



May 28, 2013

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Re: Request to Initiate Emergency Rulemaking for Suction Dredge Mining (14 CCR §228)

Dear Mr. Bonham and Mr. Mattox,

The Karuk Tribe, Center for Biological Diversity and a coalition of fishermen's and environmental organizations hereby ask the Department of Fish and Wildlife to initiate an emergency rulemaking to amend its suction dredge mining regulations. Despite the statutory moratorium, instream suction dredge mining is occurring now, as demonstrated by video and pictures submitted with this letter. Miners are modifying their suction dredges so that their equipment can be operated outside of the Department's regulatory definition. Petitioners ask the Department to amend its definition on an emergency basis, so that the definition comports with Fish and Game §5653, the authorizing statute. This situation cannot wait for a full notice and comment process as it would allow an entire season of unregulated suction dredge mining, resulting in serious impacts to the environment, public health, and important cultural resources.

Factual Background

On March 20, 2013, the Center for Biological Diversity, Karuk Tribe, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Friends of the River, California Sportfishing Protection Alliance, Foothill Angler's Coalition, North Fork American River Alliance, Upper American River Foundation, Central Sierra Environmental Resource Center, Environmental Law Foundation and Klamath Riverkeeper filed a Petition for an Administrative Rulemaking to Amend the Department's Suction Dredge Mining Regulations. The same parties join this Petition and all matters submitted on March 20th are incorporated herein.

The March 20th petition asked the Department to undergo an emergency rulemaking to amend 14 CCR §228(a), which defines suction dredge mining as an activity that requires the concurrent use of a motor, a hose and a sluice box. As of that date, Petitioners knew of miners' intentions to modify their dredges (*e.g.* detach the sluice box so the motor and hose will operate independently of the sluice) in order that their machines will technically fall outside of the Department's regulatory definition of suction dredge mining. The miners contend that the moratorium, which explicitly prohibits suction dredging, does not apply to the modified equipment. (Fish and Game §5653.1(b).)

On April 19, 2013, the Department denied Petitioners' request for an emergency rulemaking on grounds that there was insufficient evidence of "operation-specific environmental effects." (Denial Letter, April 19, 2013, p. 4.) The Department acknowledged that "certain members of the public appear to have designed or devised ways to mine instream using some, but not all of the required equipment included in the Department's current definition." (*Id.*)

The Department stated that it would reconsider its denial if presented with evidence that suction dredge mining is in fact occurring. It stated: "An increase in the extent to which persons undertake these or other instream mining methods that fall outside of the current regulatory definition or other law, along with evidence of related environmental effects, could highlight the need for related changes to existing law to protect and conserve California's fish and wildlife resources. Any such changes will have the support of the Department." (*Id.*)

With this letter, Petitioners submit substantial evidence that demonstrates the need for emergency action. Specifically, Petitioners provide video, pictures, declarations of personal eyewitness accounts, reports to government officials, an investigative report by USFS, and accounts from the suction dredge mining community. The evidence, discussed in detail below, demonstrates that suction dredge mining is occurring, that its frequency has increased over the past several weeks and that it is expected to escalate as summer approaches. Petitioners also provide a brief overview of the well-documented harm that is caused by suction dredge mining.

Proposed Regulation

Petitioners seek an emergency rulemaking to amend 14 CCR §228(a). The regulation currently states:

(a) Definition

(1) Suction Dredging. For purposes of Section 228 and 228.5, the use of vacuum or suction dredge equipment (i.e. suction dredging) is defined as the use of a motorized suction system to vacuum material from the bottom of a river, stream or lake and to return all or some portion of that material to the same river, stream or lake for the extraction of minerals. A person is suction dredging as defined when all of the following components are operating together:

- a. A hose which vacuums sediment from a river, stream or lake; and
- b. A motorized pump; and
- c. A sluice box.

(2) Motorized. For purposes of these regulations, "motorized" means a mechanical device powered by electricity or an internal combustion engine.

