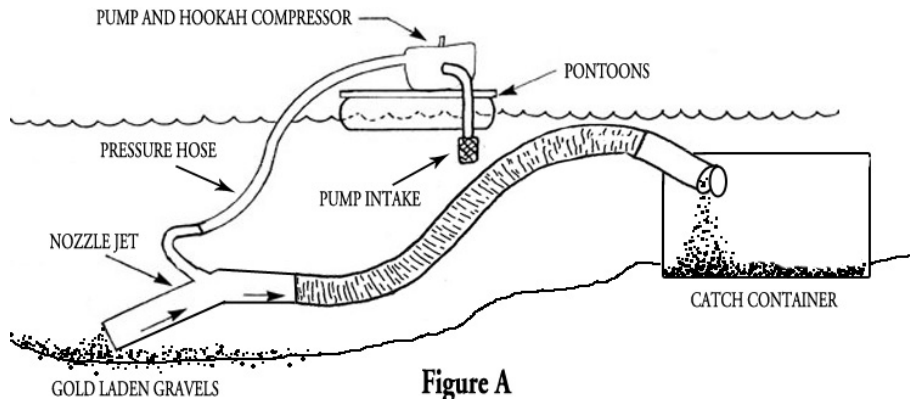


**BEFORE THE DIRECTOR OF THE CALIFORNIA
DEPARTMENT OF FISH AND WILDLIFE**

**PETITION FOR ADMINISTRATIVE RULEMAKING
TO AMEND THE SUCTION DREDGE PERMITTING
PROGRAM REGULATIONS**



**CENTER FOR BIOLOGICAL DIVERSITY,
PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,
INSTITUTE FOR FISHERIES RESOURCES,
KARUK TRIBE,
FRIENDS OF THE RIVER,
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE,
FOOTHILL ANGLER'S COALITION,
NORTH FORK AMERICAN RIVER ALLIANCE,
UPPER AMERICAN RIVER FOUNDATION,
CENTRAL SIERRA ENVIRONMENTAL RESOURCE CENTER,
ENVIRONMENTAL LAW FOUNDATION, AND
KLAMATH RIVERKEEPER**

NOTICE OF PETITION

Director Charlton H. Bonham
California Department of Fish and
Wildlife
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
Email: director@wildlife.ca.gov

John Laird, Secretary for Natural
Resources
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814
(916) 653-5656
secretary@resources.ca.gov

John Mattox, Senior Staff Counsel
California Department of Fish and
Wildlife
1416 Ninth Street, 12th Floor
Sacramento, California 95814
Phone: (916) 651-7648
john.mattox@wildlife.ca.gov

Mark Stopher, Senior Policy Advisor
California Department of Fish and
Wildlife
601 Locust Street
Redding, CA 96001
Phone: 530.225.2275
mstopher@dfg.ca.gov

March 20, 2013

Pursuant to section 11340.6 of the California Government Code, Cal. Gov. Code § 11340.6, the Center for Biological Diversity, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Karuk Tribe, Friends of the River, California Sportfishing Protection Alliance, Foothill Angler's Coalition, North Fork American River Alliance, Upper American River Foundation, Central Sierra Environmental Resource Center, Environmental Law Foundation, and Klamath Riverkeeper (collectively "Petitioners") as interested parties hereby petition the Director of the California Department of Fish and Wildlife ("CDFW") to amend section 228 of the Suction Dredge Permitting Program regulations ("2012 regulations"), 14 C.C.R. 228, as provided herein.

The proposed amendments ensure vacuum and suction dredge equipment is regulated as required by the California Fish and Game Code. §§ 5653 *et. seq.* Miners are using vacuum and suction dredge equipment in violation of the 2012 regulations and the statutory requirements. CDFW staff arbitrarily authorized unregulated use of vacuum and suction dredge equipment contrary to guidance on the Department's website. The proposed amendments remove the component list from the definition of suction dredge mining, ensure that all permits issued under the 2012 regulations are accompanied by a finding of no significant impacts, and ensure that all fees collected fully cover the cost of administering the program.

Petitioners hereby request that CDFW approve the proposed amendments under emergency rulemaking authority pursuant to California Government Code section 11346.1. The unregulated vacuum and suction dredge miners pose harms constituting an emergency. These harms include impacts to public health and safety from mercury

resuspension and concentration in organisms consumed by humans. Many additional impacts posing harm to the general welfare are intended to be mitigated by adhering to the 2012 regulations. These include but are not limited to harms to cultural resources, the recovery of coho salmon, biodiversity, recreational experiences, and archaeological resources.

CDFW has jurisdiction over this petition and authority to amend the 2012 regulations.¹ This petition sets in motion a specific process, placing definite response requirements on CDFW. Specifically, CDFW must “notify the petitioner in writing of the receipt and shall within 30 days . . .” schedule the matter for a public hearing or indicate in writing why the petition was denied. Cal. Gov. Code § 11340.7(a).

///
///
///

¹ Cal. Fish & Game Code §§ 202 & 5653; Cal. Gov. Code § 11340.6.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
INTERESTS OF THE PETITIONERS	3
VACUUM DREDGE LOOPHOLE	5
ARBITRARILY AUTHORIZING UNREGULATED USE	8
AMENDMENTS ARE REQUIRED TO COMPLY WITH CALIFORNIA LAW	9
<i>California Fish and Game Code Requires Regulation of Vacuum Dredging</i>	10
<i>Vacuum Dredge Systems Are Subject to CDFW Control Under the 2012 Regulations</i>	10
<i>The 2012 Regulations Do Not Adhere to the Scope and Purpose of the Statute</i>	12
IMPACTS CONSTITUTING AN EMERGENCY	13
ALTERNATIVE (NON-EMERGENCY)	20
PROPOSED AMENDMENTS	20
CONCLUSION	22
TABLE OF REFERENCES	23

INTRODUCTION

CDFW regulates motorized dredges used for instream mining pursuant to California statute. Gov. Code. §§ 5653 *et. seq.* The statute requires a permit for “[t]he use of any vacuum or suction dredge equipment” Cal. Fish & Game Code § 5653(a). The 2012 regulations improperly define vacuum or suction dredges by defining the use of both as suction dredging, then too narrowly defining “suction dredging” as requiring a “sluice box.” 14 C.C.R. 228(a)(1). Miners increasingly exploit this narrow definition as a loophole and use suction dredge equipment without a sluice box (“vacuum dredges”), thereby attempting to escape all regulatory and statutory protections.

The 2012 regulations require miners using a dredge to also have a permit. 14 C.C.R. 228(b). A limited number of permits are issued each year to control the number of operating dredges and miners. 14 C.C.R. 228(g). The regulations provide a designation for California’s lakes, reservoirs, rivers and streams. 14 C.C.R. 228.5. Each designation specifies dates when suction dredging is prohibited to protect various species.² There is also a statewide restriction on the hours of operation for dredging to protect species and ensure the safety of miners.³ These and other mechanisms in the regulations are intended to reduce the impacts from suction dredging on a number of species including humans.⁴ However, the 2012 regulations do not fully mitigate the adverse impacts from suction dredging.⁵

Due to concerns about unmitigated environmental impacts to fish, water quality, and human health the California Legislature established a moratorium on dredge mining.⁶ The Legislature extended the moratorium, calling for “new regulations [to] fully mitigate all identified significant environmental impacts”⁷ The moratorium effectively halts dredge mining by suspending existing permits and the issuance of new permits. Cal. Gov. Code § 5653.1. As of the date of this petition, the moratorium remains in effect. The State Water Resources Control Board recommends the “moratorium be continued indefinitely, or that [the] activity be permanently prohibited.”⁸

Miners seeking to elude all these statutory and regulatory safeguards are now using “vacuum dredges” to conduct what they term “suction mining.” This is a purely semantic trick intended to disguise the fact that they are still in violation of the statute. These miners simply reconfigure their dredge operations specifically to evade the very narrow

² Horizon Water and Environment. Suction Dredge Permitting Program: Final Subsequent Environmental Impact Report. Chapter 3.3. California Department of Fish and Game. Mar 2012.

³ Horizon Water and Environment. Suction Dredge Permitting Program: Final Subsequent Environmental Impact Report. 3-63. California Department of Fish and Game. Mar 2012.

