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-----ORIGINATOR/CONTACT-----

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14. Subject: Letter on behalf of Friends of the North Fork concerning the failure of state and federal agencies to enforce the laws and regs governing suction gold dredging in CA

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Friends of the North Fork
3781 E. Pacific Avenue
Sacramento, CA 95820
(916) 244-8561



February 9, 2007

Ms. Tam M. Doduc, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

Dear Ms. Doduc:

I am writing on behalf of Friends of the North Fork concerning the failure of state and federal agencies to enforce the laws and regulations governing suction gold dredging activities in California.

We are a group dedicated to protecting the environmental qualities of the North Fork of the American River and its canyons. Each year we witness the damage to water quality and the deleterious effects on fish caused by dredging activities. Yet, despite repeated requests, no agency has stepped forward to protect these resources.

I have enclosed a memorandum from our attorney. In frustration, we asked him to look into the applicable state and federal laws and to report to us on whether these activities are even legal. As he notes, the permits issued to dredgers by the California Department of Fish and Game violate CEQA and the streambed alteration laws, and they do not comply with the Clean Water Act, which is your agency's duty to enforce.

When I asked the DFG whether it enforces its permit requirement that dredgers obtain all necessary federal and state water quality permits, I was informed that enforcement of this requirement is your responsibility.

When I inquired at the SWRCB, I was referred to the Central Valley Regional Water Quality Control Board. When I inquired at the CVRWQCB, I was informed that they have never issued a single permit for suction gold dredging under any provision of the Clean Water Act, even though they acknowledged that it applies to this activity.

who did she talk to?

Ms. Tam M. Doduc, Chair
State Water Resources Control Board
February 9, 2007
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I have provided all three agencies photographic documentation of gross water quality violations, and each agency has ducked its legal responsibilities to protect state water quality standards by stating that enforcement is another agency's duty.

As our attorney notes:

- Clean Water Act section 404 requires the issuance of a "dredge and fill" permit by the Army Corps of Engineers for any proposed suction dredging activities in "waters of the United States." Major rivers and their tributaries in the State of California qualify as "waters of the United States." The Corps' 404 regulations expressly include in-stream mining as an activity regulated by section 404. The only 404 permit ever issued by the Corps for suction dredging activities in the State of California only covered part of the State, and expired in May of 2000. Accordingly, any suction dredging activity in California constitutes a violation of the Clean Water Act.
- Clean Water Act section 401 requires certification by the State Water Quality Control Board that any proposed section 404 permit proposed to be issued by the Corps will not result in a violation of the State's water quality standards. In this case, no 401 certification can be issued for suction dredging activity in the state because there is no section 404 permit to certify. This constitutes a separate and distinct additional violation of the Clean Water Act.
- Clean Water Act section 402 requires the issuance of an NPDES permit for any discharge of pollutants from a point source into navigable waters of the U.S. A memorandum provided by the Central Valley Regional Water Quality Control Board affirmatively asserts that suction dredging is subject to section 402's permitting requirements. Yet, no section 402 permit has ever been issued, either on a general, or individual, basis for suction dredging activities in the State. This constitutes yet another violation of the Clean Water Act.

We don't Control Corps

No 404 or 401

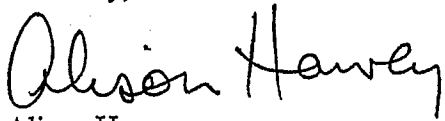
Yes, we can issue a general WDR

The purpose of this letter is to inquire, in light of our attorney's memorandum, what the State Water Quality Control Board intends to do to resolve these violations and to properly exercise its responsibilities to protect the state's water quality.

Ms. Tam M. Doduc, Chair
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I can provide you with any of the documentation referred to in the memorandum and I am available to meet with you at your convenience.

Sincerely,

A handwritten signature in cursive script that reads "Alison Harvey". The signature is written in black ink and is positioned above the printed name.

Alison Harvey

cc: concerned legislators
Enclosures

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J. WILLIAM YEATES

KEITH G. WAGNER
JASON R. FLANDERS

To: Friends of the North Fork

From: Keith Wagner

Date: January 30, 2007

Re: State and Federal Agencies' Failure to Regulate Suction Dredge Mining in California.

This memorandum provides an overview of the federal and state laws and regulations that address suction dredging activities in rivers across the State of California, and how state and federal agencies' intractable failure to enforce those laws and regulations renders suction dredging in California inconsistent with practically all applicable legal requirements.

FEDERAL LAW

Two federal statutes are primarily implicated in the regulation of suction dredge mining in California – the 1872 General Mining Law and the Clean Water Act. As the following discussion demonstrates, the former does not address environmental protection, while current suction dredging activity in California's rivers violates practically every, relevant aspect of the latter.

I. THE 1872 GENERAL MINING LAW

The law that broadly governs mining on federal public lands is the 1872 General Mining Law.¹ Many rivers and streams where suction dredge mining occurs in California pass through such federal lands. Under this antiquated law, miners are allowed to stake claims to, and extract, valuable hardrock minerals including gold, silver, and uranium from federal public lands without paying any royalties to the U.S. Government (*i.e.*, the public whose land is being mined). This law also offers federal public land for sale at \$5 an acre – 1872 prices.

The 1872 mining law is briefly mentioned to begin this memorandum, because it is often cited by suction dredge operators as a basis for allowing them to continue operations that violate practically every other applicable federal and state environmental laws. Such claims appear to be overly broad because, while the 1872 General Mining Law allows mining claims to be staked on federal public lands, this law does not prevent the application of later enacted federal and state laws that otherwise protect the environmental quality of California's rivers and streams.

¹ 30 U.S.C., § 21 et seq.

II. CLEAN WATER ACT, SECTION 404 (DREDGE AND FILL PERMIT)

Suction dredging activities on "waters of the United States" requires the issuance of a "dredge and fill" permit under section 404 of the Clean Water Act.² Despite the U.S. Supreme Court's ongoing efforts to reinvent the jurisdictional scope of the Clean Water Act, it remains generally accepted that the nation's major rivers and their direct, natural tributaries, qualify as "waters of the United States", and therefore remain subject to the Clean Water Act's requirements.

Under section 404 of the Clean Water Act, the U.S. Army Corps of Engineers issues permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."³ In carrying out this function, the Corps may issue so-called "general" permits on a state, regional, or nationwide basis "for any category of activities involving discharges of dredged or fill material," if the Corps determines that the activities in the category "are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect[s] on the environment."⁴

The Corps' regulations for its 404 permit program expressly designate suction dredging an activity that *requires* a dredge and fill permit: "The Corps and EPA regard the use of mechanized earth-moving equipment to conduct . . . in-stream mining . . . in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback."⁵ In other words, unless project-specific evidence shows that the dredging will only result in incidental fallback, a 404 permit must be issued before any suction dredging activity is allowed to occur on waters of the United States. Such a finding is unlikely, given the fact that suction dredging, to be successful, requires the substantial removal of materials from one part of a streambed, screening of the materials to extract gold deposits, and then deposition of that material back into another location in the stream bed.

With regard to suction dredging activities in the State of California, on May 2, 1995, the Corps' Sacramento District adopted a Clean Water Act general permit, GP-046, generally authorized "dredge and fill" activities associated with suction dredging in the Corps' Sacramento District for holders of standard suction dredging permits issued by the California Department of Fish and Game under Fish and Game Code section 5653.⁶

Notably, the Corps' Sacramento district only covers *part* of California, and does not include, *at all*, California's coastal areas, or substantial portions of northern or southern California. In other words, even upon its issuance, GP-046 only covered the parts of California under the Corps' Sacramento District's jurisdiction, and does not apply at all to areas of California not within the Sacramento District.

² 33 U.S.C. § 1344.

³ 33 U.S.C. § 1344, subd. (a).

⁴ 33 U.S.C. § 1344, subd. (e).

⁵ 33 C.F.R. § 323.2, subd. (d)(2)(i).

⁶ A copy of this general permit (GP-046) is attached as Exhibit 1 to this Memorandum.

Can't find
Corps

Moreover, and perhaps more importantly, on its own terms, GP-046 expired on May 2, 2000, and has not been renewed. As a result, it would appear that suction dredging in "waters of the United States" located within California constitutes a present and ongoing violation of section 404 of the Clean Water Act, because 1) the Clean Water Act and the Corps' regulations expressly state that "in stream mining" constitutes an event triggering the need for compliance with the permitting requirements of section 404, but 2) no CWA section 404 dredge and fill permit currently authorizes such activities in any part of California, either on a general, or project-specific, basis.

In addition, even if GP-046 had not expired in 2000, this permit, as it was adopted on May 2, 1995, contains an express condition stating that waterways of the state under 4,000 feet in elevation "shall be excluded" from the activities authorized by the permit, in the event that the California Red-Legged Frog is listed as "threatened" under the Federal Endangered Species Act:

The US Fish and Wildlife Service (USFWS) has indicated that the California red-legged frog occurs along waterways in Sacramento District, below 4,000 feet elevation, in the following counties: Amador, Calaveras, El Dorado, Mariposa, Nevada, Placer, and Tuolumne. Currently the California red-legged frog is proposed for listing as a federal threatened species. In the event that the USFWS lists the California red-legged frog as threatened under the federal Endangered Species Act, all waterways in the above listed counties, below 4,000 feet elevation shall be excluded from the authorization established by GP-046. This will remain in effect until adequate surveys of these waterways are conducted to ensure that the continued existence of the species is not jeopardized by the regulated activity.⁷

On May 23, 2006, the United States Fish and Wildlife Service listed California red-legged frog as threatened under the Federal Endangered Species Act.⁸ Accordingly, *even if* the term of GP-046 had not expired, suction dredging in the portion of California that is under the jurisdiction of the Corps' Sacramento District (most all of which occurs on waters below 4,000 feet) *still* would be in violation GP-046's express terms unless and until surveys of all waterways below 4,000 feet are conducted to ensure that the continued existence of the California Red Legged Frog is not jeopardized. Such studies have never been conducted.

III. CLEAN WATER ACT, SECTION 401 (STATE CERTIFICATION)

Clean Water Act, section 401, requires that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters" must "provide to the licensing or permitting agency a certification from the State in which the discharge will originate" that any such permit will comply with the Clean Water Act's effluent limitations and the need for National Pollution Discharge Elimination System (NPDES) permits.⁹ *or WDF*

On May 23, 1995, the State Water Resources Control Board (SWRCB) issued a CWA section 401 certification for GP-046, stating that "there is a reasonable assurance that State water quality

⁷ US Army Corps of Engineers, Public Notice GP-046 (May 10, 1995), at p. 2.

⁸ 61 Fed.Reg. 25813.

⁹ 33 U.S.C. § 1341, subd. (a)(1).

in the past

standards will not be violated," so long as suction dredging operations are carried out pursuant to the conditions imposed by GP-046.¹⁰

Pass Activity
The SWRCB's 401 certification document purports to also "certify" suction dredging activity that is *not* consistent with the Corps' general permit GP-046 (or any other federal permit), stating that "certification is also granted for suction dredge mining done under DFG Section 5653 'Special Permits' and for suction dredge mining in federal Wild and Scenic Rivers and 'study rivers'." A CWA section 401 certification can only be issued by a state to certify that issuance of a *federal* CWA permit (e.g., a section 404 dredge permit) will comply with state water quality standards. In this case, GP-046 expressly *excludes* "special permits" or suction dredging on wild and scenic rivers from its ambit, and no other federal permit for such activities is identified in the SWRCB's 401 certification. Put simply, the SWRCB has no legal authority to issue a 401 certification for activities that are *excluded* from a federal 404 permit.

It should be noted that GP-046, itself, expressly recognizes that section 401 certification is required, before any suction dredging authorized by GP-046 may be carried out:

Persons who propose to discharge dredge and fill material into waters of the United States under the authority of a Department of the Army permit issued pursuant to §404 of the Clean Water Act must obtain §401 certification of water quality from the state in which the discharge is proposed. Section 401 is administered in California by the State Water Resources Control Board (SWRCB) through the various Regional Water Quality Control Boards (RWQCB). In the event that the SWRCB issues blanket §401 certification for this regional general permit, all terms and conditions of such certification shall become terms and conditions of this permit by reference. Until such time that the SWRCB issues §401 certification, or in the event that the SWRCB declines to issue §401 certification, individual application for §401 certification, or waiver, must be made to the appropriate RWQCB, prior to being authorized under this general permit.¹¹

In light of the fact that GP-046 has 1) expired, and 2) is no longer in effect on streams below 4,000 feet, due to the listing of the California red-legged frog, the SWRCB's May 1995 section 401 certification for suction dredging is, also, no longer valid. As explained above, CWA section 401 certifications can be issued by a state only for discharges to navigable waters pursuant to a federal CWA permit. In this case, the underlying federal CWA section 404 permit, GP-046, *expired* in May of 2000. Since the only federal permit that SWRCB's section 401 certification for suction dredging relates to is GP-046, which has *expired*, the state's 401 certification, itself, has no continuing legal force or effect.

¹⁰ A copy of the SWRCB's May 23, 1995 section 401 certification is attached as Exhibit 2.

¹¹ US Army Corps of Engineers, Department of the Army Permit, General Permit 046, at p. 3, ¶ 18. This statement in GP-046 further confirms that the SWRCB's attempt to include activities that are not permitted by GP-046 in its 401 certification was in error.

Yes, we know

where is this

IV. CLEAN WATER ACT, SECTION 402 (NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM, OR "NPDES," PERMITS)

Finally, with regard to federal law, as this memorandum was being researched and prepared, communications with the Central Valley Regional Water Quality Control Board ("RWQCB") resulted in the apparent assertion that there is no need for suction dredge operators to comply with section 404 of the Clean Water Act, based on the "incidental fallback" or "Tulloch" rule.¹²

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①

This is wrong for several reasons.

First, as noted above, the Corps' own regulations expressly define "in stream mining" as an activity that triggers the need for section 404 compliance, regardless of the RWQCB's opinion to the contrary.

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(AS FAR AS
KNOW)

Second, the memo, itself, states that suction dredging is not exempt under the "incidental fallback" rule, unless the material dredged is deposited away from the streambed, or in a container.¹³ But, as noted in below, under state law, suction dredging is only allowable so long as the material dredged is redeposited back into the streambed.¹⁴

check on this

Third, the memo notes that the "incidental fallback" rule does not apply to circumstances where the dredged material is moved away from the point of excavation. "For example, sidecasting dredged material immediately adjacent to the excavation point is considered intentionally moving the material away from the excavated area, and thus does not meet the test of falling back to substantially the same place."¹⁵ Again, as noted above, suction dredging, to be successful, requires the substantial removal of materials from one part of a streambed, screening of the materials to extract gold deposits, and then deposition of that material back into another location in the stream bed.

With the above points having been made, however, the memorandum provided by the RWQCB does appear to raise another interesting issue: the potential need for suction dredge operations to compliance with yet another aspect of the CWA: the National Pollutant Discharge Elimination System, or "NPDES," permitting requirements of CWA section 402. The memorandum notes that "gold dredging activity and discharge . . . includes a discharge of processed waste, [and, therefore] should be addressed through section 402."¹⁶

This, in fact, is a fair point. And, as with the lack of any evidence of any valid CWA section 404 permit for suction dredging activity in the state of California, either on a general or individual

¹² A copy of the memorandum regarding "incidental fallback" received from the Central Valley RWQCB is attached as Exhibit 3 to this memorandum.

¹³ Exhibit 3, at p. 5-11.

¹⁴ Cal. Code Regs., tit. 14, § 228 ("suction dredging (also called vacuum dredging) is defined as the use of a suction system to remove and return material at the bottom of a stream, river, or lake for the extraction of minerals." [emphasis added])

¹⁵ Exhibit 3, at p. 3-11.

¹⁶ Exhibit 3, at p. 6-11.

This is a 2003 memo from chief of Regulatory Branch

wasn't required to

basis, there is no evidence that any suction dredge operator in the State of California has ever sought or been granted a section 402 permit, either.

Accordingly, it would appear that suction dredging activity in the state violates the NPDES permitting provisions of the CWA as well.

STATE LAW

In addition to the federal laws, listed above, suction dredging on California's rivers is also regulated by a number of state laws and legal doctrines, including, but not limited to, the Public Trust Doctrine; Fish and Game Code section 5653 and its implementing regulations (which specifically addresses suction dredging activity); Fish and Game Code section 1603 (streambed alteration agreements); and the California Environmental Quality Act.

I. PUBLIC TRUST DOCTRINE

In 1983, in *National Audubon Society v. Superior Court*, the California Supreme Court held 1) that California's Public Trust Doctrine "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands," and 2) that the "state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."¹⁷ The Public Trust Doctrine is not a mere declaration of the state's right to use public property for public purposes: "it is an affirmation of the *duty* of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."¹⁸

Traditional uses protected by the Public Trust Doctrine include navigation, commerce, fishing, hunting, swimming, wading, standing, bathing and general recreation purposes.¹⁹ California has expanded these traditional uses to include "the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."²⁰

Under the traditional formulation of the Public Trust Doctrine, the states each acquire trusteeship over lands underlying navigable waterways within the state upon their admission to the Union, unless the federal government clearly and expressly reserves to itself the beds of navigable waters prior to statehood.²¹ The traditional basis of the Public Trust Doctrine is founded in the

¹⁷ *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441, 446.

¹⁸ *National Audubon, supra*, 33 Cal.3d at p. 441 (emphasis added).

¹⁹ *National Audubon, supra*, 33 Cal.3d at p. 434 citing *Marks v. Whitney* (1971) 6 Cal.3d 251, 259.

²⁰ *Marks v. Whitney, supra*, 6 Cal.3d at p. 259-260, cited in *National Audubon, supra*, 33 Cal.3d at p. 434-435.

²¹ *National Audubon, supra*, 33 Cal.3d at p. 434 (citations omitted); *Utah v. United States* (1971) 409 U.S. 9.

"equal footing" doctrine, whereby each new state, upon its admission to the Union, assumes sovereign trusteeship over the beds of navigable waters within their borders, so as to be assured of "equal footing" with the original states.²² "The State of California acquired title as trustee to such lands and waterways upon its admission to the union; from the earliest days its judicial decisions have recognized and enforced the trust obligation."²³

As noted at the beginning of this memorandum, the General Mining Law allowing individuals to stake claims to valuable minerals on federal lands was adopted by the federal government in 1872. In the Department of Fish and Game's 1994 EIR for its suction dredging regulations, the Department appears to concede, without analysis, that regulations preventing suction dredging activities would constitute a "taking" of private property under this law:

(2)

The Department acknowledges that the proposed regulations could have resulted in the taking of private property for which the Department would have been required to provide private property owners with just compensation. Specifically, the closure of certain waters in conjunction with the phasing-out of special permits, and the prohibition on winching posed potential takings problems. The Department recognizes that persons with valid, prior, existing rights who hold claims under the federal mining laws in waters closed by the proposed regulations could have successfully asserted a takings claim against the Department, if special permits were not available to enable such persons to operate in those waters. In addition, the Department recognizes that in some circumstances the prohibition on winching could have made recovering gold, to which a person has a valid, existing right, practically impossible. Thus the Department redeveloped the proposed regulations in order to dispense with any of these potential takings problems. The current proposed regulations allow winching under certain conditions and allow for special permits for suction dredging in certain circumstances, including those where a person has a prior, valid, existing claim under the federal mining laws in an otherwise closed water.²⁴

James, says that
ownership is not
The Department's unsupported assertion that regulation of suction dredge mining would somehow constitute a "taking" of private property under the General Mining Law is, in fact, wrong: by the time the 1872 mining law was enacted, the federal government *had already lost its jurisdiction* over the beds of the navigable waters of the State of California, and thus no cognizable "property right" to mine the beds of navigable streams in the State (even streams passing through federal lands) can be established under the 1872 mining law. — we have
PT

California was admitted into the Union in 1850, 22 years *before* the General Mining Law was enacted in 1872. Under the "equal footing" doctrine, upon becoming a state, California assumed title and trusteeship from the federal government of the beds of all navigable waters of the

²² *Pollards Lessee v. Hagan* (1845) 44 U.S. 212.