Petitioners propose that the regulation be amended as follows:

(a) Definition

- (1) Suction Dredging. For purposes of Section 228 and 228.5, ~~the use of vacuum or suction dredge equipment (i.e. suction dredging)~~ is defined as the use of any motorized suction system to vacuum or suction dredge equipment to vacuum or suction material from the bottom of a river, stream or lake ~~and to return all or some portion of that material to the same river, stream or lake~~ for the extraction of minerals. ~~A person is suction dredging as defined when all of the following components are operating together: These regulations do not apply to non-motorized, non-vacuum or suction-based recreational mining activities, such as panning for gold.~~
 - ~~a. A hose which vacuums sediment from a river, stream or lake; and~~
 - ~~b. A motorized pump; and~~
 - ~~c. A sluice box.~~
- (2) Motorized. For purposes of these regulations, “motorized” means a mechanical device powered by electricity or an internal combustion engine.
- (3) For purposes of these regulations, “bottom of a river, stream or lake” includes the bed of the water body, side channels and flood plain up to the point of vegetation.

Thus, under the proposed changes, 14 CCR §228(a)(1) would read:

“Suction Dredging. For purposes of Section 228 and 228.5, suction dredging is defined as the use of any vacuum or suction dredge equipment to vacuum or suction material from the bottom of a river, stream or lake for the extraction of minerals. These regulations do not apply to non-motorized, non-vacuum or suction-based recreational mining activities, such as panning for gold.

Section (a)(2) would remain the same. The proposed changes would create 14 CCR §228(a)(3), which would read: “For purposes of these regulations, ‘bottom of a river, stream or lake’ includes the bed of the water body, side channels and flood plains up to the point of vegetation.”

Petitioners believe these changes will bring the regulation into conformity with the statute, which states: “The use of any vacuum or suction dredge equipment by any person in any river, stream, or lake of this state is prohibited, except as authorized under a permit...” that is issued under regulations that comply with CEQA and the APA. (Fish and Game §5653(a); *see also* Fish and Game §5653.1(b), (e).)

The statute broadly prohibits, without qualification, all equipment used to engage in suction dredge mining. (Fish and Game §5653(a).) Thus, the addition of the word “any,” the deletion of the words “motorized suction system,” and striking the last sentence (requiring the concurrent use of a motor, hose and sluice) harmonize the regulation with the statute.

In addition, adding the language from the moratorium (non-motorized recreational activities, such as panning) clarifies which activities are within the regulatory framework and which are

without. (Fish and Game §5653.1(e).) The addition of the words “non-vacuum or suction-based” make it clear that “non-motorized recreational activities, such as panning for gold” is a clarification of which activities are outside of the regulatory scheme; the regulation does not carve out an exemption. Under the current circumstances, it is good policy to provide as clear as possible a demarcation of the regulated activities, without narrowing the statute’s broad prohibition.

Last, we believe that it is important to strike the phrase “and to return all or some portion of that material to the same river, stream or lake” because the miners have already begun to circumvent this requirement by transferring streambed material into large buckets, rather than returning it to the river. In addition, the focus of this statute is the suction aspect of the activity, not the deposition of river material. Thus, removing the phrase clarifies what activities are within the regulatory scheme, it curbs mischief and ultimately it assists, rather than impedes, the enforcement of the regulation.

On-The-Ground Evidence to Demonstrate the Necessity For Emergency Action

The following summarizes the evidence that Petitioners submit to demonstrate the need for emergency action:

1. Video, April 18th, Independence Bridge, Klamath River
2. Video, April 20th, Independence Bridge, Klamath River
3. Video, May 19th, Independence Bridge, Klamath River and Portuguese Creek
4. Pictures, April 16th, Portuguese Creek
5. Pictures, May 6th, Portuguese Creek
6. Picture, May 20th, Klamath River
7. Documentation of eyewitness accounts (declarations and reports to government officials) of suction dredge mining on the Klamath and Salmon Rivers on April 9, April 14, April 18, April 22, April 24, and April 25.
8. Personal accounts from miners that they engaged in suction dredge mining on the Klamath River on May 11, 2013 and, more generally, in March through May 2013.
9. USFS Report of Investigation of suction dredge mining on Morehouse Creek, Salmon River on April 19, 2013.
10. Accounts from the miners that they are engaging in suction dredge mining on the Klamath River.