⁴ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4. California Department of Fish and Game. Feb 2011.

⁵ *Id.*

⁶ Sen. Bill No. 670 (2009-2010 Reg. Sess.) § 2.

⁷ Sen. Bill No. 1018 (2011-2012 Reg. Sess.) § 3.

⁸ Executive Director Thomas Howard. Letter to Mr. Charlton H. Bonham, Director of CDFW. 1 State Water Resources Control Board. 11 Mar 2013.

(and arbitrary) regulatory definition of “suction dredging” as requiring a sluice box.⁹ They merely remove the sluice box, a device used to separate gold from dredged material.¹⁰ However, their motorized dredging operations still use a vacuum system to dredge material from the river and are therefore still subject to the statute and various provisions of the 2012 regulations as indicated by CDFW guidance.¹¹ It is dredging of river bottoms with the use of vacuum equipment that is the operative violation of statute, not whether or not a “sluice box” is being employed as a sediment sorting mechanism.

However, CDFW staff arbitrarily contradicted their own guidance and authorized unregulated vacuum dredge mining as “not prohibited”¹² noting “[t]here is no specific permit required and no seasonal restrictions. Since this is not suction dredging, neither the moratorium or [CDFW’s] adopted regulations for suction dredging apply. It’s essentially a loophole in existing law.”¹³ This shift in position is based on CDFW staff’s “guess [] that such a system will be less efficient, and less excavation will occur, than if [one] were using a suction dredge”¹⁴ In the context of a moratorium, it is not possible for “less excavation” to occur. This position even recognizes that the sluice box will be substituted by “some other system to sort through the material.”¹⁵ CDFW’s change in position¹⁶ is arbitrary as staff’s “guess” does not constitute a factual or statutory basis for the shift.

Petitioners are a coalition of tribal, environmental, and fisheries groups. Their proposed amendments are intended to close the potential loophole currently being exploited by miners and to bring the 2012 regulations into full compliance with the California Fish and Game Code. As a result, the unmitigated impacts from unregulated vacuum dredge mining will cease as required by the statute. Additionally, if the regulations are revised and once the moratorium is lifted, these new “vacuum dredge” operations will also be

⁹ Dave McCracken. Motorized Suction Mining is Allowed in California! The New 49’ers. <http://www.goldgold.com/motorized-suction-mining-is-allowed-in-california-january-2013.html>. Accessed on 16 Jan 2013.

¹⁰ *Id.*

¹¹ California Department of Fish and Wildlife. Suction Dredge Permitting Program. <http://www.dfg.ca.gov/suctiondredge>. Accessed 18 Jan 2013.

¹² Mark Stopher. Underwater Suction Gravel Transfer Systems. California Department of Fish and Wildlife. Email to j-clark1@hotmail.com, from Mark.Stopher@wildlife.ca.gov. Sent 2 Jan 2013. Available on http://www.goldprospectors.org/forum/forum_posts.asp?TID=27630&KW=SUCTION+MINING&PN=5&title=working-underwater-in-california-this-year. Accessed 28 Jan 2013.

¹³ *Id.*; Malcolm Terence, Two Rivers Tribune, Gold Prospectors Spot Loophole in State’s Dredge Mining Moratorium, March 4, 2013. <http://www.tworivertribune.com/2013/03/gold-prospectors-spot-loophole-in-states-dredge-mining-moratorium>. Last Accessed on March 18, 2013.

¹⁴ Mark Stopher. Underwater Suction Gravel Transfer Systems. California Department of Fish and Wildlife. Email to j-clark1@hotmail.com, from Mark.Stopher@wildlife.ca.gov. Sent 2 Jan 2013. Available on http://www.goldprospectors.org/forum/forum_posts.asp?TID=27630&KW=SUCTION+MINING&PN=5&title=working-underwater-in-california-this-year. Accessed 28 Jan 2013.

¹⁵ *Id.*

¹⁶ Earl Crosby. RE: Latest News from Miner forums. Department of Natural Resources, Karuk Tribe. Email from ecrosby@karuk.us. Sent 3 Jan 2013); Mark Stopher. RE: Dredging w/o a sluice box. California Department of Fish and Wildlife. Email to Craig Tucker, from Mark.Stopher@wildlife.ca.gov. Sent 6 Mar 2013.

subject to the permit requirements and regulatory protections as required by section 5653 of the California Fish and Game Code.

The proposed amendments are required to comply with California law. The vacuum dredging operations used within the supposed loophole are in fact also restricted under California statute. Cal. Fish & Game Code §§ 5653 *et. seq.* Unpermitted use of vacuum dredge mining equipment also violates the existing 2012 regulations. 14 C.C.R. 228. Additionally, the 2012 regulations violate sections 5653 and 5653.1 of the California Fish and Game Code because they seem to exclude this alternative means of vacuum dredging. These amendments will correct the deficiencies in the 2012 regulations and ensure California's people and waterways are protected as required by the Legislature.

INTERESTS OF THE PETITIONERS

Petitioners make this request pursuant to Section 11340.6 of the California Government Code, which provides that “any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation”

Center for Biological Diversity (“Center”) is a non-profit, public interest corporation with over 500,000 members and e-activists, and offices throughout the United States. The Center and its members are dedicated to protecting the diverse native species and habitats of North America through science, policy, education, and environmental law. Center members reside and own property in California and use waterways throughout California for recreational, wildlife viewing, scientific, and educational purposes. The Center is also a plaintiff in related lawsuits.

Pacific Coast Federation of Fishermen's Associations (“PCFFA”) is the largest trade organization of commercial fishing men and women on the west coast. PCFFA is a federation of 15 different port associations and marketing associations in California, Oregon and Washington. Collectively, PCFFA's members represent over 1,200 commercial fishing families, most of whom are small and mid-sized commercial fishing boat owners and operators. PCFFA has been active for nearly 30 years in efforts to rebuild salmon populations and correct water pollution problems in Northern West Coast salmon-bearing streams and rivers, as well as watersheds connected to these rivers. PCFFA is also a plaintiff in related lawsuits.

Institute for Fisheries Resources (“IFR”) is a non-profit organization working to meet the fishery research and conservation needs of working men and women in the fishing industry, including by funding and executing PCFFA's expanding salmon habitat protection programs. From its inception, IFR has helped fishing men and women in California and the Pacific Northwest address salmon protection and restoration issues, with particular focus on improving water quality in salmon-bearing rivers and streams throughout California. IFR is an active leader in several salmon restoration programs affecting winter-run and spring-run chinook salmon and coho salmon, including the development of better water quality standards and enforcement. IFR has actively advocated for the protection and restoration of flows and improving water quality critical

to the health of California's North Coast rivers and streams and their economically important salmon runs. IFR is also a plaintiff in related lawsuits.

The Karuk Tribe is a federally recognized Indian Tribe with a population of approximately 3,400 members. Its headquarters is located in Happy Camp, along the Klamath River and in the vicinity of the Salmon and Scott Rivers. The Karuk Tribe has lived in northern California since time immemorial and its ancestors are considered among the earliest inhabitants of aboriginal California. The stated mission of the Karuk Tribe is to promote the general welfare of all Karuk people; establish equality and justice for the Tribe; restore and preserve Tribal traditions, customs, language, and ancestral rights; and secure for themselves and their descendants the power to exercise the inherent rights of self-governance. Among the many goals of the Tribe is the protection and restoration of native fish and wildlife species that the Tribe has depended upon for traditional cultural, religious, and subsistence uses. The Karuk Tribe is also a plaintiff in related lawsuits.

Friends of the River ("FOR") is a non-profit organization dedicated to preserving and restoring California's rivers, streams, and their watersheds as well as advocating for sustainable water management. FOR accomplishes this goal by influencing public policy and inspiring citizen action through grassroots organizing. FOR was founded in 1973 during the struggle to save the Stanislaus River from the New Melones Dam. Following that campaign, the group grew to become a statewide river conservation organization. FOR currently has nearly 6,000 members. FOR is also a plaintiff in related lawsuits.