²³ *National Audubon, supra*, 33 Cal.3d at p. 434 (citations omitted).

²⁴ California Department of Fish and Game, Final Environmental Impact Report, Adoption of Regulations for Suction Dredge Mining (April 1994) (Hereinafter "1994 EIR"), at p. 161.

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state.²⁵ Thus, the federal government *no longer had jurisdiction in 1872* to grant plenary, private rights to valuable minerals that might be located in the state's navigable waterways (including those traversing federal lands), when it enacted the General Mining Law. Accordingly, federal mining claims patented under the 1872 mining law *cannot* include claims to the beds of navigable waters of the U.S. within the state of California. Accordingly, as a matter of law, state regulation of suction dredge mining cannot possibly effect a "taking" of claimed mining rights under the 1872 mining law, because, since 1850, the beds of the State's navigable waters have been held in trust by the State for the People of California, and are, therefore, beyond the reach of the 1872 federal mining law.

In fact, it appears that the duties imposed on the state and its agencies by the Public Trust Doctrine were entirely, and improperly, *ignored* in the mid-1990's in enacting the current regulatory framework for suction dredging activity in the state.

II. SUCTION DREDGING STATUTES AND REGULATIONS

A. FISH AND GAME CODE, SECTION 5653

The primary state statute that regulates suction dredging is located at California Fish & Game Code section 5653.²⁶ Under section 5653, no person may engage in suction dredging of a stream until they obtain a permit from the Department of Fish and Game, pursuant to regulations adopted by the Department.²⁷

Section 5653 requires that the regulations adopted by the Department shall, at a minimum: "designate waters or areas wherein vacuum or suction dredges may be used pursuant to a permit, waters or areas closed to those dredges, the maximum size of those dredges that may be used, and the time of year when those dredges may be used."²⁸ Section 5653 also appears to require operation-specific findings that the proposed dredging activities will not be deleterious to fish before the operation may be permitted: "If the department determines, pursuant to the regulations adopted pursuant to Section 5653.9, that the operation will not be deleterious to fish, it shall issue a permit to the applicant."²⁹

B. CAL CODE REGS, TITLE 14, SECTION 228

In 1994, the Department adopted the regulations mandated by Fish and Game code section 5653.³⁰ The Department's regulations provide for the issuance, and renewal, of annual suction

²⁵ *Utah v. United States* (1971) 409 U.S. 9.

²⁶ A copy of Fish and Game Code section 5653 is attached as Exhibit 4.

²⁷ Fish & Game Code, § 5653, subd. (a). Fish and Game Code, section 5653.9, expressly mandates that the Department "shall adopt regulations to carry out Section 5653," but does not provide any further guidance regarding the substance of the required regulations.

²⁸ Fish & Game Code, § 5653, subd. (b).

²⁹ Fish & Game Code, § 5653, subd. (b).

³⁰ Pub. Resources Code, § 5653.9; Cal. Code Regs., tit. 14, § 228 et seq. A copy of section 228 is attached as Exhibit 4.

dredging permits with a term that extends "from the first of the year for one calendar year or if issued after the first of the year, for the remainder of that year."³¹

The Department's regulations purport to provide for the issuance of "special" suction dredging permits "to operate a suction dredge with a nozzle larger than prescribed in [the regulations] or during the closed season or in a closed water for suction dredging"³² In January of 2000, however, California's Attorney General submitted an informal opinion to the Department, stating that the Department's "special permit" regulations constitute an unlawful expansion of the authorities granted to the Department under Fish and Game Code section 5653.³³ Although some applications for "special" suction dredging permits have been submitted to the Department over the years, it appears that the Department has never actually approved or issued a "special" suction dredge permit.

The regulations contain provisions 1) establishing detailed due process evidentiary hearing procedures governing the revocation, or refusal to issue, a suction dredge permit, 2) forbidding the use of suction dredges in lakes or reservoirs without special permission and inspections, and 3) limiting the size of the intake nozzle to a maximum of 6" in diameter.³⁴ The regulations then go on to establish "restrictions on methods of operation" which 1) allow "winching" only so long as a series of specified conditions are met; 2) prohibit suction dredging into the bank of any stream, lake or river; 3) prohibit the removal of, or damage to, woody riparian vegetation during suction dredge operations; 4) prohibit moving any anchored, exposed woody debris such as root wads, stumps or logs; 5) prohibit diverting a stream or river into the bank; 6) prohibit damming or otherwise obstructing any stream, river or lake to the extent that fish passage is impeded, and 7) prohibiting the importation of any earthen material into a stream, river or lake.³⁵

The Department's regulations purport to relieve suction dredge permit applicants from compliance with the Streambed Alteration Agreement statute, so long as the conditions specified in the regulations are followed: "Operating outside these Restrictions On Methods Of Operation may require compliance with Fish and Game Code sections 1600 - 1607, which govern lake and streambed alterations."³⁶ The regulations do state, however, that suction dredge operators must generally comply with "applicable federal, State, or local laws or ordinances."³⁷

III. STREAMBED ALTERATION AGREEMENT STATUTE – F & G CODE § 1600 ET SEQ.

Despite statements to the contrary in the Department's suction dredge regulations, suction dredging must comply with the Fish and Game Code's provisions regarding Streambed

³¹ Cal. Code Regs., tit. 14, § 228, subd. (a).

³² Cal. Code Regs., tit. 14, § 228, subd. (b).

³³ Bill Lockyer, Attorney General, letter re: Informal Opinion Request: Issuance of Special Suction Dredge Permits, to Ann Malcom, Chief Deputy General Counsel, Department of Fish and Game (Jan. 6, 2000) (attached at Exhibit 5);

³⁴ Cal. Code Regs., tit. 14, § 228, subds. (c), (d) and (e).

³⁵ Cal. Code Regs., tit. 14, § 228, subd. (f).

³⁶ Cal. Code Regs., tit. 14, § 228, subd. (f).

³⁷ Cal. Code Regs., tit. 14, § 228, subd. (g).

Alteration Agreements. Fish and Game Code section 1602 broadly states that an entity "may not . . . substantially change or use any material from the bed . . . of, any river, stream, or lake . . ." unless a detailed plan of the operation, its location, and the water body affected, and CEQA documentation regarding the activity, are provided to the Department.³⁸

The Department's suction dredge regulations assert that compliance with section 1600 et seq. of the Fish and Game Code *will not* be required for a suction dredge permit so long as the stated "Methods of Operation" are followed:

Operating outside these Restrictions On Methods Of Operation may require compliance with Fish and Game Code sections 1600-1607, which govern lake and streambed alterations.³⁹

In its 1994 EIR for its suction dredging regulations, the Department justifies the regulations' exemption of suction dredge operations from compliance with the Streambed Alteration Agreement statutes, stating –

the Department can not legally combine the two Fish and Game Code sections, 1600-1607 (Streambed Alteration Agreements) and Section 5653 (Suction Dredge Regulations). The two code sections were passed by the Legislature in the same year, 1961. It was clearly the intent of the Legislature to authorize discretionary permit authority for suction dredging activities while placing activities which result in a substantial impact to the bed, bank, channel or flow of streams under the Streambed Alteration Agreement Program (SAAP). The SAAP can not be used to circumvent permit authority under Fish and Game Code Section 5653 - Suction Dredging.⁴⁰

That JAMES thinks & SBAA Wagner is correct & dredge & suction are compatible
③

The problem with this conclusory statement in the Department's EIR is that nothing in either statute demonstrates the Legislature's purported intent that suction dredge operators should not have to comply with the provisions of *both* statutes. The fact that two laws overlap the same subject matter *is not* grounds to declare that one is preempted by the other.⁴¹ Rather, the courts have a long-standing presumption *against* such "repeals by implication," and have *regularly* and *consistently* stated that all laws on a similar subject must be given full force and effect, unless it is impossible to rationally do so. "The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together."⁴² Other than generally noting that the two statutes were initially enacted in the same year, the Department's EIR provides no basis for its drastic conclusion that suction dredge permittees need not comply, at all, with the Fish and Game Code's provisions regarding Streambed Alteration Agreements.

³⁸ Fish & Game Code, § 1602, subd. (a)(1)(D)

³⁹ Cal. Code Regs., tit. 14, § 228, subd. (f).

⁴⁰ 1994 EIR at p. 76.

⁴¹ *Sweasy v. Sweasy* (1899) 126 Cal. 123, 127-128; *Nickey v. Sterns Ranchos Co.* (1899) 126 Cal. 150, 152.

⁴² *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943.

The text of the Streambed Alteration Agreement statute supports this conclusion, as well. In particular, the Streambed Alteration Agreement statute expressly spells out several specific situations and activities where a Streambed Alteration Agreement will not be required, but suction dredging *is not among them*.⁴³ The fact that the Legislature in enacting the Streambed Alteration Agreement statute, expressly and specifically exempted certain statutes from compliance, but did not include the suction dredge statutes in those exemptions, indicates the Legislature's intent that suction dredge applicants must comply with both statutes' provisions.

The EIR's rationale in declaring that suction dredge permittees need not also comply with the Streambed Alteration Agreement statute is not only *legally* flawed, it is also *logically* flawed. The EIR's (correct) observation that compliance with the Streambed Alteration Agreement statutes' requirements cannot "be used to circumvent" the need for concurrent compliance with the suction dredge statute's requirements does not logically lead to the EIR's sweeping conclusion that the Streambed Alteration Agreement statutes, therefore, have no application to suction dredging activities *at all*. The better view, especially in light of the Court's presumption against implied repeals, is that the Department's EIR and suction dredge regulations are in error on this point, and that suction dredge operations must comply with both statutes' permitting requirements.

IV. CALIFORNIA ENVIRONMENTAL QUALITY ACT – PUB. RESOURCES CODE, § 21000 ET SEQ.

As a matter of practice, the Department does not conduct project-specific environmental review under the California Environmental Quality Act ("CEQA") for any of the thousands of suction dredge permits that it issues each year. Instead, the Department treats the issuance of suction dredge permits much like the issuance of a fishing license – the applicant fills out and submits an informational, application form and the specified fee, and the Department, in return, issues the requested permit.

The Department's 1994 EIR while somewhat unclear on the point, appears to assert that permit-by-permit CEQA analysis is not required under the Department's suction dredge regulations and permitting program because the mere fact of the adoption and implementation of the Department's regulations would, somehow, reduce environmental effects associated with suction dredging to less than significant levels, as well as prevent deleterious effects to fish:

The Department is the trustee for fish and wildlife resources of the State of California. The Department is charged with protecting and managing fish populations and other related aquatic dependent resources in a sound biological manner.

⁴³ See, e.g., Fish & Game Code, §§ 1602, subd. (a)(4)(A)(i) (exempting project from requirement of obtaining a Streambed Alteration Agreement, where Department informs an applicant, in writing, that a proposed activity will not substantially, adversely impact fish or wildlife resources), 1610 (exempting emergency projects from section 1600's requirements), 1611 (allowing timber harvest plan to substitute as compliance with section 1600's requirements).

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Suction dredge mining can potentially result in the loss of fish production, temporary loss of benthic/invertebrate communities, localized disturbance to streambeds, increased turbidity of water in streams and rivers, and mortality to aquatic plant and animal communities. However, based on best available data, it is anticipated the project to adopt regulations for suction dredging as proposed, will reduce these effects to the environment to less than significant levels and no deleterious effects to fish.

The proposed regulations would result in the maintenance of healthy lake, stream and river systems while allowing for suction dredge mining in California. To further ensure the maintenance of healthy lake, stream and river systems in California, the Department would periodically review and amend regulations based on additional evidence and data.⁴⁴

Unfortunately, the activities permitted under the Department's regulations since their adoption in 1994 have, as a matter of undisputable and documented fact, resulted in adverse environmental effects and deleterious effects on fish throughout the state. In September of 1998, the Department prepared a biological and aquatic resources assessment of Brushy Creek and the North Fork American River in Placer County.⁴⁵ In that study, the Department concluded that suction dredging in this area is having adverse environmental consequences and deleterious effects on fish:

The channel of North Fork American River was disturbed in numerous areas by suction dredge activities. There was evidence of "high banking" and "pot holes" along the right bank of the river in the surveyed reach. These areas were being utilized by foothill yellow-legged frogs and juvenile fish were trapped in isolated holes. The frogs will be able to survive, but the fish are not likely to.

The large numbers of foothill yellow-legged frogs present in the surveyed reaches may lead to the conclusion that there is no adverse effect by suction dredge activities. However, 1995 through 1998 have been above normal water years and there is some indication that other drainages (Butte Creek) have seen a large increase in foothill yellow-legged frog numbers in recent years (K. Hill, DFG pers. communication). In below normal water years, low flows will reduce year. There is some evidence that the egg masses of this species are highly susceptible to suspended particulates, e.g. sediment, however to what extent is unknown (Jennings and Hayes, 1994). Disruption of channel bedload in breeding areas and rearing areas will have an adverse effect upon this species.⁴⁶

⁴⁴ 1994 EIR at p. 10.

⁴⁵ Stafford K. Lehr, Fishery Biologist, California Department of Fish and Game, Biological and Aquatic Resources Assessment of Brushy Creek and the North Fork American River Placer County, California (Sept. 16, 1998) (hereinafter "Brushy Creek Biological Assessment") (attached at Exhibit 6).

⁴⁶ Brushy Creek Biological Assessment, supra, at p. 6.

Moreover, in a July 2006 Memorandum from the Department to "All Suction Dredge Permittees," the Department acknowledges that there is, presently, ongoing litigation regarding the adverse effects that suction dredging activities permitted under the Department's regulations are having on the state-listed threatened and endangered fish on the Klamath, Scott and Trinity Rivers.⁴⁷ In that case, CDFG and the Director of the Department of Fish and Game have expressly gone on the record to concede that permitted suction dredging activity on those rivers has, without question, had deleterious effects on coho salmon.⁴⁸

(5) In sum, given the fact that the Department concedes in its EIR that the issuance of individual suction dredge permits is a discretionary, not a ministerial activity, and that the issuance of such permits can be directly traced to adverse environmental consequences and deleterious effects on fish, it would appear highly likely that the Department's ongoing practice of issuing individual suction dredging permits without environmental review is not consistent with CEQA's requirements. Under CEQA, government agencies must consider, and mitigate or avoid, to the extent feasible, the environmental consequences associated with any discretionary permits that they may issue.⁴⁹

The issuance of a suction dredge permit is a discretionary approval for purposes of CEQA's requirements. The 1994 EIR states that the issuance of suction dredge permit is a "discretionary" act by the Department:

It was clearly the intent of the Legislature to authorize discretionary permit authority for suction dredging activities while placing activities which result in a substantial impact to the bed, bank, channel or flow of streams under the Streambed Alteration Agreement Program (SAAP).⁵⁰

Not Private (5) In addition, the suction dredge statute, itself, evinces the Legislature's intent that the Department should evaluate the project-specific effects of each suction dredging "operation" before issuing a permit: "If the department determines, pursuant to the regulations adopted pursuant to Section 5653.9, that *the operation* will not be deleterious to fish, it shall issue a permit to the applicant."⁵¹ The fact that the statute envisions project-specific site inspections and determinations to be made by the Department, at least for *some* of the suction dredge permits it issues, further indicates the Legislature's intent that the Department consider the impacts of suction dredging on a permit-by-permit basis.⁵²

⁴⁷ Department of Fish and Game, Memorandum to All Suction Dredge Permittees (Jul. 2006), at p. 3.

⁴⁸ Defendant's Case Management Statement (Oct. 17, 2006) at p. 2, filed in *Karuk Tribe v. CDFG* Alameda County Super. Ct. Case No. RG 05 211597). A copy of this case management statement and its supporting declarations are attached as Exhibit 7.

⁴⁹ Pub. Resources Code, § 21080.

⁵⁰ 1994 EIR at p. 76.

⁵¹ Fish & Game Code, § 5653, subd. (b) (emphasis added).

⁵² Fish & Game Code, § 5653, subd. (c) (for residents, base fee of twenty-five dollars to be charged when an onsite investigation is not deemed necessary by the department, but base fee of

The substantive law governing any particular agency approval determines whether sufficient agency "discretion" is being exercised to trigger CEQA's environmental review requirements.⁵³ Thus, the Department's implied conclusion in its 1994 EIR that no further environmental review should be required for individual permits is not dispositive of the question of whether CEQA review is actually required by law.⁵⁴ Rather, the question is: does the Department, under the suction dredge permitting statute, have the ability to refuse issuance of the permit due to its adverse environmental effects, or to impose conditions on the permit to reduce or avoid those effects?⁵⁵

In this case, the Department's apparent reliance on its 1994 EIR to issue suction dredging permits to any and all persons who submit the requisite fee is not consistent with CEQA's or section 5653's requirements. The Department clearly has the authority to refuse approval of a suction dredging permit to avoid its adverse environmental effects: section 5653, on its own terms, only authorizes the Department to issue a suction dredging permit upon a finding that the "operation" will not be deleterious to fish.⁵⁶

In sum, the Department owes a mandatory duty to comply with CEQA's environmental review and mitigation requirements on a case-by-case before issuing suction dredging permits, because 1) the Department has documented and conceded the fact that significant, adverse environmental effects and deleterious effects to fish have occurred, and are continuing to occur, as a result of suction dredging activities permitted under its suction dredge permitting program, and 2) the Department has the express statutory authority (and duty) to deny any particular permit due to its potentially, significant adverse (i.e., deleterious) effects on fish. In addition, the need for the Department to comply with the Streambed Alteration Agreement statutes when issuing suction dredging permits provides an additional, independent basis for requiring CEQA review for proposed suction dredging operations.⁵⁷

one hundred thirty dollars to be charged when the department deems onsite investigation is necessary; for non-residents base fee of one hundred dollars to be charged when onsite investigation is not deemed necessary, and base fee of two hundred twenty dollars to be charged when onsite investigation is deemed necessary).

⁵³ *Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 90.

⁵⁴ 1994 EIR at p. 10.

⁵⁵ *San Bernardino Associated Governments v. Superior Court* (2006) 135 Cal.App.4th 1106, 1114.