Detailed Account of Evidence:

Starting as early as April 9, 2013, Petitioners have witnessed suction dredge mining on rivers and streams in Northern California, particularly on the Klamath and Salmon Rivers. (*See*, Declaration of Leaf Hillman In Support of Request to Initiate Emergency Rulemaking, ¶4.) Thus, suction dredge mining has in fact been occurring long before it would have been allowed if the moratorium were not in effect. (14 CCR §228.5.)

On April 14, 2013, James Peterson, who is employed by the Mid-Klamath Watershed Council, witnessed suction dredge mining while kayaking on Morehouse Creek, off of the lower Salmon River. (Declaration of James Peterson in Support of Request to Initiate Emergency

Rulemaking, ¶¶1-2.) Mr. Peterson witnessed two miners with a sluice box approximately 4 feet from the river bank. (*Id.*, ¶2.) The miner working the dredge was pouring sand and rocks into the sluice. The sediment was being delivered directly back into the river and could be seen downstream for 80 to 100 feet. (*Id.*) When Mr. Peterson informed the miners that they were violating the moratorium, the miners indicated that they were indifferent. (*Id.*, ¶3.) Subsequently, Mr. Peterson returned to the same location and saw large piles of tailings ranging from 15 to 50 feet from the wetted edge of the river. (*Id.*, ¶4.) The miners also had a floating hookah system hidden in the rocks. (*Id.*) It was a Brownie Third Lung System with a buoyancy compensator and compressor. (*Id.*) In his declaration, Mr. Peterson states:

I have been living and kayaking on the Salmon River since September of 2011. I can honestly say that I am on that river more than anyone else in the area. I paddle down the mainstem on an average of 3-4 times a week and take notice of what is happening.

I see firsthand all the time what the miners are doing and I believe that most of the time it is illegal. Not being a law enforcement agent there is little I can do. I see the dredges and pumps they hide along the river banks. I see spots that no one else sees, unless they paddle. Consequently, I have access to the remotest sections of the river. The miners go to these spots because they are far removed from the public eye.

I watch every day as more and more of the river banks are torn up with little to no regard for the adverse effects that come from these activities. If needed I would guide anyone down to a multitude of spots where these activities are happening.

(*Id.*, ¶6.) On April 15, 2013, Mr. Peterson reported the mining to LeRoy Cyr with the US Forest Service.

On April 16, 2013, a Fisheries Technician for the Karuk Tribe's Natural Fisheries Department¹ took pictures of a suction dredge on the Klamath River, mile marker 57.92 on Highway 96, just upstream of Portuguese Creek. The same technician witnessed suction dredge mining at the same location on April 22, 2013. However he did not have his camera with him on second occasion. True and correct copies of the five pictures taken on April 16 are attached hereto as Exhibit 1.

Two days later, on April 18, 2013, another Fisheries Technician for the Karuk Tribe's Natural Fisheries Department took a video of a miner suction dredging near Independence Bridge on the Klamath River (milepost 28.5). The video has been uploaded to youtube and can be viewed at: <http://www.youtube.com/watch?v=kRigmPsfSnE>. The technician narrated what he witnessed:

As you can see he's dredging. He may not be putting it through a sluice but he's endlessly dredging. He's not putting it into a closed

¹ Certain individuals will be identified by their place of employment and job title, rather than their name, due to the controversy that surrounds this issue.

container as I understood was supposed to be [the miners'] way of getting around the loophole.

So, these guys are clearly illegally dredging and the ironic thing is that they wouldn't even be legally allowed to dredge yet it if it were legal. So, I'm going to call the Game Warden. Hopefully these guys... This is ridiculous.

