercial crab fishing gear.

CHANGES TO RULE:

635-005-0460

Harvest Areas - Dungeness Crab Fishery ¶

(1) Oregon Dungeness crab permits are valid only in Oregon state waters and the Pacific Ocean in federal waters south of an east-west line extending westward at 46° 15' 00" North Latitude (Oregon/Washington border) and north of an east-west line at 42° 00' 00" North Latitude (Oregon/California border).¶

(2) Effective for calendar years 2021 through 2023, from May 1 through August 14 it is unlawful to place, operate, or leave commercial Dungeness crab gear seaward of the 30 fathom curve (defined by latitude and longitude) as shown in Title 50 Code of Federal Regulations Part 660 Section 71. Any commercial Dungeness crab gear found seaward of the 30 fathom curve during the effective dates shall be considered derelict and may be retrieved per 635-005-0490.

Statutory/Other Authority: ORS 506.036, 506.109, 506.119, 506.129

Statutes/Other Implemented: ORS 506.109, 506.129

AMEND: 635-005-0465

RULE SUMMARY: This regulatory package implements a suite of management measures to reduce the risk of whales becoming entangled in commercial crab fishing gear.

CHANGES TO RULE:

635-005-0465

Closed Season in Pacific Ocean and Columbia River

(1) It is unlawful to take, land or possess Dungeness crab for commercial purposes from the Pacific Ocean or Columbia River from August 15 through December 1, 08:59 AM.¶

(2) The season opening for the commercial Ocean Dungeness crab fishery may be delayed in one or more fishing zones based on the results of crab quality testing. The Pre-season Testing Protocol for the Tri-State Coastal Dungeness crab Commercial Fishery (hereafter, "Tri-State Protocol") specifies the process for establishing fishing zones (section VI) and coordinating the opening of the fishery in Washington, Oregon, and California north of Point Arena (sections IV and V). Therefore, the following sections of the Tri-State Protocol (~~August 2019~~ [INSERT REFERENCE WHEN AVAILABLE]) are hereby incorporated into Oregon Administrative Rule by reference:¶

(a) Section IV - Season Opening Criteria.¶

(b) Section V - Test Fishing and Process for Setting the Season Opening Date.¶

(c) Section VI - Procedure for Establishing Fishing Zones. As used in the Tri-State Protocol "fishing" means any operation of Dungeness crab fishing gear to take, possess on board, or land Dungeness crab for commercial purposes, except setting Dungeness crab gear for another vessel as allowed per OAR 635-005-0405(1). In the event that crab quality tests do not meet the criteria for opening the season on December 1, the Director shall adopt temporary rules delaying the season in accordance with the Tri-State Protocol.¶

(3) It is unlawful to land, receive or buy, Dungeness crab in the first thirty days of the ocean Dungeness crab fishery from a vessel that has not been certified by officials of the State of Oregon, Washington, or California to have been free of Dungeness crab before fishing in the ocean Dungeness crab fishery. In the event the area between Gray's Harbor, Washington and Point Arena, California is divided into zones with different season opening dates, the ocean Dungeness crab fishery refers to the fishery in that zone for the purposes of this rule.¶

(4) In the event the area between Gray's Harbor, Washington and Point Arena, California is divided into zones with different season opening dates, the transfer of a permit from one vessel to another is suspended from the earliest season opening date through thirty days after the latest season opening date, except in the event a vessel is unintentionally destroyed due to fire, capsizing, sinking, or other event.¶

(5) Upon a determination by the Department that catch in Oregon's ocean Dungeness crab fishery after May 31 is greater than ten percent of the catch in the previous December 1 through May 31 period, the Director shall adopt a temporary rule closing the commercial season until the following December 1.¶

[Publications: Publications referenced are available from the Department.]

Statutory/Other Authority: ORS 506.036, ORS 506.109, ORS 506.119, ORS 506.129

Statutes/Other Implemented: ORS 506.109, ORS 506.129

AMEND: 635-005-0466

RULE SUMMARY: This regulatory package implements a suite of management measures to reduce the risk of whales becoming entangled in commercial crab fishing gear.