⁵⁶ Fish & Game Code, § 5653, subd. (b). Other than confirming that the application paperwork has been completed and that the requisite fee has been paid, the Department makes no "determinations" or "findings" when it issues individual suction dredge permits. This practice is facially inconsistent with section 5653's plain text, which states that a suction dredge permit shall be issued to a "person" only upon a "determination" by the Department that the "operation" proposed by the applicant will not be deleterious to fish.

⁵⁷ Fish & Game Code, § 1602, subd. (a)(1)(D). See discussion at note 38, *supra*.

CONCLUSION

Suction dredging on California's rivers is governed by a complex web of federal and state law. This memo has briefly summarized the key points of these laws and their intersections, and why it would appear that the suction dredging permits that are presently being issued by the Department of Fish and Game violate practically all of these laws. In particular, the above discussion illuminates the following, ongoing major violations of federal and state law relating to suction dredging activities in California's Rivers:

- Clean Water Act section 404 requires the issuance of a "dredge and fill" permit by the Army Corps of Engineers for any proposed suction dredging activities in "waters of the United States." Major rivers and their tributaries in the State of California qualify as "waters of the United States." The Corps' 404 regulations expressly include in-stream mining as an activity regulated by section 404. The only 404 permit ever issued by the Corps for suction dredging activities in the State of California only covered part of the State, and expired in May of 2000. Accordingly, any suction dredging activity in California constitutes a violation of the Clean Water Act.
- Clean Water Act section 401 requires certification by the State Water Quality Control Board that any proposed section 404 permit proposed to be issued by the Corps will not result in a violation of the State's water quality standards. In this case, no 401 certification can be issued for suction dredging activity in the state, because there is no section 404 permit to certify. This constitutes a separate and distinct additional violation of the Clean Water Act.
- Clean Water Act section 402 requires the issuance of an NPDES permit for any discharge of pollutants from a point source into navigable waters of the U.S. A memorandum provided by the Central Valley Regional Water Quality Control Board affirmatively asserts that suction dredging is subject to section 402's permitting requirements. Yet, no section 402 permit has ever been issued, either on a general, or individual, basis for suction dredging activities in the State. This constitutes yet another violation of the Clean Water Act.
- The California Department of Fish and Game's claim, in its 1994 EIR, that strict regulation of suction dredging activities may constitute a "taking" of rights to mine under the 1872 mining law is wrong. Under the "equal footing" doctrine, the State of California has held such resources in trust for the People of the state since 1850, and after that date, the Federal Government no longer had any right to grant mining access to the beds of navigable waters of the state under the Public Trust Doctrine.
- The California Department of Fish and Game's failure to require suction dredge permittees to comply with the state's Streambed Alteration Agreement statutes violates the Court's presumption against "implied repeals." The state's laws

Not proven

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regarding suction dredging and streambed alteration agreements are not so fundamentally incompatible that one must be preempted by the other:

- The California Department of Fish and Game's failure to require environmental review of suction dredge permits on a project-by-project basis violates both the State's suction dredging statutes and CEQA. The statutes regarding suction dredging state that determinations regarding environmental impacts must be made regarding each "operation", not just at the moment in time that the Department promulgated its suction dredge regulations. Moreover, even if the EIR that the Department prepared in 1994 could have been viewed as adequate at the time, new information – including the Department's own studies and in-court declarations – has demonstrated that suction dredging activities under those regulations are, in fact, having significant, adverse environmental effects, including deleterious effects on fish.

In sum, as a matter of fact *and* as a matter of law, suction dredging operators have no cognizable claim or legal right to impair the environmental quality of California's precious Public Trust resources with impunity, especially in light of the fact that they are conducting patently illegal operations under practically every applicable state and federal law. Indeed, environmental advocates have, for years, continuously and repeatedly implored relevant state and federal agencies to *enforce* the laws under their purview that would stem the unmitigated and wanton destruction of Public Trust resources caused by suction dredging across the State of California.

Unfortunately, no agency, to date – not the Army Corps of Engineers, not the State Water Resources Control Board, not the Regional Water Quality Control Boards, not the California Department of Fish and Game – has lifted a *finger* to enforce the law, or to stop the environmental damage caused by illegal suction dredging. Instead, the finger they raise is to *point at each other* as the agency that should "do something."

This bureaucratic "passing of the buck" is unacceptable, and must stop. As the above analysis demonstrates, *all* of these agencies are culpable, and responsible for correcting *their own* incompetence and paralysis. It is far beyond the time that these agencies redirect their energy from pointing fingers at each other, toward holding themselves to account – or, absent such self-imposed remedial action, that they be held accountable – for their failure to properly exercise their legal authorities to protect California's rivers and streams from the damage caused by illegal suction dredging activity.

EXHIBIT 1



Public Notice

US Army Corps
of Engineers

GENERAL PERMIT 46
Date: May 10, 1995

Sacramento District
1325 J Street
Sacramento, CA 95814-2922

TO WHOM IT MAY CONCERN:

The District Engineer, Sacramento District, Corps of Engineers, has issued General Permit GP-046, *Suction Dredge Mining by Holders of California Department of Fish and Game §5653 Standard Permits*. Section 404 of the Clean Water Act requires a Department of the Army permit prior to any discharge of dredge or fill material into waters of the United States. Section 10 of the Rivers and Harbors Act requires a Department of the Army permit for any work in, over, or under federal navigable waterways. The California Fish and Game Code Section 5653 requires a Department of Fish and Game (DFG) permit for the use of any vacuum or suction dredge equipment in the state's waterways. The regulations of the California Department of Fish and Game, together with the conditions contained within the General Permit, provide protection for waters of the United States and the public interest that achieves the objectives of the Corps' permit program.

Holders of DFG §5653 standard permits are authorized to operate consistent with the terms of the attached permit without submitting a separate application to the Corps of Engineers. A copy of the General Permit is attached.

Excluded from the general permit are:

1. Holders of DFG §5653 Special permits, as described at Title 14 California Code of Regulations Section 228(b). Persons who are holders of, or propose to obtain, DFG §5653 Special permits must apply for an individual §404 permit from the Corps of Engineers. Information on applying for an individual permit may be obtained by writing to the letterhead address or calling (916) 557-5250.
2. Activities requiring Department of the Army authorization in components of the Federal Wild and Scenic Rivers System, including Congressionally designated "study rivers".

As of January 1, 1995, the following waterways are components of the Federal Wild and Scenic River system within Sacramento District:

Feather River: entire Middle Fork downstream from the confluence of its tributary streams one kilometer south of Beckwourth, California.

American River: the North Fork from a point 0.3 mile above Heath Springs downstream to a point approximately 1,000 feet upstream of the Colfax-Iowa Hill Bridge, including the Gold Run Addition Area.

Tuolumne River: the main river from its sources on Mount Dana and Mount Lyell in Yosemite National Park to Don Pedro Reservoir.

Merced River: the Main stem from its sources (including Red Peak Fork, Merced Peak Fork, Triple Peak Fork, and Lyell Fork), on the south side of Mount Lyell in Yosemite National Park to the normal maximum operating pool water surface level of Lake McClure, and the South Fork of the river from its source near Triple Divide Peak in Yosemite National Park to the confluence with the main stem.

Kings River: The Middle Fork of the Kings River from its headwaters at Lake Helen between Muir Pass and Black Giant Mountain to its confluence with the main stem; the South Fork from its headwaters at Lake 11599 to its confluence with the main stem; and the main stem from the confluence of the Middle Fork and the South Fork to the point at elevation 1,595 feet above Mean Sea Level.

North Fork Kern River: The segment of the main stem from the Tulare-Kern County line to its headwaters in Sequoia National Park.

South Fork Kern River: The segment from its headwaters in the Inyo National Forest to the southern boundary of the Domelands Wilderness in the Sequoia National Forest.

Congressionally Designated Study Rivers:

Merced River: the North Fork from its headwaters to its confluence with the Merced River.

This list is only intended to provide a minimum of information and may not be all inclusive. Additional information on the Federal Wild and Scenic Rivers system may be obtained from the National Park Service and the U.S. Forest Service.

3. Waterways that are designated as critical habitat for federally listed threatened or endangered species.
4. Areas that have been set aside by the state of California and the Federal government for wildlife refuges.
5. Areas on or adjacent to sites identified in the National Register of Historic Places and all supplements thereto.

ADDITIONAL INFORMATION

A number of comments were received during the public comment period requesting that the General Permit also cover the Federal Wild and Scenic Rivers System. 16 USC §1278(a) states in part "...No department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established...". 16 USC §1278(b) uses similar language for Congressionally designated "study rivers", with a study period not to exceed three years.

The statute does not preclude the Corps from issuing §404 permits on Federal Wild and Scenic Rivers. It does require the Corps of Engineers to confirm with the agency charged with the management of the particular component of the Federal Wild and Scenic River System, including "study rivers", that the proposed discharge under a §404 permit would not have a direct and adverse effect upon the river.

The time involved in consulting with the various federal agencies responsible for the management of those

Federal Wild and Scenic Rivers that are within the jurisdiction of the Sacramento District would have delayed issuance of this Regional General Permit for the majority of the suction dredging season in 1995.

Recommendations for the development of a Regional General Permit that will provide for recreational suction dredging for gold on a specific Wild and Scenic River may be submitted to the letterhead address, Attn: Regulatory Branch.

Special Condition 4 states that mercury removed during operation of a suction dredge may not be returned to the waterway. Title 26 California Code of Regulations, Section 22-66266.120 provides that a person who stores or transports in a container ten pounds or less of waste elemental mercury is exempt from the permit requirements established for handling such material. The state agencies responsible for the handling and disposal of materials such as mercury are currently working on an efficient and economical way for the recreational gold dredging community to properly dispose of mercury. They anticipate making a public notice on this by late fall of 1995. For further information on the storage and disposal of mercury before then, you should contact your county waste disposal activity.

The US Fish and Wildlife Service (USFWS) has indicated that the California red-legged frog occurs along waterways in Sacramento District, below 4,000 feet elevation, in the following counties: Amador, Calaveras, El Dorado, Mariposa, Nevada, Placer, and Tuolumne. Currently the California red-legged frog is proposed for listing as a federal threatened species. In the event that the USFWS lists the California red-legged frog as threatened under the federal Endangered Species Act, all waterways in the above listed counties, below 4,000 feet elevation shall be excluded from the authorization established by GP-046. This will remain in effect until adequate surveys of these waterways are conducted to ensure that the continued existence of the species is not jeopardized by the regulated activity.

The California Department of Boating and Waterways indicated during the public comment period that operators of suction dredge equipment need to obtain a copy of the state's waterway marking system regulations, found at Title 14 California Code of Regulations, Section 7000 *et seq.* The purpose of these regulations are to warn or advise boaters of hazards or equipment in or near the water.

In accordance with environmental procedures and documentation required by the National Environmental Policy Act of 1969, an environmental assessment was prepared for this general permit. The assessment may be viewed at, or requested from, the Sacramento District Office, at the address given above.

If additional information is required, please write to the letterhead address, Attn: Regulatory Branch, or telephone (916) 557-5250.

John N. Reese
Colonel, Corps of Engineers
District Engineer

Enclosures:

Copy of GP-046 w/drawing



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO, CALIFORNIA 95814-2922

DEPARTMENT OF THE ARMY PERMIT
GENERAL PERMIT 046
Suction Dredge Mining by Holders of
California Department of Fish and Game
§5653 Standard Permits

Effective Date:
May 2, 1995

Expiration Date:
May 2, 2000

TO WHOM IT MAY CONCERN:

The District Engineer, Sacramento District, U.S. Army Corps of Engineers, hereby issues General Permit 046 which authorizes holders of current and valid California Department of Fish and Game §5653 "standard" permits for suction dredge mining to perform such mining. The geographic scope of the general permit is those waters of the United States that are located in the state of California and within the jurisdiction of the Sacramento District, as shown on the enclosed map.

The authorized work must be done in accordance with the special and general conditions stated herein. This permit will be in effect for five years. Projects that do not qualify under this criteria or do not conform to the conditions of this general permit will require an individual Department of the Army permit prior to commencement of work within waters of the United States.

Issuance of this permit is under the authority of Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), and Section 404 of the Clean Water Act (33 U.S.C. 1344), and is in accordance with provisions of the "Regulatory Programs of the Corps of Engineers", 33 CFR 322.2 (f) for activities which are substantially similar in nature, which cause only minimal individual and cumulative environmental impacts. All activities meeting the established criteria defined in this permit are approved and do not require individual authorization in writing.

Excluded from the general permit are those waterways that are components of the Federal Wild and Scenic Rivers System, including Congressionally designated "study rivers"; waterways that are designated as critical habitat for federally listed threatened or endangered species; work in areas that have been set aside by the state of California and the Federal government for wildlife refuges; or work on or adjacent to sites identified in the National Register of Historic Places and all supplements thereto.

Also excluded from the general permit are holders of Fish and Game §5653 Special permits, as described at Title 14 California Code of Regulations Section 228(b).

1. Permit Conditions

Special Conditions:

1. Work under the general permit is authorized only for holders of current and valid California Department of Fish and Game §5653 Permits, issued under Title 14 California Code of Regulations, Section 228 (a), (14 CCR

§228 (a)), commonly referred to as "standard permits". Persons who propose to operate under a DFG §5653 Special permits, issued under 14 CCR §228 (b), are not authorized to operate under the terms of this general permit. Persons proposing to operate with a Department of Fish and Game §5653 Special permit must apply for separate authorization to the District Engineer, Sacramento District, U.S. Army Corps of Engineers, prior to performing any suction mining within waters of the United States.

2. All terms and conditions of the California Department of Fish and Game §5653 permits are incorporated into this regional general permit by reference. All work must be done in conformance with the requirements established under §5653 of the California Fish and Game Code and Title 14 California Code of Regulations Sections 228-228.5 (14 CCR §§228-228.5) in order to be in compliance with the authorization established under this general permit.

3. Anchorage or mooring systems shall not span the stream or interfere with the passage of water craft.

4. Mercury recovered from the waterway as part of the suction dredging process may not be returned to the waterway. The mercury must be removed from the waterway and disposed of in accordance with all applicable federal, state, and local laws and regulations.

5. The work site shall be kept free of litter at all times. Litter and other refuse are to be removed by the permittee and disposed of properly.

6. Persons operating under the authority of this permit must use existing trails and roads to access the waterway. No new access trails may be cut into the site where dredging is to be performed under the authorization of this permit.

7. Persons operating a suction dredge under this permit must use best management practices to not leave substantial pit and pile formations within the waterway at the end of their operation. Those individuals operating in waters of the United States where annual high flows in the stream cannot be relied upon to substantially restore the original cross section of the waterway, due to the existence of dams or other structures, shall ensure that the waterway is substantially restored to its original cross section before completing work on the site.

8. Suction dredging authorized under this permit shall not be located within 200 feet of a public water supply intake or a fish hatchery intake without the prior written approval of the entity operating the intake. The 200 foot distance shall be measured along the flow line of the stream.

9. Dredging shall not occur within 100 feet of any bridge support, the footing of which is below the ordinary high water mark of a stream. The 100 foot distance shall be measured along the flow line of the stream.

10. This permit does not authorize individuals to perform aggregate extraction (sand and gravel mining). Separate authorization for this activity must be made to the District Engineer, Sacramento District, U.S. Army Corps of Engineers.

11. Debris and trash removed from the waterway during the operation of suction dredges shall not be returned to the waterway. These materials shall be removed from the waterway and disposed of in accordance with applicable federal, state, and local codes.

12. Refueling of motorized equipment shall take place out of the waterway and no closer than 10 feet to the wetted perimeter of the waterway.

13. No work is authorized under this permit in areas that have been set aside by the State of California or the

Federal government as wildlife refuges; or adjacent to sites identified in the National Register of Historic Places and all supplements thereto.

14. No work is authorized under this permit in areas that have been set aside by municipalities, counties, the State of California, or the Federal Government as parks, national or historic monuments, or wilderness areas, without prior written authorization from the agency responsible for the management of the area.

15. No work is authorized under this permit within a one-half mile radius of known bald eagle nesting sites for the period January 15 to July 31, annually. Information on the location of known bald eagle nesting sites should be obtained from the managing agency on federal public lands and from the California Department of Fish and Game for all other areas within the bald eagle's range. Within Sacramento District this includes the counties of Butte, Calaveras, El Dorado, Lake, Lassen, Madera, Modoc, Plumas, Shasta, Sierra, Tehama, and Yuba.

16. Due to the presence of the proposed for listing as federally threatened plant species, Red Hills vervain, Andrew and Big Creeks in Tuolumne County are closed to work and are to be treated as Class A waters, as defined in the DFG §5653 permit program regulations (14 CCR 228.5 (a)), by all persons holding DFG §5653 permits.

17. No filling or excavation activities located within or that would otherwise adversely effect wetlands is authorized under this general permit. Note: Wetlands are defined by the Corps of Engineers and the U.S. Environmental Protection Agency as those areas "...inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." If you are operating in water where the substrate is composed of sand and/or gravel, you are not in a wetland. If you are not sure whether the area you propose to work in is considered a wetland, you should first contact the Corps Regulatory office and obtain further information and guidance.

18. Persons who propose to discharge dredge and fill material into waters of the United States under the authority of a Department of the Army permit issued pursuant to §404 of the Clean Water Act must obtain §401 certification of water quality from the state in which the discharge is proposed. Section 401 is administered in California by the State Water Resources Control Board (SWRCB) through the various Regional Water Quality Control Boards (RWQCB). In the event that the SWRCB issues blanket §401 certification for this regional general permit, all terms and conditions of such certification shall become terms and conditions of this permit by reference. Until such time that the SWRCB issues §401 certification, or in the event that the SWRCB declines to issue §401 certification, individual application for §401 certification, or waiver, must be made to the appropriate RWQCB, prior to being authorized under this general permit.

19. The District Engineer retains discretionary authority to prohibit the use of this general permit on a case-by-case basis and require the submittal of an individual permit if it is determined that the project will result in unacceptable impacts to the aquatic environment.

General Conditions:

1. That any discharge of dredged or fill material authorized by this permit shall be consistent with the terms and conditions of this permit. Activities involving the discharge of dredge and fill material not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension, or revocation of approval to conduct the activity authorized under this permit.

2. That the permittee agrees to make every reasonable effort to conduct the authorized activity in a manner so as to minimize any adverse impact of the activity on fish, wildlife, and natural environmental values.

3. That the permittee shall allow the District Engineer or his authorized representatives(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.
4. No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area. Intended or incidental impoundment of water is not authorized under this permit.
5. No activity may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.
6. No activity is authorized which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or critical habitat might be affected or is in the vicinity of the project and shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. Information on the location of threatened and endangered species and their critical habitat can be obtained from the U.S. Fish and Wildlife Service and National Marine Fisheries Service.
7. No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the District Engineer has complied with the provisions of 33 CFR 325, App. C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Officer and in the National Register of Historic Places. If you discover any previously unknown historic or archeological remains while conducting the activity authorized under this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Registers of Historic Places.
8. No activity may cause more than a minimal adverse effect on navigation.
9. No discharge of dredged or fill material may consist of unsuitable material (e.g. trash, debris) and material discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).
10. To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water.
11. No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status. Information on Wild and Scenic Rivers may be obtained from the National Park Service and the U.S. Forest Service.
12. Discharges into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.