On the same day, April 18, 2013, the incident was reported to officials from the Department of Fish and Wildlife, the Regional Water Board and the United States Forestry Service ("USFS"). Earl Crosby, Watershed Restoration Coordinator for the Karuk Tribe Department of Natural Resources, reported the incident via email as part of his job responsibilities. A true and correct copy of the email exchange, dated April 8 through April 19, 2013, which also contains a link to the video, is attached to the Declaration of Earl Crosby in Support of the Request to Initiate Emergency Rulemaking, Exhibit A, p. 1; *see also* ¶¶3, 4.

Also on April 18, 2013, Mr. Crosby reported another incidence of suction dredge mining, this one occurred about 300 yards upstream of Morehouse Creek on the Salmon River. (Crosby Declaration, ¶¶3, 4; Ex. A, p. 2.)

On April 19, 2013, LeRoy Cyr, District Fish Biologist with USFS in the Lower Trinity, Orleans and Ukunom Ranger District, investigated Mr. Peterson's April 15th report. Mr. Cyr submitted an Interoffice Memorandum to the District Ranger, which describes his investigation of the mining on Morehouse Creek, on the lower Salmon River. A true and correct copy of the April 19, 2013 Interoffice Memorandum is attached hereto as Exhibit 2. Mr. Cyr found that "it is apparent that someone is actively working this lower bank within this stream reach." (*Id.*, p. 9.) Consistent with the declaration of Mr. Peterson, saw:

... a floating hookah system that was left there on the upper bank. It was a 'Brownie's third lung system' which is often used to dive without conventional scuba equipment. This particular one had a buoyancy compensator and a compressor. These are rather expensive systems which can easily run over \$3K.

(*Id.*, p. 7.) Mr. Cyr also reported:

According to local reports, it appears most of this activity is occurring on the weekends. However, we did observe some mining activity today... some additional leads have been reported to federal and state law enforcement officers regarding certain individuals and vehicles seen parked along the highway near this location in the past.

(*Id.*, p. 9.)

On April 20, 2013, the Karuk Tribe Fisheries Technician, who took the April 18th video, shot another video of a miner suction dredge mining on Portuguese Creek. The video was uploaded

to youtube and can be viewed at:

<http://www.youtube.com/watch?v=zK3P2iFVD60&feature=youtu.be>. The technician narrated what he witnessed:

Unfortunately, there are trees in the way, but you can see a one-man pontoon boat, a dredge and some other floating contraption out there. There's no sluice attached to the dredge but there's no functional difference in what they are doing from running a dredge with a sluice.

So, this is illegal activity. It also happens to be April 20th today and we are well before legal dredging season would have started even before the moratorium.

On April 24, 2013, Leaf Hillman, the founder of the Karuk Tribe's Natural Resources Department and Director of the Karuk Tribe's Natural Resources Environmental Policy, witnessed suction dredge mining on the Salmon River. (Hillman Declaration, ¶4.)

Mr. Hillman served as Vice Chairman of the Karuk Tribe and has lived and worked on the Klamath and Salmon Rivers his entire life. (*Id.*, ¶¶2, 3.) Mr. Hillman submitted a sworn declaration stating that it is his opinion, based on his extensive familiarity with these rivers, that suction dredge mining stopped after the moratorium took effect in the summer of 2009. Recently, however, he has seen suction dredge mining again and it is occurring with increasing frequency over the last several weeks. (*Id.*)

On April 25, 2013, Mr. Crosby reported another incidence of suction dredge mining at Portuguese Creek. The incident was reported to Thomas Mutz, United States Forest Service. However, it appears that USFS's enforcement policy was influenced by the Department's definition of suction dredge mining. Mr. Mutz wrote: "We'll take a closer look at this but it appears there are 2 floating platforms and not suction dredges *as defined by the State Department of Fish and Wildlife*." A true and correct copy of this email exchange is attached to Mr. Crosby's Declaration as Exhibit B (emphasis added).

On May 6, 2013, Earl Crosby took pictures of a miner suction dredge mining near Independence Bridge on the Klamath River. The pictures were taken from mile marker 27.85 on Highway 96. Slightly downstream, Mr. Crosby witnessed another dredge in the water. True and correct copies of the May 6th pictures are attached to Mr. Crosby's declaration as Exhibits C, D, E.