CHANGES TO RULE:

635-005-0466

Dungeness Crab Closure or Evisceration Requirement Based on Biotoxin Testing

(1) For the purposes of this rule, unless context requires otherwise, the following definitions apply:¶

(a) "Biotoxin management zone" means one or more harvest areas that due to test results the Oregon Department of Agriculture, in order to protect public health from domoic acid or other biotoxin concerns, has so designated in accordance with OAR 603-025-0410.¶

(b) "Harvest area" means a section of waters of this state or the Pacific Ocean off Oregon delineated for crab traceability purposes in accordance with OAR 635-006-0201.¶

(2) During any open commercial Dungeness crab season, if a biotoxin management zone is designated due to a single crab sample result at or above 20 ppm in the meat, it is unlawful to:¶

(a) Land Dungeness crab taken for commercial purposes from any biotoxin management zone that was so designated due to a single crab sample result of 20 ppm or above in the meat or into a harvest area within a biotoxin management zone that an affected crab sample was taken from starting at 12:01 on the date of harvest of the affected sample; and¶

(b) Land crab taken for commercial purposes from any harvest area within a biotoxin management zone where all crab samples were below 20 ppm in the meat unless the conditions set forth in OAR 603-025-0410(6) are met, starting at 12:01 am on the date that test results are issued.¶

(3) During any open commercial Dungeness crab season, it is unlawful to land Dungeness crab taken for commercial purposes from any biotoxin management zone that was so designated due to a single crab sample result at or above 30 ppm in the viscera and below 20 ppm in the meat unless the conditions set forth in OAR 603-025-0410(6) are met, starting from:¶

(a) The date and time of the landing 12:01 am on the date of harvest of the crab sample that was at or above 30 ppm in the viscera and below 20 ppm in the meat, if the landed Dungeness crab taken for commercial purposes was taken from a harvest area where such result was taken; or¶

(b) The date and time of the biotoxin management area designation 12:01 am on the date that test results are issued, if the Dungeness crab taken for commercial purposes was not taken from a harvest area where a crab sample result was at or above 30 ppm in the viscera and below 20 ppm in the meat.

Statutory/Other Authority: ORS 506.036, ORS 506.109, ORS 506.119, ORS 506.129

Statutes/Other Implemented: ORS 506.109, ORS 506.129

AMEND: 635-005-0480

RULE SUMMARY: This regulatory package implements a suite of management measures to reduce the risk of whales becoming entangled in commercial crab fishing gear.

CHANGES TO RULE:

635-005-0480

Dungeness Crab Buoy Tag and Gear Marking Requirements ¶¶

It is unlawful for commercial purposes to:¶¶

(1) Use commercial Dungeness crab gear in the Columbia River or Pacific Ocean unless the gear is individually marked with a surface buoy bearing, in a visible, legible and permanent manner, the buoy brand and buoy color(s) of the owner, and the Department buoy tag, provided that:¶¶

(a) The buoy brand consists of letters and/or numbers, and the buoy brand and buoy color or color combination are registered with and approved by the Department; The buoy color or color combination shall be submitted to the Department as a color photograph for registration;¶¶

(b) Only one unique buoy brand and one buoy color or color combination shall be registered to any one permitted vessel;¶¶

(c) All Dungeness crab gear fished by a permitted vessel must use only the Oregon buoy brand number and at least one buoy with the buoy color or color combination registered to that vessel in the area off of Oregon;¶¶

(d) The Department shall issue crab buoy tags to the owner of each commercial crab permit in the amount determined by OAR 635-005-0405(5);¶¶

(e) All buoy tags eligible to a permit holder must be purchased from the Department at cost and attached to the gear prior to setting gear;¶¶

(f) Buoys attached to Dungeness crab gear must have the buoy tag securely attached to the buoy closest to the gear at the end away from the buoy line; and¶¶

(g) Additional buoy tags to replace lost tags will be issued by the Department as follows:¶¶

~~(A) As of the first business day after 30 days following the season opening in the area fished, up to ten percent of the tags initially issued for that season; or~~¶¶

~~(B) For a catastrophic loss, as defined in ORS 635-005-0240; or~~¶¶

~~(C) If the Director finds that the loss of buoy tags was:~~¶¶

~~(i) Due to an extraordinary event;¶¶~~

~~(ii) The loss was minimized with the exercise of reasonable diligence; and¶¶~~

~~(iii) Reasonable efforts were taken to recover lost buoy tags and associated fishing gear.¶¶~~