Limits of this authorization.

- a. This permit does not obviate the need to obtain other Federal, state, or local authorizations required by law.
- b. This permit does not grant any property rights or exclusive privileges.
- c. This permit does not authorize any injury to the property or rights of others.
- d. This permit does not authorize interference with any existing or proposed Federal projects.

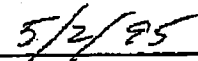
Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

- a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.
- b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.
- c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.
- d. Design or construction deficiencies associated with the permitted work.
- e. Damage claims associated with any future modification, suspension, or revocation of this permit.

Issued for and in behalf of Colonel John N. Reese, District Engineer.



Art Champ, Chief, Regulatory Branch



Date

Enclosure:

Map of Corps of Engineer Districts in California

CORPS OF ENGINEERS DISTRICTS

State of California



USAED, LOS ANGELES
ATTN: REGULATORY BRANCH
300 N. LOS ANGELES STREET, ROOM 6062
LOS ANGELES, CALIFORNIA 90012
10

EXHIBIT 2

MAY 23 1995

3053.21.00

Mr. Art Champ, Chief
Regulatory Branch
Sacramento District
U.S. Army Corps of Engineers
1325 J Street
Sacramento, CA 95814-2922

Dear Mr. Champ:

**WATER QUALITY CERTIFICATION UNDER CLEAN WATER ACT (CWA)
SECTION 401: SUCTION DREDGE MINING**

Under a new federal definition of "dredged material" (33 CFR 323.2), suction dredge mining now requires a CWA Section 404 permit from the U.S. Army Corps of Engineers (Corps) and CWA Section 401 State Water Quality Certification (Section 401 Certification) from the State Water Resources Control Board (SWRCB). Issuance of Section 401 Certification must be based on a reasonable assurance that the proposed activity will not violate State water quality standards, including beneficial uses, water quality objectives, and the State's anti-degradation policy.

There are approximately 5,000 suction dredge miners in California. Suction dredge mining is regulated by the Department of Fish and Game (DFG) pursuant to Fish and Game Code Section 5653. DFG issued a final Environmental Impact Report (EIR) and adopted regulations for its Section 5653 program in April 1994 (California Code of Regulations Section 228.5). The EIR identified potentially significant effects from suction dredge mining on (a) benthic and invertebrate biological communities; (b) fish, fry, and fish eggs; (c) other aquatic or riparian-dependent plant or animal species; (d) channel morphology; (e) water quality and quantity; and (f) riparian habitat. To reduce each of the identified potential impacts from suction dredge mining to less than significant levels, DFG's regulations prohibit suction dredge mining in specified times and

SURNAME	Completed 5/19/95	J. Hartman	V. W. [Signature] 5-22-95	
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places, specify maximum suction dredge sizes, and impose other general conditions. DFG issues annual "Standard Permits" which authorize suction dredge mining in compliance with the Section 5653 regulations. Suction dredge mining not in compliance with the regulations may be authorized under a DFG "Special Permit", if DFG finds that there will be no deleterious effect on aquatic biota.

On May 2, 1995, the Corps' Sacramento District issued Regional General Permit (RGP) No. 46 for suction dredge mining in California. The Corps' RGP covers any suction dredge miner holding a DFG Section 5653 "Standard Permit". The RGP does not authorize suction dredge mining conducted under DFG Section 5653 "Special Permits" or conducted in federal Wild and Scenic Rivers; these activities will require a Corps CWA Section 404 individual permit. The Corps' RGP also specifies a number of additional special and general conditions which address the potentially significant impacts of suction dredge mining. The RGP will be effective for five years.

Pursuant to the California Environmental Quality Act, the SWRCB is proceeding as a "responsible agency", using DFG's EIR. We find that DFG's Section 5653 regulations and the Corps' RGP conditions avoid or substantially lessen each of the significant environmental impacts identified in the DFG's EIR, and that there is a reasonable assurance that State water quality standards will not be violated.

Pursuant to CWA Section 401 I hereby certify suction dredge mining which:

1. is conducted in compliance with a valid DFG Section 5653 permit, and
2. is conducted in compliance with all the special and general conditions specified in the Corps' May 2, 1995 RGP No. 46, except that certification is also granted for suction dredge mining done under DFG Section 5653 "Special Permits" and for suction dredge mining in federal Wild and Scenic Rivers and "study rivers".

We understand that the San Francisco and Los Angeles Corps Districts will issue RGPs in the near future which will be similar to that issued by the Sacramento Corps District. In any case, this Section 401 Certification applies throughout California to all suction dredge mining which complies with the terms specified above. Suction dredge mining activities which do not comply with the terms specified above will require review by the appropriate Regional Water Quality Control Boards for individual Section 401 Certification.

Art Champ

-3-

MAY 23 1995

We appreciate your staff's active coordination with the SWRCB on this issue. Should there be any questions, please contact Mr. Oscar Balaguer, the staff person assigned to this matter, at 916/657-1025.

Sincerely,

Original Signed By:

Walt Pettit
Executive Director

Mr. Calvin Fong, Chief
Regulatory Section
San Francisco District
U.S. Army Corps of Engineers
211 Main Street
San Francisco CA, 94105

Ms. Diane Noda, Chief
Regulatory Section
Los Angeles District
U.S. Army Corps of Engineers
P.O. Box 2711
Los Angeles, CA 90053

Regional Water Quality Control Boards
and Field Offices

Interested Parties List

OBALAGUER/slandau
d:\oscar\suctcert.sal
7-1025 (5-18-95f)
DWQ 224
file #

EXHIBIT 3

To:	Regstaff, Counsel
From:	Chief, Regulatory Branch
Subject:	Discharge of dredged material - 33 CFR 323.2(d)

1. The final rule on the change to the definition of discharge of *dredged material* was published in the FR on January 17, 2001 (66 FR 4549), and is now incorporated into our regulations as 33 CFR 323.2(d)(2)(i) and (ii). It became effective on April 17, 2001, and is often referred to as the *2001 final Tulloch or excavation rule* based on a series of lengthy lawsuits culminating in this final rulemaking. There are still pending lawsuits so this final rule may change again depending on the outcome of those lawsuits. Note that this rule pertains *only* to Section 404 of the CWA, and does not apply to Section 10 of the RHA 1899. I have included a detailed overview of Part 323.2(d), discharge of dredged material, and did not limit the discussion to just the 2001 excavation rule, since there have been substantial changes to Part 323.2(d) in recent years. I apologize for the length of this memo but my purpose is to point out and discuss important aspects of discharging dredged material to insure branch consistency in its interpretation and application.

<u>Content of Memo</u>	
Topic	Paragraph
• Summary of 2001 final excavation rule	2
• What is incidental fallback?	3
• Mechanized earth-moving equipment	4
• Suspended material from excavation	5
• Backfilling of trenches	6
• Examples of excavation activities not regulated under 404	7
• Processed dredged material, including recreational gold dredging	8
• Excavation equipment that may or may not result in a 404-discharge	9
• 3 situations where discharges would not require 404 authorizations	10
• Destroy or degrade waters of the U.S.	11
• Some definitions	12
• References	13
• Appendix - consolidated citation of Part 323.2(d)	

2. Summary of the 2001 final excavation rule: As you know, excavation or dredging *per se* is not an activity regulated by section 404. Section 404 pertains only to the **discharge** of dredged or fill material. However, there are certain types of excavation equipment that could result in a 404 discharge. The intent of the January 2001 change to the definition of discharge of dredged material is to clarify what types of dredging or excavation activities the Corps and EPA believe are likely to result in a section 404 discharge (Part 323.2(d)(2)(i)). If the discharge of dredged material is only *incidental* to the excavation or dredging activity, then the discharge does not require a 404 permit. As a general rule, the use of mechanized earth-moving equipment (see paragraph 4 for some examples) in waters of the U.S. is "regarded" to result in a regulated discharge of dredged material unless project-specific evidence shows the activity results in only *incidental fallback*. In other words, the Corps and EPA will assume there's a regulated discharge (more than incidental fallback) from mechanized earth-moving equipment, but the project proponent can provide specific information to show that the discharge is *merely incidental* and therefore should not be considered a section 404 regulated discharge (66 FR 4553, 1st col). As a matter of record, the Corps has always regarded mechanized landclearing to result in a regulable 404 discharge (e.g., see RGL 84-05, and the November 13, 1986 regs at 51 FR 41232)). Although the project proponent has the option of providing specific information concerning excavation equipment to be used, it is not mandatory.
3. What is "incidental fallback?" Part 323.2(d)(1) states that incidental fallback is not considered a discharge of dredged material (i.e., not a 404 discharge), and Part 323.2(d)(2)(ii) defines incidental fallback. In order to determine whether a discharge fits the definition of incidental fallback, there are three key terms in the definition to consider.

Part 323.2(d)(2)(ii) states, "*Incidental fallback is the redeposit of **small volumes** of dredged material that is **incidental** to the excavation activity in waters of the United States when such material **falls back to substantially the same place** as the initial removal*" (emphasis mine).

All three terms in **bold** face in the definition have to be met in order for the discharge to qualify as incidental fallback. Note that incidental fallback pertains *only* to *dredged* material, and not to the discharge of *fill* material, which is defined separately at Part 323.2(d)(f).

a. "small" volume is relative. It needs to be placed in context with the type of equipment being used and the total amount being redeposited into waters. Most excavation equipment will have some incidental spills (fallback) due to the movement of the equipment, and in order for the spill to be considered small, it must be minor in relation to the amount excavated. Also, the total amount of fallback into waters should be small (perhaps, less than a few hundred cubic yards??). In an EPA appeals case (Slinger Drainage Inc., U.S. Environmental Protection Agency Environmental Appeals Board, Docket No.

5-CWA-97-022, September 29, 1999, 1999 WL 778576 (E.P.A.)), 2900 cubic yards of fallback was not considered small because the fallback amount constituted 100% of the excavated material that was intentionally sidecasted temporarily (and then backfilled with the same material after drainage tiles were placed in the trench). Even if the fallback did not constitute a large percentage of the excavated material, 2900 cys is equivalent to 190 to 290 truckloads of material, which the judge did not consider small.

b. "incidental" (according to the dictionary) is something occurring by chance, by happenstance, without intention, or is a minor consequence. Incidental is an important term because some mechanized earth-moving equipment are *designed* to sidecast the excavated material to one or both sides (e.g., some suction or hydraulic dredges), or are designed to move/push material around (e.g. bulldozers). Material intentionally or purposely sidecasted, relocated, redeposited or moved within waters of the U.S. is considered a regulated 404 discharge (66 FR 4553, 2nd col). In order for the fallback to be incidental, it must occur by chance or is a minor consequence (such as drippings from a bucket or clamshell dredge), and not on purpose. Incidental fallback is usually an *unavoidable by-product* of a larger removal action, and is nothing more than residue from the excavation or dredging action. It is usually not possible to scoop material from the bottom of a waterbody without some unintentional fallback into the water.

c. "falls back to substantially the same place" - the residual material should generally fallback into the same location from which it was excavated. If the excavated material is intentionally *moved away* from the point of excavation and deposited elsewhere in the waterbody, then the material is not considered falling back into the same location. For example, sidecasting dredged material immediately adjacent to the excavation point is considered intentionally moving the material away from the excavated area, and thus does not meet the test of falling back to substantially the same place. Even if sidecasting the material is temporary and is redeposited back into the area excavated within a very short period of time, it would not meet this test (as confirmed in the Slinger Drainage lawsuit). The same holds true for pushing and relocating material with a bulldozer or temporarily stockpiling sand/gravel next to the area excavated below OHW.

Besides looking at the horizontal movement of material, one needs to consider the vertical relocation as well; such as backfilling of trenches. Excavating a trench and then backfilling it again is considered a jurisdictional discharge of dredged material, and is not considered "falling back" to substantially the same place (66 FR 4553, 2nd col.). The rationale is the backfilling of a trench is intentional and not incidental to the excavation.

d. The definition of incidental fallback (small volumes and incidental) implies impacts to the aquatic environment must also be minimal. See paragraphs 5 and 11 for further discussion of "de minimis" impacts.

e. In summary, in determining whether there is incidental fallback, factors to consider are: (1) amount of material being redeposited, (2) movement of the material away from the place of initial removal, (3) whether the movement is a minor consequence (accidental) or intentional, (4) horizontal and vertical relocation (sidecasting, backfilling), and (5) whether there are *de minimis* adverse effects.

4. Mechanized earth-moving equipment that is regarded to result in *more than* an incidental discharge includes bulldozers, graders, backhoes, and bucket dredges¹. The use of this equipment in waters to move or excavate material would therefore be regulated under section 404 unless the applicant provides case-specific evidence to the contrary (66 FR 4552, 3rd col). Part 323.2(d)(1)(iii) clearly specifies that discharges, other than incidental fallback, from mechanized landclearing, channelization, etc are considered discharges of dredged material.
5. What about material suspended in the water column as a result of excavation? A regulable discharge results if earth-moving equipment causes the suspension or disturbance of material to be moved by currents and resettled beyond the place of initial removal in such volume as to constitute other than incidental fallback (66 FR 4553, 2nd col). See e.g., *United States v. M.C.C. of Florida*, 722 F.2d 1501 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part on remand, 848 F.2d 1133 (11th Cir. 1988) (resettling of material resulting from propeller rotation onto adjacent seagrass beds is jurisdictional). However, most suspended material resulting from dredging or excavation is very small compared to the amount dredged or excavated, and therefore would be considered incidental, and not a regulable 404 discharge. Suspended material would be considered a regulated 404 discharge only if there is evidence indicating smothering of aquatic habitat or other impacts from settling of the suspended material (i.e., action that "degrades" waters of the U.S. See paragraph 11).
6. Backfilling of trenches, filling in low spots and creating a level area (e.g., smoothing out high and low areas in a channel after dredging or excavating) generally are considered regulable discharges (i.e., more than incidental fallback because the filling is intentional) (66 FR 4567, 3rd col).
7. Some examples of excavation activities that generally are **not** regulated as a section 404 discharge:

¹ Note: Material falling off a bucket dredge used in dredging sediments is normally considered incidental fallback. See paragraph 9e.

- a. Suction (hydraulic) dredging where the material is pumped to an upland location or into a container outside waters of the U.S., and any suspended material resulting from the excavation is relatively small (in relationship to the total excavated), unless there is evidence that settling of the suspended material will harm or cover aquatic habitat.
- b. Discing, harrowing, and harvesting where the soil is stirred, cut or turned over to prepare for planting of crops. These practices involve only minor redistribution of soil, rock or other surface material and are considered incidental fallback (66 FR 4554, 3rd col). It should be noted the 2001 excavation rule does NOT affect the Section 404(f) exemptions. Normal farming activities, such as plowing (including discing and harrowing), cultivating and harvesting are not discharges requiring a 404 permit (33 CFR 323.4(a)(1)) unless such discharges contain toxic pollutants or convert waters into a use to which it was not previously subject (see Parts 323.4(b) and (c) for further details).
- c. Use of K-G blades and other forms of vegetation cutting, such as bush hogging or mowing that cut vegetation *above* the soil line do not involve a discharge of dredged material (66 FR 4554, 3rd col). Use of equipment to cut trees above the roots that does not disturb the root system would not involve a discharge (66 FR 4555, 3rd col, and Part 323.2(d)(3)(ii)). After the vegetation is cut, it is sometimes windrowed (stacked or heaped in a row). If vegetation is cut above the ground and then lifted into windrows without causing redeposition of excavated material, then no section 404 permit is required. If windrowing results in a redeposit of dredged material (e.g., by pushing the fallen vegetation with a bulldozer or similar equipment), then a 404 permit would be required. Additional discussion of vegetation removal can be found at 58 FR 45017, dated Aug 25, 1993. Part 323.2(d)(3)(ii) was added to the Regulatory program as a final rule on August 25, 1993. Also, RGL 84-1, although dated, continues to provide good guidance on vegetative removal.
- d. Is snow plowing a regulable discharge? Snow plowed into creeks is not regulated since snow is not considered a discharge of dredged or fill material. However, if during the snow removal, snowplows, front loaders, bulldozers or similar equipment discharge sand, gravel or other material into waters of the U.S., or move sediment or soil to new locations within waters, then such activities would be considered a 404 discharge (66 FR 4570, 2nd col).
8. In addition to the above, Part 323.2(d)(3)(i) states that discharges resulting from onshore-subsequent processing of dredged material that is extracted for any commercial use (other than fill) is not considered a discharge of dredged material. On-shore processing includes on-board processing (e.g., on a boat

or floating dredge). These discharges are subject to section 402 (NPDES permits by the RWQCBs).

a. Recreational gold dredging: I would regard *recreational gold dredging* to be consistent with Part 323.2(d)(3)(i). While the excavated material is not processed upland nor is recreational gold dredging a commercial venture, the activity fits the principle of material being processed (gold being extracted from the sediments) and the unusable material discharged. Additionally, the material is processed on-board a floating suction dredge. Serious recreational gold dredgers (as opposed to those that pan for gold) typically use scuba gear and a portable, floating suction dredge. The scuba diver directs the hose to bottom areas where the sand and gravel are sucked up by the portable dredge. The material is sorted by grain size ("processed" on-board a portable, floating dredge) and the unsuitable material ("waste") is discharged back into the water. I would consider the discharged material as regulable under section 402.

b. The gold dredging activity and discharge (especially on a cumulative basis) may well have adverse impacts (turbidity, disturbance of spawning habitat, changing the stream bottom characteristics, etc) and may even change the bottom elevation but the overall activity, which includes a discharge of a processed waste, should be addressed through section 402.

9. Some common excavation equipment that may or may not result in a regulable 404 discharge (remember: it's the *activity* - *not* the equipment - that may or may not be regulated):

a. Bulldozer - activity normally regulated because the movement of dirt generally fills low spots or levels the bottom contours.

b. Front-end loader - activity normally not regulated as a 404 discharge unless the material is redeposited back into a jurisdictional area. Any fallback from scooping up the material is considered incidental fallback.

c. Dragline - activity normally not regulated as a 404 discharge unless the material is redeposited back into a jurisdictional area.

d. Backhoe - activity normally not regulated as a 404 discharge unless the material is redeposited back into a jurisdictional area.

e. Bucket, cutterhead or clamshell dredge - activity normally not regulated as a 404 discharge unless the material is redeposited back into a jurisdictional area. As the bucket or clamshell dredge excavates sediments and moves up the water column, the falling back or overflow of the sediment from the bucket/clamshell is considered incidental. The stirring up or loosening of the bottom sediments by a cutterhead dredge (which then is

hydraulically pumped into and contained in a bin, scow or upland facility) is generally considered an incidental discharge. These dredges are specific examples given in the joint Corps/EPA guidance of 1997 (see reference below) as equipment that normally will result in *only* incidental discharges.