California Sportfishing Protection Alliance ("CSPA") is a non-profit public benefit conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state's water quality and fishery resources and their aquatic ecosystems and associated riparian habitats. CSPA has approximately 2,500 members who live, recreate and work in and around waters of the State of California, including waterways throughout the Sierra Nevada, Central Valley and the Sacramento-San Joaquin River Delta Estuary. CSPA has actively promoted the protection of water quality and fisheries throughout California before state and federal agencies, the State Legislature, and Congress and regularly participates in administrative and judicial proceedings on behalf of its members to protect, enhance, and restore California's water quality and fisheries. CSPA is also a plaintiff in related lawsuits.

Foothill Angler's Coalition is a fisheries and aquatic habitat non-profit conservation organization dedicated to the protection and restoration of Sierra Nevada trout, steelhead, and salmon resources, along with their habitat and the Sierra Nevada foothill watersheds that sustain those resources, as well as the enhancement of the sport of fishing. They support an ecosystem-based approach to watershed management, and the protection and preservation of all native species, including wildlife and plant populations.

North Fork American River Alliance ("NFARA") is a non-profit organization created to protect and preserve the natural, cultural and historic beauties of the North Fork

American River Canyon. NFARA is dedicated to the careful participation and planning of recreation along the North Fork of the American river.

Upper American River Foundation (“UARF”) is a member-based non-profit organization founded to conserve and protect the unique qualities of the Upper American River watersheds in Placer and El Dorado Counties. The objectives of UARF include identifying issues that need to be resolved, and developing cooperative involvement and funding that will be needed to help resolve them so that future generations will continue to be able to enjoy the same quality experiences that we have enjoyed during our lifetimes in the Upper American River Watershed.

Central Sierra Environmental Resource Center (“CSERC”) is a non-profit center that works to protect the remaining water, wildlife, and wild places in the central Sierra Nevada. CSERC serves as the foremost environmental defender of more than 2,000,000 acres of forests, rivers, lakes, wetlands, roadless areas, old growth groves, scenic oak woodlands, and other precious areas within the northern Yosemite region of the central Sierra Nevada.

The Environmental Law Foundation’s (“ELF”) purpose is to improve environmental quality for those most at risk by providing access to information, strategies, and enforcement of environmental, toxics, and community right-to-know laws. ELF complements the approach of other environmental law groups by enforcing existing environmental regulations, providing a bridge of direct service to people in need, and serving as the critical link between at-risk communities and the legal, scientific, financial, and other resources they need to effectively address environmental problems.

Klamath Riverkeeper is a community-based non-profit corporation with offices in Orleans, California and Klamath Falls, Oregon. Klamath Riverkeeper works to restore water quality and fisheries throughout the watershed of the Klamath River and its tributaries, including the Shasta River watershed, bringing vitality and abundance back to the rivers in the watershed and to its people. Klamath Riverkeeper works closely with the Klamath River tribes, fishermen, and recreational groups, in all aspects of its programs.

VACUUM DREDGE LOOPHOLE

CDFW and the mining community currently rely on a perceived loophole to circumvent the statutory requirements and 2012 regulations. The loophole exploits the excessively narrow existing regulatory definition of “suction dredging.”

The definition includes two elements. The first is a qualitative description of the activity as “the use of a motorized suction system to vacuum material from the bottom of a river, stream or lake and to return all or some portion of that material to the same river, stream or lake for the extraction of minerals.” 14 C.C.R. 228(a)(1). This element generally defines the use of vacuum and suction dredges as contemplated by the statute and remains largely intact under this Petition.

The second element fatally narrows the above definition by requiring three equipment components operate together: 1) a hose which vacuums sediment, 2) a motorized pump, and 3) a “sluice box.” 14 C.C.R. 228(a)(1). The hose and motorized pump terms are sufficiently general to encompass variations commonly associated with vacuum dredging equipment. However, a sluice box is but one type of recovery system used to separate gold from dredged gravel.¹⁷ Miners increasingly now use vacuum dredges with a variety of other recovery systems to try to escape that very narrow technical definition of “suction dredging.”¹⁸

Dave McCracken, the General Manager of the New 49er’s Prospecting Organization,¹⁹ provides detailed instructions on his web site to miners seeking to exploit this loophole.²⁰ McCracken spells out the theory of the loophole while reassuring miners that

“as long as [they] remove the sluice box from [their] motorized suction system, [they] are not operating a ‘suction dredge.’ Said another way, there is an opportunity to use a motorized suction system to transfer high-grade gravel from one place in the river or creek to another location where the gravel can be more-easily processed in a separate system.”²¹

McCracken advises those miners adapting suction dredges “to not have the sluice box from [their] original ‘suction dredge’ anywhere in the vicinity of the program.”²² He recommends not to “discharge . . . into some other type of recovery system that uses a sluice box . . . [to avoid] meet[ing] the regulatory definition of a ‘dredge.’”²³

The web site provides several examples of recovery systems that can be used as alternatives to a sluice box. Each system includes a catch container as a staging point for the dredged material. One system includes “a 20-foot piece of PVC plastic tubing to direct the [dredged] discharge into a catch container . . . sitting up on the streambank.”²⁴ Another includes transferring discharge “over to a catch container in shallower, slower water which is closer to the bank.”²⁵ A third involves fixing the “catch container between

¹⁷ California Department of Fish and Game. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. 3-2. Project No. 09.005. February 2011.

¹⁸ Dave McCracken. Motorized Suction Mining is Allowed in California! The New 49’ers. <http://www.goldgold.com/motorized-suction-mining-is-allowed-in-california-january-2013.html>. Accessed on 16 Jan 2013; Miners are currently using vacuum dredge equipment to mine in California. Dave Mack (McCracken). Suction Mining has Already Started on the Klamath River! The New 49er’s. Email from admin@goldgold.com. Sent 9 Mar 2013.

¹⁹ Pro Mack Mining. Resume of Dave McCracken. <http://www.promackmining.com/resume.htm>. Accessed on 8 Feb 2013.

²⁰ Dave McCracken. Motorized Suction Mining is Allowed in California! The New 49’ers. <http://www.goldgold.com/motorized-suction-mining-is-allowed-in-california-january-2013.html>. Accessed on 16 Jan 2013.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

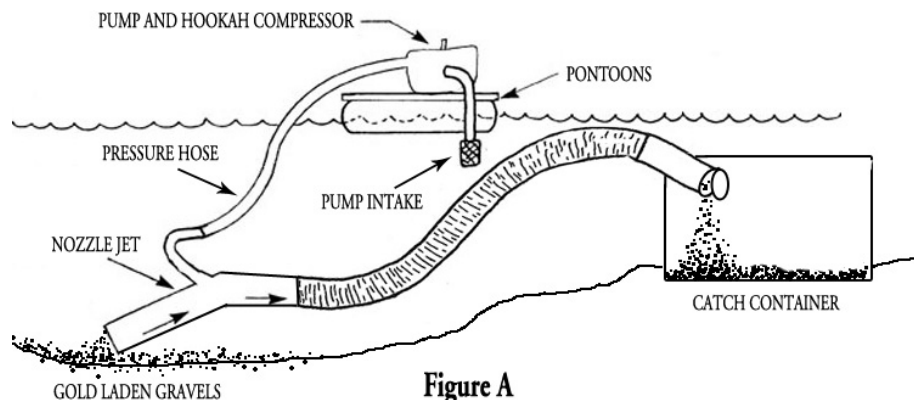
²⁵ *Id.*

pontoons on [the] floating platform . . . ”²⁶ in place of the sluice box. There is even discussion of adding a second engine to provide the extra power needed to move discharge to a distant catch container.²⁷

Once dredged material is in the catch container it must be processed to separate out the gold. McCracken suggests “minimize[ing] the amount of gravel . . . [transferred] to the catch container . . . and recover[ing] [the] gold between dives with just a classification screen and gold pan.”²⁸ He even promotes the use of a sluice box so long as the dredge is not running because “the regulation defines the three components as operating together.”²⁹ Finally, McCracken advises “process[ing] the gravel in any normal way that does not violate water quality standards.”³⁰ The use of the phrase “any normal way” suggests that additional methods are available for processing without a sluice box.

The combination of a catch container and a processing method are functionally equivalent to a sluice box for the purposes of motorized instream dredge mining. The vacuum dredges used to exploit the loophole still employ recovery systems. While they do not use a typical “sluice box” physically attached to the dredge, they nevertheless still employ a similar type of catch container as a staging point for dredged material. The container is used in combination with a processing method that may include a sluice box. These recovery systems are functionally equivalent to a sluice box “operating together” with the motorized pump and hose and thus bring this form of vacuum dredging within even the regulatory definition of suction dredging.

