



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
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EDMUND G. BROWN JR., Governor
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April 19, 2013

Jonathan Evans
Michael Callahan-Dudley
Center for Biological Diversity
351 California Street, Suite 600
San Francisco, CA 94104

Craig A. Lindsay, President
Western Mining Alliance
P.O. Box 33218
Reno, NV 89532

Re: **Instream Suction Dredge Mining Petitions for Rulemaking:** Center for Biological Diversity et al. (March 20, 2013), and Western Mining Alliance (March 27, 2013); (Fish & G. Code, § 5653 et seq.; Cal. Code Regs., tit. 14, § 228).

Dear Messrs. Evans, Callahan-Dudley, and Lindsay:

On behalf of the California Department of Fish and Wildlife (Department), thank you for your recent petitions asking the Department to initiate rulemaking under the Administrative Procedure Act (APA) related to suction dredging. (See generally Gov. Code, § 11340.6.) The Department regulates the use of vacuum and suction dredge equipment in California under the Fish and Game Code, and adopted updated regulations to administer its permitting program in March 2012. (Fish & G. Code, §§ 5653, 5653.9; Cal. Code Regs., tit. 14, §§ 228, 228.5, effective April 27, 2012.) Of note, the use of any vacuum or suction dredge equipment for instream mining purposes is currently prohibited in California by statute. (Fish & G. Code, § 5653.1, subd. (b).)

The Department received each of your petitions within thirty days from the date of this letter. We received the petition from the Center for Biological Diversity on behalf of itself and eleven other environmental, tribal, and fishery organizations (collectively, the Center) via email on March 20, 2013. The Department received the petition from the Western Mining Alliance (WMA) via email on March 27, 2013.

Each of the entities named in both petitions is involved either as party to or as a legal office for one or more attorneys of record in related litigation pending against the Department. As you know, that litigation is currently comprised of six lawsuits coordinated before the Honorable Gilbert Ochoa in San Bernardino County Superior Court. (*Suction Dredge Mining Cases*, Super. Ct. San Bernardino County, Judicial Council Proceeding No. JCPRS4720.) In general, the coordinated actions challenge the Department's recently amended regulations, and the Department and the State of California's authority to regulate the use of vacuum and suction dredge equipment for instream mining purposes. In granting the Department's petition to coordinate the lawsuits brought by the Center and WMA, among other parties, the Judicial Council of California deemed the litigation complex under the California Rules of Court. Under those rules, a "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to

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expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.” (Cal. Rules of Court, rule 3.400(a).)¹

Having considered your rulemaking petitions individually and collectively, the Department denies both as a matter of discretion, consistent with its authority under controlling law. (Gov. Code, § 11340.7.)

Both the Center and WMA petition the Department to initiate rulemaking to address the same issues, based on the same legal arguments that each party is making, respectively, in the coordinated proceeding in San Bernardino. The Center, for example, asks the Department to initiate rulemaking to address two issues. One concerns the use of vacuum and suction dredge equipment as defined in the Department’s 2012 regulations. (Cal. Code Regs., tit. 14, § 228, subd. (a)(1).) The other is tied to the same regulation and the Center’s view that Fish and Game Code section 5653.1 provides substantive authority for purposes of the regulations the Department is required to adopt to implement section 5653. The Center is making these same arguments, seeking similar relief in the San Bernardino litigation.

The same is true of WMA. It seeks repeal of the Department’s 2012 regulations based largely on argument that federal law preempts the regulations, related statute, and California’s broader authority to regulate instream suction dredge mining. Again, WMA and other mining interests involved in the coordinated proceeding are actively pressing the same legal theories in San Bernardino. Indeed, briefing related to mining interest preemption arguments is underway and an initial hearing is scheduled before Judge Ochoa on July 24, 2013.²

Taking up in yet another rulemaking the very same issues before the court in the San Bernardino litigation will not expedite resolution, but doing so would increase all parties’ costs while thwarting effective decision making by the court and the parties. None of those results would benefit the broader public.

The issues highlighted by the Center and WMA’s rulemaking petitions are also under consideration by the California Legislature. As you know, the Department recently submitted a detailed report to the Legislature regarding the use of vacuum and suction

¹ In addition to the six actions coordinated in San Bernardino, a mining interest plaintiff recently filed another related lawsuit against the Department in Sacramento County. (*Walker v. Harris et al.*, Super. Ct. Sacramento County, 2013, No. 34-2013-80001439, filed March 14, 2013.) The *Walker* action brings to fourteen the total number of lawsuits related to suction dredging brought against the Department since May 2005.