10. Part 323.2(d)(4) specifies three situations where discharges of dredged material would *not* require section 404 authorizations. They are (i) incidental discharges that do not destroy or degrade waters of the U.S., (ii) incidental movement of dredged material during normal navigation dredging, and (iii) 404(f)(1)(A) exempt discharges.

a. 323.2(d)(4)(i), destroy or degrade waters of the U.S.: If the incidental discharge of dredged material does not "destroy or degrade" waters of the U.S., then a 404 permit is not required. Destroy and degrade waters are defined at Parts 323.2(d)(5) and (6), and discussed under paragraph 11, below. Note that there is a presumption that mechanized landclearing, ditching, channelization and other excavation activities resulting in discharging dredged material into waters *does* destroy or degrade such waters. The project proponent has the option and burden of demonstrating such activities would result in only incidental fallback and would not destroy or degrade waters (i.e., would have no more than a *de minimis* effect).

b. 323.2(d)(4)(ii), dredging for navigation in navigable waters of the U.S.: the incidental movement (discharge) caused by dredging equipment specifically used for dredging a *navigation project* in navigable waters of the U.S. (section 10 waters only) does not require 404 authorization. *This does not apply to navigation dredging in wetlands.* The dredging activity in section 10 waters must have either a section 10 permit or be specifically authorized by Congress (such as a Corps navigation dredging project).

Note: this part of the regs will not have much impact in SPN because a section 10 permit is required for non-Corps navigation projects in navigable waters of the U.S., and thus any alternatives to be evaluated or mitigation that might be required would be covered by our public interest review. Furthermore, many navigation dredging projects intentionally dispose of the dredged material back into the water, and therefore would trigger a section 404 permit. Intentional disposal is not incidental fallback.

c. 323.2(d)(4)(iii), certain discharges associated with normal (on-going) farming, silviculture, and ranching activities are not subject to section 404, provided that they are not "recaptured" by section 404(f)(2) (see Part 323.4 and Section 404(f) of the CWA for details). This part was added to clarify that exempt discharges under 404(f)(1)(A) and the recapture clause of 404(f)(2) are not affected by this regulation.

11. The terms, "destroy" and "degrade" waters are defined at Part 323.2(d)(5) and (6) respectively. If the discharge of dredged material destroys or degrades waters of the U.S., then it would require 404 authorization.

a. "Destroy waters" of the U.S. means eliminating or altering its physical characteristics such that it no longer remains a waters of the U.S. as defined at Part 328.3. It is important to note that *unauthorized* discharges do *not* eliminate CWA jurisdiction.

b. "Degrade waters" of the U.S. occurs if it has more than a *de minimis* (i.e., inconsequential) effect by causing an identifiable adverse effect on any aquatic function.

1) Converting a jurisdictional wetland to an open waterbody through dredging, even though the net environmental effects are beneficial, would degrade waters because there will be some identifiable adverse effects on wetland functions due to the conversion (58 FR 45019, 2nd col). As such, the discharge of dredged material from the excavation/dredging activity would require a 404 permit because the discharge does not meet the definition of *de minimis* adverse effects, and may not meet the definition of incidental fallback.

2) The threshold of adverse effects of the *de minimis* exception is a very low one (58 FR 45020, 2nd col). For example, a dredging/excavation activity altering the hydrology of a wetland may result in restoring pre-existing hydrology, or may improve habitat value or water quality in the long-term. If the activity would result in some loss or identifiable reduction of any aquatic function to achieve this result, the activity would "degrade" waters and a permit would be required. It is not the intent of the definition of degrade waters that the positive and negative effects be balanced and to require a permit only where the *net* effect is adverse. Rather, an adverse effect on any one aquatic function, even if it were temporary, would be sufficient to trigger the section 404 permit.

3) Concurrence by either the USFWS or NOAA Fisheries with the Corps' determination of "not likely to adversely affect" Federally listed species would be considered as *not* degrading waters (58 FR 45020, 2nd-3rd col).

c. The type of information the project proponent may submit to the Corps to demonstrate its activity does not destroy or degrade waters is described at 58 FR 45022, 3rd column.

12. Informal definitions (based on an HQUSACE presentation in 1999):

a. Mechanized landclearing – when equipment moves materials in a manner that would fill or level jurisdictional areas. For a more detailed discussion of mechanized landclearing, see 58 FR 45017-45018.

b. Channelization – when equipment is used to fill or level bottom contours. See 58 FR 45018.

c. Sidecasting – the use of equipment to redeposit dredged materials within jurisdictional areas located adjacent to or alongside the excavated area.

13. References:

a. 51 FR 41232, November 13, 1986.

b. 58 FR 45008, August 25, 1993.

c. 64 FR 25120, May 10, 1999.

d. 66 FR 4549, January 17, 2001.

e. Regulatory Guidance Letter 84-05, Fifth Circuit Decision in Avoyelles vs. Marsh, March 26, 1984.

f. Corps of Engineers/Environmental Protection Agency, "*Guidance Regarding Regulation of Certain Activities in Light of American Mining Congress v. Corps of Engineers*," April 11, 1997.

14. Since Part 323.2(d) has changed several times and published in various federal registers, the consolidated version is attached as Appendix A for your convenience.

Calvin Fong
Chief, Regulatory Branch

Appendix A

Consolidated citation of 33 CFR 323.2(d) as of the January 17, 2001.
(Except as otherwise noted, the following citation is from the August 25, 1993 Federal Register – 51 FR 41232)

323.2 Definitions.

(d) (1) Except as provided below in paragraph (d)(3)², the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material *other than incidental fallback*² within, the waters of the United States. The term includes, but is not limited to, the following:

- (i) the addition of dredged material to a specified discharge site located in waters of the United States;
- (ii) the runoff or overflow from a contained land or water disposal area; and
- (iii) any addition, including redeposit *other than incidental fallback*,² of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) (i)³ The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA.

(ii)³ *Incidental fallback* is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

(3)¹ The term *discharge of dredged material* does not include the following:

- (i) discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable state Section 404 program.
- (ii) activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chain sawing) where the activity neither substantially disturbs the root system, nor involves mechanized pushing,

² Renumbered due to revisions to part 323.2(d) as per 66 FR 4575, January 17, 2001.

² Added as per 64 FR 25120, May 10, 1999.

³ (2)(i) and (ii) added as per 66 FR 4575, January 17, 2001.

dragging, or other similar activities that redeposit excavated soil material.
(iii) *incidental fallback*.²

(4¹) Section 404 authorization is not required for the following:

(i) any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States as defined in paragraphs (d)(5¹) and (d)(6¹) of this section; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (d)(5¹) and (d)(6¹) of this section. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) incidental movement of dredged material occurring during normal dredging operations, as defined as dredging for navigation in *navigable waters of the United States*, as that term is defined in part 329 of this chapter, with proper authorization from the Congress and/or the Corps pursuant to part 322 of this Chapter; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at section 328.3 of this Chapter.

(iii) certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by otherwise subject to regulation under Section 404. See 33 CFR 323.4 for discharges that do not require permits.

(5¹) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

[Note: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.]

(6¹) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a *de minimis* (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

¹ Renumbered due to revisions to part 323.2(d) as per 66 FR 4575, January 17, 2001.

EXHIBIT 4

5653. (a) The use of any vacuum or suction dredge equipment by any person in any river, stream, or lake of this state is prohibited, except as authorized under a permit issued to that person by the department in compliance with the regulations adopted pursuant to Section 5653.9. Before any person uses any vacuum or suction dredge equipment in any river, stream, or lake of this state, that person shall submit an application for a permit for a vacuum or suction dredge to the department, specifying the type and size of equipment to be used and other information as the department may require.

(b) Under the regulations adopted pursuant to Section 5653.9, the department shall designate waters or areas wherein vacuum or suction dredges may be used pursuant to a permit, waters or areas closed to those dredges, the maximum size of those dredges that may be used, and the time of year when those dredges may be used. If the department determines, pursuant to the regulations adopted pursuant to Section 5653.9, that the operation will not be deleterious to fish, it shall issue a permit to the applicant. If any person operates any equipment other than that authorized by the permit or conducts the operation in any waters or area or at any time that is not authorized by the permit, or if any person conducts the operation without securing the permit, that person is guilty of a misdemeanor.

(c) The department shall issue a permit upon the payment, in the case of a resident, of a base fee of twenty-five dollars (\$25), as adjusted under Section 713, when an onsite investigation of the project size is not deemed necessary by the department, and a base fee of one hundred thirty dollars (\$130), as adjusted under Section 713, when the department deems that an onsite investigation is necessary. In the case of a nonresident, the base fee shall be one hundred dollars (\$100), as adjusted under Section 713, when an onsite investigation is not deemed necessary, and a base fee of two hundred twenty dollars (\$220), as adjusted under Section 713, when an onsite investigation is deemed necessary.

(d) It is unlawful to possess a vacuum or suction dredge in areas, or in or within 100 yards of waters, that are closed to the use of vacuum or suction dredges.

14 CA ADC S 228

14 CCR s 228

Cal. Admin. Code tit. 14, s 228

<KeyCite Citations >

BARCLAYS OFFICIAL CALIFORNIA CODE OF
REGULATIONS

TITLE 14. NATURAL RESOURCES
DIVISION 1. FISH AND GAME COMMISSION
-DEPARTMENT OF FISH AND GAME
SUBDIVISION 1. FISH, AMPHIBIANS AND
REPTILES

CHAPTER 8. MISCELLANEOUS

This database is current through 09/08/06,
Register 2006, No. 36

s 228. Suction Dredging.

For purposes of these regulations, suction dredging (also called vacuum dredging) is defined as the use of a suction system to remove and return material at the bottom of a stream, river, or lake for the extraction of minerals. Suction dredges may only be used pursuant to the following provisions:

(a) Permit requirement. Every person who operates the intake nozzle of any suction dredge shall have a suction dredge permit in his/her immediate possession. Suction dredge permits shall be valid from the first of the year for one calendar year or if issued after the first of the year, for the remainder of that year. The department will charge a fee for each suction dredge permit pursuant to Section 5653(c), Fish and Game Code. Permits may be obtained at any Regional office or at the License and Revenue Branch 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.

(b) Special Suction Dredge Permits.

(1) Submission of Written Plan. Any person may apply for a special suction dredge permit to operate a suction dredge with a nozzle larger than prescribed in subsections 228(e)(1), 228.5(c) or 228.5(d) or during the closed season or in a closed water for suction dredging by submitting a written plan detailing the proposed operation. If the department determines that no deleterious effect to fish may occur, the special permit shall be issued with conditions prescribed by the department to protect fish resources. A special permit will be issued or denied within 30 days upon receipt of a complete written plan detailing the proposed operation unless the time is intended by mutual agreement. If the special permit is denied, the justification for denial will be provided.

(2) Appeal of Denial. The denial of a special suction dredge permit may be appealed in writing to the director or his/her designee (hereinafter referred to as director). If the director determines that no deleterious impacts to fish may occur, the director shall authorize the issuance of the permit. The director shall respond to an appeal within 45 days from receipt of notice of request to appeal.

(c) Permit Revocation or Suspension. Any suction dredge permit, assistant suction dredge permit, or special suction dredge permit may be revoked or suspended by the regional manager or his/her designee (hereinafter referred to as regional manager) for any violation of the laws or regulations pertaining to suction dredging. The regional manager may, in his/her discretion, revoke or suspend the permit or permit renewal or permanently revoke the renewal of a permit based on past citations or convictions of such laws or regulations. A regional manager's decision to revoke or suspend a permit or permit renewal may be appealed to the director. Any revocation or suspension of a permit or permit renewal shall be in accordance with the following provisions:

(1) Hearing When Permittee Convicted of Violation. In the case where the permittee has

already been convicted of a violation of Section 5653 or 5653.3 of the Fish and Game Code or any regulation pertaining thereto permitted by said code, the regional manager shall schedule a hearing to consider the revocation or suspension of his/her permit or permit renewal:

(A) Notification. The regional manager shall notify the permittee, by certified letter, of the intent to consider the revocation or suspension of his/her permit or permit renewal at the hearing. The certified letter shall include the following information:

1. Name of permittee and last known address.
2. Date, time and place of scheduled hearing.
3. Reason for impending action, including a statement as to date and fact of conviction(s).
4. A copy of Section 228, Title 14, California Code of Regulations.
5. A statement that the permittee has the right to appear and to be represented by legal counsel.

(B) Recording. The proceedings of the hearing shall be recorded by an electronic tape recording system.

(C) Reading of Documents. At the hearing, the regional manager shall read the conviction documents. The department shall provide the regional manager with the background information regarding the violation(s) and conviction(s) and shall submit into the record a copy of the document(s) which include(s) the facts of the conviction(s) of a violation of the regulation(s) or statute.

(D) Statement by Permittee. The permittee shall make his/her statement regarding the violation(s) and conviction(s), and may argue that extenuating circumstances were such as to not warrant the loss of his/her permit or permit renewal.

(E) Questioning. The permittee or the department personnel may be questioned by the regional manager.

(F) Findings. At the conclusion of the hearing, the regional manager shall make a decision which contains findings or reasons for the proposed action.

(G) Notification by Certified Mail. After the hearing, the regional manager shall provide the permittee, by certified mail, a copy of the final decision.

(H) Appeal. The permittee may request an appeal in writing to the director within 30 days of the date of receipt of the regional manager's decision. The director shall respond to an appeal in writing within 45 days from receipt of notice of request to appeal.

(I) Judicial Review. The permittee may request judicial review by filing a petition for writ of mandate in accordance with provisions of the Code of Civil Procedure within 30 days from the date of the decision. The record of the proceedings shall be prepared by the department and delivered to the petitioner within 30 days after receipt of petitioner's request and upon payment of the fee specified in Section 69950 of the Government Code.

(2) Hearing When Permittee Cited but Not Convicted. In the case where the permittee has not been convicted of a violation of Section 5653 of the Fish and Game Code or any regulation pertaining to suction dredging permitted by said code, but has been cited by the department, the regional manager shall schedule a hearing to consider the revocation or suspension of his/her permit or permit renewal:

(A) Notification. The regional manager shall notify the permittee, by certified letter, of the regional manager's intent to consider the revocation or suspension of his/her permit or permit renewal at the hearing. The certified letter shall include the following information:

1. Name of permittee and last known address.
2. Date, time and place of scheduled hearing.
3. Reason for impending regional manager's action, including a concise statement of the acts or nonactions of the permittee which constitutes a violation of Section 5653 or 5653.3, of the Fish and Game Code or regulations made pursuant thereto.
4. A copy of Section 228, Title 14, California Code of Regulations.
5. A statement that the permittee has the right to appear and to be represented by legal counsel.

(B) Recording. The proceedings of the hearing shall be recorded by an electronic type recording system.

(C) Presentation of Evidence. The permittee and the department have the right to present evidence at the scheduled hearing as follows:

1. Oral evidence shall be taken on oath or affirmation.

2. Each party may call and examine witnesses, cross-examine opposing witnesses on any relevant matter, may rebut evidence against him/her, and may orally argue the matter.

3. The hearing need not be conducted according to the technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons would rely in the conduct of serious affairs.

4. The permittee or the department may be questioned by the regional manager.

(D) Findings. At the conclusion of the hearing, the regional manager shall make a decision based on the evidence presented at the hearing and shall issue written findings containing reasons for the decision and the evidence relied upon.

(E) Notification by Certified Mail. After the hearing the regional manager shall provide the permittee, by certified mail, a copy of the final decision.

(F) Appeal. The permittee may request an appeal in writing to the director within 30 days of the date of receipt of the regional manager's decision. The director shall respond to an appeal in writing within 45 days from receipt of notice of request to appeal.

(G) Judicial Review. The permittee may request judicial review by filing a petition of writ of mandate in accordance with provisions of the Code of Civil Procedure within 30 days from the date of the director's decision. The record of the administrative proceedings shall be prepared by the department and delivered to the petitioner within 30 days after receipt of petitioner's request and upon payment of the fee specified in Section 69950 of the Government Code.

(d) Special Approval for Use of Suction Dredges in

Lakes and Reservoirs. No suction dredging is permitted in any lake or reservoir without written approval from the lake operating agency, the Regional Water Quality Control Board and an on-site inspection and approval by the Department.

(e) Equipment Requirements.

(1) Nozzle Restriction. No suction dredge having an intake nozzle with an inside diameter larger than six inches may be used unless:

(A) Otherwise provided under special regulations of Section 228.5, Title 14, California Code of Regulations, or

(B) A constricting ring with an inside diameter not larger than six inches has been attached to the intake nozzle. This constricting ring must be of solid, one-piece construction with no openings other than the intake and openings not greater than one inch between the constricting ring and nozzle. It must be welded or otherwise permanently attached over the end of the intake nozzle. No quick-release devices are permitted.

(2) Hose Restriction. The inside diameter of the intake hose may not be more than four inches larger than the permitted intake nozzle size.

(f) Restrictions on Methods of Operation.

(1) Winching is permitted under the following provisions:

(A) Boulders and other material may only be moved within the existing water line. No boulders or other material shall be moved outside the water line.

(B) Winching of any material embedded on banks of streams or rivers is prohibited.

(C) Winching of any material into a location which deflects water into the bank is prohibited.

(D) No power-winch activated shovels, buckets or rakes may be used to excavate materials in the stream course. Nets and other devices may be used to collect cobbles and boulders by hand for removal from dredge holes providing the materials are not removed from within the water line.

(E) No woody streamside vegetation shall be

removed or damaged. Trees may be used as winch and pulley anchor points provided that precautions are taken to ensure that trunk surfaces are protected from cutting or abrasions.

(2) No person may suction dredge into the bank of any stream, lake or river.

(3) No person shall remove or damage woody riparian vegetation during suction dredge operations.

(4) No person shall move any anchored, exposed woody debris such as root wads, stumps or logs.

(5) No person shall divert a stream or river into the bank.

(6) No person shall dam or otherwise obstruct a stream, river or lake in such a manner that fish passage is impeded.

(7) No person shall import any earthen material into a stream, river or lake.

Operating outside these Restrictions On Methods Of Operation may require compliance with Fish and Game Code sections 1600 - 1607, which govern lake and streambed alterations.

(g) Compliance with Other Laws. Nothing in any permit issued pursuant to these regulations authorizes the permittee to trespass on any land or property, or relieves the permittee of the responsibility of complying with applicable federal, State, or local laws or ordinances.

(h) Emergency Closure. The Department may initiate emergency regulatory action pursuant to Government Code Section 11346.1 to close any water to suction dredging.

< General Materials (GM) - References, Annotations, or Tables >

Note: Authority cited: Sections 5653 and 5653.9, Fish and Game Code. Reference: Sections 5653 - 5653.9, Fish and Game Code.

HISTORY

1. New section filed 5-27-94; operative 5-27-94 (Register 94, No. 21). For prior history, see Register 81, No. 41.

2. Amendment of subsection (b)(1), new subsections (b)(2)-(3) and subsection renumbering filed 4-26-2001 as an emergency; operative 4-26-2001 (Register 2003, No. 9). A Certificate of Compliance must be transmitted to OAL by 8-24-2001 or emergency language will be repealed by operation of law on the following day.