McCracken also provides diagrams of the vacuum dredge systems designed to exploit the loophole (Figures A & B below).³¹ Arrows illustrate water and gravel being vacuumed from the streambed into a catch container. These vacuum dredge systems, while operating without a sluice box, are nonetheless subject to the California Fish and Game Code, sections 5653 and 5653.1, as “any vacuum . . . dredge equipment.”



²⁶ *Id.*
²⁷ *Id.*
²⁸ *Id.*
²⁹ *Id.*
³⁰ *Id.*
³¹ *Id.*

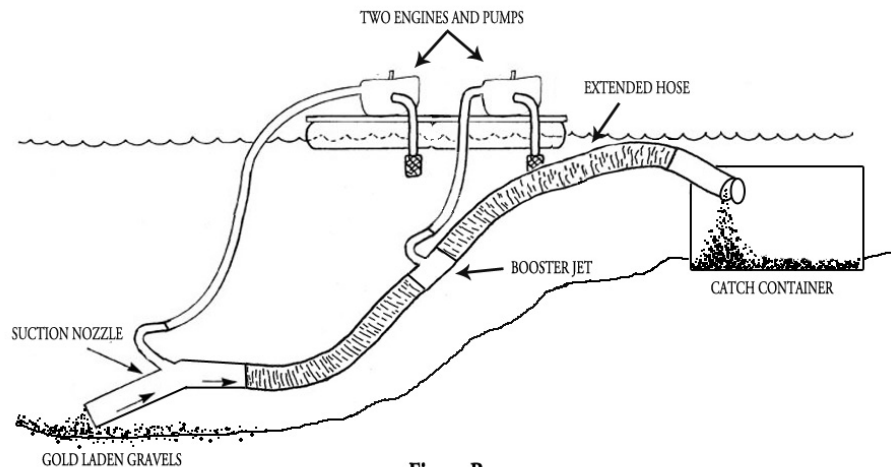


Figure B

ARBITRARILY AUTHORIZING UNREGULATED USE

CDFW staff arbitrarily and repeatedly authorized unregulated use of such vacuum dredge equipment contrary to the statute and guidance on the Department’s website. The Department maintains a webpage on the Suction Dredge Permitting Program. The page provides guidance pertaining to the moratorium pointing out it “does not prohibit or restrict some other forms of mining, including, for example, practices known as high banking, power sluicing, sniping or using a gravity dredge, so long as gravel and earthen materials are not vacuumed with a motorized system from the river or stream.”³² The diagrams and description of the vacuum dredging systems provided above clearly demonstrate that they are motorized systems used to vacuum gravel and earthen materials from a river or stream. The CDFW’s guidance clearly states that vacuum dredging systems are subject to the moratorium.

However, CDFW staff arbitrarily contradicted the statute and CDFW’s guidance by authorizing unregulated use of these types of vacuum dredging systems. Staff responded to an inquiry from a miner and assured him “[i]f practiced as [Dave McCracken] describes, this is not a violation of the moratorium and is not prohibited.”³³ Staff clarified “[t]here is no specific permit required and no seasonal restrictions. Since this is not suction dredging, neither the moratorium or our adopted regulations for suction dredging apply. It’s essentially a loophole in existing law.”³⁴

This shift in CDFW’s position is based on pure speculation. CDFW staff’s “guess is that such a system will be less efficient, and less excavation will occur, than if [one] were

³² California Department of Fish and Wildlife. Suction Dredge Permitting Program. <http://www.dfg.ca.gov/suctiondredge>. Accessed 18 Jan 2013.

³³ Mark Stopher. Underwater Suction Gravel Transfer Systems. California Department of Fish and Wildlife. Email to j-clark1@hotmail.com, from Mark.Stopher@wildlife.ca.gov. Sent 2 Jan 2013. Available on http://www.goldprospectors.org/forum/forum_posts.asp?TID=27630&KW=SUCTION+MINING&PN=5&title=working-underwater-in-california-this-year. Accessed 28 Jan 2013.

³⁴ *Id.*

using a suction dredge”³⁵ In the context of a complete moratorium, it is not possible for “less excavation” to legally occur. The CDFW website and staff’s statement are inconsistent. One staff member’s “guess” does not constitute a factual or statutory basis for a shift in the position of CDFW. Staff even acknowledges that the sluice box will be replaced by “some other system to sort through the material.”³⁶

CDFW’s original guidance provided on their website adheres to the requirement of the California Fish and Game Code, sections 5653 & 5653.1, that “any vacuum or suction dredge equipment” be restricted. In short, the statute restricts *all forms of vacuum mining*, with or without a sluice, not just the narrowly defined “suction dredge” form typically incorporating a sluice system. One staff member’s arbitrary change in position is insufficient to authorize unrestricted operation of vacuum mining equipment. This change defies the California Legislature’s statutory framework on suction (i.e., vacuum) mining generally.

AMENDMENTS ARE REQUIRED TO COMPLY WITH CALIFORNIA LAW

The proposed amendments ensure that the 2012 regulations comply with their statutory authority. Two layers of California law restrict the use of vacuum and suction mining systems for instream dredging purposes. The first layer, the California Fish and Game Code, is statutory, provides the authority for the CDFW to promulgate regulations, and requires regulation of all forms of vacuum mining. §§ 5653 *et. seq.*

The second layer, the California Code of Regulations, is merely regulatory and CDFW may not allow motorized in-stream vacuum mining under the loophole even under the 2012 regulations. Vacuum dredging systems being developed to take advantage of this supposed “loophole” do in fact substantially meet the regulatory definition of suction dredging.

All a “sluice box” is, is a system for filtering out and separating mud from minerals like gold. A sluice box by any other name is still a sluice box. If the dredging operation uses any device that is or does, in essence, what a sluice box system does, then it is “operating together” with a sluice box and the operation is a suction dredging system. Using vacuum dredging systems in-stream with any equipment without a permit is a restricted method of operation under the statute.

The provision of the 2012 regulations requiring a “sluice box” is also inconsistent with rest of the regulations as well as the statute. The proposed amendments herein remedy this internal inconsistency and clarify that motorized vacuum dredging mining operations in any form are subject to regulation.

The 2012 regulations do not adhere to the scope and purpose of the statute. The regulations are inconsistent with the scope of the statute because they fail to regulate vacuum dredging equipment and require specific equipment components. The

³⁵ *Id.*

³⁶ *Id.*

regulations condone the use of vacuum dredge equipment posing harm to fish, water quality, and human health. Allowing these harms violates the very purpose of the statute. The amendments proposed herein better incorporate the scope and purpose of the statute into the regulations.

California Fish and Game Code Requires Regulation of Vacuum Dredging

The California Fish and Game Code governs vacuum dredges. The statute restricts “[t]he use of any vacuum or suction dredge equipment . . . in any river, stream, or lake” Cal. Fish & Game Code §§ 5653(a); 5653.1(b). The statute does not require a sluice box or any type of recovery system. The statute does not provide a definition of vacuum dredge equipment. However, the use of “any” when referring to vacuum dredge equipment implies an expansive meaning.

To vacuum is defined as “to draw or take in as if by suction.”³⁷ Dredge as a noun is defined as “a machine for removing earth usually by . . . a suction tube.” Dredge is also a transitive verb, defined as “to dig, gather, or pull out with or as if with a dredge” or “to deepen (as a waterway)”³⁸ The vacuum dredge system used with the loophole is, in the designers’ own words, an “underwater suction gravel transfer system[]”³⁹ (emphasis removed). The system is used to “suck up” gold laden gravel or “pay dirt” and “transfer [it] by suction” to a recovery container.⁴⁰ The vacuum dredge system uses a “suction hose” to accomplish this task.⁴¹ The use of a suction hose for removing gravel fits the dictionary definition of a dredge machine. The equipment uses a vacuum, as defined above, to draw the gravel into the hose. The loophole uses vacuum dredge equipment as defined, and the equipment is therefore subject to the statutory restrictions.