The location of the May 6th suction dredge mining is particularly disturbing to the Karuk Tribe because it occurred at a well-known Karuk Pickyowish Ceremonial Site, which is considered sacred by the Karuk People. (Hillman Declaration, ¶5.) This sacred site is used by Karuk practitioners to perform ceremonial rituals and prayers during the annual Karuk world renewal ceremonies. (*Id.*) The site is central to the success of the ceremony. (*Id.*)

Like Mr. Hillman, Mr. Crosby also submitted a declaration stating that, based on his twelve years of working for the Karuk Tribe, it is his opinion that suction dredge mining stopped after the moratorium went into effect in the summer of 2009 and that it has started again in the last several

weeks. (Crosby Declaration, ¶¶2, 6.) His opinion is based on the number of reports he has received citing suction dredge mining on the Klamath and Salmon Rivers. (*Id.*) It is his opinion that suction dredge mining is starting to increase in frequency and that that is expected to continue through the summer. (*Id.*)

The May 6th incident was reported to Rick Banko, Mike Carion, and Charlton Bonham with the Department. Phone calls were also exchanged with AC Warrington and Lt. Krug. A true and correct copy of the email exchange, dated April 8 through May 6, is attached to Mr. Crosby's declaration as Exhibit F.

On May 19, 2013, video of suction dredge mining was taken by the Klamath-Salmon Media Collaborative. Video was taken on the Klamath River and Portuguese Creek. In one day, the Collaborative four independent suction dredge miners on the Klamath and Portuguese Creek, 3 at the former and one at the latter. The video was uploaded to youtube and can be viewed at: <http://www.youtube.com/watch?v=sQBEJlydDI4&feature=youtu.be>. The videographer narrated what she witnessed:

[Klamath River] So it looks like the sluice box is going into that bucket. OK, we'll come back to these guys later. I'm going to go back down to where I'm parked, which is also where another dredge is.

This is a truck with The New 49'ers sticker on it. And I can't get a good shot of the dredge down below. But, you can see this [rope] is going down to the river. This is looking over the edge [of the embankment]. There's Independence Bridge... and you can see the campsite.

Now, this is looking across the [Klamath] river from the [Highway] 96. Downriver from that truck, downriver from Independence [bridge], you can see the turbid water coming through. There's a generator sitting on top. Maybe a 100 yards downriver of that, there is another machine running... There's a campsite up here and he's going to what maybe is the sluice you can... see just a little ways away. I'm going to go back to the guy who's just a little bit up from him.

[Camera subsequently focuses on image of another truck with a New 49'ers sticker on it.]

So this is May 19, 2013 and I'm downriver of Portuguese Creek. There's quite a few RVs parked up here but I think I can only see just this one dredge. [Camera subsequently shows image of several RVs parked nearby.]

On May 20, 2013, the Karuk Tribe's Water Quality Program took a picture of two suction dredges on the Klamath River, mile marker 56 on Highway 96, just downriver from the USGS gauge. A true and correct copy of the picture is attached hereto as Exhibit 3.

In addition to the evidence gathered by the Petitioners, we submit a sample of the accounts of suction dredge mining from the miners themselves. According to the New 49'ers, an organization that represents miners, suction dredge mining has been occurring since March 2013. Their March 2013 Newsletter featured an article entitled, "Suction Mining Has Already Started on the Klamath River!" A true and correct copy of article, published in The New 49'ers Newsletter, First Quarter, Vol. 27, No. 3, March 2013, is attached hereto as Exhibit 4. The story describes a miners' invention of a suction dredge that was created for the explicit purpose of circumventing the moratorium, by removing the sluice box from the hose and motor. (*Id.*, pp. 1-4.)