~~(D) Upon receipt of the declaration of loss required by subsection (1)(g)(E) of this rule, and a request for replacement tags under sub-subsection (1)(g)(C) of this rule, the Director or the Director's designee may provide an opportunity for the permit holder requesting the replacement tags to describe why the buoy tag loss meets the criteria for replacement under subsection (1)(g)(C) of this rule. The Director or the Director's designee shall provide the Director's order to the permit holder and to the Department's License Services. The permit holder may appeal the Director's findings to the Fishery Permit Review Board under OAR 635-005-0425.¶¶~~

~~(E) Permit holders (or their alternative designated on the buoy tag order form) must obtain, complete, and sign a declaration of loss under penalty of perjury in the presence of an authorized Department employee. The declaration shall state the number of buoy tags lost, the location and date where lost gear or tags were last observed, and the presumed cause of the loss.¶¶~~

(2) Possess on a vessel, use, control, or operate any Dungeness crab gear which does not have a tag affixed to the individual pot or ring identifying the gear as belonging to that vessel, a surface buoy bearing the Department buoy brand registered to that vessel, and a Department buoy tag issued by the Department to that vessel, as pursuant to ORS 509.415, except:¶¶

(a) To set gear as allowed under OAR 635-005-0405; or¶¶

(b) Under a waiver granted by the Department to allow one time retrieval of permitted Dungeness crab gear to

shore by another crab permitted vessel provided that:¶

(A) The vessel is incapacitated due to major mechanical failure or destroyed due to fire, capsizing, or sinking;¶

(B) Circumstances beyond the control of the permit holder as defined by undue hardship in OAR 635-005-0240 occurred;¶

(C) A Request must be in writing and a waiver approved and issued prior to retrieval; and¶

(D) A copy of the waiver must be on board the vessel making the retrieval (Contact Department of Fish and Wildlife Licensing Services, Salem for guidelines).¶

(c) Under a waiver granted by the Department to allow one time change of buoy tags associated with a Dungeness crab permit transfer under OAR 635-005-0440 provided that:¶

(A) A request must be in writing and a waiver approved and issued prior to change of buoy tags; and¶

(B) A copy of the waiver must be on board the vessel making the change of buoy tags (Contact Department of Fish and Wildlife Licensing Services, Salem for guidelines).¶

(d) Under a waiver granted by the Department to allow one time retrieval of permitted Dungeness crab gear to shore by another crab permitted vessel from August 1 through August 14 provided that:¶

(A) A Request must be in writing and a waiver approved and issued prior to retrieval; and¶

(B) A copy of the waiver must be on board the vessel making the retrieval (Contact Department of Fish and Wildlife Licensing Services, Salem for guidelines).¶

(e) When retrieving derelict Dungeness crab gear as pursuant to OAR 635-005-0490 or 635-005-0491;¶

(ef) A vessel may transit through the Columbia River and the Pacific Ocean adjacent to Oregon while possessing Dungeness crab gear not bearing Oregon buoy tags or Oregon buoy branded surface buoys, provided that the vessel is authorized and en route to participate or returning from participating in the Dungeness crab fishery of an adjacent state; or¶

(fg) When operating crab rings in bays or estuaries, only a tag affixed to the individual ring is required.¶

(3) Use commercial Dungeness crab gear in the Columbia River or Pacific Ocean with a line mark that is required for any state or federal fishery, other than the Oregon Dungeness crab fishery, operating in the U.S. West Coast EEZ, or the state waters of Washington, Oregon, or California.¶

(4) Effective for calendar years 2021 through 2023, from May 1 through August 14, possess on a vessel, use, control, or operate commercial Dungeness crab gear in the Columbia River or Pacific Ocean unless the gear is individually marked with a secondary Department buoy tag issued by the Department to that vessel in addition to the buoy tag required under section (1) of this rule, provided that:¶

(a) The primary buoy tag shall remain attached as required per section (1) of this rule;¶

(b) The secondary buoy tag shall be securely attached to the buoy closest to the gear at the end away from the buoy line;¶

(c) The Department shall issue secondary buoy tags to the owner of each commercial crab permit in the amount requested by the permit owner, not to exceed the amount determined by OAR 635-005-0405(10);¶

(d) Secondary buoy tags must be purchased from the Department at cost and attached to the gear as of the effective date but no earlier than two weeks before the effective date; and¶

(e) The exceptions found in sections (2)(b) through (2)(g) of this rule also apply to this section; and¶

(f) Any commercial Dungeness crab gear found in the ocean or Columbia River without a secondary buoy tag during the effective dates of this section shall be considered derelict and may be retrieved per 635-005-0490.