Vacuum Dredge Systems Are Subject to CDFW Control Under the 2012 Regulations

Vacuum dredge systems cannot be used without a permit under the 2012 regulations. The regulations require a permit for all suction dredging. 14 C.C.R. 228(b). Suction dredging is defined in the regulations as “the use of a motorized suction system to vacuum material from the bottom of a river, stream or lake and to return all or some portion of that material to the same river, stream or lake for the extraction of minerals.” 14 C.C.R. 228(a)(1).

Dave McCracken describes the loophole as “an opportunity to use a motorized suction system to transfer high-grade gravel from one place in the river or creek to another location where the gravel can be more-easily processed in a separate system [for the

³⁷ Merriam-Webster Dictionary. Vacuum. <http://www.merriam-webster.com/dictionary/vacuum>. Accessed 28 Jan 2013.

³⁸ Merriam-Webster. Dredge. <http://www.merriam-webster.com/dictionary/dredge>. Accessed 28 Jan 2013.

³⁹ Dave McCracken. Motorized Suction Mining is Allowed in California! The New 49’ers. <http://www.goldgold.com/motorized-suction-mining-is-allowed-in-california-january-2013.html>. Accessed on 16 Jan 2013.

⁴⁰ *Id.*

⁴¹ *Id.*

extraction of gold].”⁴² The vacuum dredge system he believes escapes regulation is used “to expose and recover gold from very shallow deposits out in the river . . . [i.e. from] shallow streambed material on top of underwater gold deposits.”⁴³ These descriptions clearly mirror the regulatory definition of suction dredging. Since the 2012 regulations require a permit for suction dredging, a permit is required to use a vacuum dredge.

Using a vacuum dredge without a permit is a restricted method of operation. The section of the regulations governing restricted methods of operation identifies “motorized winching or the use of other motorized equipment to move boulders, logs, or other objects [as] prohibited, unless . . . [t]he permittee has a valid suction dredge permit” 14 C.C.R. 228(l)(1). There are no valid suction dredge permits while the moratorium is in effect. Cal. Fish & Game Code § 5653.1(b). A vacuum dredge system also uses a motorized pump to move other objects from the streambed such as gravel, gold deposits, earth, stones, organic matter, and mercury. This is unpermitted use of motorized equipment to move other materials. Permitless use of a vacuum dredge is prohibited under the 2012 regulations.

Further, a vacuum dredge system may be used to move the materials from within the current water level in violation of the 2012 regulations. The regulations specify “stream substrate, including gravel, cobble, boulders, and other material may only be moved within the current water level. 14 C.C.R. 228(l)(11). Dave McCracken discusses one implementation of the technique using “20-foot piece of PVC plastic tubing to direct discharge into a catch container that was sitting up on the streambank.”⁴⁴ This implementation clearly moves stream substrate and other material from within the current water level. Other implementations use a submerged catch container as a staging point for dredged material.⁴⁵ These implementations still require the material to be removed from the water level for processing. Using a vacuum dredge system involves removing material from the water, is a restricted method of operation, and is a violation of the 2012 regulations.

The 2012 regulations inconsistently require a “sluice box” to operate a dredge. The first definition of suction dredging requires “operating” a sluice box, hose, and motorized pump together. 14 C.C.R. 228(a)(1). This is the only time a sluice box is mentioned in the regulations. In fact, the Equipment Requirements section excludes the sluice box while providing specifications for the nozzle, hose, and pump. 14 C.C.R. 228(k). Additionally, the regulations proclaim

“[n]o person shall operate a suction dredge within 500’ of another operating suction dredge. For the purposes of these regulations, ‘operating’ shall mean that the motor on the suction dredge is creating a vacuum through the vacuum hose and nozzle.”

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

14 C.C.R. 228(l)(21). This definition of “operating” is also inconsistent because it does not require a sluice box. These inconsistent definitions must be brought into alignment. The proposed amendments are required to remedy this internal inconsistency.

The CDFW cannot allow unregulated use of vacuum dredging systems without a sluice box. Using a vacuum dredge system already meets the regulatory definition of “suction dredging.” A permit is required to use a motorized vacuum dredge to move objects like gravel. Removing materials from the water level with a vacuum dredge system already violates the regulations. The regulations define operating a dredge both with and without a sluice box and this inconsistency must be eliminated. CDFW cannot ignore their own statutes and regulations and continue to condone unregulated use of vacuum dredges. Instead, the amendments should be adopted to ensure statutory and regulatory compliance.

The 2012 Regulations Do Not Adhere to the Scope and Purpose of the Statute

The 2012 regulations are too narrow because they attempt to exclude vacuum dredging systems, which operate the same in every way as regulated systems but merely lack sluice boxes. The regulations classify suction dredging as a hose, a motorized pump, and a sluice box operating together. 14 C.C.R. 228(a). The statute calls for regulation of “any vacuum or suction dredge equipment . . .” Cal. Fish & Game Code § 5653(a). A sluice box may be part of an appropriate definition for some types of suction dredging equipment. However, the statute also requires regulation of vacuum dredge equipment without a sluice box.⁴⁶ Since the regulations specifically require a sluice box, the DFW is not regulating “any vacuum or suction dredge equipment” as called for in the statute. The DFW is only regulating suction dredge equipment with a sluice box. The regulations thus fall far short of what is called for in the statute.

The 2012 regulations also exceed the scope of their statutory authority by requiring specific equipment components. The statute makes clear that

“[u]nder the regulations . . . the [CDFW] shall designate [1] waters or areas wherein vacuum or suction dredges may be used pursuant to a permit, [2] waters or areas closed to those dredges, [3] the maximum size of those dredges that may be used, and [4] the time of year when those dredges may be used.” (numeration added).

Cal. Fish & Game Code § 5653(b). This list clearly sets out the scope of the regulations with regard to equipment. The CDFW is confined to specifying the size of equipment. The CDFW does indeed regulate the size of the equipment in the regulations. 14 C.C.R. 228(k). However, the CDFW expanded the regulations to require specific equipment components including the sluice box. 14 C.C.R. 228(a)(1). The equipment component list exceeds the scope of statutory authority and must be removed.

⁴⁶ Cal Fish and Game Code § 5653.

The 2012 regulations also violate the purpose of the statute by excluding dredge machines without a sluice box. The California legislature, in creating the moratorium, found “that suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state” Sen. Bill No. 670 (2009-2010 Reg. Sess.) § 2. The moratorium requires “new regulations . . . fully mitigate all identified significant environmental impacts.” Cal. Fish & Game Code § 5653.1(b)(4). A vacuum dredge system without a sluice box will suspend more elemental mercury in the water which poses a health impact to people. CDFW is also, in essence, condoning unrestricted vacuum dredging which poses a number of adverse impacts to fish and water quality allegedly mitigated under the regulations. The moratorium was also established to avoid the risks posed by unregulated use of a sluiceless vacuum dredge systems. CDFW’s refusal to regulate these vacuum dredges violates the purpose of the statute.

The 2012 regulations do not adhere to the scope or purpose of the statute. The proposed amendments will subject vacuum dredge equipment (i.e., suction dredge machines merely without a sluice box) to regulation as intended by the statute. Additionally, the amendments remove the specific equipment list requirement because it exceeds the statutory authority. Finally, the amendments align the regulations with the purpose of the statute and eliminate adverse environmental and health impacts. The amendments are required to ensure the regulations adhere to the scope and purpose of the California Fish and Game Code.

IMPACTS CONSTITUTING AN EMERGENCY

Miners taking advantage of this loophole pose serious harms to public health, safety, and general welfare. The California Legislature instituted a moratorium on suction dredge mining due to “various adverse environmental impacts to . . . the health of the people of this state”⁴⁷ Miners exploiting the loophole ignore the statute and pose a health and safety risk to humans through mercury resuspension.⁴⁸ Additional impacts are intended to be mitigated through provisions in the regulations.⁴⁹ But vacuum dredge miners would avoid these potentially mitigating provisions by using this loophole to utterly avoid state regulation, thus resulting in adverse impacts to the general welfare. These impacts have economic consequences including undermining the recovery of salmon fisheries, contaminating domestic water supplies, degrading recreational opportunities, and

⁴⁷ Sen. Bill No. 670 (2009-2010 Reg. Sess.) § 2; The State Water Resources Control Board believes that indefinite continuation of the existing moratorium “is the only option that fully mitigates all environmental impacts.” Thomas Howard, Executive Director of the State Water Resources Control Board. Letter to Mr. Charlton H. Bonham, Director of CDFW. March 11, 2013.

