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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

Coordination Proceeding Special Title (Rule 1550(b))	Judicial Council Proceeding No. JCCP4720
SUCTION DREDGE MINING CASES	**MINERS' JOINT OPENING BRIEF REGARDING THE CEQA/APA ISSUES RELATING TO THE 2012 SUCTION DREDGE MINING REGULATIONS AND OTHER MATTERS RELATING TO THE SUCTION DREDGE PERMITTING PROGRAM** Judge: Hon. Gilbert G. Ochoa Dept.: S36 Date: Time:
Included Actions:	
Karuk Tribe of California, *et al.* v. California Department of Fish and Game	RG 05211597 – Alameda County
Hillman, *et al.* v. California Department of Fish and Game	RG 09434444 – Alameda County
Karuk Tribe of California, *et al.* v. California Department of Fish and Game	RG 12623796 – Alameda County
Kimble, *et al.* v. Harris *et al.*	CIVDS 1012922 – San Bernardino County

Public Lands for the People, Inc. *et al.* v. California Department of Fish and Game	CIVDS 1203849 – San Bernardino County
The New 49ers *et al.* v. California Department of Fish and Game, *et al.*	SCCVCV 1200482 – Siskiyou County
Walker v. Harris, *et al.*	34-2013-80001439 – Sacramento County
Foley *et al.* v California Department of Fish and Game, *et al.*	SCCVCV-13-00804 – Siskiyou County
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INTRODUCTION AND SUMMARY OF ARGUMENT

The Miners in *Kimble*, *PLP* and *The New 49'ers* brought motions for summary adjudication based primarily on the grounds of Federal preemption relating to the State's statutory scheme, and the 2012 Regulations promulgated thereunder, for prohibiting suction dredge mining in the waters of the State of California. This Court's ruling of January 12, 2015, found that the State's statutory scheme, and the 2012 Regulations promulgated thereunder, were an unconstitutional prohibition on suction dredge mining on Federal land and that both were preempted by the Supremacy Clause of the United States Constitution.

In their complaints, *Petitioners/Plaintiffs* contend that the California Department of Fish & Wildlife ("DF&W") violated the California Environmental Quality Act ("CEQA"), Pub.Res.Code § 21000 *et seq.*; the CEQA Guidelines Cal.Code of Regs., Tit 14 § 15000 *et seq.*; and the Administrative Procedure Act, ("APA") Cal. Gov. Code § 11340 *et seq.* DF&W's misuse of the CEQA process produced results in violation of Federal law forbidding "materially interfere[nce] with prospecting, mining or processing operations or uses reasonably incident thereto". 30 U.S.C. § 612(b).

Because this Court set aside the 2012 Regulations as running afoul of this principle, the CEQA and APA issues with regard to those regulations, in the nature of procedural violations leading to a substantively defective product, are technically moot. Nevertheless, this Court has determined, on the basis of DF&W's insistence that the disputes are not moot, to proceed with the CEQA and APA challenges to the now-defunct 2012 regulations at a January 20, 2016 trial. That being the case, and pursuant to this Court's June 23, 2015 Stipulation and Order, the Miners provide pretrial briefing demonstrating the following points.

1. No FSEIR was required at all. DF&W defines the CEQA project as the regulation of suction dredging, a project which is in fact exempt from CEQA, because suction dredging regulation preceded CEQA by many years. California law forbids agencies from commencing subsequent or supplemental EIRs unless specified conditions apply, none of which are applicable here. While some of the parties stipulated to a Consent Decree requiring updated CEQA analysis for "certain parts of the Klamath, Scott and Salmon River watersheds", primarily for Coho

salmon, the rest are not bound by that Decree. Indeed, because DF&W breached the Consent Decree by far exceeding its scope, all parties are entitled to raise this argument.

2. The most important decision in applying CEQA is the baseline, for it is only by assessing environmental effects against some baseline that significance can be determined. DF&W fabricated its findings of significance—and the asserted need to limit dredging to reduce effects to less than significant—by establishing a "no dredging" baseline. The "no dredging" baseline created an artificial environment, in which asserted effects were greatly magnified, and destroyed the utility of the EIR as an informational document to analyze the impact of *changes* in the suction dredging program. DF&W also adopted, at the same time, a "2008 level dredging" baseline to minimize the economic impacts of its regulations. This was prejudicial agency conduct. The "no dredging" baseline was invalid and undermines the entire FSEIR.

3. Both CEQA and the APA require that where, as here, an agency makes significant changes to its proposals during the process, such proposals be recirculated for public review and comment. Here, the Department made drastic changes to the regulations, and allowed merely seventeen (17) days for comment, until March 5, 2012, and two (2) days thereafter, on March 7, 2012, issued the FSEIR. This was a sham of an administrative process, and alone requires setting aside the FSEIR.

4 & 5. The APA requires that agencies explain why they are doing what they are doing, cite the evidence supporting their actions, and consider less restrictive alternatives. Instead, the Department issued what are in substance hundreds of individual regulations with explanations therefor that do not meet the standards of the APA. We address some of the more egregious examples below.

6. The APA requires DF&W to prepare an analysis of the impacts of its regulatory choices upon California businesses, such as the numerous businesses who are plaintiffs in these coordinated cases, because DF&W is destroying them. Instead, the Department blithely assigned all impacts as arising from the unconstitutional moratorium, evading its responsibilities to craft regulations in a manner giving weight to minimizing regulatory burden.

7. DF&W Findings are, in numerous respects, not supported by substantial evidence. As the Supreme Court has noted, "common sense . . . is an important consideration at all levels of CEQA review". *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175. In a context where an administrative record on the order of 100,000 pages fails to identify a single documented example of harm to fish or wildlife, DF&W repeatedly finds there "may," or "might" be unspecified future harm. This dispute concerns the use of lawnmower-sized engines dispersed in remote areas operating as they have for sixty years. Common sense confirms a gross and prejudicial abuse of discretion for DF&W to drastically limit suction dredging operations based on what amounts to sheer speculation.

8 & 9. DF&W erroneously refused to recognize not only federal preemption, but also the existence of duplicative federal regulations. Its denials of any duplication, and failure to show the necessity of a second regulatory system for federal claim owners, violated the APA even without regard to federal preemption. So too did DF&W prejudicially ignore the constitutional rights of the miners to utilize California water, and its regulatory actions improperly infringe this constitutional right.

The Supreme Court has warned that "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement". *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576. This Court has already found such oppression of the Miners' federal statutory rights vital to the Nation's interests. DF&W's implementation of CEQA in this context is part and parcel of their continuing scheme of "oppression and delay".

I. DF&W SHOULD NOT HAVE PREPARED AN FSEIR

A. Further CEQA Analysis Was Not Required Because the "Project" Predates CEQA.

The plain language of CEQA exempts suction dredging from CEQA coverage. The SEIR was prepared to provide information "about the potential environmental effects of the proposed Suction Dredge Permitting Program (Program or Proposed Program". (A005523) Crucially for several of the legal arguments presented here, "The proposed project, for the purposes of this

SEIR,[1] consists of the proposed amendments to CDFG's previous regulations governing suction dredge mining throughout California, and suction dredging activities conducted consistent with those amendments." (*Id.*) At all relevant times, DF&W acknowledged an "existing permitting program". (*Id.*) There is no dispute that suction dredging was proceeding at the time of the Consent Decree, which erroneously ordered additional CEQA consideration. (*See infra* Point II(C).)

In California, suction dredging began in the 1950s. The California legislature passed SB 1459 in 1961 creating § 5653 of the Fish and Game Code regulating suction dredging (A044104) and DF&W issued regulations and began issuing permits in 1962.

CEQA did not become effective until November 23, 1970. (*See* 14 Cal. Code Regs. § 15261.) Section 21169 of the Public Resources Code and 14 Cal. Code Regs. § 15261 exempt from the operations of CEQA any project carried out or approved before the effective date of CEQA. While it is true that the exemption does not apply where "a public agency proposes to modify the project in such a way that the project might have a new significant effect on the environment", (14 Cal Code Regs. § 15261(a)(2)), nothing in the Consent Decree, or otherwise, compelled the Department to make such modifications.

Thus continued regulation of suction dredging was entirely exempt from CEQA. For example, in *Nacimiento Reg'l Water Mgmt. Advisory Comm'n v Monterey County Water Resources Agency* (1993) 15 Cal.App.4th 200, the court held that an annual water release schedule was part of the ongoing operation of a reservoir built before enactment of CEQA and was therefore exempt from its jurisdiction. The agency's water release schedule was found to be an intrinsic part of the normal operation of the reservoir. In determining the schedule for water releases, the agency was not expanding its facilities or changing its procedures for releases but was merely adjusting the operation of existing facilities to meet fluctuating conditions. Similarly, in *North Coast Rivers Alliance v Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 859, the court followed *Nacimiento* in holding that interim renewal of pre CEQA water contracts was

[1] "Project" is defined in § 21065(c) of the Public Resources Code.

covered by this exemption. *See also Simon v. City of Los Angeles* (1973), 63 Cal.App.3d 455 (police use of park predated CEQA).

Insofar as the "project" concerns the dredging itself, it is also exempt. No changes to suction dredging have taken place which would have triggered a CEQA review. The operation, location, and seasons of a suction dredge remain generally the same as when they were first introduced in the 1950s. The only changes are to the technology itself. Suction dredges have become lighter, consume less fuel, emit less noise and emissions, and recover more toxic metals such as lead and mercury. If anything, the environmental impact of today's suction dredges is far less than it was during the initial review in 1961.

Pursuant to the CEQA regulations, "a private project shall be exempt from CEQA if the project received approval of a lease, license, certificate, permit, or other entitlement for use from a public agency prior to April 5, 1973" subject to certain conditions. 14 Cal. Code Regs. § 15261(b). In particular,

> "where a private project has been granted a discretionary governmental approval for part of the project before April 5, 1973, and another or additional discretionary governmental approvals after April 5, 1973, the project shall be subject to CEQA only if the approval or approvals after April 5, 1973, involve a greater degree of responsibility or control over the project as a whole than did the approval or approvals prior to that date."

14 Cal. Code Regs. § 15261(b)(3); *see also Save our Skyline v. Board of Permit Appeals,* 60 Cal.App.3d 512 (1976). There is no evidence that DF&W has any more responsibility or control over suction dredging now than in 1962—other than by application of the additional restrictive language in the moratorium statutes struck down by this Court as unconstitutional.

B. A Subsequent or Supplemental EIR Was Not Required Because There Was No New Information Requiring It.

The Consent Decree declared that "[n]ew information has become available relating to the effect of suction dredging on Coho salmon, which was not reasonably available to the Department at the time it completed the 1994 EIR". (A049201) The only new information identified in the Consent Decree involved the listing of additional species as threatened after the 1994 EIR

(A049201-02),[2] not any different effects of suction dredging upon those species. No one has identified different effects of suction dredging upon aquatic species.