As a preface to the March 2013 story, Mr. McCracken, President of the New 49'ers, writes: I have received queries from people about what our Club rules are regarding underwater suction mining... My answer is that as long as your device does not meet the regulatory definition of a 'suction dredge' (motorized suction through a hose into a sluice box), and you stay within our simple guidelines, ***you are more than welcome to come with your inventions and keep all the gold you can find!***" (*Id.*, p. 1 (emphasis in original).) McCracken further states: "I am expecting to have [his] most productive underwater mining season ever on the Klamath River this summer... Having said that, I thought you might be interested to know that we already have members getting started." (*Id.*, p. 1-2 (emphasis in original).)

The New 49'ers May 2013 newsletter features a story entitled, "California Gives the Green Light on Underwater Suction Mining!" The article states that the Department provided a "green light" for the miners to suction dredge this summer when it denied Petitioners request for an emergency rulemaking. The article features a suction dredge miner who invented a dredge that runs without a sluice, the sole purpose of which is to circumvent the moratorium. The article includes a picture of him suction dredge mining with his machine. (*Id.*, p. 3.) In addition to the picture of the one miner, the article more generally states that: "Some members are already mining..." (*Id.*, p. 8.) A true and correct copy of the article, published in the New 49'ers Newsletter, Second Quarter, Vol. 27, No. 5, May 2013, p. 1-2, is attached hereto Exhibit 5.

On May 11, 2013, a miner posted an account entitled "My Adventure Has Begun..." The posting describes his experience suction dredge mining on the Klamath River on a claim held by the New 49'ers. The miner states that he "was there ten days and was able to get into the water for five or six of those days," working a couple of different sections of the claim with his 2" nozzle and suction dredge. A true and correct copy of the miner's account, which was posted on www.goldgold.com at <http://bb.bbboy.net/thenew49ers-viewthread?forum=2&thread=1073>, is attached hereto as Exhibit 6.

Thus, as demonstrated by Petitioners' videos, pictures, personal eyewitness accounts, governmental memoranda and the miners' own accounts, suction dredge mining is occurring on California's rivers now. Moreover, based on their own accounts it is apparent that the miners intend to continue to suction dredge mine through this summer unless the Department takes action.

Harm Caused by Suction Dredge Mining

The harm caused by suction dredge mining is well documented. In March of 2012, the Department completed a 2-1/2 year environmental review of its suction dredge mining regulatory

program under CEQA.² The Department documented nine separate significant impacts, which the report states are non-mitigable. (*See, generally*, Draft SEIR, Chapters, 4-6.) Even under the improved 2012 regulations, the Department describes suction dredge mining's impacts to be "unacceptable" and "unpalatable and inconsistent with the Public Trust Doctrine and its trustee charge under the Fish and Game Code." (Findings of Fact of the California Department of Fish and Wildlife, Suction Dredge Permitting Program, Final SEIR, March 16, 2012, pp. 2, 80.)

In 2009, the State Legislature also found that suction dredge mining has serious impacts on human health and the environment. The resulting moratorium prohibits suction dredge mining until regulations are in place that mitigate all significant impacts. The Legislature adopted the bill as urgency legislation, stating:

The Legislature finds that suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state, and, in order to protect the environment and the people of California... it is necessary that this act take effect immediately.

(2009 Cal. Legis. Serv. Ch. 62, ¶2 (S.B. 670); codified at Fish and Game §5653.1.) Since 2009, the Legislature amended this statute twice, each time requiring more environmentally protective conditions to be met before the moratorium will lift.³

Other state agencies have also expressed their opinion that suction dredge mining causes serious impacts to human health (mercury exposure), water quality, protected species and Native American cultural resources, such as burial grounds and sites of religious importance. For example, on April 2, 2013, the Department submitted a report to the Legislature regarding the nature of its suction dredge mining program. The Report included letters from the California Department of Public Health, California State Lands Commission, Department of Toxic Substances Control, Native American Heritage Commission and the State Water Board. (1018 Legislative Report, pp. 21-38; *see also*, pp. 3, 20.) Each agency discussed the serious harm caused by suction dredge mining and expressed its preference that the current moratorium remain in effect permanently. (*Id.*)