⁴⁸ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report, Chapter 4. California Department of Fish and Game. Feb 2011; Horizon Water and Environment. Suction Dredge Permitting Program: Final Subsequent Environmental Impact Report. 5-64. California Department of Fish and Game. Mar 2012.

⁴⁹ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report, Chapter 4. California Department of Fish and Game. Feb 2011.

permanent loss of cultural resources.⁵⁰ These serious risks constitute a factual basis for CDFW to implement the proposed amendments through the emergency rulemaking process.

Miners exploiting the loophole do not use a sluice box and may thus greatly increase mercury concentrations in the water. CDFW recognized the potential for a single dredge machine to increase the mercury concentration of an entire watershed by almost ten percent.⁵¹ The CDFW admitted “[e]lemental mercury is expected to be . . . removed in a suction dredge sluice box because it is heavy and thus settles effectively.”⁵² In a public comment meeting Michael Stevenson, a consultant who helped prepare the EIR and the 2012 regulations, identified the benefit from a sluice box in “the removal of heavy metals from the water, [including] lead and mercury”⁵³ Miners exploiting the loophole trap no mercury in a sluice box and thus their operations have the potential to greatly increase levels of suspended mercury.

Additional suspended mercury exacerbates a serious threat to human health. The CDFW acknowledged that “processes associated with suction dredging . . . may increase [mercury] levels . . . downstream . . . such that [mercury concentration] in aquatic organisms may be measurably increased, thereby substantially increasing the health risks to humans consuming these organisms.”⁵⁴ The CDFW admitted “this impact is considered significant and unavoidable.”⁵⁵ This unmitigated health risk exists even when using a sluice box as contemplated by the 2012 regulations. “Unfortunately, whether or not a sluice box is used, the detrimental effect on water quality, and subsequently humans and aquatic life, remains the same.”⁵⁶ Miners exploiting the loophole pose an equal or more serious risk to human health due to removal of the mercury-trapping sluice box.

In addition to mercury, dredging poses risks from the release of other trace metals. CDFW identified a number of additional trace metals that will be resuspended by dredging activities including cadmium, copper, and zinc.⁵⁷ Aquatic life as well as municipal and domestic water supply beneficial uses are considered sensitive to these

⁵⁰ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4. California Department of Fish and Game. Feb 2011.

⁵¹ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. 4.2-52. California Department of Fish and Game. Feb 2011.

⁵² Horizon Water and Environment. Suction Dredge Permitting Program: Final Subsequent Environmental Impact Report. 4-46 California Department of Fish and Game. March 2012.

⁵³ Horizon Water and Environment. Suction Dredge Permitting Program: Final Subsequent Environmental Impact Report. Appendix I-198. California Department of Fish and Game. March 2012.

⁵⁴ Horizon Water and Environment. Suction Dredge Permitting Program: Final Subsequent Environmental Impact Report. 5-64. California Department of Fish and Game. Mar 2012.

⁵⁵ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4. California Department of Fish and Game. Feb 2011.

⁵⁶ Thomas Howard, Executive Director of the State Water Resources Control Board. Letter to Mr. Charlton H. Bonham, Director of CDFW. March 11, 2013.

⁵⁷ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.2. California Department of Fish and Game. Feb 2011.

heavy metals.⁵⁸ Historic mining has resulted in “localized hot-spots containing high sediment concentrations of metal ores . . . [and] problems [] with acid mine drainage.”⁵⁹ These sites are “expected to have very elevated levels of dissolved metals in both the water column and in the sediment pore water as well.”⁶⁰ Suction dredging at these hot-spots could substantially increase bioavailable concentrations of various toxic trace metals in downstream water bodies.⁶¹ The increased concentrations would exceed the California Toxics Rule metals criteria and adversely impact one or more beneficial uses.⁶² The CDFW suggests identifying and closing these hot-spots to suction dredging.⁶³ This suggestion was not implemented in the 2012 regulations. The statutory moratorium was established to prevent this impact until regulations fully mitigate all impacts. Miners exploiting the loophole could dredge a hot-spot and create serious harm to human health and the general welfare by impairing downstream water bodies – all condoned by the state.

Unregulated dredging under the loophole also poses risks to California’s geomorphology. CDFW identified impacts including erosion, transport, and deposition of alluvial materials; destabilization of streambanks; and destabilization of the channel profile.⁶⁴ These impacts can impair the “functions and values of aquatic and riparian habitats and water quality conditions.”⁶⁵ The 2012 regulations are intended to mitigate these impacts in part by requiring miners to restore dredge holes, prohibiting dredging of or diverting flow into streambanks, and restricting the nozzle size of dredges.⁶⁶ A “Best Management Practices” pamphlet (“pamphlet”) given to each permittee⁶⁷ provides guidance to restore dredge holes.⁶⁸ Further, the regulations require that miners notify CDFW of the dredging location providing additional oversight, enforcement capabilities, and a deterrent effect.⁶⁹ However, miners exploiting the loophole choose to ignore the 2012 regulations and will never receive such a pamphlet because they will not seek a permit. These miners pose serious risks to the general welfare by impairing the function and value of aquatic and riparian habitats.

⁵⁸ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.2-55. California Department of Fish and Game. Feb 2011.

⁵⁹ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.2-57. California Department of Fish and Game. Feb 2011.

⁶⁰ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.2-58. California Department of Fish and Game. Feb 2011.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.1. California Department of Fish and Game. Feb 2011.

⁶⁵ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. 4.1-1. California Department of Fish and Game. Feb 2011.

⁶⁶ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.1. California Department of Fish and Game. Feb 2011.

⁶⁷ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. 2-76. California Department of Fish and Game. Feb 2011.

⁶⁸ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. 4.1-20. California Department of Fish and Game. Feb 2011.

⁶⁹ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.1. California Department of Fish and Game. Feb 2011.

Unregulated vacuum dredging poses the risk of serious adverse impacts to fish. The 2012 regulations “incorporate[] spatial and temporal restrictions on [] dredging . . . based on life history, distribution and abundance of . . .”⁷⁰ sixty-one fish species.⁷¹ Fifty-five out of the sixty-one species are listed under the U.S. or California Endangered Species Act, are candidates for listing, or are species of special concern.⁷² The regulations are also intended to mitigate impacts through disclosure of dredging locations, restrictions on altering water flows, limiting equipment size, avoiding disturbance of certain materials,⁷³ and requiring tailings piles be leveled.⁷⁴ The regulations use these restrictions in an attempt to avoid disrupting fish engaged in migrating, mating, spawning, and early life stage development; to prevent entrainment of eggs, larvae, juvenile, and adult fish; to allow for recovery of the benthic community; and to protect habitat.⁷⁵ Miners exploiting the loophole are unregulated, and thus do not adhere to the regulations and so pose serious risks to these fish species. These risks threaten serious harm to the general welfare due to species loss.

Unregulated vacuum dredging poses a serious harm to the general welfare by undermining the California Coho Salmon Species Recovery Strategy. Among the species protected under the 2012 regulations is the Central California Coast Coho Salmon population.⁷⁶ The CDFW has completely prohibited dredging in central coast coho habitat noting “[n]o seasonal restrictions would avoid potential impacts . . .”⁷⁷ The regulations provide varying dredging seasons to protect the Southern Oregon/Northern California Coast Coho population ranging from a complete ban to a four month season.⁷⁸ CDFW also developed a Species Recovery Strategy for the coho salmon.⁷⁹ The strategy seeks in part to restore “population levels that allow for the resumption of Tribal, recreational, and commercial fisheries . . .”⁸⁰ The estimated “costs of implementing the Recovery Strategy are about \$5 billion dollars.”⁸¹ Miners exploiting the loophole do not adhere to these seasonal restrictions and may dredge in sensitive coho salmon habitat. This activity undermines the Recovery Strategy posing two significant economic harms. The first is the delay in or perhaps preclusion of reestablishing coho salmon fisheries. The second is to diminish the effectiveness of the Recovery Strategy, thereby wasting

⁷⁰ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3-24. California Department of Fish and Game. Feb 2011.

⁷¹ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Table 4.3-1. California Department of Fish and Game. Feb 2011.