3. Editorial correction adding History 2 (Register 2003, No. 9).

4. Reinstatement of section as it existed prior to 4-26-2001 emergency amendment by operation of Government Code section 11346.1(f) (Register 2003, No. 9).

EXHIBIT 5

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE



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January 6, 2000

Ann Malcolm
Chief Deputy General Counsel
Department of Fish and Game
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Sacramento, CA 95814

RECEIVED

JAN 10 2000

LEGAL AFFAIRS DIVISION
DEPARTMENT OF FISH AND GAME

CONFIDENTIAL-ATTORNEY-CLIENT COMMUNICATION

RE: Informal Opinion Request: Issuance of Special Suction Dredge Permits

Dear Ms. Malcolm:

You have asked whether the California Environmental Quality Act (CEQA), Public Resources Code sections 21000-21177, applies to the issuance of special suction dredge permits by the Department of Fish and Game. The short answer to the question is that CEQA does apply to such permits. However, before answering that question we wish to discuss a question which you did not raise, whether the Department actually has the authority to issue special permits.

Background

The Department issues suction dredge permits pursuant to Fish and Game Code section 5653. In 1994 section 5653 was amended to prohibit the use of suction dredge equipment "except as authorized under a permit issued to that person by the department in compliance with the regulations adopted pursuant to Section 5653.9." Section 5653.9 was amended at the same time to require the Department to adopt regulations to carry out section 5653. It continued to permit the Department to adopt regulations implementing sections 5653.3, 5653.5 and 5653.7. Any such regulations had to be adopted in compliance with CEQA. Amendments to subsection 5653(b) had the effect of requiring the Department to adopt regulations designating where and when vacuum or suction dredges could be used pursuant to a permit. Amendments to subsection 5653(c) required the Department to determine that the operation would not be deleterious to fish prior to issuance of the permit. Finally, subsection 5653(d) remained in effect. It prohibits the operation of a suction dredge in or within 100 yards of any water that is closed to suction dredging.

Regulations were adopted by the Department and are found at Title 14, California Code of Regulations, section 288 et seq. These regulations set forth classifications and special use regulations for streams and portions of streams within each county. (Title 14, Cal. Code Regs., § 288.5.) These regulations also specify permissible and prohibited equipment and methods of operation. (*Id.*, § 228(e), (f).) Subsection 228(b) of the regulations allows the issuance of special suction dredge permits to operate a suction dredge with a larger than otherwise allowable nozzle, in a closed water or during a closed season, if the proposed permittee submits a written plan and the Department concludes that the proposed operation would have no deleterious impact on fish.

Authority to Issue Special Permits

Before discussing the question you raised, we observe that section 5653 does not authorize special permits, that is, permits that do not comply with the generally applicable regulations specifying permissible and prohibited waters, equipment and methods of operation. Rather, section 5653 contemplates that the Department will designate permissible and closed waters, maximum sizes for dredges and times of the year for their use, and then issue all permits that comply with these regulations where there is no deleterious impact on fish. The Legislature specifically amended section 5653(a) and section 5653.9 to make mandatory the adoption of regulations specifying open and closed waters and permissible equipment, whereas previously they had been discretionary. (See former Fish & Game Code, § 5653.9.) The Legislature also made it unlawful to possess a suction or vacuum dredge in or near any water that is closed to the use of vacuum or suction dredging. This would presumably include both waters that are always closed to suction dredging and waters that are closed at that particular time. That the Legislature continued to make it a crime to possess a suction dredge in or near closed waters suggests that it did not intend for the Department to be able to authorize the issuance of permits which would allow suction dredging in closed waters.

This conclusion is reinforced by the Legislative Counsel's Digest for AB 1688, the 1994 amendments:

"This bill would expressly prohibit use of a vacuum or suction dredge by any person in any river, stream, or lake of this state, except as authorized by a permit issued to that person by the department and pursuant to the regulations adopted by the department. The bill would require, instead of permit, the department, by regulation, to designate waters or areas wherein vacuum or suction dredges may be used pursuant to a permit, waters or areas closed to those dredges, the maximum size of dredges permitted to be used, and the time of year when the dredges may be used."

Neither the bill nor the Legislative Counsel's Digest mentions special permits that would allow dredging in waters which the regulations designated as closed. Thus, the Department appears to lack the authority to issue special permits for waters that are otherwise closed.

Although section 5653(a) does permit the department to adopt regulations and issue permits pursuant to those regulations, all regulations must be within the adopting agency's authority and consistent with existing statutes. Regulations that "alter or amend the statute or enlarge or impair its scope are void, and courts not only may, it is their obligation to strike down such regulations." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11; see also Gov. Code, § 11342.1 [Regulations are invalid if they are not consistent or conflict with the authorizing statute].) Thus, regulations may not permit what the statute forbids. It is thus likely that a court would strike down that part of section 288(b) that allows the issuance of special permits for otherwise closed waters or at times when a water is otherwise closed if it were challenged.

Application of CEQA

Assuming that the Department can issue special permits, at least for larger dredges than would otherwise be allowed, the question is whether the Department must comply with CEQA when it issues them. Under CEQA an environmental analysis is required for any project undertaken by a public agency, with certain exceptions. CEQA applies whenever an agency carries out a project that could conceivably have a significant adverse impact on the environment, unless the project is subject to some exemption. (Pub. Resources Code, § 210.) The first question is whether there is any exemption that would apply. There are a number of statutory exemptions in Public Resources Code sections 21080-21080.26. If the project falls within a statutory exemption, it is exempt entirely from CEQA.

One exemption is for projects that are "ministerial" rather than "discretionary" in nature. CEQA applies only to discretionary projects undertaken by public agencies. (Pub. Res. Code, § 21080(a).) It does not apply to ministerial projects. (*Id.*, § 21080(b)(1).) A "discretionary project" is one in which the agency "can use its judgment in deciding whether and how to carry out or approve" the project. (CEQA Guidelines, Title 14, Cal. Code Regs., 15002(j).) Unlike the issuance of a general permit under Fish and Game Code section 5653(b), the issuance of a special permit does appear to be subject to the Department's discretion. An Environmental Impact Report was done for the regulations that established closed waters, closed seasons and permissible equipment. Allowing dredging in an otherwise closed water or with a larger dredge would result in greater, and potentially adverse, impacts that would have to be evaluated on a case-by-case basis. That determination is an exercise of discretion. While reference could be made to findings in the EIR for the regulations where appropriate, at least some additional

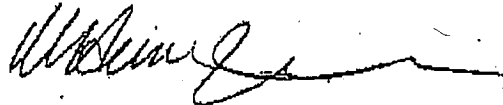
Ann Malcolm
December 13, 1999
Page 4

environmental analysis will be needed on a case-by-case basis.

In undertaking this analysis, the Department should be aware that a categorical exemption cannot be used where there is a reasonable possibility that the activity will cause a significant adverse effect on the environment. (Guidelines, § 15300.2.)

If you have further questions, please do not hesitate to call.

Sincerely,



M. ANNE JENNINGS
Deputy Attorney General

For BILL LOCKYER
Attorney General

EXHIBIT 6

APPENDIX A

September 16, 1998

Biological and Aquatic Resources Assessment of Brushy Creek and the North Fork American River Placer County, California

Stafford K. Lehr
Fishery Biologist
California Department of Fish and Game
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INTRODUCTION

The biological and aquatic resources investigation of Brushy Creek, tributary to the North Fork American River and the North Fork American River was undertaken to evaluate the existing conditions for a Special Suction Dredge Permit Application from Mr. Bruce Emerson. These surveys were conducted by myself and Jason Webber, Scientific Aid. This appendix will discuss the biological and aquatic resources in Brushy Creek and the herpetological fauna that was observed in the North Fork American River.

HABITAT DESCRIPTION

Brushy Creek is a tributary to the North Fork American River in the vicinity of Weimar and Colfax in Placer County. Brushy Creek flows south for 3.5 miles and has a overall gradient of 7%. The stream channel is in a deep, v-shaped canyon dominated by slate bedrock with boulders and cobbles (40%, 30%, and 25% respectively). Gravels are limited to less than 5% of the substrate. The gradient varied from 2 to 4% throughout the surveyed reach. The active channel width varied between 6 and 15 feet.

The stream was dominated by shallow pools (<3.0 feet deep), shallow glides, high gradient riffles, and isolated secondary channel pools. The glides and pools were often less than 1.0 foot in depth. Sedges (*Carex* spp.) and tree roots provide overhanging cover in these habitat types. Large substrate and algae provided a majority of instream cover in all habitat types.

The riparian vegetation was comprised of tree willows (*Salix* spp.), white alder (*Alnus rhombifolia*), buckeye (*Aesculus californica*), blackberry (*Rubus* spp.), California bay (*Umbellularia californica*), redbud (*Cercis occidentalis*), sedges, and wild grape (*Vitis californica*). The riparian canopy cover is 60 to 80% and provides extensive shading except in those areas where the channel broadens out. Upland vegetation was dominated by oaks (*Quercus*

spp.), toyon (*Heteromeles arbutifolia*), digger pine (*Pinus sabiniana*), douglas fir (*Pseudotsuga menziesii*), and ponderosa pine (*Pinus ponderosa*).

The hydrology of Brushy Creek is highly flashy with high winter/spring flows evidenced by flood terraces and mobilization of large bedload material. The summer/fall base flows vary according to the type of water year. Observed flows during surveys varied between 25 to 40 gallons per minute (gpm). Flows increased slightly due to local thunderstorm activity, however there was evidence that the increase was short lived. A reduction of 5 to 10 gpm was observed over a period of 24 hours. There were sections where streamflow was subsurface. These sections were fluvial deposits comprised of boulders and cobbles. Where the canyon had geological nick points, the streamflow resurfaced and flowed over bedrock.

METHODOLOGY

Herpetofauna surveys were conducted in Brushy Creek and the North Fork American River using standard protocols. The surveyed reach for Brushy Creek began upstream of the confluence of the North Fork American River and extended approximately 0.6 miles to a point where there was no streamflow. Surveys for California red-legged frogs (*Rana aurora draytonii*) were conducted according to the U.S. Fish and Wildlife Service (USFWS) protocol (USFWS, 1997). California red-legged frogs are a Federally-listed threatened species and a State Species of Special Concern-Fully Protected. Two mid-day surveys were conducted on September 9 and 14, 1998 and two night surveys were conducted on September 10 and 15, 1998. The day surveys were conducted using binoculars to scan habitats as the surveyors moved slowly upstream. When frogs were observed, identification was made visually or by capturing the individuals with a dip net. All herpetofauna were identified to species. The beginning and end time of each survey was noted. The night surveys used headlamps to detect eye shine of individual frogs. When eye shine was detected, binoculars were used to identify the individual to species.

Herpetofauna surveys were conducted along the North Fork American River for foothill yellow-legged frogs (FYLF, *Rana boylei*) and other species due to the lack of suitable habitat for California red-legged frogs (see Hiscox, 1998 for habitat description). The North Fork American River in the vicinity of the suction dredge activity is a wide, low gradient reach with deep pools and sparse riparian vegetation. Extensive gravel/cobble bars on the first flood terrace were deemed to be prime habitat for basking foothill yellow-legged frogs. The survey reach was approximately 1.0 mile in distance. The downstream starting point was approximately 200 yards upstream of the power line crossing and the end point was a large pool approximately 400 yards upstream of Mr. Emerson's parcel boundary. Both banks of the river were surveyed from downstream to upstream using binoculars to scan the area immediately upstream of the surveyors. Counts were also visually as the surveyors walked slowly upstream. All areas along the margins of the river and flood terraces were surveyed. The survey was conducted according to recognized protocols (Fellers and Freel, 1995).

RESULTS

The Brushy Creek aquatic survey for California red-legged frogs resulted in no individuals being observed during the day or night surveys. With the exception of egg masses, all life stages of foothill yellow-legged frogs were found throughout the entire surveyed reach and one pacific tree frog (PTF, *Hyla regilla*) was also observed. The difference in survey duration times is a result of our being more familiar with the stream channel and the life stages of the individuals present in the creek (Table 1).

Rainbow trout (RT, *Oncorhynchus mykiss*) of different age classes were documented in the deeper pools and one dead riffle sculpin (SCP, *Cottus gulosus*) was found just upstream of the confluence with the North Fork American River. Western fence lizards (WFL, *Sceloporus occidentalis*) and a single alligator lizard (AL, *Gerrhonotus* spp.) were also present (Table 2).

Table 1: Brushy Creek Amphibian Survey

Date	Species	Tadpole	Sub-Adult	Adults	Time (hrs)
9/9/98	FYLF	5	117	18	4.33
9/10/98	FYLF			15	3.5
9/14/98	FYLF	5	189	35	2.5
9/15/98	PTF			1	
9/15/98	FYLF		11	8	2.8

(Time = # of observers X hours of survey)

Table 2: Brushy Creek Fish and Reptile Observations

Date	Species	Numbers
9/9/98	RT	21
9/9/98	WFL	3
9/14/98	RT	23
9/14/98	AL	1

The temperature regime of Brushy Creek did not vary during the surveys. Water temperature remained a constant 70 °F and did not follow diurnal air temperature fluctuations. The North Fork American River was slightly warmer due to the lack of riparian and topographic shading (Table 3).

Table 3: Water and Air Temperatures

Date	Location	T _{water} (°F)	T _{air} (°F)	Time
9/9/98	Brushy Creek	70	77	13:00
9/10/98	NF Amer. R.	73	75	13:45
9/10/98	Brushy Creek	70	70	21:30
9/14/98	Brushy Creek	70	87	13:25; 12:50

The North Fork American River herpetofauna survey results are presented in Table 4. No western pond turtles (*Clemmys marmorata*) were observed. Sierra garter snakes (GS, *Thamnophis couchii couchii*) were documented swimming along the margins of the river. One 14 inch rainbow trout, with a damaged eye and scales missing in caudal peduncle area, was captured with a dip net in a riffle at the downstream end of the survey reach.

Table 4: North Fork American River Herpetofauna Survey

Date	Bank	Species	Tadpole	Sub-Adult	Adult	Time (hrs)
9/10/98	Right	FYLE	47	214	30	3.0
9/10/98	Right	GS			1	
9/10/98	Left	FYLE	8	128	15	4.0
9/10/98	Left	GS			3	

(Time = # of observers X hours of survey)

(Right = Right Bank looking upstream)

(Left = Left Bank looking upstream)

DISCUSSION

The large numbers of foothill yellow-legged frogs that were observed in Brushy Creek and the North Fork American River was quite surprising. This is the largest population that we know of in the Central Sierra Nevada. This species has not been found in large numbers in streams and rivers south of the North Fork American River drainage and is considered to be threatened in the Central Sierra Nevada (Jennings and Hayes, 1994). The foothill yellow-legged frog is a California

Species of Special Concern-Fully Protected and a Federal Special Concern species. There are only six known localities in the Eldorado National Forest located immediately to the south of the North Fork American River (G. Elliott, USFS pers. communication). The Rubicon River has a known population, but the viability and size have not been determined. The Tahoe National Forest is known to have more locations with larger number of individuals than the Eldorado National Forest (G. Elliott, USFS pers. communication).

The surveyed area of the North Fork American River is ideal foothill yellow-legged frog habitat with shallow, low velocity margin areas and extensive cobble bars where basking occurs. The shallow margin areas are ideal rearing areas for the tadpoles and the substrate provides extensive escape cover. The right bank had greater number of individuals of all life stages due to the habitat and substrate composition. Isolated "pot holes" did provide some habitat for tadpoles and sub-adults but this is an artifact of suction dredging activities (Hiscox, 1998). The left bank had a greater percentage of bedrock and fewer margin areas with shallow, slow moving water, thus fewer individuals of all life stages.

The large number of foothill yellow-legged frogs that were observed in Brushy Creek are not surprising given the large population in the North Fork American River. The mobility of the species would allow it to move either upstream or downstream to maintain the viability of the population. The hydrology of Brushy Creek does not allow for fish to colonize all of the instream habitat and therefore suitable refugia is available for tadpoles and sub-adults. There were sub-adults and adults observed in the same pools that rainbow trout were occupying.

The habitat along the North Fork American River was not deemed suitable California red-legged frog habitat due to the lack of riparian vegetation and low velocity habitats. Additionally, the presence of non-native smallmouth bass (*Micropterus dolomieu*) would probably preclude their ability to successfully reproduce due to predation of eggs and juveniles.

Although no red-legged frogs were observed in Brushy Creek, there is suitable habitat available. The extensive riparian vegetation and cover does not rule out the possibility of red-legged frogs being present in the canyon.

No western pond turtles were observed in either Brushy Creek or the North Fork American River in the surveyed reaches. There is anecdotal information that they have been observed in the river. Suitable habitat is present in both the mainstem river and the creek and it is highly likely that there are turtles utilizing the area.

The rainbow trout that were observed in Brushy Creek were in the larger, deeper pools where there was instream cover. Multiple age classes were observed and therefore the fish are able to survive throughout the year. During extended drought periods or during below normal water years fish may not be able to survive. However, recolonization can occur from the North Fork American River due to the lack of barriers.

CONCLUSIONS AND RECOMMENDATIONS

There was no evidence of suction dredge activity in Brushy Creek and the Emersons stated that there are no plans to do so. There is suitable red-legged frog habitat in the creek and thus, if present, may emigrate downstream and use the North Fork American River as a migration corridor.

The channel of North Fork American River was disturbed in numerous areas by suction dredge activities. There was evidence of "high banking" and "pot holes" along the right bank of the river in the surveyed reach. These areas were being utilized by foothill yellow-legged frogs and juvenile fish were trapped in isolated holes. The frogs will be able to survive, but the fish are not likely to.

The large numbers of foothill yellow-legged frogs present in the surveyed reaches may lead to the conclusion that there is no adverse effect by suction dredge activities. However, 1995 through 1998 have been above normal water years and there is some indication that other drainages (Butte Creek) have seen a large increase in foothill yellow-legged frog numbers in recent years (K. Hill, DFG pers. communication). In below normal water years, low flows will reduce suitable margin habitat and force the frogs into areas where suction dredge activities are taking place during breeding and rearing periods. Additionally, suction dredge activities did occur upon the first flood terrace this year causing a possible adverse effect during the breeding period even in an above normal water year. There is some evidence that the egg masses of this species are highly susceptible to suspended particulates, e.g. sediment, however to what extent is unknown (Jennings and Hayes, 1994). Disruption of channel bedload in breeding areas and rearing areas will have an adverse effect upon this species.

There are numerous indications that foothill yellow-legged frogs are experiencing a statewide decline as are many other amphibian species (Jennings and Hayes, 1994). A recent follow up to a historical survey in the Yosemite National Park found no individuals at historical locations (Drost and Fellers, 1996). Therefore, it is recommended that a cautious approach be taken when considering allowing suction dredge activities that may adversely effect these and other sensitive species (Harvey and Lisle, 1998).