As far back as the initial environmental reviews in 1960, the focus was always upon "damage to salmon spawning areas". (A044117) The 1994 EIR considered the salmon and other aquatic species of interest at great length (*see, e.g.,* A060020-22, A060060-62, and A060071-77), and the mere fact that some later were designated as threatened or endangered does not change the impacts of suction dredging, which were at all times *de minimis.* Far from being insensitive to concerns over listed or special status species, the 1994 EIR had concluded that additional areas "may be closed" to protect such species. (*See* A060156) But closures were not automatic, and the 1994 EIR specifically found no jeopardy to then-listed species. (*Id.*)

While the Consent Decree ordered DF&W to conduct "further environmental review" pursuant to CEQA (A049202), nothing in the Consent Decree required preparation of a subsequent or supplemental EIR, much less one of the scope undertaken. Had DF&W properly identified the "new information," DF&W could have simply concluded, after further analysis, that the new information did not identify any "environmental impacts different or more severe than the environmental impact considered in the 1994 EIR . . .". (A049201) DF&W could also have merely prepared an addendum to the previously-certified EIR. *See* 14 Cal. Code Regs. § 15164.

Under the circumstances, it was a prejudicial abuse of discretion to select a subsequent EIR. For example, in *Fund for Environmental Defense v. County of Orange* (1988), 204 Cal.App.3d 1538, 1550, the Court of Appeals rejected the argument that expansion of a wilderness area to surround a project required an EIR, rather than an addendum.

> "No new protected or rare habitat or species of flora or fauna were discovered or found to be impacted that had not been discovered when the EIR was prepared. Even though the land bordering three sides of the site to the northeast and south of the site had changed hands from Rancho Mission Viejo to the county and had changed designation from open agricultural land to part of Caspers Wilderness Park, the land itself did not suddenly spring into a verdant forest. It was precisely

[2] It is well-established that the mere presence of listed species does not require a finding of significant negative impacts, where, as here, the project has no prospect of actually exterminating the last of a species. *E.g., Sierra Club v Gilroy City Council* (1990) 222 Cal.App.3d 30, 42 & n.5.

> the same land as considered in the 1981 EIR, and the Nichols Institute project had the same impact on the land whether it was designated open agricultural land or wilderness park.

Id. at 1550-51; *see also Ft. Mohave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1605 (critical habitat designation was not "new information"). Such is the case here.

It is important to remember that the Legislature did not intend to permit DF&W to elect EIRs at will, as they did here, but to limit DF&W's power to do so. Section 21166 of the Public Resources Code provides:

> "When an environmental impact report has been prepared for a project pursuant to this division, *no subsequent or supplemental environmental impact report shall be required* by the lead agency or by any responsible agency, unless one or more of the following events occurs:
>
> > "(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
> >
> > "(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
> >
> > "(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available."

This statute was intended "to restrict the powers of agencies by prohibiting them from issuing subsequent EIRs unless the stated conditions are met". *Stone v. Board of Supervisors* (1988) 205 Cal.App.3d 927, 935. Put another way, a subsequent EIR is "not an occasion to revisit environmental concerns laid to rest in the original analysis." *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1298.

Because none of the § 21166 conditions were met, and in particular because the listing of the Coho salmon and other species was not the sort of "new information" required, DF&W was prohibited from preparing the FSEIR at all. DF&W's decision to prepare a full-blown EIR exceeded the requirements of the Consent Decree, violated § 21666, and is best understood as part and parcel of DF&W's campaign of harassment against suction dredge miners, not *bona fide* environmental analysis.

C. The Consent Decree Does Not Bar Assertion of this Position.

Several of the parties before the Court, including The New 49'ers, Inc. and Public Lands for the People, Inc., stipulated to the entry of a very limited Consent Decree regarding "mining in certain parts of the Klamath, Scott and Salmon River watersheds," requiring further CEQA analysis. DF&W, on its own, greatly expanded its mandate, which resulted in the issuances of the 2012 Final Subsequent Environmental Impact Report ("FSEIR") pursuant to CEQA, covering the whole State of California. Others, including plaintiffs Western Mining Alliance and Eric Maksymyk, were not parties to the Consent Decree.

The nonparties are not bound by the Consent Decree. In addition, the Consent Decree only authorized DF&W "to implement, if necessary, via rulemaking, mitigation measures to protect the Coho salmon and/or other special status fish species in the watershed of the Klamath, Scott, and Salmon Rivers, listed as threatened or endangered after the 1994 EIR." Since DF&W expanded the scope of its permissible activities under the Consent Decree to cover the whole State of California, and promulgated the 2012 regulations covering the whole State of California, it breached the contractual agreement for limited regulatory change embodied in the Consent Decree, and all parties have the right to challenge the CEQA analysis without regard to the Consent Decree.

II. DF&W ABUSED ITS DISCRETION BY CHOSING AN IMPROPER BASELINE.

The cornerstone of DF&W's failure lawfully to implement CEQA was its choice of a "no dredging" baseline for the FSEIR. (A005525) The Miners and others, such as the County of Siskiyou, vigorously objected to this choice in the CEQA process. (*See, e.g.*, A006450; A001349; A058445-56.) DF&W did not just assume away the activity of current suction dredges, but the baseline conditions used for the EIR assumed no dredging had ever occurred, and even failed to take into account the impact from historical mining which was long lasting and severe.

A. An Improper Baseline Fatally Flaws the FSEIR.

Where there is an approved project, an EIR must examine the incremental effect of any proposed change against the existing activities baseline. *El Dorado County Taxpayers for Quality*

Growth v. County of El Dorado (2004) 122 Cal.App.4th 1591; *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337; *City of Ukiah v. County of Mendocino* (1987) 196 Cal.App.3d 47. An agency must compare the impacts of a new plan with existing realistic conditions, not with hypothetical potential impacts of an existing plan. *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170; *Christward Ministry v Superior Court* (1986) 184 Cal.App.3d 180, 190. When a new permit will allow an increase in operations of a facility, impacts are compared to the existing level of operations, not to hypothetical conditions. *Communities for a Better Env't v South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310. The agency's choice of baseline must be supported by substantial evidence, which cannot include speculation or unsubstantiated opinion or narrative. Public Resources Code §§ 21080(e) & 21082.2(c) and 14 Cal. Code Regs. §§ 15064(f)(5) & 15384.

CEB, *Practice Under the California Environmental Quality Act*, Second Edition § 12.16, *Environmental Setting and Baseline*, states the matters succinctly:

> "An EIR must describe existing environmental conditions in the vicinity of the proposed project, which is referred to as the "environmental setting" for the project. 14 Cal.Code Regs. § 15125. See §§ 12.17-12.18. This description of existing environmental conditions ordinarily serves as the "baseline" for measuring the changes to the environment that will result from the project and for determining whether those environmental effects are significant. 14 Cal.Code Regs. §§ 15125, 15126(a). See §§ 12.19-12.26. As the California Supreme Court has noted, to provide the impact assessment that is a fundamental purpose of an EIR, the EIR "must delineate environmental conditions prevailing absent the project, defining a 'baseline' against which predicted effects can be described and quantified." *Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439, 447."

As noted above, DF&W defined the "project" as "proposed amendments to CDFG's previous regulations . . . and suction dredging activities conducted consistent with those amendments" (A005523). Absent the project, suction dredging must be assumed to proceed consistent with the prior regulations.

B. The "No Dredging" Baseline Constituted a Prejudicial Abuse of Discretion.

Nevertheless, DF&W established a "no dredging" baseline. (A005525.) DF&W rationalized its "no dredging" baseline on two factors: the Alameda Court's preliminary

injunction against dredging (subsequently vacated by the Court of Appeal) and the statutory moratorium on issuing permits (subsequently set aside by this Court). (*See id.*) The injunction was reversed on December 28, 2011, a decision included in the Administrative Record (A049949-54), a date well before DF&W issued the FSEIR. This Court's order striking down § 5653.1 came after the FSEIR, and made the baseline *wrong as a matter of law*. It is a prejudicial abuse of discretion for an agency to establish a baseline on an injunction that had been reversed and an unconstitutional statute.

Even if § 5653.1 had not been struck down, and were treated as a valid and effective "temporary moratorium"—as DF&W has so long argued—it was still a prejudicial abuse of discretion for DF&W to set the baseline based on § 5653.1. DF&W purported to be merely updating a prior CEQA analysis pursuant to the Consent Decree, and limited the scope of the project to the effects of amended regulations, mandating a focus on the changes to suction dredging operations in California, updated with new information. *See generally* Public Resources Code § 21166 (conditions requiring updated report).

As a leading CEQA treatise points out,

> "When an agency is evaluating a proposed change to a project that has previously been reviewed under CEQA, the agency must apply CEQA's standards limiting the scope of subsequent environmental review. 14 Cal.Code Regs. § 15162; *Abatti v Imperial Irrig. Dist.* (2012) 205 CA4th 650; *Sierra Club v City of Orange* (2008) 163 CA4th 523, 542; *Temecula Band of Luiseno Mission Indians v Rancho Cal. Water Dist.* (1996) 43 CA4th 425, 437; *Benton v Board of Supervisors* (1991) 226 CA3d 1467, 1477. Under these standards, once an EIR has been certified or a negative declaration adopted for a project, further CEQA review is limited. *Communities for a Better Env't v South Coast Air Quality Mgmt. Dis.* (2010) 48 C4th 310. These standards apply whether or not the project has been constructed. *Benton v Board of Supervisors, supra.* **In effect, "the baseline for purposes of CEQA is adjusted such that the originally approved project is assumed to exist."** *Remy, Thomas, Mosse, & Manley, Guide to CEQA*, p. 207 (11th ed 2007)." *Emphasis added.*

CEB, *Practice Under the California Environmental Quality Act*, Second Edition § 12.23, (*Baseline for Changes to Previously Reviewed Projects*). As noted above, this is a substantive limitation upon DF&W's power, to protect individuals such as the Miners from never-ending environmental reviews.

Under this approach, the "baseline" must include dredging under the prior set of regulations. For example, *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App. 4th 238, concerned an EIR over the expansion of mining operations. The Court approved a baseline that "assumes the existing traffic impact level to be the traffic generated when the mine operates at full capacity pursuant to the entitlement previously permitted". *Id.* at 242-43. The Court noted that the case involved an "ongoing mining operation" a situation "akin to ones in which categorical exemptions to CEQA have been granted," and that arguably only a supplemental EIR was required. *Id.* at 243. Here, the CEQA "project" is statewide regulation of ongoing mining operations in a context where there had been a full-blown EIR in 1994, and as set forth above, no supplemental or subsequent EIR was required or permissible. *See also Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1198 ("physical impacts of established levels of a particular use have been considered part of the existing environmental baseline"); *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270 (affirming negative declaration with baseline of existing airport usage).