⁷² *Id.*

⁷³ Materials include mussel beds, silt and clay, eggs, redds, tadpoles, mollusks, fish, streamside vegetation, and woody debris.

⁷⁴ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3. California Department of Fish and Game. Feb 2011.

⁷⁵ *Id.*

⁷⁶ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Table 4.3-1. California Department of Fish and Game. Feb 2011.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ California Department of Fish and Game. Recovery Strategy for California Coho Salmon. Feb 2004.

⁸⁰ *Id.*

⁸¹ *Id.*

private and public funds potentially totaling \$5 billion. These economic impacts constitute immediate and serious harms to the general welfare.

Unregulated vacuum dredging likewise poses harms to terrestrial wildlife and vegetation. Dredging may cause harms to a number of bird species including passerines⁸² and raptors.⁸³ These harms include “nesting failure and expenditure of critical energy reserves”⁸⁴ Other terrestrial species may suffer harms including reduction in fecundity, increased mortality, habitat fragmentation or loss, and disruption of movement corridors.⁸⁵ The regulations’ spatial and temporal restrictions are intended to mitigate these impacts.⁸⁶ CDFW identified 62 special-status plant species⁸⁷ with a “moderate” potential to be impacted in the absence of the regulations.⁸⁸ Since vacuum dredge miners do not adhere to the regulations, these impacts will occur until the loophole is closed. These impacts affect a broad set of species and constitute serious harm to the general welfare.

Miners exploiting the loophole also pose a serious risk of degrading sensitive habitat. The 2012 regulations “include measures to protect habitats that [f]ish are dependent upon, such as wetlands” (emphasis removed). As long as these measures are in place, dredging “is not likely to result in substantial adverse effects”⁸⁹ Stream ecosystems are threatened from miners “displacing large volumes of material, changing substrate characteristics, dispersing . . . invasive species, and unauthorized release[] of noxious materials (e.g., fuel spills).”⁹⁰ The regulations contain a number of “measures designed to maintain stream ecosystem function so that substantial reductions in biodiversity . . . do not occur.”⁹¹ In the absence of the regulations, as is the case with the loophole, these impacts may lead to the degradation of wetlands and substantial reductions in biodiversity. These harms constitute a serious risk to the general welfare due to associated economic harm and loss of resources.

⁸² “Passerines are birds belonging to the order Passeriformes, a large subset of birds that have evolutionary traits adapted for perching.” Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3 fn 3. California Department of Fish and Game. Feb 2011.

⁸³ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3. California Department of Fish and Game. Feb 2011.

⁸⁴ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3-49. California Department of Fish and Game. Feb 2011.

⁸⁵ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3-50-51. California Department of Fish and Game. Feb 2011.

⁸⁶ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3. California Department of Fish and Game. Feb 2011.

⁸⁷ This number is a combination of 48 aquatic and wetland plant species and 14 upland plant species.

⁸⁸ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3-52-53. California Department of Fish and Game. Feb 2011.

⁸⁹ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3-55. California Department of Fish and Game. Feb 2011.

⁹⁰ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3-56. California Department of Fish and Game. Feb 2011.

⁹¹ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3-56. California Department of Fish and Game. Feb 2011.

Unregulated vacuum dredging additionally poses risks to human health and safety from hazards and hazardous materials. CDFW relies on the 2012 regulations and the pamphlet distributed to all permit holders to avoid harm from hazards or hazardous materials.⁹² These harms include exposure to toxic materials, exacerbation of wildland fires, and management of human wastes from dredge encampments.⁹³ Miners exploiting the loophole do not adhere to these regulations, do not seek a permit, and will not receive such a pamphlet. As a result, a serious risk of harm to human health and safety exists for unregulated use of vacuum dredge systems.

Unregulated vacuum dredging miners also pose a risk of serious harm to the general welfare by degrading the quality of recreation resources. In order to maintain recreation resources, the 2012 regulations “include numerous measures to protect and restore ecological conditions during and after . . . mining activities.”⁹⁴ These measures “include restrictions related to, chemical storage and use, equipment cleaning, vegetation removal or disturbance, and the disturbance of stream substrates or flows.”⁹⁵ The CDFW distributes a pamphlet to permit holders providing “guidance regarding equipment storage, waste disposal, and proper conduct as it relates to suction dredging activities.”⁹⁶ These measures do not protect recreation resources from vacuum dredge miners exploiting the loophole. The CDFW indicated “individual incidents may occur where non-suction dredging recreational resources or experiences may be substantially degraded [even] under the [2012 regulations]”⁹⁷ Miners choosing to ignore these regulations increase the risk of substantially degrading recreational experiences. This increased risk poses a serious harm to the general welfare.

Noise from vacuum dredge systems poses a risk of harm to the general welfare by diminishing recreation resources. Dredges “may affect sensitive receptors . . . both permanent (residents) and temporary (recreationists)”⁹⁸ The CDFW notes that hikers may find the noise from a dredge greater than 1,000 ft. away “extremely disruptive.”⁹⁹ This impact is limited “given the relatively small number of dredgers statewide”¹⁰⁰ However, miners exploiting the loophole are not limited by the number of permits specified in the 2012 regulations. Under the loophole, a larger number of miners may engage in dredge mining and seriously harm the recreational value of land surrounding dredging sites. This potential constitutes a serious risk of harm to the general welfare.

⁹² Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.3. California Department of Fish and Game. Feb 2011.

⁹³ *Id.*

⁹⁴ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.8-12. California Department of Fish and Game. Feb 2011.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.7-11. California Department of Fish and Game. Feb 2011.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Degradation of the visual character of recreation lands also constitutes a serious harm to the general welfare. A number of visual impacts are intended to be mitigated by the 2012 regulations. These include turbidity plumes in streams and rivers, alteration of scenic resources from disturbing the natural habitat, and alteration of the visual character from upland activities such as dredging camps.¹⁰¹ The regulations are intended to mitigate these impacts by requiring dredgers to avoid silt and clays and restore the dredged sites, limiting the number of permittees, and providing an informational pamphlet to all permittees for proper site maintenance.¹⁰² Those miners exploiting the loophole are not bound by any of these mitigation measures because they disregard the 2012 regulations. These harms to visual and scenic resources degrade recreational opportunities. This degradation poses economic consequences and constitutes a serious harm to the general welfare.

Miners using unregulated vacuum dredge systems likewise pose serious harms to cultural resources. These harms include the loss of traditional cultural properties “known to exist in and around waterways where suction dredge mining could occur.”¹⁰³ These properties are so distinctive that “substantial adverse changes to even one [] may be considered a significant impact even in the statewide context of the [2012 regulations].”¹⁰⁴ The harms also include the disturbance or destruction of unique archaeological resources “contain[ing] important scientific information of interest to the public; . . . being the oldest or best example of its type and/or; . . . be[ing] associated with an important event [or] person.”¹⁰⁵ Finally suction dredging may “disturb, mutilate, or remove human remains”¹⁰⁶ The locations and qualities of existing cultural resources are not fully known.¹⁰⁷ Providing an informational pamphlet to permit holders is one of the primary measures to avoid harm to these resources.¹⁰⁸ Permitless vacuum dredgers will not receive a pamphlet and may be destroying these resources unknowingly and without reporting specific incidents. Considering the unique and sensitive nature of these cultural resources, unregulated and uninformed vacuum dredging poses a serious risk to the general welfare.

Allowing vacuum dredge mining without a sluice box or permit means that the activity may be conducted outside the prescribed hours of operation and in proscribed sensitive areas. Miners using this technique circumvent inspection requirements and sidestep the entire regulatory scheme. The vacuum dredging loophole is at least as dangerous to public health, safety and the general welfare as the regulated activity.

¹⁰¹ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.6. California Department of Fish and Game. Feb 2011.

¹⁰² *Id.*

¹⁰³ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.5-13. California Department of Fish and Game. Feb 2011.

¹⁰⁴ *Id.*

¹⁰⁵ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.5-14. California Department of Fish and Game. Feb 2011.

¹⁰⁶ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.5-15. California Department of Fish and Game. Feb 2011.

¹⁰⁷ Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4.5. California Department of Fish and Game. Feb 2011.