Thus, in order to protect the breeding and rearing habitat of the foothill yellow-legged frog a year-a-round suction dredge season cannot be recommended. The current season for this reach of the North Fork American River is from the last Saturday in May extending thru October 15. In some years the existing season may not be adequate to protect the breeding period, e.g. below normal water years. Therefore a modification of the existing season is warranted to allow a majority of the tadpoles to reach sub-adult stage where they would be able to escape any suction dredge activity. This drainage has unique characteristics for both ichthyofauna and herpetofauna, evidenced by strong populations of native minnows and amphibians. The development of more restrictive regulations that would protect these resources is warranted.

REFERENCES

Drost, C. A., and G. M. Fellers. 1996. Collapse of a Regional Frog Fauna in the Yosemite Area of the California Sierra Nevada, USA. *Conservation Biology* 10: 414-425.

Fellers, G. M. and K. L. Freel. 1995. A Standardized Protocol for Surveying Aquatic Amphibians. U.S. Department of Interior Technical Report NPS/WRUC/NRTR-95-01: 123 pages.

Harvey, B. C., and T. E. Lisle. 1998. Effects of Suction Dredging on Streams: a Review and an Evaluation Strategy. *Fisheries* 23(8):8-17.

Hiscox, J. 1998. CDFG Memo to Banky Curtis. Re. Emerson Suction Dredge Application.

Jennings, M. R., and M. P. Hayes. 1994. Amphibians and Reptiles of Special Concern in California. CDFG Report: 225 pages.

USFWS. 1997. Guidance on Site Assessment and Field Surveys for California Red-legged Frog. USFWS: 8 pages

EXHIBIT 7

FILED BY FAX

ALAMEDA COUNTY

October 03, 2006

**CLERK OF
THE SUPERIOR COURT
By Denise Wells, Deputy**

**CASE NUMBER:
RG05211597**

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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
COUNTY OF ALAMEDA
11 **HAYWARD DIVISION**

12 **KARUK TRIBE OF CALIFORNIA;**
13 **AND LEAF HILLMAN,**

14 Plaintiffs,

15 v.

16 **CALIFORNIA DEPARTMENT OF FISH AND**
GAME; AND RYAN BRODDRICK, DIRECTOR,
17 **CALIFORNIA DEPARTMENT OF FISH AND**
GAME,

18 Defendants.
19

20 **THE NEW 49'ERS, a California Corporation; AND**
21 **RAYMOND W. KOONS, an Individual; AND**
GERALD HOBBS, an Individual,

22 Interveners.
23
24

Case No.: RG 05 211597

**DEFENDANTS' CASE STATUS
REPORT WITH SUPPORTING
DECLARATIONS OF NEIL
MANJI AND BANKY E. CURTIS**

Judge: Honorable Bonnie Sabraw
Place: Department 512

Date: October 17, 2006
Time: 9:00 a.m.

Action Filed: May 6, 2005
Trial Date: None Set

25 This Case Status Report is submitted by Defendants, California Department of Fish and
26 Game, and Ryan Broddrick, Director, California Department of Fish and Game ("Department"),
27 in compliance with the Court's September 8, 2006 Order Following Case Management
28 Conference.

1 DESCRIPTION AND CURRENT STATUS OF THE CASE

2 Plaintiffs brought this action for declaratory and injunctive relief to challenge Defendants'
3 pattern and practice of issuing suction dredge mining permits that imperil Coho salmon and other
4 state and federally listed threatened species that were so designated after April of 1994, when the
5 Department of Fish and Game certified a Final Environmental Impact Report ("FEIR") in
6 conjunction with adoption of the suction dredge mining regulations in accordance with Fish and
7 Game Code sections 5653 and 5653.9. Plaintiffs also allege that despite the subsequent listing of
8 Coho salmon and other species, Defendants have continually issued suction dredge permits
9 without conducting any analysis of the impacts of this activity under the California Environmental
10 Quality Act ("CEQA"), Cal. Pub. Res. Code, §§ 21000 et seq. Plaintiffs complaint alleges that
11 Defendants' actions constitute a violation of CEQA and a violation of the mandate in Fish and
12 Game Code section 5653(b) that suction dredge permits issued by Defendants not be "deleterious
13 to fish." Plaintiffs seek an injunction to require Defendants to apply the mitigation measures
14 provided in the 1994 FEIR to the Coho salmon and other species named in the complaint. In the
15 alternative, Plaintiffs seek to enjoin Defendants from issuing suction dredge permits until
16 Defendant complies with CEQA.

17 Plaintiffs and Defendants reached a settlement agreement in this litigation in which
18 Defendants stipulated to conduct an analysis under CEQA and to do a formal rulemaking under
19 the APA to consider changing its regulations regarding suction dredge mining. The settlement
20 also required Defendants to refrain from issuing permits for suction dredge mining on certain
21 rivers for certain time periods, when the Coho salmon and other species named in Plaintiffs'
22 complaint are most vulnerable.

23 Plaintiffs and Defendants submitted the settlement to the Court for approval on December
24 20, 2005. Subsequently, the Court granted Intervenor New 49ers and Intervenor Gerald Hobbs
25 leave to intervene in the action and to oppose the settlement. On June 16, 2006, the Court denied
26 entry of the settlement.

27 Following the Case Management Conference with the Court on July 17, 2006, counsel for
28 all parties met in Sacramento, initially without their clients on August 2, 2006, and again with

1 their clients on August 31, 2006. The purpose of these meetings was to discuss a possible
2 settlement of the litigation. The parties were unable to agree upon a settlement, and the
3 Department announced its intention to advise the Court of its admission to liability at the Case
4 Management Conference then scheduled on September 8, 2006.

5 II. THE DEPARTMENT'S ADMISSION

6 At the September 8, 2006 Case Management Conference, and in its Case Management
7 Conference Statement of September 6, 2006, the Department made the following admission:

8 The Department of Fish and Game, as lead agency under the California Environmental
9 Quality Act (CEQA)(Pub. Resources Code, §§ 21000-21178) and as trustee of California's fish
10 resources, and its Director, Ryan Broddrick, are of the opinion that suction dredge mining in the
11 Klamath, Scott, and Salmon River watersheds under the existing regulations is resulting in
12 deleterious effects on Coho salmon as alleged in Plaintiffs' complaint. As such, the Department
13 stipulates to entry of judgment by the Court: (1) finding the Department is not in compliance with
14 Fish and Game Code sections 5653 and 5653.9; (2) finding under CEQA that such deleterious
15 effects on Coho salmon constitute a substantial change in circumstances under which the
16 Department is currently carrying out the suction dredge permitting program under the existing
17 regulations; and (3) ordering the Department to take necessary steps to bring its suction dredge
18 mining regulations into compliance with Fish and Game Code sections 5653 and 5653.9, and to
19 comply with CEQA. The steps necessary for the Department to bring the existing suction dredge
20 mining regulations into compliance with the Fish and Game Code must necessarily include a
21 timely request by the Department for and an appropriation by the Legislature of sufficient funding
22 for the Department to take appropriate action under the Administrative Procedure Act
23 (APA)(Gov. Code, §§ 11340 et seq.) and CEQA.

24 The Department argued to the Court on September 8, 2006, that its admission is entitled to
25 judicial deference as it is rationally based upon, and is supported by, a substantial body of
26 evidence, including peer reviewed scientific evidence and data possessed by the Department, and
27 therefore its opinion is neither arbitrary nor capricious. The Department further argued that if the
28

1 Court accepts this admission and defers to the Department's judgment as California's trustee
2 agency for fish and wildlife resources and as lead CEQA agency, the liability stage of this
3 litigation will be completed and the Court and the parties will progress to the remedy stage of the
4 proceedings.

5 Intervenor, The New 49'ers and Gerald Hobbs, indicated their belief that they may
6 challenge the Department's admission. The Court's September 8th Order Following Case
7 Management Conference directed the Department to provide a Case Management Conference
8 Statement that discusses, *inter alia*, how and in what form it intends to present to the Court the
9 admission previously asserted both at the September 8th Case Management Conference and in its
10 previous Case Management Conference Statement, and the time frame needed for such
11 submission. The Court's Order also requires Plaintiffs and the Intervenor to provide responsive
12 Case Management Conference Statements discussing those issues identified by the Court.

13 III. FORMAT OF DEPARTMENT'S PRESENTATION TO THE COURT

14 The Department believes the presentation of its admission in open court and its inclusion
15 in this and the previous Case Management Conference Statement, provide the Court with the legal
16 authority to enter a judgment on the Department's liability.⁴ To provide the Court with further,
17 more formal factual and scientific grounds upon which to accept the Department's admission, the
18 declarations of Neil Manji, Fisheries Branch Chief, and Banky E. Curtis, Deputy Director of
19 Regional Directions, are attached hereto and incorporated herein as Exhibits "1" and "2,"
20 respectively. These declarations summarize for the Court the rational basis for the Department's
21 administrative decision to end the liability stage of this litigation, reduce its exposure to attorneys'

22
23 1. The Department's judicial admission is conclusive on the issue of the Department's
24 liability and removes the admitted matter from consideration. (See *Fibreboard Paper Products*
25 *Corp. v. East Bay Union of Machinists, Local 1304* (1964) 227 Cal. App.2d 675, 708, fn. 17; 1
26 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, §§ 92, 97, pp. 796, 799-800.) According to
27 Witkin, matters admitted in a pretrial, or in a case management conference and embodied in a
28 conference order have conclusive effect. The order supersedes the pleadings and an issue raised
in the pleadings may be eliminated by the order. (Witkin, Cal. Evidence (4th ed. 2000) Hearsay,
§ 92, p. 796.)

1 fees and costs, avoid future protracted and costly litigation under the existing suction dredge
2 regulations, and to actively pursue the necessary legislative appropriation to conduct a formal,
3 comprehensive rulemaking under the APA with related CEQA review. The Department will
4 argue at the upcoming Case Management Conference that this rational basis is sufficient to
5 withstand Intervenor's challenge, if any, and most importantly, to establish the grounds upon
6 which the Court may give appropriate deference to the Department's decision to admit liability.

7 Should the Intervenor or another party object to the Court entering the requested
8 judgment on the Department's liability based upon counsel's open court admission, this Case
9 Management Conference Statement, and the supporting declarations attached hereto, the
10 Department is prepared to move the Court for an order entering the requested judgment. The
11 Department respectfully submits that this action is not necessary, as the Court is authorized to
12 accept the Department's tendered judicial admission and supporting declarations as conclusive on
13 the issue of liability. However, if the Court disagrees, the Department anticipates that a motion
14 could be prepared in two weeks and filed and served according to Code of Civil Procedure,
15 section 1005, subsection (b).

16 **IV. REQUIREMENT OF JUDICIAL DEFERENCE**

17 The declarations of Neil Manji and Banky E. Curtis, attached hereto, attest to the
18 substantial evidence that suction dredge mining under the Department's current regulations is
19 having deleterious effects on Coho in the Klamath, Scott, and Salmon Rivers and their
20 tributaries.² This factual and scientific evidence leads the Department to reasonably conclude that
21 the existing regulations (Cal. Code Regs., tit. 14, §§ 228, 228.5) are not in compliance with Fish
22 and Game Code sections 5653 and 5653.9, and supports the Department's well-considered
23 decision to admit liability.

24
25 2. "Substantial Evidence" is defined under section 15384 of the CEQA Guidelines (Cal.
26 Code Regs., §§ 15000-15387) to mean, "enough relevant information and reasonable inferences
27 from this information that a fair argument can be made to support a conclusion, even though
28 other conclusions might also be reached...Substantial evidence shall include facts, reasonable
assumptions predicated upon facts, and expert opinion supported by facts."

1 The Department's decision to admit liability, supported by a rational reliance upon a
2 substantial body of factual and scientific evidence, is neither arbitrary nor capricious and therefore
3 is entitled to judicial deference. The definition of "substantial evidence" in the CEQA Guidelines
4 makes clear, it is of no consequence that other persons may reach different conclusions. (CEQA
5 Guidelines, § 1538.) As the California Supreme Court has stated, "[a] reviewing court does not
6 superimpose its own policy judgment upon a quasi-legislative agency in the absence of an
7 arbitrary decision; rather the review is limited to an examination of the proceedings to determine
8 whether the action is arbitrary or entirely lacking in evidentiary support...; in these technical
9 matters requiring the assistance of experts and the collection and study of statistical data, courts
10 let administrative boards and officers work out their problems with as little judicial interference as
11 possible." (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702.) Such limited
12 judicial review forecloses inquiry as to the agency's reasons for its actions, so long as a reasonable
13 basis for such action exists, the motivating factors considered in reaching the decision are
14 immaterial and supportive findings are not required. (*Stauffer Chemical Co. v. Air Resources*
15 *Board* (1982) 128 Cal.App.3d 789, 794-795.) The limited scope of review of quasi-legislative
16 decision making is grounded on the doctrine of separation of powers which (1) sanctions
17 legislative delegation of authority to an appropriate administrative agency and (2) acknowledges
18 the presumed expertise of the agency. (*Id.*; see also *California Hotel & Motel Assn. v. Industrial*
19 *Welfare Com.* (1979) 25 Cal.3d 200, 211-212.)

20 CEQA sections 21168 and 21168.5 also limit a court's ability to substitute its own
21 judgment for that of a public agency. Both sections agree that in any action or proceeding to
22 attack, review, set aside, void, or annul a determination, finding, or decision of a public agency, a
23 court's inquiry is limited ultimately to whether the determination or decision is supported by
24 substantial evidence. (See also *National Parks and Conservation Ass'n v. County of Riverside*
25 (1999) 71 Cal.App.4th 1341, 1352.) In applying the substantial evidence standard, the reviewing
26 court must resolve reasonable doubts in favor of the administrative finding and decision. (*Id.*)
27
28

1 V. RECOMMENDATION

2 The Department's admission was made publically, both orally on the record in open court
3 during the last Case Management Conference and in writing in this and its previous Case
4 Management Conference Statements. As such, the Department's judicial admission is factually
5 and legally conclusive on the issue of liability. The Department respectfully requests that the
6 Court accept the admission, which is based upon substantial evidence as attested to in the attached
7 declarations of Neil Manji and Banky E. Curtis, and enter a Case Management Conference Order
8 superseding the pleadings, concluding the issue of liability, and requiring the Department to take
9 necessary steps to comply with CEQA and bring its suction dredge mining regulations into
10 compliance with Fish and Game Code sections 5653 and 5653.9. The Court should not sanction
11 a challenge by the Intervenor or any other party to the Department's administrative decision to
12 judicially admit liability, as that decision is entitled to judicial deference and by allowing a
13 challenge the Court would be placing itself in the position of substituting its judgment for that of
14 the agency that is presumed to have the technical expertise required to carry out its quasi-
15 legislative function. With entry of the Case Management Conference Order as recommended, the
16 Court and the parties may proceed to the remedy stage of the case.

17 VI. INJUNCTIVE RELIEF

18 The Department takes no position on Plaintiff's request for injunctive relief.

19 VII. CASE MANAGEMENT ORDERS

20 An Order After Case Management Conference was issued by the Court on July 22, 2005.
21 The Court ordered bifurcation of the CEQA and Fish and Game Code claims and set dates for
22 certification of the Administrative Record and a briefing schedule for the hearing on the CEQA
23 claims. Those dates were subsequently deferred while Plaintiffs and Defendants negotiated a
24 settlement agreement.

25 On December 20, 2005, the Court issued another Order After Case Management
26 Conference, in which the hearing on the CEQA claim was vacated while the Court made its
27 determination regarding entry of Plaintiffs' and Defendants' settlement agreement.

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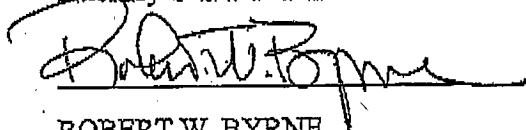
On July 17, 2006, the Court issued a Case Management Conference Order and Order Setting Further Case Management Conference on September 8, 2006.

The Court entered an Order Following Case Management Conference on September 8, 2006, which was described earlier in this Case Management Conference Statement. In addition, the Court issued an Order from the Bench on September 8, 2006, rescinding its previous Order bifurcating Plaintiffs' CEQA and Fish and Game Code claims.

Dated: October 2, 2006

Respectfully submitted,

BILL LOCKYER,
Attorney General of the State of California



ROBERT W. BYRNE
Deputy Attorney General

Attorneys for Defendants California Department of Fish and Game and Ryan Broddrick, Director, California Department of Fish and Game

Exhibit 1

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8 Attorneys for Defendants;

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
HAYWARD DIVISION
11

12 KARUK TRIBE OF CALIFORNIA,
AND LEAF HILLMAN,

13 Plaintiffs,

14
15 CALIFORNIA DEPARTMENT OF FISH AND
16 GAME AND RYAN BRODRICK, DIRECTOR,
CALIFORNIA DEPARTMENT OF FISH AND
17 GAME,

18 Defendants.

19
20 THE NEW 49ERS, a California Corporation, AND
21 RAYMOND W. KOONS, an Individual, AND
GERALD HOBBS, an Individual,

22 Interveners.

Case No. RG 05 211927

23 DECLARATION OF
24 NEIL MANJI IN SUPPORT OF
25 DEFENDANTS' CASE
26 MANAGEMENT CONFERENCE
27 STATEMENT

Judge: Honorable Bonnie Sabraw
Place: Department 512

Date: October 17, 2006
Time: 9:00 AM.

Action Filed: May 6, 2005
Trial Date: None Set

24 I, Neil Manji, declare as follows:

25 1. I am currently employed by the California Department of Fish and Game ("Department") as
26 the Fisheries Branch Chief. The matters set forth in this declaration are within my personal
27 knowledge and if called upon to testify to these matters I could and would so testify.

28 //

1 2. This declaration supplements my prior declaration in the present action as executed in
2 Redding, California, on January 20, 2006, and filed with the Alameda County Superior Court on
3 January 23, 2006.

4 3. In my current position as Fisheries Branch Chief for the Department I am responsible for
5 setting statewide policy relating to the development and implementation of fishing regulations,
6 watershed restoration and protection guidelines. I am also a member of the Klamath Basin Fishery
7 Task Force and Klamath Fishery Management Council.

8 4. Prior to serving as Fisheries Branch Chief, I worked for the Department as the Fisheries
9 Program Manager for the eight counties that comprise the Department's Northern California-North
10 Coast Regional Office ("Region"). In that capacity, I oversaw all Fisheries programs in the Region,
11 including programs involving: (1) fisheries habitat restoration; (2) inland and anadromous fisheries
12 resource assessment and monitoring; (3) watershed assessment; and (4) salmon, steelhead, and trout
13 hatcheries. I hold a Bachelor of Science degree with a major in Fisheries that I received from
14 Humboldt State University in 1986, and have worked as a fishery biologist since 1989. My work as
15 a fishery biologist focused on the Klamath River specifically from 1984 through 1986, from 1992
16 through 2006 until I began my current job as the Fisheries Branch Chief with the Department in April
17 2006.