Statutory/Other Authority: ORS 506.036, ORS 506.109, ORS 506.119, ORS 506.129

Statutes/Other Implemented: ORS 506.109, ORS 506.129

AMEND: 635-005-0485

RULE SUMMARY: This regulatory package implements a suite of management measures to reduce the risk of whales becoming entangled in commercial crab fishing gear.

CHANGES TO RULE:

635-005-0485

Dungeness Crab Gear Prohibitions ¶¶

It is unlawful for commercial purposes to:¶¶

- (1) Place, operate, or leave Dungeness crab gear in the Pacific Ocean, Columbia River or in any bay or estuary during the closed season, except that in only the Pacific Ocean and Columbia River, Dungeness crab gear may be placed no more than 73 hours immediately prior to the date the Dungeness crab season opens. ~~In addition, unbaited Dungeness crab gear with open release mechanisms may be left in the Pacific Ocean (not including the Columbia River) for a period not to exceed 14 days following the closure of the Dungeness crab season.~~¶¶
- (2) Have Dungeness crab gear deployed in the Pacific Ocean or Columbia River more than 14 days without making a landing of Dungeness crab.¶¶
- (3) Remove, damage, or otherwise tamper with crab buoy, pot or ring tags except:¶¶
 - (a) When lawfully applying or removing tags on the vessel's buoys, pots or rings; or¶¶
 - (b) When lawfully removing tags on crab gear retrieved under a Post-Season Derelict Gear Permit pursuant to OAR 635-005-0491 and after the gear has been registered by state officials.¶¶
- (4) Attach one crab pot or ring to another crab pot or ring by a common groundline or any other means that connects Dungeness crab gear together.¶¶
- (5) Take crabs for commercial purposes by crab pots from any bay or estuary except the Columbia River.¶¶
- (6) Take or fish for Dungeness crab for commercial purposes in the Columbia River or Pacific Ocean adjacent to the state of Oregon unless a Dungeness crab gear allocation has been issued to the permit required under OAR 635-005-0405(5).¶¶
- (7) Deploy or fish more Dungeness crab gear than the number of pots and rings in aggregate assigned by the Dungeness Crab Pot Allocation Certificate or to use any vessel other than the vessel designated on the Dungeness Crab Pot Allocation Certificate, except to set gear as allowed under OAR 635-005-0405.¶¶
- (8) Use Dungeness crab gear with more line than is reasonably necessary to compensate for tides, currents, and weather.

Statutory/Other Authority: ORS 506.036, 506.109, 506.119, 506.129

Statutes/Other Implemented: ORS 506.109, 506.129

OFFICE OF THE SECRETARY OF STATE
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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 635
DEPARTMENT OF FISH AND WILDLIFE

FILED
07/30/2020 4:35 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Commercial Crab Whale Entanglement Risk Reduction Measures

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/11/2020 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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Filed By:
Lisa Kingsley
Rules Coordinator

NEED FOR THE RULE(S):

Due to a 6-year elevated level of ESA-listed marine life entanglements in commercial Dungeness crab fishing gear across the West Coast (including gear from Oregon waters), this amended rule is needed to reduce the risk of whale entanglement in crab gear and improve identification of fishing gear in future whale entanglement events.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Staff report prepared for the Oregon Fish and Wildlife Commission hearing on 9/11/2020.

A copy of the rules and the other documents relied upon for this rulemaking [the above document(s)] are available from the Oregon Department of Fish and Wildlife, Fish Division, 4034 Fairview Industrial Drive SE, Salem, Oregon 97302-1142, between the hours of 8:00 a.m. and 4:00 p.m., on normal working days, Monday through Friday.