Further authority for an "existing operation" baseline arises because many private projects operate in California under permits that expire, and must be renewed. But the courts have routinely rejected arguments by environmentalists that CEQA analysis in connection with renewed or extended permits must be based on a "no operation" baseline. *See, e.g., Citizen for E. Shore Parks v State Lands Comm'n* (2011) 202 Cal.App.4th 549 (EIR for renewal of as State Lands Commission lease for marine terminal serving an oil refinery included the terminal and its ongoing operations in its description of the existing conditions baseline). And in *City of Vernon v. Board of Harbor Commissioners* (1998) 63 Cal.App.4th 677, the question concerned redevelopment of a closed military base. The Court of Appeals found the appropriate baseline to involve effects arising during the last year the base was operational. *Id.* at 692.

As the Supreme Court has explained, "a temporary lull or spike in operations that happens to occur at the time environmental review for a new project begins should not depress or elevate the baseline". *Communities for a Better Env't v South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 326 (citing *Save Our Peninsula Comm. v Monterey County Bd. of Supervisors* (2001)

87 Cal.App.4th 99, 125); *see also Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 242-243 (application for a permit to increase mine production treated as the continued operation of an existing facility and modification of the project authorized in a prior permit issued after CEQA analysis).

The period of environmental review commenced with the December 20, 2006 Consent Decree. The statutory moratorium that persisted from 2009 until ruled unconstitutional by this Court is properly understood as the sort of temporary change to conditions that "happen to occur during the period of review" that "should not depress or elevate the baseline". *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 336-37; *see also Mount Shasta Bioregional Ecology Ctr. v County of Siskiyou* (2012) 210 CA4th 184, 202.

DF&W, in discussing its "no program" alternative in the Initial Statement of Reasons, acknowledged that the "alternative would violate CDFG's mandate to issue suction dredge permits where the operation will not be 'deleterious to fish'." (A009671) So too is the baseline that gives overriding weight to the "temporary moratorium" an unrealistic, hypothetical baseline that misleads decisionmakers. In adopting the baseline, DF&W cited *Sunnyvale West Neighborhood Ass'n v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351 (A000266), but that case involved an EIR's analysis of a road extension project's traffic impacts using projected conditions in the year 2020 as its only baseline, even though EIR preparation began in 2007 and the project was approved in 2008. The case is utterly inapposite.

The final insult to the Miners that arises from the baseline choice is that the only reason the statutory moratorium arose in the first place is because after being ordered to update environmental analyses in 2006 within eighteen months, DF&W defied the Court Order and triggered further lawsuits and legislation. (*See* A058445) As Siskiyou County has pointed out, "[h]ad the Legislature intended to evaluate suction dredging as a new activity, the Legislative Counsel's Digest would not have termed the legislative activity a 'suspension.' It is also reasonably likely that had the Legislature or the Governor understood in advance that the DFG would adopt the No Dredging baseline, an entirely different fate would have met SB 670". (*Id.*)

C. DF&W's Inconsistent Treatment of The Economic Baseline

Further proof that DF&W's "no dredging" baseline was a prejudicial abuse of discretion comes from the fact that an entirely different baseline was used for the economic analysis. As DF&W's contractor explained, "... the 2008 base period conditions in which suction dredging was permitted are considered more useful for the socioeconomic evaluation because they reflect the best available information for evaluating socioeconomic effects of the DSEIR alternatives." (A008287) It is the essence of abusive agency conduct to assume continued dredging operations to minimize the economic impact of its proposals, and assume no dredging operations to maximize the imagined environmental impact.

Indeed, the misinformation resulting from the baseline manipulation is far greater than appears on first glance. The economic impact of DF&W's regulation on suction dredgers is not accurately identified by selecting the single year of 2008 for comparison. A more historical perspective shows that the increasing burden of overregulation threatens to drive the numbers of dredgers to less than half the historical average numbers after 1994; it has decimated the ability of professional dredgers to make a living.

Specifically, the economic analysis selects the 2008 permitted number of dredgers, 3,479, as representing all years and doesn't account for fluctuations. The actual average of permitted dredgers from 1976 to 2009 is 5,452 per year. (*See* A005619) There are over 10,000 placer claims in California. The numbers of dredgers fluctuates from year to year (*id.*) with the price of gold. If the price of gold goes up, then the number of people working their claims goes up.

Significantly, the average number of suction dredgers prior to the 1994 regulations was 7,040 per year with 51% defining themselves as professional, and accounting for 80% of the dredging time—they could then make a living doing it. (B001778) After the 1994 regulations the average number of dredgers per year dropped to only about 3,665 per year with only about 18% in that category. (*See* A008241) A variety of regulatory choices drove this result, especially the maximum 8" dredge limitation in the 1994 regulations, which meant only the most profitable claims could continue to operate with the smaller equipment. The unlawful 2012 regulations

would more than halve the number of dredgers from the post-1994 average to only 1,500, and the environmentalists want to reduce that number even further.

In short, if DF&W were to genuinely assess dredging regulation against a "no action" background, it would identify staggering economic effects, amounting to a policy choice to unlawfully interfere with an entire industry and replace it with minimal recreational activities. (*See generally* A001342-44 (identifying numerous other serious defects in the economic analysis).

DF&W could not lawfully use two different baselines, and assuming the 1994 regulations are lawful, the right baseline was a reasonable average of conditions under those regulations.

D. The Improper Baseline Destroys the Analysis of Effects.

Any EIR must identify and concentrate on "significant environmental effects" of a proposed project. Public Resources Code § 21100(b)(1); 14 Cal. Code Regs. §§ 15126(a) & 15143. As set forth above, since suction dredge mining had already been subjected to an EIR in 1994, it becomes the baseline for purposes of the CEQA review in 2012. Without a properly determined baseline, it is impossible to accurately determine the "significant environmental effects" of any project, whether that project is proposed, existing, or ongoing. *See also Citizens for East Shore Parks v. California State Lands Commission* (2011) 202 Cal.App.4th 549. ("An inappropriate baseline may skew the environmental analysis flowing from it, resulting in an EIR that fails to comply with CEQA").

A significant effect on the environment is defined as a substantial adverse change in the environment. Public Resources Code §§ 21068, 21100(d); 14 Cal. Code Regs. § 15382. DF&W should have evaluated changes to existing environmental conditions caused by suction dredge mining under the 1994 regulations which might arise from proposed amendments to those regulations.

Such a comparison would show no incremental adverse effect upon the environment, but rather a marked improvement to the environment. Suction dredges have become quieter and more efficient in removing toxic metals such as mercury from the waterways of California. From 1994 to 2012, the performance level of suction dredge mining in relation to its effect upon the

environment has been overwhelmingly positive.

Moreover, a true "no dredging" baseline would require DF&W to reconstruct a hypothetical state of non-existent physical conditions associated with "no dredging". DF&W would then have to assemble historical data concerning the natural, concretized state of the Lower Salmon and other California rivers prior to years of suction dredging, during which little or no spawning habitat was available. DF&W made no attempt to do this.

Because of the erroneous baseline chosen by DF&W, no "thresholds of significance", 14 Cal. Code Regs. § 15064.7, could ever be properly established. Reality is therefore turned on its head. Insignificant changes are magnified way out of proportion. This destroys the ability of the FSEIR to act as an informational document, by presenting the wrong information and the wrong effects.

III. DF&W FAILED TO RECIRCULATE SIGNIFICANT CHANGES TO THE SDEIR AND REGULATIONS FOR PUBLIC REVIEW.

A. CEQA Requirements.

CEB, *Practice Under the California Environmental Quality Act*, Second Edition, § 16.15, *New Information Added to Final EIR*, states:

> "Normally, an EIR is circulated for one round of review and comment by the public and by public agencies. In some instances, however, an EIR must be recirculated for a second round of review and comment. If significant new information is added to an EIR after notice of public review (see § 9.17) has been given, but before final certification of the EIR (see § 16.4), the lead agency must issue a new notice and recirculate the EIR for comments and consultation. Pub.Res.Code § 21092.1; 14 Cal.Code Regs. § 15088.5. *Vineyard Area Citizens for Responsible Growth v City of Rancho Cordova* (2007) 40 C4th 412, 447. Recirculation is generally required when the addition of new information deprives the public of a meaningful opportunity to comment on substantial adverse project impacts or feasible mitigation measures or alternatives that are not adopted. *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1993) 6 C4th 1112; 14 Cal.Code Regs. § 15088.5(a)."

> § 16.15A, supra, *Recirculation Required for Significant New Information,* further states: "The critical issue in determining whether recirculation is required is whether any new information added to the EIR is "significant." If added information is significant, recirculation is required under Pub.Res.Code § 21092.1. The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it. *Silverado Modjeska*

Recreation & Park Dist. V County of Orange (2011) 197 CA4th 282, 305; Save *Our Peninsula Comm. v Monterey County Bd. of Supervisors* (2001) 87 CA4th 99, 131; *Sutter Sensible Planning, Inc. v Board of Supervisors* (1981) 122 CA3d 813, 822."

As to the timing of the recirculation, 14 Cal. Code. Regs. § 15088.5 states that "when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification" that notice is required.

In the Final Statement of Reasons (A009827-28), DF&W argues changes made to the Final SEIR were not substantial and consisted of minor adjustments to the regulations which did not require recirculation. This was also the position DF&W took in the Findings: "As noted above, DF&W has also identified a few additional typographical and grammatical, and nonsubstantial changes to the proposed regulations since public release of the revisions on February 17, 2012. All of these changes are necessary to address minor errors or typographical issues, and all are nonsubstantial." (A000013-A000014)

But DF&W also made numerous last-minute changes that the agency claimed "were necessary under its substantive mandate to reduce related significant effects to the extent feasible and, as directed by the Fish and Game Code, to ensure that authorized suction dredging would not be deleterious to fish". (A000013) These changes were anything but insignificant and included:

- Reduction in number of permits to be issued by 65% from 4,000 to 1,500
- Reduction in the number of hours per day of 50% from 12 hours (1/2 hour prior to sunrise to sunset) to 6 hours from 10 a.m. to 4 p.m.
- Reduction in the density of dredges to a minimum spacing of 500'

(*See id.*)

The program DF&W had described in the draft SEIR involved an annual permit limit of 4,000. With no prior notice or comment period, the final SEIR reduced the permit level to 1,500, and adopted the "Reduced Intensity" Alternative. As far as the Miners can tell from the Administrative Record, in the Final SEIR sent out for review on March 5, 2012 (*e.g.*, A24404) the wording still included a permit level of 4,000 (*E.g.,* A000300). In any event, a reduction in the program scope by 65% constitutes significant new information and the SEIR should have been recirculated to all agencies and to the public.

The DSEIR should have been recirculated. The fact that DF&W could utilize almost the same language in describing all effects in the DSEIR and FSEIR, while radically reducing suction dredging opportunities to less than a fifth of those initially considered demonstrates the utter lack of substance behind DF&W's conclusions.[3]

B. APA Requirements

The same rationale for recirculation and public comment of new and significant information applies under the Administrative Procedure Act. Section 11346.8(c) of the Government Code declares:

> "No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action."