The State Legislature and the Department's sister government agencies expected that suction dredge mining would not occur (if at all) until *more* environmental protections were in place – not *less*. However, suction dredge mining is now occurring without any regulation, because the modified equipment allegedly falls outside of the Department's regulatory framework. (14 CCR 228(a).) If suction dredging's harm is "unpalatable" with improved regulations, it is certainly "unacceptable" without any regulation at all. The Department is mandated, as trustee of fish and wildlife, to protect these resources. (Fish and Game §§711.7(a), 1802.) An emergency exists, as discussed below, that needs immediate attention to prevent serious harm to human health, the

² California Environmental Quality Act (Public Resources Code §21000, *et. seq.*) ("CEQA"). The Department initiated the CEQA review on October 26, 2009 by filing its Notice of Preparation. The Final Subsequent Environmental Impact Report ("SEIR") was adopted March 16, 2012.

³ Added by Stats.2009, c. 62 (S.B.670), § 1, eff. Aug. 6, 2009. Amended by Stats.2011, c. 133 (A.B.120), § 6, eff. July 26, 2011; Stats.2012, c. 39 (S.B.1018), § 7, eff. June 27, 2012.

environment and cultural resources.

Statement of Emergency under the APA

Under the California Administrative Procedures Act (“APA”), an agency has the discretion to issue emergency regulations to address an emergency that needs prompt action. (Gov’t Code §11346.1(b), (e); *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 305.) When an emergency situation arises and action must be taken before a full notice and public comment period can transpire, public policy interests allow the agency to forego the traditional notice and comment. (*Wilson*, at 312; *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177, 195.)

The APA defines an “emergency” as a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. (Gov’t Code §11342.545.) Courts have ruled that the term “emergency” should be given a practical, commonsense meaning: “[E]mergency has long been accepted in California as an unforeseen situation calling for immediate action. This is ‘the meaning of the word that obtains in the mind of the lawyer as well as in the mind of the layman.’” (*Wilson*, at 305, quoting *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 276-277, and quoting *San Christina etc. Co. v. San Francisco* (1914) 167 Cal. 762, 773.)

In *Wilson*, *Schenley*, *Sonoma County* and *San Cristina*, Courts ruled in favor of an agency’s exercise of its discretion to adopt emergency regulations when the legal landscape had shifted and there was insufficient time to undergo a fully noticed rulemaking. For example, in *Wilson*, a new federal law would have made provisions for prenatal care of undocumented women illegal, unless the state adopted new regulations before a short deadline. The *Wilson* Court found that the shift in the legal landscape, the nature of the regulated activity, and the lack of time to promulgate regulations in the normal way justified the agency’s exercise of discretion to adopt emergency regulations. (*Wilson*, 57 Cal.App.4th at 305, 312.) The *Schenley* Court found that the agency did not abuse its discretion when promulgating emergency regulations when other new and rather unclear regulations were about to go into effect and clarity was needed in order to implement the statutory scheme. (*Wilson*, at 305, citing *Schenley*, at 195.)

In the present situation, a change in the available technology has allowed the miners, in mass, to circumvent the regulatory definition of suction dredge mining. The Department cannot wait to engage in a normal rulemaking process to rectify the situation because an entire season of unregulated suction dredge mining will have passed. The situation is an emergency because, if the Department does not act, serious harm will occur to the public health, water quality, protected species and unique cultural resources. As discussed above, the harm that results from suction dredge mining is well documented. (*See, e.g.*, Final SEIR Statement of Reasons, pp. 1, 80; Draft SEIR Chapters 4-6; 1018 Report, dated April 2, 2013, with attached letters (pp. 21-38, *see also*, pp. 3, 20); 2009 Cal. Legis. Serv. Ch. 62, ¶2 (S.B. 670).)