FISCAL AND ECONOMIC IMPACT:

This is one part of a larger package of whale entanglement mitigation measures will result in economic and fiscal impacts as described below. These moderate regulatory steps are expected to maintain fishery activity, have minor economic impacts, and avoid more extreme measures such as a fishery closure, which was implemented in the commercial Dungeness crab fishery in California in 2019.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) The Oregon Department of Fish and Wildlife (ODFW) and Oregon State Police (OSP) could experience fiscal impacts, as implementation and enforcement of measures may result in adjustments to staff time allotted to specific activities. While these staff time impacts cannot be estimated in monetary terms, it can be determined that these effects are not expected to be significant enough to affect the net number of agency staff. The maximum potential reduction to ODFW ad valorem revenues can be estimated at \$13,346 per year for three years totaling a maximum loss of \$40,038. This number comes from an estimated overall impact to ex-vessel values of \$567,895 per year. Since our ad valorem rate is 0.235%, \$13,346 would represent the lost ODFW revenue, as this is the foregone collected ad valorem relating to the 20% pot limit reduction. While these are the maximum potential impacts to agency revenue, we expect the actual revenue impacts to ODFW from these rules to be minimal.

There are no expected direct economic impacts to local governments. However, it should be noted that port communities could be affected by indirect or induced economic effects of the measures discussed below.

Implementation of the full set of measures will have economic impacts to all Dungeness commercial crab fishers, although there will be a larger economic impact to participants that typically continue crabbing later into the season (after April). This regulatory package would implement three key measures to reduce risk of whale entanglement, each of which has a potential economic impact of reducing catch and hence potentially resulting in foregone revenue:

- A 20% reduction of pot limits across all ocean Dungeness crab permits.
- Prohibition on commercial crabbing outside of 30 fathoms.
- Requirement for an additional "late season" buoy tag after the start date of provisions (measure aimed to identify derelict or abandoned gear not in use).

These measures would be implemented from May 1 through the end of the season on August 14th for three years (2021 through 2023). After three years, the rules would be vacated unless the Commission extends or modifies them, so any impacts are limited to this timeframe absent additional Commission action. The sunset date will allow evaluation of the conservation effectiveness of the management measures, as well as, the economic effects of these measures.

It is difficult to measure the exact economic impact of these measures as there are many moving biological and behavioral variables. In regards to collective fishery costs resulting from reduced pot limits in the later portion of the season, this is particularly difficult to predict, as some participants may find ways to be more efficient with fewer pots or move their gear more often. The state of Washington implemented a pot limit reduction of 33% from July 1 – September 15 in 2019, and assessed the resulting economic impacts as part of a permanent rule-making action in January, 2020. Washington Department of Fish and Wildlife staff compared catch data from the reduced pot limits to the same timeframe in other seasons and did not note any differences. For context, the average ex-vessel value of the Oregon fishery in the past five crab seasons from May through the end of the season on August 14 is 2.8 million dollars or 5% of the total season value. Approximately 34% of the 424 permittees participate in the fishery during this time period. It is reasonable to assume that the maximum ex-vessel revenue loss, absent any behavioral changes or inherent biological responses, would be equal to the percent reduction in allowable pots under the proposed measures. Twenty percent of the 5-year average ex-vessel value from May through the end of the season would represent an estimated \$567,895, or 1% annual loss of ex-vessel revenue to the fishery as a whole. Only \$554,549 of this will directly impact crab fisherman, as the other \$13,346 will be impacts to ODFW ad valorem. Impacts to the public would not be distributed evenly across participants because patterns of participation (i.e., time of year) vary greatly across the fleet. This also does not account for potential downstream impacts to other businesses that buy and sell crab or provide

services to the fleet. There has been additional economic impact work by The Research Group on behalf of the Oregon Dungeness Crab Commission (ODCC). The Research Group used an existing bio-economic crab fishery model to evaluate economic impacts of early season closures and effort reductions of 10, 20, and 30 percent starting in April, May and June. The report on that work is available on the ODCC website here: <https://oregondungeness.org/wp-content/uploads/2020/04/ODCC-final-report-and-presentation-ec-impact-ODFW-proposed-measures-whale-entanglement-avoidance-Mar-2020-ver-6.pdf>

When comparing the economic impacts of these measures they are less severe than the regulatory alternative of a fishery closure, which occurred in California during the 2018-2019 season in response to increased whale entanglements. ODFW is pursuing management measures aimed to mitigate economic impacts where possible while effectively reducing the risk of whale entanglements to keep the commercial Dungeness fishery open.