² WMA’s petition also asks the Department to repeal Fish and Game Code section 5653. A statute, however, cannot be repealed by regulation.

dredge equipment under the Fish and Game Code. (See Fish & G. Code, § 5653.1, subd. (c).) The Department issued its report in response to Senate Bill 1018 (Stats. 2012, ch. 39, § 7) (SB 1018), which directed the Department to consult with, at a minimum, the Department of Public Health, Native American Heritage Commission, and State Water Resources Control Board, and to produce a report regarding statutory and other changes for the Legislature to consider related to suction dredging. Consistent with SB 1018, the Department's report includes a number of recommendations that, in turn, reflect input from five of the Department's sister state agencies, all with an eye toward comprehensive reform of existing law. In fact, the Department's report specifically addresses the two issues highlighted by the Center in its rulemaking petition. Likewise as to WMA, the Department's report emphasizes that any related action by the Legislature must be consistent with federal law.³

With the Department's recent report to the Legislature and related litigation actively underway, it is not an appropriate time for the Department to initiate yet another rulemaking effort related to suction dredging under the Fish and Game Code. Indeed, both the Legislature and judiciary have before them the very issues the Center and WMA are asking the Department to address in the moment through rulemaking. Moreover, importantly, the Legislature and judiciary are considering those issues partly in response to the multi-year, multi-million dollar environmental review and rulemaking effort that culminated slightly more than twelve months ago with the Department's adoption of the 2012 regulations. And that effort, as both the Center and WMA know, was itself prompted by litigation and a related court order entered in December 2006 with the consent and support of many of the same tribal and environmental, and mining interests involved in the San Bernardino litigation and the petitions at issue here. Against this backdrop, initiating yet another rulemaking action as requested would only likely frustrate current judicial and legislative efforts to resolve the parties' differences and this long-simmering controversy. Finally, if past practice since 2005 is any indication, the only certainty for the Department following rulemaking as requested is additional litigation, likely by the Center, WMA, or both.

Said differently, it is reasonable to conclude the result of the Department taking action on the petitions will just be more litigation and regulatory uncertainty for tribal, environmental, and mining interests, and the public at large. Absent further input from the Legislature or judiciary, the best course of action in the present moment, in the Department's opinion, is to deny the petitions and focus on resolving these issues once and for all through the current litigation, or with additional direction from the Legislature.

In denying the petitions the Department emphasizes three points related to the current regulatory definition of what it means to use vacuum or suction dredge equipment under the Fish and Game Code. (Cal. Code Regs., tit. 14, § 228, subd. (a)(1).) First, the

³ The Department's "SB 1018 Report" to the California Legislature dated April 1, 2013, is available online at www.dfg.ca.gov/suctiondredge (last visited April 19, 2013).

current definition reflects a reasonable exercise of discretion by the Department in light of historic practice, the legislative history of Fish and Game Code section 5653, and use of the equipment as described in recent federal case law. (*Karuk Tribe of Cal. v. U.S. Forest Service* (N.D. Cal. 2005) 379 F.Supp.2d 1071, 1080, fn. 5, rev'd on other grounds (9th Cir. 2012) 681 F.3d 1006.) Moreover, no tribal and environmental, or mining interest stakeholders, including CBD or WMA, objected to the current definition during the Department's prior rulemaking effort that culminated in March 2012.

Second, the issue of when and what it means to use vacuum or suction dredge equipment under the Fish and Game Code is of great importance to the Department. Although deference to the Legislature and judiciary strikes the Department as appropriate in the moment, particularly absent evidence at present of operation-specific environmental effects, the Department knows it may need to update its definition in the future as necessary. For now, we welcome the opportunity to address the issue in the San Bernardino litigation. Indeed, it is at issue in front of the court already. That is a venue available to each of the petitioners and the other parties to the litigation, including the Department, to address this particular issue with finality in a timelier manner than commencing another rulemaking.

As we highlighted in our SB 1018 Report to the Legislature, for example, since the enactment of the existing moratorium as an initial matter in 2009, miners have increasingly turned to other forms of placer mining in California, especially high banking and power sluicing. Further, certain members of the public appear to have designed or devised ways to mine instream using some, but not all of the required equipment included in the Department's current definition. An increase in the extent to which persons undertake these or other instream mining methods that fall outside of the current regulatory definition or other law, along with evidence of related environmental effects, could highlight the need for related changes to existing law to protect and conserve California's fish and wildlife resources. Any such changes will have the support of the Department.

Third, in the meanwhile, we note that irrespective of the Department's definition, numerous other fully enforceable provisions of the Fish and Game Code, as well as other laws administered by various other state and federal agencies apply and regulate unauthorized impacts to California's fish and wildlife resources, and the environment generally. (See, e.g., Fish & G. Code, §§ 1600 et seq., 2000, 2080, 5515, 5650, 12000.) The Department does not intend to stand by and watch when other authorities exist to prevent instream activities from adversely affecting resources. Pending further action by the Legislature or the judiciary, these laws as enforced by the Department and other relevant agencies will safeguard against and significantly reduce the prospect that any instream mining operation that falls outside the current definition will adversely affect California fish and wildlife resources, or the environment generally.

Should that prove untrue, the Department will revisit its decision today.

Sincerely,



Charlton H. Bonham
Director

cc: Mr. John Laird
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