On February 17, 2012, DF&W posted for public comments its revised "proposed regulations governing suction dredge mining in California under the CF&GC." The revised regulations contained numerous radical changes from the initially proposed regulations. There was no way that the public or the Miners were adequately placed on notice that their hours would be cut in half and the overall permit number reduced by 65%. For the agency so to contend itself demonstrates a total disregard of procedural requirements and fundamental fairness.

In addition to the radical changes discussed above, the revised regulations also included the effective confiscation of 2009 permit fees (since no provision was made in the regulations for returning those fees upon termination of suction dredge mining in 2009); the new recordkeeping and reporting requirements for permittees; new requirements for substantial containment systems; and a two-week quarantine periods when moving equipment between different water bodies; a five hundred (500) foot limitation on the proximity of multiple dredge operations.

To make matters worse, the comment period ended Monday, March 5, 2012, just seventeen days later. (A009675 (DF&W calls it 15 days)) This March 5th date was the very date

[3] The 50% reduction in hours, coupled with the 65% reduction in permits, and numerous other restrictions, easily supports a conclusion that dredging opportunities were suddenly reduced by a factor of five.

DF&W began mailing out the FSEIR, and DF&W filed the final Notice of Determination pursuant to Public Resources Code § 21108 on March 16, 2012. (A00001) DF&W failed to comply with the procedures required under the Administrative Procedure Act, which require more than the sham consideration of public comment that obviously occurred here.

In particular, the radically-revised regulations were in no way "sufficiently related" to the initially proposed regulations to support a truncated comment period. A full forty-five (45) day comment period was required, not a seventeen (17) day truncated comment period. *See* Government Code § 11346.4(a) (requiring mailed notice 45 days in advance of close of comment period); *see also* § 11326.2(c) (importance of right to "comment on the draft regulation before the regulation is adopted in final form"); § 11346.8(c) (fifteen day truncated period only available for change "sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action").

By issuing these radically-new requirements and regulations with a truncated comment period, all in violation of the Administrative Procedures Act, as set forth above, DF&W adopted an unlawful "underground regulation". *See Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal.App.4th 1365, 1381. In particular, the regulation is entirely "invalid". *Naturist Action Committee, et al., v. California State Department of Parks & Recreation, et al.* (2009) 175 Cal.App.4th 1244, 1250. These APA procedural defects provide an additional and independent basis for declaring the 2012 Regulations invalid and unenforceable, and this Court should so declare.

IV. DF&W FAILED TO ANALYZE ALTERNATIVES TO THE RESTRICTIONS IMPOSED.

Government Code § 11346.2(b)(4) requires:

> "(A) A description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives. Reasonable alternatives to be considered include, but are not limited to, alternatives that are proposed as less burdensome and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.

"(B) A description of reasonable alternatives to the regulation that would lessen any adverse impact on small business and the agency's reasons for rejecting those alternatives."

DF&W failed to comply with these APA requirements, providing only the most cursory discussion of alternatives claiming that none existed. (See A009931-34)

DF&W failed to consider performance standards as an alternative to simply reducing permit numbers and operating hours, and failed entirely to consider alternatives to less impact on the small businesses dredgers represent.

In addition to the APA requirements, § 21002 of the Public Resources Code also puts sideboards on the sort of "alternatives" to be considered by DF&W in a CEQA process: they must both ""substantially lessen the significant environmental effects" and they must be "feasible" in light of "economic, social or other conditions". The CEQA regulations further define "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors". 14 Cal. Code Regs. § 15364; *see also* Public Resources Code § 21061.1.

A. DF&W's Alternatives Were Not "Feasible" Given the Legal Factor of Federal Preemption.

This Court's ruling on federal preemption confirms that it is not "feasible" to simply prohibit mining as a so-called "mitigation" measure to lessen its effects. DF&W must develop and analyze alternatives that do not "materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto". 30 U.S.C. § 612(b). The arbitrary and oppressive restrictions on mining discussed above do not meet these standards.

B. DF&W's "No Program" Alternative Was Defective.

As a matter of CEQA law, DF&W was *required* to consider a "no program" alternative. 14 Cal. Code Regs. § 15126.6(e)(1). Specifically, "[w]hen the project is the revision of an existing land use or regulatory plan, policy or ongoing operation, the 'no project' alternative will be the continuation of the existing plan, policy or operation into the future." *Id.* § 15126.6(e)(3)(A). In short, the "no project" alternative was the permitting program under the existing 1994 regulations, the revisions to which were under consideration.

Instead, DF&W took the position that the "no program" alternative is the continuation of the unconstitutional ban on suction dredging. (A006248) The results, as reflected in the summary comparison of alternatives, are staggeringly misleading, showing, for example, "similar" impacts to Mineral Resources across all alternatives. (*Id.*)

V. DF&W FAILED TO PROVIDE LEGALLY SUFFICIENT EXPLANATIONS FOR ITS ACTIONS

Govt. Code, Section 11346.2(b) requires "[a]n initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation". There are detailed requirements for this "initial statement of reasons," which "shall include, but not be limited to, all of the following:

> (1) A statement of the specific purpose of each adoption, amendment, or repeal, the problem the agency intends to address, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed. The statement shall enumerate the benefits anticipated from the regulatory action, including the benefits or goals provided in the authorizing statute. . . Where the adoption or amendment of a regulation would mandate the use of specific technologies or equipment, a statement of the reasons why the agency believes these mandates or prescriptive standards are required.
>
> ". . . .
>
> (2) An identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation.

Instead of producing the required initial statement of reasons, DF&W provided a highly-abbreviated ten-page document (A009665-74) which did not begin to meet these requirements.

The whole idea of § 11346.2(b) is to make the agency identify the rationales for further regulation *before* regulating. The 2012 regulations set forth in 14 Cal. Code Regs. §§ 228 & 228.5 constitute a collection of over 900 individual regulations, of which the vast majority are supported by no material in the initial statement of reasons whatsoever. Nor does DF&W provide alternatives to the prescriptive regulations, or justification for imposing the prescriptive regulation rather than a performance-based regulation. DF&W has created a massive regulatory program for suction dredging that fails not only to provide an explanation setting forth the analytic bridge from

studies and findings to the regulatory restrictions, but also to even to cite the studies themselves.

DF&W did expand the Final Statement of Reasons to 25 pages (A009825-49), detailed requirements for which are set forth in § 11346.9(a)(1)-(5), but again failed entirely to identify data and studies upon which it relied (*see* A009826).

As noted above, DF&W took the position that the changes it released on February 17, 2012 required only a 15-day comment period. Section 11346.8(c) warns that "[a]ny written comments received regarding the change must be responded to in the final statement of reasons". The Final Statement of Reasons reports receiving, during the 15-day period, more than 600 e-mail comments and 100 letters, some "totaling more than 40 pages". (A009829)

DF&W's response to comments did not begin to justify such things as the permit cap in light of the § 11346.9(a)(4) requirement that the agency make:

> A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

For example, with respect to the number of permits, DF&W simply declared that it had "determined that a reduction in the number of permits from 4,000 to 1,500 is necessary to mitigate the proposed project's significant effects to the extent feasible". (A009837) DF&W offered the same conclusory justification for reducing operating hours by 50%.[4] (A009844-45)

This does not begin to approach a legally sufficient explanation of its decision to limit the number of permits far below historical levels, even under more stringent regulations controlling permitted operations. Under § 5653 of the Fish and Game Code, DF&W may only deny permits if it would be deleterious to fish (and not individual fish). DF&W may not deny a permit to a miner if his individual activity is found to not be deleterious to fish. There is no explanation as to why the 1,501st permit issued, will somehow be the tipping point to deleterious. There is no discussion concerning, for example, the carrying capacity of any specific river.

[4] DF&W also argue that the closure was necessary to permit fish to "rest and [have an] opportunity to pass through the dredge areas". (A009844) Since there is no dispute that fish congregate around and feed from operating dredges, this statement is not remotely supported by substantial evidence.

To the extent DF&W might contend that all 1,500 permitted dredgers might converge on a single river and cause appreciable effects, DF&W then failed to consider an alternative that would allow more overall permits while capping capacities on particular rivers. Further explanation and an analysis of alternatives is particularly important insofar as the record shows there were over 12,000 permitted dredgers in 1980, and on average over 6,000 dredgers per year from 1976 to 1994. (*See* A005619) There is no evidence in the record this higher number of dredgers created any type of effect more significant than 1,500.

In addition, there is no requirement that any permittee actually have a mining claim, be a prospector, or intend to use the permit for prospecting or mining. The issuance of permits is on a first come, first served basis. Fifteen hundred environmentalists could on the very first day that suction dredge mining permits become available obtain all available permits.

With regard to the hundreds of regulations classifying particular water bodies as closed during all or part of the year, DF&W simply responded that it "takes pride" in the fact that its regulations provide "greater protections". (A009845) In the factual context of the regulations, "pride" is not an adequate response. For example, the 2012 regulations arbitrarily close entire portions of counties above certain elevations to protect possible Mountain Yellow Legged Frog habitat, without providing the specific population information to justify the existence of the frogs, or the necessity of any specific, or wide-ranging, habitat. Their primary habitat is ponds and lakes, not rivers and streams where suction dredge mining takes place. Moreover, in surveys, the frogs are often found in holes made by suction dredge miners, which may form the only available habitat. Pressed to explain the closures, DF&W admitted that "a given species is not necessarily present in all streams that are covered by the regulations" (A000220), but closed them all anyway.

With regard to motorized winching, DF&W demands that only human power may be used to move hazard boulders and prohibited the use of motorized equipment without prior on-site inspections. DF&W provided no explanation as to why the movement of a boulder by motorized equipment has a more severe effect on the environment than moving the boulder by manual means. (A009840)

DF&W did respond that it "does not dispute that motorized winching can . . . improve safety," but stated that "Fish and Game Code § 5653 *et seq.* does not provide for consideration of miner safety in the development of proposed regulations". (A009840) Mine safety is regulated by the U.S. Mine Safety Health Administration (MSHA), and issues such as the removal of hazard boulders from the work area is a matter of mine safety, not fish safety. Federal law preempts this prohibition on motorized winching.

DF&W has it backwards: if it cannot consider miner safety, it should not be regulating motorized winching at all, particularly in a context where no substantial incremental impact on fish resources is related to the use of motorized winching. Agency rulemaking powers do not extend the substantive authority of an agency. Government Code § 11342.1 ("Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law"). Where, as here, an agency strays from its mission to micromanaging operations, the courts will not hesitate to strike down quasi-legislative agency action. *Cf., e.g., Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391 (Department may promote cost-effectiveness, but not direct operations).