Other measures not subject to the three year sunset date include a requirement to keep buoy lines taut, a prohibition on using buoy line markings that are required in any other West Coast fishery, the elimination of the two week "gear clean-up period", the elimination of replacement tags (except in extraordinary circumstances or when due to a catastrophic loss), and reduction of the meat yield criteria for opening the season south of Cascade Head from 25% (rounding allowed) to 24% (no rounding).

The requirement to keep buoy lines taut and the prohibition on using buoy line markings required in another fishery are not expected to impact vessel revenues but may cause minor increases to operational costs as discussed below.

Elimination of the two week gear clean-up period and replacement tags are expected to have similar effects on revenue as the late-season pot limit reduction since both functionally reduce the number of pot-days (1 pot day equals 1 pot fished for 1 day) available to fishery participants. In contrast to the late-season measures, eliminating replacement tags could affect any vessel participating after the first 30 days of the season, which is the date that vessels may currently apply for replacement tags (up to 10% of their pot limit). However, the industry wide impact of this measure on vessel revenue is expected to be minor because behavioral changes to increase efficiency (pulling and/or moving available pots more often) are more likely to be effective early in the season during the highest revenue months for most vessels. When implementation of the original pot limit program was reviewed after five years, the Department found pot limits had not appreciably changed the amount, rate, or distribution of harvest and revenue, and attributed the lack of any discernable economic impact to behavioral changes that increased efficiency. Provisions to issue replacement tags due to a catastrophic loss or an extraordinary event will remain in place.

Elimination of the two week post-season gear clean-up period is expected to have an economic impact on vessels that continue to fish through the end of the season. Many of these vessels are smaller and require several trips to remove all of their pots at the end of the season. Some of these vessels will likely need to begin removing their gear earlier in the season (presumably by about two weeks) to comply with the regulation. In order to mitigate the economic impact of this measure, the proposed regulations contain a provision to allow another crab permitted vessel to assist in removal of gear during the last two weeks of the season under a waiver issued by the Department. However, there is typically a cost associated with this type of assistance, so it is unknown how widely this mechanism may be used or how the cost of assistance compares with the cost of removing gear earlier in the season.

The change to the season opening meat yield criteria has the potential to negatively affect the ex-vessel price per pound of crab at the beginning of the season. It is not possible to estimate the potential impact, but it is expected to be minor. The criteria change itself is small (0.5%meat yield), and many other factors affect season start price. Retrospective analysis by the Department indicates the change would have only potentially affected the opening date, and therefore meat yield at the beginning of the season, in one of the last seven seasons. This change may also reduce retesting of areas that have not met criteria, which would reduce costs for the Department and the volunteer vessels that carry out the tests.

Housekeeping changes related to biotoxin management measures are not expected to have any fiscal or economic impacts.

(2) There are 424 commercial Dungeness crab permit holders, which will be subject to the rules.

(a)The type of small businesses most affected is commercial Dungeness crab fishers that fish later into the season. The majority of the harvest occurs during the first eight weeks of the season, and the smaller subset of those who continue to participate later in the season are more likely to be affected. This smaller subset is estimated to be 143 permit holders based on the 5-year average of crab permits that made landings in the "late season" (May-Aug).

(b) Additional compliance costs relating to reporting, recordkeeping and administrative activities are not anticipated at this time.

(c) The prohibition on using buoy lines with line markings that are required in another West Coast fishery may result in additional costs to crab fishers that participate in those fisheries, since they would not be allowed to use line with marks in the Oregon crab fishery and may need to purchase additional line. There may also be minor labor costs associated with switching lines. The Washington coastal Dungeness crab fishery is currently the only West Coast fishery that has a line marking requirement, and that requirement only applies to line with one fathom (six feet) of the main buoy and the pot. Since crab gear is typically rigged so that short sections of line ("shots") can be added or removed as gear is moved to different depths, it is unlikely that any Oregon crab fishers who also fish in Washington would need to purchase all new line to comply with this measure, rather they could comply by purchasing only new top and bottom "shots". Other West Coast fisheries may implement require line marking requirements in the future, which could result in additional costs at that time.