Furthermore, the Department is bound to enforce the provisions of the Fish and Game Code and cannot allow a “loophole” to impede its trustee obligations. (Fish and Game §§711.7, 1802.) The Legislature has made clear its intention that the prohibition on suction dredge mining is only to be lifted under conditions in which the environment will be protected, whether that be the issuance

of a permit (Fish and Game §5653(a)) or the Department's adoption of more protective regulations. (Fish and Game §5653.1(b).) The plain language of the respective statutes "prohibit" "any use of vacuum or suction dredge equipment." (*Id.*) Moreover, every time the Legislature has acted, it has increased the environmental protections over this activity.⁴

Exemption under CEQA

The record contains substantial evidence to support a finding that the emergency rulemaking is exempt under CEQA. The emergency regulations will be adopted to protect and preserve the environment, public health and cultural resources. Thus, no CEQA review is necessary. (*See Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 472-74.)

There are two categorical exemptions applicable here:

Class 7 consists of actions taken by regulatory agencies, as authorized by state law or local ordinance, to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. (14 CCR §15307.)

Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. (14 CCR §15308.)

If the agency finds the project is exempt from CEQA under any of the stated exemptions, no further environmental review is necessary. (*Magan*, 105 Cal.App.4th at 473, citing *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 112-113, 115.)

The adoption and implementation of emergency regulations is within the regulatory powers granted to the Department under the APA and the Fish and Game Code. (Gov't Code §11346.1(b), (e); Fish and Game §5653.) An emergency rulemaking is requested to ensure that suction dredge mining does not occur in any stream, river or lake during the operation of the moratorium. The emergency rulemaking will protect human health, the environment and important cultural resources, as discussed above. In fact, *not* conducting the rulemaking will result in significant impacts to the environment. Therefore, the emergency rulemaking is exempt from CEQA review.

The situation here is analogous to that in *Magan*. The Court found that a Class 8 categorical exemption applied to an ordinance which phased out, and then eliminated, the land application of sewage sludge based on the Board of Supervisor's finding that land application of the sludge results in harm to human health and the environment. (*Magan*, at 470-71.) The Court gave little credence to the challenger who claimed that the Board should have undergone a CEQA review due to

⁴ Fish and Game §5653 (Added by Stats.1986, c. 1368, § 23, Amended by Stats.1988, c. 1037, § 1; Stats.1994, c. 775 (A.B.1688), § 1). Fish and Game §5653.1 (Added by Stats.2009, c. 62 (S.B.670), § 1, eff. Aug. 6, 2009. Amended by Stats.2011, c. 133 (A.B.120), § 6, eff. July 26, 2011; Stats.2012, c. 39 (S.B.1018), § 7, eff. June 27, 2012).

potential environmental impacts that were not reviewed. (*Id.*, at 470; *c.f. International Longshoremen's and Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal.App.3d 265, 275-76 (Court ruled that a categorical exemption did not apply to a rule amendment that doubled NOx emissions, as Legislature determined that NOx are dangerous substances).)

Like *Magan*, no exception to the exemptions exists in the present situation. Such exceptions include an activity that would otherwise be categorically exempt, but is not because of “unusual circumstances” which create a “reasonable possibility” that the activity will have a significant effect on the environment. (14 CCR §15300.2(c); *Magan*, at 473-74, quoting *Davidon Homes*, 54 Cal.App.4th at 112-113, 115.) The Department and the Legislature have both found that suction dredge mining *when regulated* causes significant impacts to human health, cultural resources and the environment. Thus, preventing the activity from occurring *without* regulation will not result in adverse impacts to the environment, requiring CEQA review.

Conclusion

The evidence submitted with this letter demonstrates that suction dredge mining has been occurring since at least April 9th. An upswing in activity began in mid- to late April and by late May one videographer witnessed 4 dredgers in a single day. Moreover, the miners have been announcing that it is ‘open season’ on suction dredge mining this summer and, by their own accounts, they intend to be out suction dredge mining in large numbers unless the Department takes action. This activity is unregulated and unless the Department takes immediate action, the miners are going to cause significant destruction to California’s rivers. Thus, we ask that the Department initiate an emergency rulemaking to amend 14 CCR 228(a) so that it comports with the spirit and the letter of Fish and Game §5653.

Thank you for your attention to this matter. We look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read "Lynne R. Saxton". The signature is fluid and cursive, with the first name being the most prominent.

Lynne R. Saxton
Attorney for Petitioners