Finally, 14 Cal. Code Regs. § 228(l)(4) provides that "[n]o person may damage or destroy streamside vegetation". This includes such a vague and overarching statement that any streamside vegetation to include grass, noxious weeds and invasive species are included. It is unsupported by technical or empirical studies. There is no consideration of alternatives limiting coverage to sensitive or special status plants; it just covers all plant life. Less restrictive alternatives might, for example, protect shade trees.

VI. DF&W FAILED TO ASSESS ADVERSE ECONOMIC IMPACTS OF ITS DECISION ON CALIFORNIA MINERS.

As set forth above, DF&W adopted inconsistent baselines for assessing economic impacts, violating CEQA. DF&W's extraordinary manipulations also violated the APA, insofar as Government Code § 11346.3(a) requires that:

> "[a] state agency proposing to adopt, amend, or repeal any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements.

Specifically, DF&W was to prepare "an economic impact assessment that assesses whether and to what extent it will affect the following:

> "(A) The creation or elimination of jobs within the state.
>
> "(B) The creation of new businesses or the elimination of existing businesses within the state.
>
> "(C) The expansion of businesses currently doing business within the state."

Government Code § 11346.3(b)(1).

These requirements extend to the initial statement of reasons for regulation, which, as set forth in Government Code § 11346.2(b)(5)(A), must include "[f]acts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business". Instead of any such determination, DF&W merely concluded that any adverse impacts "are associated with the current prohibition on permit issuance rather than the regulatory action to amend Title 14 . . .". (A009673). This is akin to the baseline error discussed above. In the Final Statement of Reasons (A009847), DF&W reiterates the same error.

The APA and CEQA require DF&W to make a serious effort to assess the economic impacts of its regulatory regime. The Administrative Record reflects no effort by the agency to recognize and acknowledge the impacts to thousands of miners who could not obtain permits. DF&W fails to consider the economic loss to people who own mining claims in areas where suction dredge use is prohibited. (*See generally* A001340-A001343 (identifying weaknesses in the economic analysis).) DF&W fails to consider the economic impact of the thousands of federally-registered placer mining claims that would be closed to suction dredging in areas previously open under the 1994 regulations.

DF&W also failed to consider broader impacts not just to suction dredgers, but also supporting businesses. This Court has already reviewed substantial testimony of adverse economic impacts in *Kimble v. Harris* and *The New 49'ers, Inc. v. DF&W.* In the *Foley* case, fourteen businesses from Siskiyou County joined the lawsuit as plaintiffs protesting DF&W's economic impacts from emergency regulatory changes. The Administrative Record is full of detailed information that DF&W prejudicially failed to incorporate in any coherent assessment of economic impacts. The Board of Supervisors of Siskiyou County, hit perhaps harder than any other by DF&W's actions, has repeatedly provided detailed testimony on impacts. (*See, e.g.,* A058447 ("the economic analysis is appalling for its lack of effort"); *see also* A001121 (criticism of SDEIR); A058443 ("It is impossible to understand how such a prescriptively oppressive regulatory barrier to legitimate rights inherent to American citizenship can be allowed to stand").) DF&W's treatment of the impact of its regulatory actions on the development of mineral resources is equally inadequate.

VII. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DF&W FINDINGS.

An impartial observer who expected a rational assessment of the environmental impact of suction dredges on fish, the environmental impact most obviously to be expected, might expect DF&W to examine scientific studies to determine whether suction dredging has any effect on fish populations. To the Miners' knowledge, only one such study has ever been conducted.

The U.S. Forest Service commissioned the study, by Professor Peter B. Bayley of the Department of Fish and Wildlife at Oregon State University. Professor Bayley's report was able to rely upon data from the Siskiyou National Forest in Northern California and Southern Oregon, where there was extensive data concerning both dredging intensity and fish populations. His conclusions:

> "Localized, short-term effects of suction dredge mining have been documented in a qualitative sense. However, on the scales occupied by fish populations such local disturbances would need a strong cumulative intensity of many operations to have a measurable effect. Local information reveals that most suction dredge miners adhere more or less to guidelines that have recently been formalized by the Forest Service and generally in . . . Oregon, but there are individual cases where egregious mismanagement of the immediate environment has occurred, particularly with respect to damaging river banks in various ways. This analysis cannot account for individual transgressions, and a study to do so at the appropriate scale would be very expensive if feasible.

> *"Given that this analysis could not detect an effect averaged over good and bad miners and that a more powerful study would be very expensive, it would seem that public money would be better spent on encouraging compliance with current guidelines than on further study".*

(C123032-33) Professor Bayley's focus upon detecting "population" level effects dovetails nicely with DF&W's asserted definition of when an effect might be "deleterious to fish" within the meaning of Fish and Game Code § 5653: an effect that "manifests at the community or population level and persists for longer than one reproductive or migration cycle" (see A005543-44).

Undersigned counsel transmitted this study to DF&W as soon as the CEQA process started (B026635), and have cited it in litigation pleadings ever since, because it is obviously the single most relevant scientific study in existence to assess the significance of suction dredging impacts upon fish. DF&W, though it had the study, never put the study into the principal portion of the Administrative Record. However, because a copy was e-mailed, the document made it into the certified Administrative Record. (C123019 et seq.)

Undersigned counsel then noticed its absence as the CEQA process continued, although DF&W was relying upon such tangentially-relevant sources as "invertebrate productivity in a subtropical black water river" (A006277) or the effects of tourists on "tropical reefs" (A006283). Counsel thus called it to DF&W's attention specifically, quoting the above conclusion in its entirety. (A025664-65) But the study remains absent from the references upon which DF&W relied in the FSEIR, and its treatment stands a testament to the implacable anti-mining bias in the FSEIR. One cannot make impact determinations supported by substantial evidence by relying upon speculation and irrelevancies to the exclusion of the best evidence.

With the foregoing as the "baseline," we turn to the specific "substantial evidence" failings of the FSEIR. Fundamentally. DF&W fails to bridge the analytic gap between statements in the SEIR and the resultant regulations. Section 21082.2(a) of the Public Resource Code states an agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record. The EIR fails as an informational document

when information is selectively used to achieve a predetermined outcome. That is most especially the case with respect to the FSEIR's findings concerning water quality, but more generally, as the Supreme Court has explained, ". . . there is a prejudicial abuse of discretion if the findings are not supported by the evidence." *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515. Simply put,

> "it is the duty of the trial court vigorously to examine the record to determine not only if the findings support the decision of the [agency] but also to determine whether substantial evidence supports the "findings" of the [agency]. The absence of either establishes abuse of discretion."

Gabric v. City of Rancho Palos Verdes, 73 Cal. App. 3d 183, 193, 140 Cal. Rptr. 619, 625 (1977).

In the SEIR there are no examples of a permanent adverse change to the environment caused by suction dredging, nor are there examples of documented harm to fish, wildlife or humans. To the contrary, effects are highly localized and temporary. (B001780.) The SEIR's findings of "significant" impacts, and the regulatory restrictions imposed ostensibly to avoid other findings of "significance" are contrary to a long line of court decisions requiring actual effects be used in lieu of speculative hypothetical effects. *E.g., Communities,* 48 Cal.4th at 322.

A. Substantial Evidence Does Not Support the Conclusion of Significant Impacts.

1. Mercury Issues.

We have previously filed, and ask the Court to take judicial notice of, the Declarations of Joseph Greene, Claudia Wise, Eric Maksymyk, David McCracken and Dr. Thom Seal describing the significant omissions and selective use of data utilized by DF&W to reach conclusions concerning mercury and suction dredging. (*See generally* Joint Request for Judicial Notice, filed herewith.)

In the DSEIR (A005694-95), DF&W provides its criteria for determining significance, which include:

> "(1) Increase the levels of any priority pollutant such that the water body would be expected to exceed state or federal [standards];
>
> "(2) Result in substantial long term degradation...;

"(3) Increase levels of any bioaccumulative pollutant in a water body by frequency or magnitude such that body burdens in populations of aquatic organism would be expected to measurably increase..."

There is no substantial evidence that mercury encountered by suction dredgers would meet this standard. Rather, DF&W and others engaged in what constitutes agency misconduct to mislead the public and decisionmakers about suction dredging in relation to these criteria.

a. Suction dredgers release utterly insignificant amounts of mercury in their operations.

Suction dredging opponents began their attack with a study by Humphreys, 2005, which had concluded that although suction dredges recovered 98% of the mercury encountered, the mercury that they did not collect could violate various discharge standards. This conclusion was disproved with simple math. (A002256-58) The study also gave rise to the myth that suction dredges "floured" mercury by breaking it into small pieces, a conclusion easily refuted by understanding that the mercury fed into the dredges was already in small pieces. (A002259-61; *see also* A005706)

By the time of the SDEIR, DF&W had switched gears and relied almost entirely on "preliminary results of . . . recent research in the Yuba River . . . specifically focused on assessing the potential discharge of elemental Hg and Hg enriched suspended sediment from suction dredging activities". (A005688) "This new information and data from USGS was used in formulating the approach to this assessment of the Program." (*Id.; see also* A005693 ("The assessment of suction dredging-related effects on the potential for Hg discharge, transport, and contribution to fish uptake and bioaccumulation involved conducting quantitative discharge, transport, and rate calculations based primarily on recent field sediment and special study data collected by the USGS.").)

The study has the rather unwieldy official name of "The Effects of Sediment and Mercury Mobilization in the South Yuba River and Humbug Creek Confluence Area, Nevada County, California: Concentrations, Speciation, and Environmental Fate – Part 1: Field Characterization. US Geological Survey, Open File Report 2010-1325A, Fleck *et al.* (*See* B042319 *et seq.*) It is cited herein as the "Fleck Report".

In substance, DF&W claims that suction dredgers encounter sediments containing mercury, and release a small portion back into the environment in smaller "floured" particles that do not return to the riverbed, which is imagined to increase the mercury content of the water in some appreciable way. These claims are contrary to the evidence before DF&W.

The Fleck Report had three components:

1) An actual in-stream instrumented test of a running suction dredge being operated by a professional dredger (2007 – Phase 1);

2) An above-the-water line collection of mercury contaminated soils (2008 – Phase 2);

3) Laboratory Testing using the collected samples from the previous year. (2009 – Phase 3).

To measure the output of mercury from a suction dredge, common sense mandates measuring the output from a running suction dredge. Phase 1 of the experiment did exactly that. The scientists instrumented an actual running suction dredge, with an experienced operator, in the same location as the other part of the experiment, which was described as a mercury hot spot. (*See* B042340)

The results from this actual dredge test are provided (B042372), and are virtually the opposite of the conclusions in the SEIR. Compared to pre-dredging measurements, the measurements of various types of mercury dropped during the dredge test. (*Id.* (comparing levels at times of -1 and 1).) The Report concluded: "Dredging appeared to have no major effect on methylmercury during the dredge operations." (B042368)

The results of the 3" suction dredge test in the Fleck Report isn't mentioned a single time in the 1,388 pages of the SEIR. This was the only instrumented test of a suction dredge specifically designed to test for mercury loading of rivers ever conducted, and is in substance the only direct evidence available on the question of mercury discharges from suction dredging operations. Like Professor Bayley's report, it was a result that could not be mentioned, being entirely inconsistent with the agency's biases.

