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**BY E-MAIL AND FIRST CLASS MAIL**

Charlton H. Bonham
Director, California Department of Fish and Wildlife
1416 Ninth Street, 12th Floor
Sacramento, CA 95814

Dear Director Bonham:

I write on behalf of The New 49'ers, Inc. in opposition to the Petition for Administrative Rulemaking to Amend the Suction Dredge Permitting Program Regulations filed by the Center for Biological Diversity *et al.* As set forth below, there is not remotely any emergency that would support utilization of emergency rulemaking procedures under the Government Code. This is primarily because there is no evidence that any appreciable amount of mining is occurring that could produce adverse environmental effects, and even if there were, the effects identified by petitioners do not constitute "emergencies". The issues raised by petitioners are already pending in litigation before the Superior Court of San Bernardino County, including the "loophole" claims they have filed,[1] and there is no reason for the Department to again address the issues before guidance is received from the courts.

**California Law Requires a Real "Emergency" to Grant the Petition**

The pertinent provisions of the Government Code define "emergency" as "a situation that calls for immediate action to avoid *serious harm* to the public peace, health, safety, or general welfare". Government Code § 11342.545 (emphasis added). This definition is consistent with a large body of statutory definitions outside the fiscal context where the term "emergency" requires "extreme peril," "clear and imminent danger," and so forth.[2] Prior to

[1] First Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, filed Mar. 14, 2013 in Judicial Council Proceeding No. JCPDS4720, ¶ 57.

[2] *See, e.g.*, Government Code § 8558 ("Local emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county, city and county); Public Resources Code § 21060.3 ("Emergency" means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services); Health & Safety Code § 1797.70 ("Emergency" means a condition or situation in which an individual has a need for immediate medical attention); Welfare & Institutions Code § 5008(m) ("Emergency" means a situation in which action to impose treatment over the person's objection is

the legislative moratorium, suction dredge mining in California had been proceeding for decades with no hint of any emergency ever arising, and there is no hint of any bona fide emergency now.

Pursuant to Government Code § 11346.1(b)(2), to exercise emergency rulemaking authority, an agency must craft

> "a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency. The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies. . ."

In this context, particular attention is called to the need to distinguish between "technical, theoretical, and empirical" studies, for "speculation" about potential harm is plainly insufficient.

Nearly every assertion identified by petitioners constitutes speculation concerning potential *theoretical* impacts of an activity about which no empirical proof is provided whatsoever. Section 11346.1(b)(2) provides that: "A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency." This definition of inadequacy fits the petition like a glove.

As a matter of law, the Legislative moratorium cannot be construed as any mandate for emergency action. Pursuant to § 11346.1(b)(2), even"[t]he enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action". And the Legislature has not enacted any "urgency statute" in connection with the allegations of the petition.

**There Is No Evidence of Any Actual Activities Threatening the Environment, or a Serious Threat of Such Activities**

The only evidence offered of any potential activities involving what petitioners call the "theory of the loophole" are statements from the representative of a single operation, The New 49'ers, Inc. Statements of theory are not, of course, proof of actual activities causing "serious harm" (Government Code § 11342.545) meriting emergency regulations.

And even to the extent that any miners attempt to exploit the so-called "loophole," petitioners fail to disclose that members of The New 49'ers operate under extensive and soundly-enforced rules which eliminate any possibility of adverse environmental harm. The

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immediately necessary for the preservation of life or the prevention of serious bodily harm to the patient or others); Health & Safety Code § 1799.107(e) ("emergency services" includes, but is not limited to, first aid and medical services, rescue procedures and transportation, or other related activities necessary to insure the health or safety of a person in imminent peril).

rules may be reviewed at http://www.goldgold.com/operational-guidelines-for.html, and include the following

SPECIAL RULES FOR UNDERWATER SUCTION MINING:

1. Suction mining in the active waterway, or within 100 yards of the active waterway, must not use a "suction dredge" as defined by California's regulations (motorized pump generating suction through a hose to feed a sluice box) unless the operator possesses a valid California suction dredge permit. Read this for a more thorough discussion of the difference between a "dredge" and a motorized suction system.