¹⁰⁸ *Id.*

Unregulated use of vacuum dredges poses other serious risks of harm. These harms include exposing humans to hazardous materials, degradation of habitat and water quality, loss of biological resources, undermining the recovery of salmon fisheries, loss of cultural resources, and loss of recreational value. These harms affect public safety, health, and the general welfare. The risks of serious harm to public health, safety, and general welfare justify emergency rulemaking pursuant to California Government Code section 11346.1. Since vacuum dredge miners operate with impunity, Petitioner is requesting CDFW exercise their emergency rulemaking authority to close the loophole promptly.

ALTERNATIVE (NON-EMERGENCY)

In the event CDFW evaluates this Petition and does not determine a sufficient factual basis exists to constitute an emergency, Petitioners request CDFW amend the 2012 regulations under the normal rulemaking process. CDFW has jurisdiction over this Petition and authority to amend the regulations.¹⁰⁹ This Petition set in motion a specific process, placing definite response requirements on CDFW. Specifically, CDFW must “notify the petitioner in writing of the receipt and shall within 30 days . . .” schedule the matter for a public hearing or indicate in writing why the petition was denied. Cal. Gov. Code § 11340.7(a).

PROPOSED AMENDMENTS

The substance of the amendment includes a necessary clarification to the regulatory definition of suction dredging. The definition is comprised of two elements. The first element describes the activity and remains largely intact under this Petition. 14 C.C.R. 228(a)(1). The second element lists three specific equipment components and is eliminated under this Petition. 14 C.C.R. 228(a)(1). The listed components *may* be commonly included on suction dredges. However, vacuum dredge miners substitute one component on their dredges and thus attempt to completely circumvent the 2012 regulations.¹¹⁰ This component list narrows the definition of suction dredging so drastically that vacuum dredge equipment is effectively excluded from the definition. The proposed amendments expand the definition to include all vacuum dredges, thereby closing the loophole.

The amendments also include language to ensure that the statute is fully embodied in the regulations. The statutory moratorium requires that new regulations fully mitigate all adverse environmental impacts, Cal. Fish & Game Code § 5653.1(b)(4), and include a fee structure that fully covers the cost of administering the dredge program, Cal. Fish & Game Code § 5653.1(b)(5). These requirements are included in the regulations as prerequisites to issuing a permit.

¹⁰⁹ Cal. Fish & Game Code §§ 202 & 5653; Cal. Gov. Code 11340.6.

¹¹⁰ Dave McCracken. Motorized Suction Mining is Allowed in California! The New 49'ers. <http://www.goldgold.com/motorized-suction-mining-is-allowed-in-california-january-2013.html>. Accessed on 16 Jan 2013.

Petitioners hereby request that the Department amend the California Code of Regulations, Title 14, by amending Sections 228(a) & 228(b) as follows (~~strike through~~ indicates language deleted under the amendments and an underline indicates language added under the amendments):

§228(a) Definitions.

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

- ~~(A) A hose which vacuums sediment from a river, stream or lake; and~~
- ~~(B) A motorized pump; and~~
- ~~(C) A sluice box.~~

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

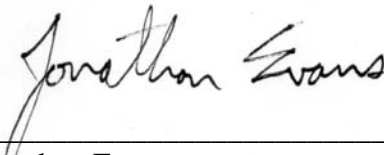
§228(b) Permit requirement. Every person who operates the intake nozzle of any suction dredge shall have a suction dredge permit in his/her immediate possession. Any amended permit shall also be in his/her immediate possession. Suction dredge permits shall be valid from the first day of the year for one calendar year or if issued after the first day of the year, for the remainder of that year. The Department will make a determination of no significant impacts and charge a fee for each suction dredge permit pursuant to Sections 5653, subdivision (c), and 5653.1, subsection (b)(4), of the Fish and Game Code. The fee charged for each permit shall be sufficient to ensure that all fees collected fully cover the cost of administering and enforcing the program pursuant to Section 5653.1, subsection (a)(5), of the Fish and Game Code. Permits may be obtained at any Department license sales office.

Any person with a qualifying disability under the Americans With Disabilities Act, who presents a Disabled Person DMV registration or other State, or Federal approved documentation of disability, and who requires assistance in operating a suction dredge may also apply for an assistant suction dredge permit. Any assistant suction dredge permit issued by the Department to such disabled person shall be in the disabled applicant's name and shall be issued at no charge. The disabled permittee must be present at the dredge site while the assistant is operating the suction dredge. The assistant shall have the assistant suction dredge permit in his/her immediate possession while assisting the disabled permittee in suction dredging activities. Any assistant may be prosecuted for a violation of the laws or regulations pertaining to suction dredging. The disabled permittee may be prosecuted for a violation of the laws or regulations pertaining to suction dredging committed by his/her assistant.

CONCLUSION

The amendments Petitioner requests would close a gaping loophole in the 2012 regulations to ensure that the Department's regulatory scheme applies to all vacuum or suction dredging activities conducted for instream mining purposes. The proposed amendments remove the specific equipment list from the regulations. The amendments largely leave intact the existing regulatory definition of suction dredging that reaches equipment configurations intended to be reached by the statute. As a result of implementing the proposed amendments, the seasonal dredging restrictions, permit requirements, equipment restrictions, inspection requirements, authorized hours of operation, penalties for violation, and all other statutory and regulatory protections will apply to both vacuum and suction dredging as intended by the Legislature. Further, the statutory moratorium will not be sidestepped, inconsistency between the 2012 regulations and the statute will be eliminated, and a number of harms to the public will be avoided.

CENTER FOR BIOLOGICAL DIVERSITY



Jonathan Evans
Michael Callahan-Dudley
Counsel for Petitioners

CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA. 94104
Tel: (415) 436-9682 x318
Email: jevans@biologicaldiversity.org

Enclosure: CD with references

TABLE OF REFERENCES

California Department of Fish and Game. Recovery Strategy for California Coho Salmon. Feb 2004.

California Department of Fish and Wildlife. Suction Dredge Permitting Program. <http://www.dfg.ca.gov/suctiondredge>. Accessed 18 Jan 2013.

Crosby, E. RE: Latest News from Miner forums. Department of Natural Resources, Karuk Tribe. Email from ecrosby@karuk.us. Sent 3 Jan 2013

Horizon Water and Environment. Suction Dredge Permitting Program: Draft Subsequent Environmental Impact Report. Chapter 4. California Department of Fish and Game. Feb 2011.

Horizon Water and Environment. Suction Dredge Permitting Program: Final Subsequent Environmental Impact Report. Chapter 3.3. California Department of Fish and Game. Mar 2012.

Howard, T. Executive Director of the State Water Resources Control Board. Letter to Mr. Charlton H. Bonham, Director of DFW. State Water Resources Control Board. March 11, 2013.

Mack (McCracken), D. Suction Mining has Already Started on the Klamath River! The New 49er's. Email from admin@goldgold.com. Sent 9 Mar 2013.

McCracken, D. Motorized Suction Mining is Allowed in California! The New 49'ers. <http://www.goldgold.com/motorized-suction-mining-is-allowed-in-california-january-2013.html>. Accessed on 16 Jan 2013.

Merriam-Webster Dictionary. Dredge. <http://www.merriam-webster.com/dictionary/dredge>. Accessed 28 Jan 2013.

Merriam-Webster Dictionary. Vacuum. <http://www.merriam-webster.com/dictionary/vacuum>. Accessed 28 Jan 2013.

Pro Mack Mining. Resume of Dave McCracken. <http://www.promackmining.com/resume.htm>. Accessed on 8 Feb 2013.

Stopher, M. RE: Dredging w/o a sluice box. California Department of Fish and Wildlife. Email to Craig Tucker, from Mark.Stopher@wildlife.ca.gov. Sent 6 Mar 2013.

Stopher, M. Underwater Suction Gravel Transfer Systems. California Department of Fish & Wildlife. Email to j-clark1@hotmail.com, from Mark.Stopher@wildlife.ca.gov. Sent 2 Jan 2013. Available on http://www.goldprospectors.org/forum/forum_posts.asp?TID=27630&KW=SUCTION+MINING&PN=5&title=working-underwater-in-california-this-year. Accessed 28 Jan 2013.

Terence, M., Two Rivers Tribune, Gold Prospectors Spot Loophole in State's Dredge Mining Moratorium, March 4, 2013. <http://www.tworivertribune.com/2013/03/gold-prospectors-spot-loophole-in-states-dredge-mining-moratorium> . Last Accessed on March 18, 2013