Instead of using actual results from an operating dredge, DF&W, in concert with others described in the Maksymyk testimony, concocted an approach that two former EPA scientists

characterized as the "poorest excuse for science" that they had "observed in our combined 60+ years of scientific research". (5/18/15 Wise Decl. ¶ 24.) Properly understood, what happened here was not "science" at all, but a species of agency misconduct that invalidates the FSEIR and its results.

The first part of this "science" concerned how much mercury might attach itself to tiny particles of sediment released from suction dredges, small enough to be transported far downstream from suction dredging areas to areas where the mercury might become biologically active. Rather than measure actual materials released by an operating suction dredge, DF&W reached to results in the Fleck Report's based on hand-digging a hole on the bank, above the water line, where no suction dredge could reach; putting the rocks and cobbles in a bucket; then sifting these results using three separate screens which ensured mercury particles were broken up into tiny pieces and attached to sediment. (B042379-81) They then transported this sediment to a lab where they mixed it in flasks for a week with sediment then measured the amount of mercury attached to suspended sediment in the flask. Not surprisingly, constant recirculation for up to 40 hours could increase the concentration of "reactive mercury". (B043388-90) Constant re-circulation of the materials to exaggerate mercury loading was utterly inconsistent with the once-through operation of a suction dredge. (*See* A002261.)

DF&W next used Fleck's measurements concerning these materials other information to generate spectacularly misleading estimates of mercury "discharged as a function of hours dredged with selected nozzle sizes as a function of hours dredged and a comparison to watershed loads". (A005710) DF&W piled unrealistic assumptions on top of unrealistic assumptions, and passed off the result as representing the impact of a typical dredger on the environment. Specifically, DF&W took the Fleck Report's unrealistically high mercury content measurements for material encountered in dredging at the worst possible spot (A005706 (Pit 2 BRC, or "bedrock contact")), multiplied them by the highest suspended sediment readings ever recorded in dredge discharges anywhere (A005707 (340 mg/L)), and then multiplied them by marketing materials from a dredge manufacturer concerning the maximum quantity of material that could be moved per hour (A005706 (citing Table 3-2)).

This was roughly the same as assuming that dredgers spent 100% of their time taking the smallest, most contaminated portions of Fleck's mercury-enhanced sediment material and discharging them into the river. The Fleck Report itself had found that the vast majority of material to be excavated, even in the South Yuba area, was not the fine particles containing mercury. (B042379) Indeed, the Fleck Report warned that the approach adopted by DF&W "accounts for the dredging of the Hg-rich layers exclusively, a situation that is unlikely given the variable spatial distribution of these Hg-rich layers." (B042412).

The miners had also warned DF&W in public comments that a real dredge operating in the same hole they hand dug would spend 98% of the time reaching the bedrock contact layer on which they conducted the test. (A002273). Put another way, the miners showed it would take 16 hours for a dredge to excavate the pit they hand dug, and of this total of 16 hours, only 5 minutes would be spent in bedrock contact layers used by DF&W exclusively to determine their calculations. (*Id.*) And outside of "hot" areas like the South Yuba River, there would nearly always be no mercury at all.

DF&W had to make still further assumptions to speculate that the tiny mercury particles might somehow become biologically active. While acknowledging that "transport of elemental Hg that is floured and discharged from suction dredging is largely unknown" (A005711), DF&W nonetheless assumed that 50% of the imagined mercury discharges would be transported all the way down the river to the delta. (A005712), where DF&W further speculated that chemical changes might occur to make the mercury harmful.

It is difficult to characterize DF&W's analysis as anything other than a biased assault on suction dredgers and their operations. It is one thing to be conservative, but by multiplying layer after layer of hyperconservative assumptions, DF&W departed entirely from reality. Even if it is within the realm of agency discretion to use 10% of real number to be conservative, it is a prejudicial abuse of discretion to use 10% (picking the South Yuba as typical) times 10% (picking the worst spots there) times 10% (artificially enhancing the mercury) times 10% (picking the highest suspended solid measurement) times 10% (using non-real word material/hour estimates)

times 10% (unrealistic transport distances). The result is being wrong by a factor of one million—which is, roughly speaking, why DF&W's "science" is invisible in real world data.

DF&W grossly misled the public and decision makers with ridiculous suggestions that as few as two dredger working for 160 total hours would contribute 10% of the year's total load of mercury in a California river. (A000306) In a context where DF&W admitted there were over 25,000 dredging hours on the South Yuba River (A005712), vast spikes of mercury should have been seen during the summers when dredgers were operating, totally overwhelming natural variation.

The SDEIR presents in Table 4.2-8 (A005709) mercury measurements taken over a period of four years (2001-2004) in the South Yuba River, which were all dredging years. The table shows the normal spiking of mercury levels consistent with the winter flows, but shows no mercury spikes during the summer. Instead, one sees the lowest readings of the year.[5] The Miners contend that DF&W's mercury analysis constitutes agency misconduct, making the testimony submitted herewith in the Miners Joint Request for Judicial Notice admissible to explain the conduct in detail. At the least, it was a prejudicial abuse of discretion for the agency to rely upon its analysis to conclude that mercury discharges from suction dredging are a significant adverse environmental impact.

b. Suction dredgers pose no threat to human health by contaminating fish with mercury.

It should be noted that the U.S. EPA has established criteria for measuring amounts of mercury in a watershed based on the measurement of methylmercury in fish tissue (B009847 ("EPA concluded that it is more appropriate at this time to derive a fish tissue (including shellfish) residue water quality criterion for methylmercury rather than a water column-based water quality criterion")). However, the Administrative Record is devoid of any fish tissue-related threat to human health.

[5] In further pseudo-scientific sophistry, DF&W attempted to explain away the measurements by arguing that sampling "almost always occurred on weekday mornings" and "would not be expected to detect pulse flows from dredges that are frequently operated on weekends" (A005708) But the whole premise of their loading analysis is that the mercury once released would flow many miles downstream over a period of days, rather than settling out quickly.

Fish throughout the State, even in the worst-case South Yuba areas, do not show mercury levels of concern.[6] (A005718) And as a matter of chemistry, most fish have a high enough molar ratio of selenium to mercury to make the mercury absorption impossible. The DSEIR disparages this as a "laboratory" effect (A005721); Ms. Wise provides background for evaluating this statement in her Declarations.

Hence DF&W was required to retreat to the claim that "invertebrate Hg data from the South Yuba River indicate that suction dredging may have been contributing to elevated tissue concentrations." (A005717) DF&W based its claim on only two years of data was available for analysis, with the data from a no-dredging year (2008) showing lower levels than the data from a dredging year (2007). (A005717) The Fleck Report had warned that such data "are insufficient to determine the cause for this interannual variation". (B042419).

It appears that not only did DF&W misuse the available data, but in fact, the very individual who provided this data—whom we now know to be an environmental activist (*see* 5/18/15 Maksymyk Decl. ¶ 26)—also possessed data for 1999, 2000, 2001, 2002 and 2012. This additional data paints a completely different picture. (*Id.* ¶¶ 22-23.) When challenged by the Inspector General at his federal agency, the scientists blamed the State of California as not wanting suction dredges to be a solution, but to be a problem. (*Id.* ¶ 25 & Ex. 1.)

The Fleck Report had properly suggested that "[f]urther monitoring of MeHg in biota where previous data exist during the statewide suction-dredging moratorium that began in 2009 would be helpful in evaluating this possibility." (B042419) In circumstances further suggestive of agency misconduct, once the 2009 statutory ban on permits was in place, providing perfect circumstances to test mercury loading, suddenly data become unavailable to test the hypothesis, though very limited sampling suggests some increase in mercury levels with the ban. (5/18/15 Maksymyk Decl. ¶ 43.)

"An error consisting of a failure to comply with CEQA is prejudicial where it results in a subversion of the purposes of CEQA by omitting information from the environmental review

[6] There are isolated advisories in certain lakes and reservoirs, but suction dredging has never been allowed in lakes and reservoirs.

process." *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection*, 44 Cal.4th at 486. This "rule emerges out of the difficulty courts have in assessing the effects of the omitted information, much of it generally highly technical, on the ultimate decision." What happened here was far worse than the omission of information.

c. Common sense confirms that mercury removal is a benefit, not an adverse impact.

Giving weight to common sense, the FSEIR is properly understood as not merely lacking any basis in substantial evidence with respect to the claims of harm, but also fails to analyze the negative impacts of removing suction dredgers from the water, given the benefits of removing mercury and other toxics from California's watersheds. The only known survey to ask dredgers how much mercury they recovered per year was the 2009 DF&W Suction Dredger Survey (A008244). The average amount of mercury recovered per dredger is 2.69 ounces. DF&W provides the average number of dredgers permitted since 1994 as 3,200. DF&W's permitting records show on average there were 7,040 permitted dredgers prior to the 1994 regulations.

If you take the average amount of mercury recovered, times the average number of permitted dredgers, then 31,965 lbs. of mercury have been removed from California waterways by suction dredgers since 1954. This equates to 14 tons of mercury removed by suction dredgers. DF&W's arbitrary estimate that miners remove only on the order of 50 kg of mercury per year (A000301) is not supported by substantial evidence.

DF&W dismisses the removal of over 14 tons of mercury as "insignificant relative to the total remaining in the watersheds affected by gold mining." (A000301) But DF&W has no substantial evidence of how much mercury was remaining in the watersheds,[7] and this conclusion,

[7] DF&W cites Churchill, 2000 as the source for information on how much mercury is remaining in the watersheds. (A000301) Churchill, 2000 did not did not estimate how much mercury was remaining, only how much had been used and lost back in the Gold Rush days. (B009397) The estimates are also of limited reliability because, as DF&W concedes, "few, if any, other sediments containing hydraulic mine debris in California have been characterized with respect to Hg..." (A005705). It is entirely possible that the 14 tons of mercury removed by suction dredgers actually represents a significant portion of remaining mercury, and it was a prejudicial abuse of discretion for DF&W to discount this important benefit.

if correct, makes the suction dredgers background noise in the patterns of mercury transport in the environment. There is no dispute that the dredgers remove 98% of the mercury they encounter. If there is only on the order of 50kg of mercury recovered, it is still obviously an environmental benefit to remove it, even if 1 kg drops back in.