2. No nozzle with an intake restriction ring larger than 4-inches in diameter may be used within 100 yards of an active waterway on New 49′er-controlled properties.

3. No excavation into the stream bank of an active waterway is allowed. This does not mean that bedrock cracks along the edge of a waterway cannot be worked. It means the bed material (rocks, sand and silt) must be left alone which rises up from the bedrock and creates a structure that holds the existing waterway in its path. This also means the stream bank may not be undermined or destabilized in any way.

4. Boulders and woody debris along the stream bank of an active waterway must be left alone.

5. Underwater suction mining without the use of a "dredge" is only allowed on our Klamath River properties between the Scott and Salmon Rivers on a year-round basis, and up the Klamath from its confluence with the Scott from the 4th Saturday in May through September 30. Underwater suction mining is permitted along our creek properties and the Scott River from July 1 to September 30. Underwater suction mining is permitted on the Salmon River from July 1 through September 15.

6. Underwater suction mining may not be pursued in any way that violates Water Quality standards, or exceeds Streambed Alteration standards. These are addressed in our Surface Mining Guidelines just above.

Members of The New 49'ers have been engaging in small-scale mining activities in the Klamath Basin for many years under cooperative arrangements with the U.S. Forest Service and the Department, and have not caused any conditions that might remotely be referred to as an "emergency".

More generally, petitioners' repeated allegations concerning "unregulated" mining are false. Notwithstanding the moratorium, miners remain forbidden from activities which

"substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake . . .". Fish and Game Code § 1602(a). The simple truth is that the activities of members of The New 49'ers and others are not substantial enough to fall within this prohibition and certainly not substantial enough to create even an appreciable risk of an "emergency," but in the unlikely event that some miner determined to do something of significance, the Department would have ample regulatory authority to stop him without the necessity of any emergency regulations.

Finally, the so-called "loophole" methods do not have the same volume capacity as suction dredging. Mr. McCracken has promoted the possibility of utilizing the technique to clean gold out of bedrock cracks, rather than moving substantial quantities of material. As a practical matter, even if miners begin to attempt to exploit the so-called "loophole," they will have substantially less impact than the suction dredgers and certainly cause no emergency.

**General Effects in the EIR Do Not Constitute an Emergency**

Petitioners refer to the suction dredge mining EIR for listings of potential effects, but none of these effects constitute an "emergency". The Department found that suction dredge mining under the new regulations would generally provide for no significant adverse effects on fish and wildlife, and raised questions about such things as the noise of small gasoline motors, possible encounters with cultural resources, and possible turbidity-related effects. There are activities going on throughout the State of California, including the operation of motor boats, not gold-related dredging, and even fishing and other recreational activities, which pose substantially the same risks, and manifestly have not called for the exercise of emergency regulatory power.

The notion of any appreciable risks to California's fish populations is particularly far-fetched. While biologists can theorize about effects that might arise, the only study attempting to quantify adverse effects of small-scale mining on fish populations concluded that "this analysis could not detect an effect averaged over good and bad miners"[3]—meaning those miners operating within work windows and other rules designed to protect fish and wildlife and those mining illegally and causing localized damage to banks and other resources.

**The Mercury Issue Does Not Represent an Emergency**

The only arguable distinction between small-scale mining and many other activities ongoing in California rivers is that the miners occasionally dig holes in river and stream bottoms deep enough to expose sediments that have lain undisturbed for many decades. These sediments might or might not be exposed by further erosive activities over time, and the activities do not add any toxic substances to the environment that are not already present in California's rivers and streams. A single tree falling in the river, a common event not

[3] P. Bayley, Response of fish to cumulative effects of suction dredge and hydraulic mining in the Illinois subbasin, Siskiyou National Forest, Oregon (April 2003). This study is included in the Administrative Record for the recent regulations.

regarded as an "emergency," can cause natural streambed erosion leading to exposure of the very sort of older sediments exposed by miners.