Those who continue to participate in the late-season fishery will need to purchase a late season buoy tag at a cost of \$1.15 each. Permit holders will be allowed to purchase any amount of tags they choose to continue fishing within their reduced pot limit and will not be required to purchase the full allotment of late-season tags.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

These rules were developed with extensive public input from 2017-present, including representatives of small businesses. The Oregon Whale Entanglement Working Group (OWEWG) convened from 2017-2019 with Department and crab industry representation, to make preliminary and general recommendations on management measures for the Department to consider. The Department held a series of public meetings targeted to the commercial Dungeness crab industry in both 2018 (during the OWEWG process) and in 2019 (following the OWEWG process) in each of the coastal ports of Brookings, Coos Bay, Newport and Astoria. In the 2018 meetings the Department described the issue, it's relevance to Oregon commercial fisheries, and potential regulatory actions at a high level. In the 2019 meetings, the Department described a suite of detailed management options and alternatives, and received input on these from the public. The majority of over 170 attendees at the 2019 public meetings were owners or employees of small businesses. The Department has also met regularly with the Department's Oregon Dungeness Crab Advisory Committee (ODCAC) to discuss management approaches and details of the regulations. Membership of ODCAC was expanded in 2019 to

include all Commissioners from the Oregon Dungeness Crab Commission and members of the OWEWG, and representatives of any other type of crab association in Oregon specifically to gain wider input on these regulations. The vast majority of ODCAC members are owners or employees of small businesses. The prohibition on using line markings required in another fishery and the change to season opening meat yield criteria were discussed and agreed upon through the Tri-State Dungeness Crab Committee, which includes a subset of ODCAC members as industry representatives.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

These rules were developed with extensive public input including the OWEWG process from 2017-2019, eight public meetings sponsored by the Department and held over two years (2018 and 2019), and regular consultation with the Department's Oregon Dungeness Crab Advisory Committee (ODCAC).

AMEND: 635-005-0490

RULE SUMMARY: This is one part of a regulatory package that will implement a suite of management measures to reduce the risk of whales becoming entangled in commercial crab fishing gear.

CHANGES TO RULE:

635-005-0490

Derelict Dungeness Crab Gear ¶¶

Derelict Dungeness crab gear may be retrieved from the ocean, including the Columbia River, and transported to shore provided that:¶¶

- (1) The retrieving vessel holds a valid boat license, issued pursuant to ORS 508.260, and the captain and crew of that vessel hold valid commercial fishing license(s), issued pursuant to ORS 508.235.¶¶
- (2) The number of derelict Dungeness crab gear which may be retrieved per trip are as follows:¶¶
 - (a) From the opening of the ocean Dungeness crab fishery in the area where retrieval takes place until the second Monday in June of the same ocean Dungeness crab season: 25 derelict pots and rings in aggregate;¶¶
 - (b) From the second Monday in June through August ~~28~~14: 50 derelict pots and rings in aggregate;¶¶
 - (c) August ~~29~~15 through October 31: an unlimited number of derelict pots and rings may be retrieved.¶¶
- (3) Upon retrieval from the ocean or Columbia River, the Dungeness crab gear must be un-baited.¶¶
- (4) Crab from the retrieved Dungeness crab gear shall not be retained, except crab of legal size and sex may be retained by vessels holding a valid Dungeness crab permit, at such times and in such areas that Dungeness crab may otherwise be legally taken for commercial purposes.¶¶
- (5) Immediately upon retrieval of Dungeness crab gear, the retrieving vessel operator must document in the retrieving vessel's logbook the date and time of pot or ring retrieval, number of retrieved crab pots or rings in aggregate, location of retrieval, and retrieved Dungeness crab gear owner identification information.¶¶
- (6) Any retrieved Dungeness crab gear must be transported to shore during the same fishing trip that retrieval took place.

Statutory/Other Authority: ORS 506.036, 506.109, 506.119, 506.129

Statutes/Other Implemented: ORS 506.109, 506.129, 506.306