Finally, in a world governed by common sense, the State would not fight successful federal programs to utilize suction dredgers to recover mercury from the State's rivers. One such federal program quickly collected the equivalent of the "mercury load in 47 years' worth of wastewater discharge from the City of Sacramento". (B025886)

2. Other Toxics.

DF&W speculates suction dredges would release sufficient trace metals to constitute a significant and unavoidable adverse change in the environment. However, the SDEIS acknowledges that "there are very little data regarding the effects of suction dredging on trace metals mobilization" and "[d]ue to the limited quantitative information, the water quality impact assessment for trace metals is largely qualitative and based on the anticipated level and nature of dredging activity that is projected to occur." (A005694)

This is incorrect. There are several credible studies that measured trace metal discharges from suction dredges and DF&W was well aware of them, for they are contained in Appendix D of the SEIR. These studies include "Effects of small scale gold dredging on arsenic, copper, lead and zinc concentrations in the Similkameen River, Washington" and another conducted by the US EPA. (Prussian, A., T. Royer, and W. Minshall. 1999. Impact of suction dredging on water quality, benthic habitat, and biota in the Fortymile River, Resurrection Creek, and Chatanika River, Alaska.

The EPA study examined the effects from a 8" dredge and a 10" dredge (twice as large as currently permitted in California) on trace metals, the study found measurements of these trace metals was elevated just behind the dredge, but dropped back to normal levels within 80 meters of the dredge. (B008182) In the Similkameen study conducted in 2005 trace metal discharge from a dredge was measured and confirmed the same result. (A005726)

It was prejudicial error for DF&W to rely on its qualitative assessment contrary to the available scientific evidence.

3. Effects on Birds.

Lacking any evidence of harm to fish, DF&W stretched to find that suction dredging miners working underwater could somehow harm birds. DF&W argues the mere chance of a suction dredger, somewhere in the state encountering a special status passerine is a Significant and Unavoidable effect. Special status passerines listed include the Least Bell's Viero, the Yellow Billed Cuckoo, Willow Flycatcher and the Bank Swallow.

DF&W attempts to justify its position by claiming the impact is significant when considered "statewide." "While the likelihood of disturbance is considered relatively low, several of these species (*e.g.* Least Bell's Vireo) are sufficiently rare that even a small disturbance would be substantial considering the restricted population and/or range of the species." (A000295) Common sense cannot support the infinitesimal risk of a miner causing a bird to fly away being characterized as a significant adverse impact. Were that the case, all human activity in California out of doors could not proceed.

A closer examination of the listed birds' habitat demonstrates that this adverse impact is almost entirely fictional:

- Southwestern Willow Flycatcher – Riparian woodlands in Southern California (A008377).
- Least Bell's Vireo – Summer resident of Southern California in low riparian in vicinity of water or in dry river bottoms; below 2000 ft. elevation (*id.*)
- Western Yellow Billed Cuckoo - Riparian forest nester, along the broad, lower flood bottoms of larger river systems. (A008381) In California, stable breeding populations are currently limited to the Sacramento River from Red Bluff to Colusa, and the South Fork Kern River from Isabella Reservoir to Canebrake Ecological Reserve (Layman, 1998).
- Bank Swallow – Colonial nester; nests primarily in riparian and other lowland habitats west of the desert. Requires vertical banks/cliffs with fine textured/sandy soils near streams, rivers, lakes, ocean to dig nesting hole. (A008383)

There is little in common between suction dredging areas and these habitats. Suction dredging does not take place in dry river beds or the flood bottoms of larger river systems. If there are any cliffs of fine textured/sandy soils in gold mining areas for Bank Swallows, mitigation can be devised specific to those areas to the extent legally permissible.

Fish and Game Code § 2081 requires mitigation measures be roughly proportional to the extent of the impact. Banning dredging throughout the State based on bird impacts is an obvious and prejudicial abuse of discretion. At the least, no substantial evidence to support the finding that bird impacts are significant and unavoidable.

4. Historical and Archeological Resources.

Consistent with the general pattern, DF&W is unable to provide a single specific example of any historical or cultural resource impacted by suction dredgers. It is sheer speculation, under which is the near impossibility of such an event occurring, far from "substantial evidence." The Miners are aware of no other reported CEQA cases with historic or archaeological issues where there is no specific identification of the resource at issue. We are unaware of any other activity ever analyzed under CEQA where a California agency found significance because somewhere in this State someone might impact a significant site.

In the SDEIS, DF&W speculates that historical resources may be present within the water where miners work:

> "The vast majority of these resources are wood-hulled, Gold Rush-era vessels submerged within the Sacramento, American, Feather, Yuba, and San Joaquin rivers in Central California...While many of these resources are concentrated within the rivers and tributaries of the Sacramento-San Joaquin Delta, they may exist anywhere within the state's waterways." (A006148)

This is patently untrue and completely unsupported by any data in the administrative record. Simple research from the state's own database www.shipwrecks.slc.ca.gov shows there are no shipwrecks virtually anywhere suction dredging takes place. (5/18/15 Maksymyk Decl. ¶ 72.) Specifically, the state shipwreck database shows there are no shipwrecks in the following counties: Plumas, Sierra, San Bernardino, Siskiyou, Placer, Trinity, Kern, Nevada, El Dorado, Mariposa, and others. (*Id.*) The SEIR finding is completely unfounded and refuted by the state's own records.

Moreover, Public Resources Act § 21084.1 states:

> "For purposes of this section, an historical resource is a resource listed in, or determined to be eligible for listing in, the California Register of Historical Resources. Historical resources included in a local register of historical resources, as defined in subdivision (k) of Section 5020.1,"

The record is devoid of any such resource, or any "archaeological resource" within the meaning of § 21083.2 being located where any suction dredge miners are likely to operate, and every reason to believe that the risk is imaginary. (*See also id.* ¶ 67.) Common sense dictates that flowing water rolls boulders down the stream and fills dredge holes every year; few artifacts could even survive this. (*See also id.*)

Moreover, the Miners are governed by 36 C.F.R. § 261.9, which requires them to avoid "digging in, excavating, disturbing, injuring, destroying, or in any way damaging any prehistoric, historic, or archaeological resource, structure, site, artifact, or property". In addition, federal regulations require immediate reporting of any inadvertent discovery of "human remains, funerary objects, sacred objects, or objects of cultural patrimony". 43 C.F.R. § 10.4. In short, the risk is negligible, and in the extraordinarily unlikely event that a miner encounters such a resource, he or she is required to cease operations and avoid damage.

The Karuk Tribe has expressed concerns, accommodated in the CEQA process, of damage to "Traditional Cultural Properties" ("TCPs"). But this now a concept so broad as to be utterly useless in determining CEQA significance. According to the SEIS, "one defined TCP is a 'riverscape,' or 'a river and its environs, including their natural and cultural resources, wildlife, and domestic animals,'" and such TCPs can be determined significant under CEQA. (A006143) In substance, the Karuk Tribe now claims that essentially the entire Klamath riverscape is a TCP, such that any non-Tribal activity is significant. Allowing DF&W to adopt such an interpretation of CEQA that will ensure that no non-Tribal activity governed by CEQA can ever proceed if Tribe objects—manifestly not the Legislature's intent in enacting CEQA.

5. Noise.

The FSEIR finds that noise in excess of city or county standards is a significant and unavoidable impact of permitting suction dredging. No substantial evidence supports this conclusion.

DF&W considers the effects of noise on a statewide basis and cites a single noise ordinance for Yuba County (A006176). The Yuba County ordinance (Ordinance Chapter 8.20) allows a maximum level of 65db in residential areas from 7:00 a.m. to 7:00 p.m. (Ordinance 8.20.140). Suction dredging is not conducted in residential areas. Within the noise regulation categories identified in Yuba County ordinance, mining is more akin to "extractive industrial," with a maximum level of 80db.

The DSEIR defines the noise levels from various sized engines that may be used in suction dredging. (A006179) The noise levels are derived from a 1971 document from the US EPA. The document states the noise levels range from 70db for a 5hp engine to 76db for a 20hp engine. For general reference the most commonly used dredge in California is a 4" dredge, with a 6.5 hp engine, but it is apparent that the tables and ordinance upon which DF&W relied do not support its conclusion that noise ordinance violations make noise from suction dredging a significant environmental impact.

6. Effects on Wildlife Species and Their Habitats.

DF&W concludes in suction dredging will have a significant and unavoidable impact on wildlife species and their habitats. DF&W makes this finding despite no loss or modification of habitat; no take of special status species and no evidence of the reduction of any species by a single animal based on suction dredging. Substantial evidence does not support this finding.

7. Turbidity from suction dredges.

The SEIR reports that "[a]ll scientific studies to date suggest that the effects of suction dredging on turbidity and suspended sediment concentrations as it relates to water clarity are limited to the area immediately downstream of the dredging for the duration of active dredging." (A005688). The imposition, within the regulations of dredge spacing, extends the distance

between dredges to a distance which exceeds the maximum reach of a turbidity plume from a dredge to another dredge.

This impact is manifestly not significant as a matter of common sense, and a clear example of why an appropriate baseline needs to be imposed upon DF&W. "As noted in the Literature Review, there is very little new dredging-specific data available since the preparation of the 1994 EIR, and no substantial changes in the scientific understanding of the effects of increased turbidity/TSS from suction dredging operations with respect to water clarity." (A005690) Apart from the choice of baseline, DF&W offers no reason why turbidity was not significant in 1994, and is significant now.

The effects from turbidity both individually and cumulatively were and are less than significant. DF&W erred in finding a temporary effect that returns to normal creates a substantial adverse change in the environment. In sum, DF&W has failed to provide substantial evidence, in light of the whole record, to justify a finding of "significant and unavoidable" the cumulative effect of turbidity.

B. Substantial Evidence Does Not Support the Regulatory Restrictions.

The regulations are not supported by substantial evidence in light of the whole record. Space does not permit a challenge to all 900 regulations set forth in 14 Cal. Code Regs. §§ 228 & 228.5. This memorandum focuses on a few example regulations which are ostensibly to mitigate the supposed destabilization of the stream banks. DF&W establishes multiple regulations with the stated purpose of protecting the stream bank or channel from erosion. These regulations include:

§ 228(l)(4) – No person may remove or damage streamside vegetation

§ 228(l)(3) No dredging within 3' of the current water line

§ 228(k)(1) Nozzle Restriction.

§ 228(l)(1) Limitation on motorized winching.

The justification for no dredging within 3' of the current water line is "This regulation would protect against streambank destabilization that could result in the release of fine sediment."