The mercury issue is based on a single report, defective for reasons amply demonstrated in the comments on the EIR,[4] and in substance crafted to attempt to manufacture a water quality issue out of whole cloth. No tangible harm to human health or fish and wildlife has ever been demonstrated from the mercury in California rivers, and a focus on this issue at the same time the State promotes mercury consumption in other contexts (*e.g.*, CFL light bulbs) is at best hypocritical. At most, a tiny fraction of fish sampled in California rivers have sometimes show mercury levels in excess of those recommended for human consumption, but no such detections have been or possibly could be linked to any modern mining activities.

For an harm to arise from mercury, a series of events, each of vanishingly small probability, would have to combine in a fashion never before observed in California or elsewhere: (1) a miner would have to locate a mercury hotspot underwater, (2) he would have to pick up the mercury, (3) the mercury would have to be free (not amalgamated to gold), (4) that the mercury would have to undergo a transformation into tiny particles not subject to capture in whatever device the miner is using ("flour"), (5) that the floured mercury could not settle out or recombine in the fashion that led it to be deposited in the first place; (6) the floured mercury would have to travel many miles downstream from mining areas in a fashion never seen; (7) the mercury would have to be deposited in warm, marshy, biologically-active flats of a type not present in most mining rivers in any relevant location; (8) the mercury would have to remain in place and other agents must be in place to methylate the mercury; (9) the mercury would then be dislodged and consumed by some creature; (10) the creature would have to be adversely affected by the mercury, or eaten by a human being suffering from nutritional deficiencies (selenium) generally unknown to occur; and (11) *any adverse effects arising from a chain of (1)-(10) would have to be outweighed by the positive effects of removing 99% or more of the mercury from the river in the first place.* The same chain of causality is required to demonstrate harm from any other sort of toxic materials miners might be imagined to dislodge from the bottom of California rivers and streams.

It is no small wonder, then, that no adverse effects of mercury releases associated with suction dredge mining have ever been documented. Petitioners' concerns about mercury are unscientific fearmongering falsely attacking an activity to which they are opposed on primarily aesthetic grounds that do not, as a matter of law, constitute an emergency. "I don't like to see miners in the rivers" is not "serious harm to the public peace, health, safety, or general welfare" within the meaning of Government Code § 11342.545

Petitioners advance no evidence that any of the theoretical mining techniques postulated by Mr. McCracken are associated with the return of mercury to the riverine

[4] The Alpers study considered by the Department in which the possibility of mercury flouring was imagined involved use of a "crashbox" technology no longer generally used in suction dredge mining, and involved use of a sluice box, not to be utilized in the theoretical mining methods identified by Mr. McCracken and cited by petitioners.

environment. Indeed, to the extent that suction hoses are utilized to obtain material for processing out of the river, evidence concerning suction dredging is not even pertinent. In fact, during the Alpers project (*see* n. 4), McCracken demonstrated that a catch container can recover 100% of the mercury from a known mercury hot spot. It is certainly not the case that use of suction hoses to remove sediments inherently causes mercury problems, and again, the technique is best seen as a method to *remove* mercury from the environment, for a net environmental benefit.

Finally, to the extent the mercury issue and others claimed by petitioners are outside the jurisdiction of the Department, as the Department has determined, the agency therefore lacks power to issue any emergency regulations based on such issues.

**Conclusion**

Should the Department determine to exercise emergency authority to change the present regulations, we will bring an action pursuant to Government Code § 11350(a) to invalidate any resulting regulations "upon the ground that the facts recited in the finding of emergency prepared pursuant to subdivision (b) of Section 11346.1 do not constitute an emergency within the provisions of Section 11346.1." We remind you that *California Medical Ass'n v. Brian* (1973) 30 Cal. App. 3d 637 and other authority establishes that "the facts stated in the declaration of an emergency are not conclusive on the courts . . .". *Id.* at 652. Through this letter we are also requesting immediate notice of any action taken by the Department.

Sincerely

James L. Buchal
Counsel to The New 49'ers, Inc.