18 5. I make this declaration to provide additional detail to the court regarding the Department's
19 current opinion that suction dredge mining under existing regulations found in Title 14 of the
20 California Code of Regulations in sections 228 and 228.5 (the "existing regulations") in the Klamath,
21 Scott and Salmon River watersheds is resulting in deleterious effects on coho salmon (*Oncorhynchus*
22 *kisutch*). The Department expressed its current opinion to the court for the first time in a Case
23 Management Conference Statement filed in the present action on September 6, 2006.

24 6. This declaration and the Department's current opinion are based on existing scientific
25 literature, data available to the Department, and my professional experience as a fishery biologist.
26 With respect to scientific literature, there is now a substantially larger body of published, peer
27 reviewed scientific research regarding fisheries science and suction dredge mining than there was at
28

1 Spawning.

2
3 10. The scientific literature, available data, and survey information possessed by the Department
4 indicate coho salmon typically spawn in the Klamath Basin from November through January. (Manser
5 2002, 2003; Quigley 2005). Spawning has also been documented in the Klamath system (which
6 includes the Scott and Salmon Rivers) as early as late September. ((CDFG 2004), cooperative
7 spawning ground survey data 2005). Spawning is an extremely high energy activity for all salmon,
8 including coho. According to the scientific literature, Pacific salmon, including coho, that are
9 subjected to added stressors (Benham 1990, as cited in (McCullough 1999)) or migration delays
10 (Andrew and Green 1960 as cited in (McCullough 1999)) during spawning, experience reduced
11 spawning success and pre-spawn mortality. In order to avoid deleterious impacts, it is important coho
12 salmon are not delayed or disturbed by instream activities such as suction dredge mining during their
13 upward migration and spawning. Likewise, it is important to avoid instream activities like suction
14 dredge mining once spawning is complete because it can take several months for eggs to develop and
15 coho larvae to emerge from the gravel. Available data and scientific literature indicate coho fry
16 emerge from the gravel from March to June (Clardy 1999, CDFG 2004).

17 11. Under the Department's existing regulations, suction dredge mining in the Klamath, Scott
18 and Salmon River watersheds is generally governed by the "Class" D, G, and H designations.
19 (See, e.g., 361 Code Regs., tit. 14, § 223.5, sub 5, (3)(49), (76), (90).) The Class D designation
20 authorizes suction dredge mining from July 1 through September 15; under the Class G
21 designation suction dredging is authorized from the fourth Saturday in May through September
22 30; and, under the Class H designation, suction dredging is authorized throughout the year. (Id.,
23 sub. (a)(4), (7), (8).) In light of these designations, suction dredge mining is currently authorized
24 under the existing regulations during times of the year when coho are migrating and spawning, as
25 well as when coho eggs and larvae are developing. Suction dredge mining during these times is
26 causing deleterious impacts to coho salmon as a result.

27 12. Deleterious impacts on coho spawning are of further concern because of scientific literature
28 regarding the use of dredge tailings as spawning substrate. That literature indicates tailings from

1 suction dredge mining can provide attractive spawning habitat for coho salmon because the tailings
2 are loose and not compacted. (Harvey *et al.* 1995) However, the literature also indicates dredge
3 tailings are often scoured or redistributed during high flows and, therefore, the tailings are not suitable
4 spawning habitat. (Stem 1988; Harvey and Lisle 1998, 1999) Likewise, the scientific literature
5 indicates scour is greater on dredge tailings than on natural substrates. (Harvey and Lisle 1999) The
6 scientific literature indicates as a result that eggs and larvae deposited by fish on dredge tailings are
7 at greater risk of scour than those on naturally deposited gravel. The stability of spawning gravel is
8 critical to reproductive success of salmonids, including coho, because of the long time period that the
9 eggs and embryos remain in the gravel. In short, coho eggs and embryos deposited in dredge tailings
10 likely suffer higher mortality when high winter flows scour the tailings. (Harvey and Lisle 1998)

11 Eggs and Alevin

12
13
14 15. As described above, suction dredge mining is authorized under the existing regulations in the
15 Klamath River system, including the Scott and Salmon Rivers and their tributaries, from July through
16 the end of September, in some cases in May through September, and in other cases year-round.

17 During these times, particularly late September to June, when coho eggs, larvae, and alevin (a pre-
18 emergent life stage where the yolk in a fertilized egg is nearly gone) are in the gravel. The
19 Department is concerned these life stages are particularly vulnerable to deleterious impacts caused
20 by suction dredging because the mining activity causes temporary and localized increases in turbidity.

21 14. The scientific literature indicates the sediments suspended from suction dredging while
22 eggs are developing may reduce the oxygen reaching developing eggs and alevins. (Harvey *et al.*
23 1995) For example, the presence of clay particles can create a thin film across the egg membrane
24 and reduce the consumption of oxygen in developing eggs. (Greig *et al.* 2005) Reduced oxygen
25 has been linked in the scientific literature to reduced survival and greater deformities in some
26 salmonid eggs. (Simons *et al.* 2002) Because suction dredging is authorized under the existing
27 regulations during times when eggs or alevin may still be in the gravel (CDRG 2004), fine

1 sediments suspended by suction dredge mining activity is likely causing deleterious localized
2 impacts to coho during this particularly vulnerable life stage.

3 15. The Department is also particularly concerned about deleterious impacts to coho eggs and
4 alewin resulting from entrainment of the life stage in suction dredge mining equipment.

5 According to the scientific literature, entrainment can cause varying mortality rates to salmonid
6 eggs at differing developmental stages. (Griffith and Andrews 1981 as cited in (CDFG 1994;
7 Harvey and Lisle 1998) The scientific literature also indicates alewin specifically suffer high
8 mortality rates following entrainment. (Griffith and Andrews 1981 as cited in (CDFG 1994;
9 Harvey and Lisle 1998) Because eggs and alewin are still in the gravel when suction dredge
10 mining is authorized under the existing regulations, mining activities are likely causing
11 deleterious localized impacts to coho during this particularly vulnerable life stage.

12 13 Juveniles

14
15 16. The Department is concerned suction dredge mining during periods of steelhead currently
16 authorized under the existing regulations is having deleterious impacts on juvenile coho salmon.

17 Although juvenile and adult coho are not likely to be entrained in suction dredge mining
18 equipment, several aspects of dredging may affect juvenile coho distribution. Unlike Chinook
19 salmon, juvenile coho reside in tributaries for a year or more before migrating to the ocean. Optimal
20 spawning habitat is thus critical to the survival of juvenile coho.

21 17. The scientific literature establishes suction dredge mining can affect stream channel stability
22 and streambed morphology (Harvey *et al.* 1982; Harvey 1985; Hassler *et al.* 1986; Stern 1988; CDFG
23 1994; Harvey and Lisle 1998, 1999) which can affect salmonid distribution. Dredge tailings can alter
24 habitat depth by filling in pools (Harvey and Lisle 1998) and small streams where coho rear are
25 particularly susceptible to this effect if the tailings span the entire width of the stream. The scientific
26 literature indicates, for example, that a reduction in pool volume from dredging can cause a decline
27 in abundance of rainbow trout in that pool. (Harvey 1986) This illustrates the ability of instream
28 habitat changes to affect salmonid distribution. In addition to changes to stream morphology,

1 dredging releases prey items for immediate consumption. Yet, in the longer term, dredging causes
2 localized decreases in macroinvertebrate populations that may affect feeding behavior and ultimately
3 growth of juvenile salmonids, including coho. (Harvey *et al.* 1982; Thomas 1985; Harvey 1986;
4 Hassler *et al.* 1986; Harvey and Lisle 1998; Prusatan *et al.* 1999).

5 18. Juvenile and adult fish have been observed holding in dredge holes. (Harvey 1986; Stant
6 1988). However, the scientific literature indicates filling naturally occurring pools (Harvey 1986)
7 with dredge fillings and creating new holes as a result of suction dredging displaces fish from
8 preferred habitats with cooler water (CDFG 1994). Available data indicates juvenile salmonids
9 use cold water thermal refugia around the mouths of numerous tributaries entering the Klamath,
10 Shasta, Scott and Salmon Rivers (Belchik 1997, 2003; internal CDFG report 2000). Department
11 biologists have documented the location and use of thermal refugia by salmonids, including coho,
12 during field investigations and juvenile fish surveys. In addition, there have been several studies
13 and observations conducted by other state, federal and tribal biologists that identify and quantify
14 thermal refugia in the Klamath River Basin. The importance of cool water habitats as refugia is
15 widely discussed in the literature (Nielsen *et al.* 1994; Sauter *et al.* 2001; Welsh *et al.* 2001). The
16 combined effects of temperature and potential displacement may be particularly detrimental in the
17 Klamath Basin where water temperatures not only appear to be increasing (Bartholow 2005) but
18 can exceed critical thresholds for coho (internal CDFG report 2000). Under the existing
19 regulations, however, the importance of thermal refugia and disturbance to those habitats are not
20 addressed.

21 I declare under penalty of perjury that the foregoing is true and correct.

22 Executed in Sacramento, California on October 2, 2006.

23
24 By: 

25 NEIL MANN
26
27
28

1 Exhibit A to Declaration of Neil Manji

2
3 (1999). Evaluation of interim flow needs in the Klamath River. U. S. U. Institute for Natural Systems
4 Engineering. Final Report to Department of Interior: 60.

5
6 Bartholow, JM (2005). Recent water temperature trends in the Lower Klamath River, California.
7 North American Journal of Fisheries Management 25: 152-162.

8
9 Belchik, MR (1997). Summer locations and salmonid use of cool water areas in the Klamath River:
10 Iron Gate dam to Salsal Creek, 1996. Yurok Tribal Fisheries Program: 13p.

11
12 Belchik, MR. (2002). Use of thermal refugia areas on the Klamath River by juvenile
13 salmonids, summer 1998. Y. T. F. Program. #3-RG-20-17619.

14
15 CDFG (1994). Final Environmental Impact Report. Adoption of regulations for silt and dredge mining.
16 C. D. o. F. a. Game: 174p.

17
18 CDFG (2000) Documentation of The Klamath River Fish Kill, June 2000. Internal C. D. o. F. a. Game
19 file report. 26 p.

20
21 CDFG (2004). Recovery strategy for California coho salmon. R. t. t. C. F. a. G. Commission. Species
22 Recovery Strategy. 2004-1: 594 pp.

23
24 Eklund, S, AP Hendry and LA Fleming (2002). Egg size evolution in aquatic environments: does
25 oxygen availability constrain size? Proceeding of the Royal Society of London B: 269: 2325-2330.

26 //

27 //

28 //

1 Greig, SM, DA Stear, D Smallman and FA Carling (2005). Impact of clay particles on the cutaneous
2 exchange of oxygen across the chorion of Atlantic salmon eggs. *Journal of Fish Biology* 66: 1681-
3 1691.

4
5 Harvey, BC (1986). Effects of station gold dredging on fish and invertebrates in two California
6 streams. *North American Journal of Fisheries Management* 6: 401-409.

7
8 Harvey, BC and TE Lisle (1998). Effects of station dredging on streams: A review and an evaluation
9 strategy. *Fisheries* 23(6): 8-17.

10
11 Harvey, BC and TE Lisle (1999). Scour of Chinook salmon redds on station dredge tailings. *North
12 American Journal of Fisheries Management* 19: 613-617.

13
14 Harvey, BC, TE Lisle, T Vallier and DC Fredley (1995). Effects of station dredging on streams: A
15 review and evaluation strategy. 31p.

16
17 Harvey, BC, K McElenehan, JB Linn and CL Langley (1982). Some Physical and biological effects
18 of station dredge mining. 82-2, 48p.

19
20 Haskler, JW, WL Sprner and GR Stein (1986). Impacts of station dredge mining on anadromous fish,
21 invertebrates, and habitat in Canyon Creek, California. *Coop. Agreement No. 14-16-0009-1547*,
22 135p.

23
24 Mrazek, S (2002). Scott River watershed adult cold salmon spawning survey December 2001 -
25 January 2002. Report to U.S. Forest Service, Klamath National Forest. Report no.90612; 52p.

26
27 Mrazek, S (2003). Scott River watershed adult cold salmon spawning survey December 2002 -
28 January 2003. Report to California Dept. of Fish and Game. 51p.

1
2 McCullough, D. (1995). A review and synthesis of effects of alterations to the water temperature
3 regime on freshwater life stages of salmonids, with special reference to chinook salmon. C. I. F.
4 Commission, U.S. Environmental Protection Agency, EPA 610-R-99-010; 291p.

5
6 Nielsen, J.L., T.E. Lisle and V. Ozaki (1994). Thermally stratified pools and their use by steelhead in
7 Northwest California. Transactions of the American Fisheries Society 123: 613-626.

8
9 Russian, A.M., T.V. Koyva and M.W. Nimsfall (1999). Impacts of suction dredging on water quality,
10 benthic habitat, and biota in the Fortymile River, Resurrection Creek, and Charanika River, Alaska.
11 Report to U.S. Environmental Protection Agency, Region 10; 83p.

12
13 Griggley, D. (2005). Scott River watershed adult coho spawning ground surveys November 2004-
14 January 2005. Report to U.S. Fish and Wildlife Service and California Dept. of Fish and Game.
15 Agreement # P0310351-142p

16
17 Santos, S., T.J. McWhelan and J. Dumbam (2001). Salmonid behavior and water temperature. U.S. E. P.
18 Agency, US EPA, EPA-910-D-01-001; 32p.

19
20 Stern, G.S. (1987). Effects of suction dredge mining on anadromous salmonid habitat in Canyon
21 Creek, Trinity County, California. Humboldt State University, M.S. 80p.

22
23 Thomas, M.G. (1985). Experimentally determined impacts of a small, suction gold dredge on a
24 Montana stream. North American Journal of Fisheries Management 5: 480-488.

25
26 Welsh, H.H., Jr., G.R. Hodgson, B.C. Harvey and M.E. Roche (2001). Distribution of juvenile coho salmon
27 in relation to water temperatures in tributaries of the Mattole River, California. North American
28 Journal of Fisheries Management 21: 454-470.

Exhibit 2

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8 Attorneys for Defendants.

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
HAYWARD DIVISION

11
12 MARVIN TRIBE OF CALIFORNIA'S
AND LEAF ELLEMAN,

13 Plaintiffs.

14
15 CALIFORNIA DEPARTMENT OF FISH AND
16 GAME, AND RYAN BROEDRICK, DIRECTOR,
CALIFORNIA DEPARTMENT OF FISH AND
17 GAME,

18 Defendants.

19
20 THE NEW 49ERS, a California Corporation, AND
21 RAYMOND W. KOONS, an Individual, AND
GERALD HOBBS, an Individual,

22 Interveners.

Case No. 5 RG 05 211497

23
24 DECLARATION OF
BANKY E. CURTIS IN SUPPORT
OF DEFENDANTS' CASE
MANAGEMENT CONFERENCE
STATEMENT

Judge: Honorable Bonnie Sabraw
Place: Department 512

Date: October 17, 2006
Time: 9:00 a.m.

Action Filed: May 6, 2005
Trial Date: None set

25 I, Banky E. Curtis, declare as follows:

26 1. I am currently employed by the California Department of Fish and Game ("Department") as
27 the Deputy Director of Regional Operations. The matters set forth in this declaration are within my
personal knowledge and if called upon to testify to these matters, I could and would so testify.

28 //

1 2. In my current capacity as Deputy Director I serve at the discretion of the Department's
2 Director, L. Ryan Brodinski. As Deputy Director for Regional Operations I am responsible for
3 statewide coordination of efforts by the Department's various regional offices. I have worked for the
4 Department for more than 37 years, serving as Deputy Director for the Habitat Conservation Division,
5 Regional Manager for the Department's Sacramento Valley - Central Sierra Regional Office,
6 Regional Manager for the Northern California - North Coast Regional Office, and various other
7 positions. I also participated in the Department's efforts to promulgate the existing regulations
8 governing suction dredge mining in California, which the Department adopted in 1994. Those
9 regulations are found in Title 14 of the California Code of Regulations in sections 228 and 228.5 (the
10 "existing regulations").

11 3. I am familiar with the present litigation and have participated in the policy decision making
12 related to the lawsuit since the action began in May 2005. I have also read and considered the
13 Declaration of Neil Manji filed with the court concurrently with this declaration. The Department
14 concurs with the substance of Mr. Manji's declaration and I am authorized to speak on behalf of the
15 Department regarding such matters in my capacity as Deputy Director, including the opinions
16 expressed below:

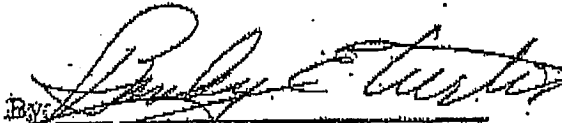
17 4. The Department believes suction dredge mining under the existing regulations in the Klamath
18 Scott and Salmon River watersheds is resulting in deleterious impacts on coho salmon (*Oncorhynchus*
19 *keta*), a species currently protected by the California Endangered Species Act ("CESA") (Fish &
20 & Game Code, § 2050 et seq.). (See Cal. Code Regs., tit. 14, § 6703, subd. (b)(2)(E).) Because of this,
21 the Department also believes its current suction dredge permitting program is not in compliance with
22 California Fish and Game Code section 5653, subdivision (b), and section 5653.9.

23 5. For the Department to bring the suction dredge permitting program into compliance with the
24 California Fish and Game Code the Department will need to gather additional scientific information,
25 conduct formal rulemaking under the Administrative Procedure Act ("APA") (Gov. Code, § 11340
26 et seq.), and commence related review under the California Environmental Quality Act ("CEQA")
27 (Pub. Resources Code, § 21000 et seq.). To accomplish these tasks the Department must and will
28 seek an appropriation by the Legislature of funding sufficient for the Department to take appropriate

1 action under the APA and CEQA.

2 I declare under penalty of perjury that the foregoing is true and correct.

3 Executed in Sacramento, California on October 2, 2006.

4
5
6 By: 
7 BANKY E. CURTIS

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DECLARATION OF SERVICE BY FACSIMILE AND MAIL

Case Name: Kuruk Tribe v. California Dept. Fish and Game, et al.
Case No.: RG05 211597

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. My facsimile machine telephone number is (415) 703-5480.

On October 2, 2006 at 5:03 PM., I served the attached Defendants' Case Status Report with Supporting Declarations of Neil Manji and Banky E. Curtis by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2008. The facsimile machine I used complied with Rule 2003, and no error was reported by the machine. Pursuant to rule 2008(e)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. In addition, I placed a true copy thereof enclosed in a sealed envelope with postage thereof fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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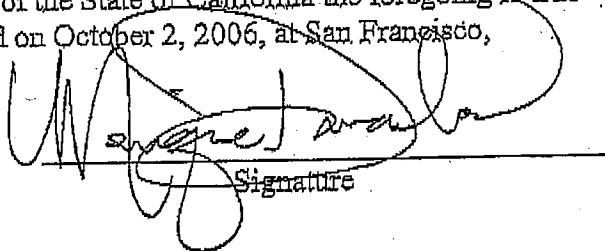
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 2, 2006, at San Francisco, California.

Monique Davalos
Declarant


Signature