(A005766) But even before this regulation was adopted it was obvious that "due to the limited extent of potential bank erosion and instability caused by suction dredging, this impact is considered to be less than significant when considered statewide." (A005662)

The most comprehensive study, well prior to the 1994 regulations, which heavily restricted suction dredging operations, is characterized by the DSEIR as finding that 7% of dredgers were "undercutting banks". (A005662) The study itself concluded that " aquatic and riparian assessments revealed that relatively few suction dredgers are causing negative impacts . . . . Even with the large increase in the number of suction dredge mining operations in recent years, the aquatic and riparian habitat impacts observed on selected streams of the Mother Lode during this study were minimal." (B001780)

DF&W speculated that miners might "destabilize streamside vegetation," perhaps causing trees to fall into the water. (A005662) While this is "often a habitat benefit," according to DF&W, it is not "considered a preferred method," presumably since DF&W personnel would rather run programs to put large woody debris in the water themselves. (*Id.*) These preferences, however, are not substantial evidence supporting a serious restriction on the activities of miners, shutting down all small streams to dredging, particularly in a context where all over California, wind storms, fire, and natural erosion cause trees to fall down all the time. (*See id.*)

The proposition that is supported by substantial and overwhelming evidence in the record (*see* A005655 (citing multiple studies)) is that the vast majority of geomorphic effects caused by suction dredge miners are erased by natural river flows, such that after the next major flood event there is no trace of the activity. In contrast to the seven actual *studies* of dredging, DF&W highlighted a few personal observations by anti-mining advocates (*e.g.*, A005656 (citing Humphreys)) who found holes left by suction dredgers to persist to the next year. Even the highly-understated Findings of Fact confirm that "[i]n most cases, the geomorphic processes for recovery would reset...within one to three years." (A000026)

This sort of impact does not meet DF&W's significance criteria, which call for "substantial modifications to the geomorphic form or function of rivers or streams" which persist following "dominant discharge events". (A005653) Scattered dredge holes or other geomorphic

traces in rivers without "dominant" or "bankfull" discharge the winter following the summer dredging season are not a substantial and adverse change in the environment (*cf.* Public Resources Code § 21068 (definition of "significant effect"), particularly since they improve fish habitat (A060077 (1994 EIR finds that "[a]bandoned dredger holes can also provide holding and resting areas for fish")).

By all appearances, DF&W has abused its discretion by giving controlling weight to "[u]nsubstantiated opinions, concerns, and suspicions about a project;" even if "sincere and deeply felt, [these] do not rise to the level of substantial evidence supporting a fair argument of significant environmental effect". *Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1354.

It was a prejudicial abuse of discretion to impose substantive restrictions to dredging within 3' of banks, without regard to the size of the water body concerned, based on this record. DF&W failed to consider alternatives such as considering how close trees or vegetation might be to the bank, or size-based restrictions, instead arbitrarily shutting down all streams in the entire state which are less than 6' in width. The same record cannot support restricting the nozzle size to a maximum of 4" or forbidding moving boulders either.

VIII. DF&W ERRED BY IGNORING RELEVANT FEDERAL LAW AND POLICY.

An overarching problem of the regulation and the FSEIR is that DF&W gave no weight whatsoever to the federally-established property rights and mining rights of suction dredge miners. The DF&W, in substance, treated the suction dredge miners as individuals who could be "shooed out the door" at their whim. *Cf. United States v. Shumway* (9th Cir. 1999) 199 F.23d 1093, 1103 (U.S. Forest Service cannot do this either). The CEQA project, and the regulations themselves, were crafted as if the only purpose was to sustain a permit-issuing organization that would issue permits under any set of conditions, without regard to any mining-related purpose.

Quite apart from the unconstitutional demand in § 5653.1(b)(4) of the Fish and Game Code to "fully mitigate all identified significant environmental impacts," CEQA generally requires DF&W to only mitigate to the extent "feasible" (Public Resources Code §§ 21002 & 21002.1(b)),

where feasibility includes giving effect to "legal" constraints such as federal mining rights (see 14 Cal. Code Regs. § 15021(b)).

It was a prejudicial abuse of discretion for DF&W to disregard entirely the federal rights of miners. The Final Findings of Fact, in flatly declaring that DF&W's "proposed regulatory action does not duplicate, conflict with, or compromise existing federal law or regulations" (A009848) is dead wrong, and not a conclusion made in ignorance of the principles of federal preemption forcefully asserted by miners at every stage of the CEQA proceedings.

Even apart from federal preemption, DF&W failed to recognize two comprehensive sets of federal regulations, one governing National Forest Lands (36 CFR Part 228) and one governing lands managed by the U.S. Bureau of Land Management (43 CFR Part 3809). These regulations are aimed somewhat more broadly than DF&W's, protecting all surface resources and not just fish and wildlife. *See, e.g.*, 36 C.F.R. § 228.1 (noting purpose "to minimize adverse environmental impacts on National Forest System Resources"). However, they closely regulate mining operations which "will likely cause a significant disturbance of surface resources". *E.g., id.* § 228.4(a)(3). These regulations in turn operate in concert with the federal equivalent of CEQA, the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

DF&W did not identify substantial evidence for the "necessity" of its regulations insofar as suction dredging on federal lands is concerned. *See* Government Code § 11349 (a) (definition of "necessity"). Nor did DF&W advance substantial evidence to support of finding of "nonduplication". See id. § 11349(f) (definition of "nonduplication"). Government Code § 11346.2(b)(6) required DF&W to "describe its efforts, in connection with a proposed rulemaking action, to avoid unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues." DF&W flatly refused to do this.

Instead, DF&W acted at all relevant times as if federal law did not exist. The Findings of Fact flatly denying "duplication" are simply dead wrong. (A009848). In its response to comments, DF&W makes a more subtle argument that is equally wrong, arguing that it is without power "to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the

enforcement of a statute unless an appellate court has made a determination that enforcement of such statute is prohibited" (A00268 (quoting Cal. Const., Art. III, § 3.5).) This is sophistry, not merely because the statute directs DF&W to issue permits (where not deleterious to fish), but because the Miners are not asking the Department to "refuse to enforce" the Fish and Game Code at all. Rather, they are asking the Department to exercise its regulatory discretion to implement that Code in a fashion that gives effect to the Government Code's commands to avoid duplication except where necessary.

DF&W is in need of judicial guidance that it cannot continue to invoke Article III, § 3.5 to pretend as if federal law does not exist. Significantly, ample alternatives were available to give effect to federal rights. For example, DF&W might limit its overall permit number only for those miners who were not operating on federal land. DF&W might dispense with state permits where miners are already operating under federal "plans of operation". DF&W refused to consider such alternatives at all, blithely claiming that no feasible alternatives exist. (A009931-34 (findings concerning alternatives).)

IX. MINERS HAVE A STATE CONSTITUTIONAL RIGHT TO THE USE OF WATER.

This Court has made it clear that it wishes to dispose of all remaining issues in the coordinated cases, other than takings, at the January 20, 2016 hearing. In addition to these CEQA and APA issues that have not previously been determined by the Court, there remains in the *Kimble* case, Plaintiffs' claim that the Miners have a State constitutional right to be suction dredge mining in the waters of California. The *Kimble* Plaintiffs reiterate for the Court's consideration their claim.

A Federal mining claim on Federal land gives to the holder of such claim a proprietary and possessory interest in the mineral estate associated with such claim. The claim holder, as the owner of the mineral estate has traditionally been held to have dominance over the surface estate. Waters in and upon the Federal mining claim constitute part of the surface estate. *American Law of Mining,* 2d Ed. § 200.02 [1][b][i].

The owner of the mineral estate and mineral rights is entitled to take and use from the land constituting his Federal mining claim that amount of water which is reasonably necessary for the exploitation of the mineral rights upon the aforesaid claim. *Russell v. Texas Co.,* 238 F.2d 636, 644 (9th Cir. 1956), *cert. denied,* 354 U.S. 938 (1957); *Maley, Mineral Law,* 6th Ed., p. 266.

"Our opinions thus recognize that...mining law and water law developed together in that West" *Andrus v. Charlestone Stone Products, Inc.* (1978) 436 U.S. 604, 613. "Common law appropriation originated in the gold rush days when miners diverted water necessary to work their placer mining claims." *People v. Shirokow* (1980) 26 Cal.3d. 301, 307-308, 162 Cal.Rptr. 30.

The California State Constitution, Article X, § 2 guarantees that:

> ". . . the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable...and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare...nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled."

In *United States of America v. State Water Resources Control Board* (1986 1st Dist.) 182 Cal.App.3d 82, 101, 227 Cal.Rptr. 161, the Court stated:

> "It is equally axiomatic that once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation... Upon discovery of gold and the development of the California mining industry, water was often diverted from streams passing through government lands to be used on nonriparian lands. To accommodate this usage, the doctrine of *appropriation* originated and was incorporated in California water law." (Emphasis in original.)

Use of water for mining is a beneficial use protected under the California State Constitution. 23 Cal. Code Regs. §§ 659, 664. Suction dredge mining takes place in the streams and waterways of California primarily on Federal land by possessors of Federal mining claims. The Plaintiffs in this action possess such Federal mining claims.

Suction dredge miners do not take water, they only use water. Suction dredge mining is a nonconsumptive instream use of waters. It adds no substance to the waters, or any of the habitats of fish. "Nonconsumptive or 'instream uses,' too, are expressly included within the category of beneficial uses to be protected in the public interest." *United States v. State Water Resources*

Control Board (1986) 182 Cal.App.3d 82, 103. *See* Cal. Const., Art. X, § 2; 23 Cal. Code of Reg. §§ 659, 664.

No statutory or regulatory scheme can overrule or prohibit the State's constitutionally protected right to mine in the waterways of California. DF&W cannot establish a regulatory program to repeal that constitutional right.

CONCLUSION

For the foregoing reasons, this Court should find DF&W to have failed to comply with CEQA and the APA in its preparation of the FSEIR and 2012 regulations and (a) set aside the FSEIR as void and of no further force and effect; (b) as an alternative and independent holding beyond the Court's federal preemption ruling, set aside the 2012 regulations as void and of no further force and effect; (c) remand the cause to DF&W to proceed in accordance with the legal principles set forth herein; and (d) reinstate the 1994 regulations until such time DF&W has lawfully promulgated further regulations.

Respectfully submitted,

DATED: August 31, 2015

DAVID YOUNG
Attorney for Plaintiffs/Petitioners
Kimble *et al.* and PLP *et al.*

DATED: August 31, 2015

JAMES BUCHAL
Attorney for Plaintiffs/Petitioners
The New 49'ers, Inc. *et al.* (as to APA claims only) & Western Mining Alliance and Eric Maksymyk (as to CEQA and APA claims)

PROOF OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On August 31, 2015, I caused the following document to be served:

MINERS' JOINT OPENING BRIEF REGARDING THE CEQA/APA ISSUES RELATING TO THE 2012 SUCTION DREDGE MINING REGULATIONS AND OTHER MATTERS RELATING TO THE SUCTION DREDGE PERMITTING PROGRAM

by transmitting a true copy in the following manner on the parties listed below:

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County of San Bernardino
Rancho Cucamonga District, Civil Division
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Rancho Cucamonga, CA 91730
Via U.S. Mail

Chair, Judicial Council of California
Administrative Office of the Courts
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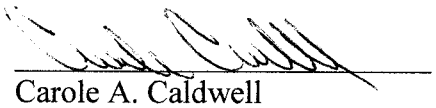

Carole A. Caldwell
Declarant