

State of California
California Department of Fish and Game
1416 Ninth Street
Sacramento, CA 95814

TITLE 14, CALIFORNIA CODE OF REGULATIONS
AMEND SECTIONS 228 and 228.5
SUCTION DREDGING
INITIAL STATEMENT OF REASONS

Specific Purpose of the Proposed Amendments

The California Department of Fish and Game (CDFG) proposes to implement a permitting program for suction dredging activities consistent with the requirements of Fish and Game Code Section 5653 et seq. and the December 2006 Alameda County Superior Court Order (pursuant to *Karuk Tribe of California et al. v. California Department of Fish and Game* [Super. Ct. of Alameda County, 2005, no. RG05211597]) by amending the regulations of Title 14 of the California Code of Regulations, Sections 228 and 228.5.

Necessity

CDFG previously administered a permitting program governing the use of vacuum and suction dredge equipment pursuant to Fish and Game Code Section 5653 et seq. The regulations previously adopted by CDFG governing suction dredge mining are found in Title 14 of the California Code of Regulations, in Sections 228 and 228.5.

CDFG promulgated the previous regulations governing suction dredge mining in 1994 after preparing and certifying an environmental impact report (EIR) (State Clearinghouse Number 93102046) under the California Environmental Quality Act (CEQA) (hereafter, the 1994 EIR). Under the statute and regulations, any California resident or non-resident could obtain a suction dredge mining permit from CDFG upon payment of a fee specified by statute. (See Fish & G. Code, § 5653, subd. (c).) The permits issued by CDFG authorized suction dredge mining throughout California subject to the terms and conditions set forth in the regulations, which were established to ensure that suction dredging activities would not be “deleterious to fish.” (See *Id.*, subd. (b).)

CDFG considered proposed amendments to the regulations governing suction dredge mining in 1997, releasing a draft subsequent EIR for public review that same year (hereafter, the 1997 Draft SEIR). However, the 1997 Draft SEIR was never completed or certified, and the proposed amendments were not adopted.

The currently proposed amendments stem from a legal challenge initiated in Alameda County Superior Court in May 2005 (*Karuk Tribe of California et al. v. California Department of Fish and Game* [Super. Ct. of Alameda County, 2005, No. RG05211597]). The *Karuk* lawsuit focused on the Klamath, Scott and Salmon River watersheds in northern California, and included allegations regarding impacts to various fish species, such as coho salmon (*Oncorhynchus kisutch*), and contended that CDFG's administration of the suction dredging program violated CEQA and various provisions of the Fish and Game Code. In February 2006, various mining interests and a number of individuals joined the lawsuit by court order as party interveners. In December 2006, the Alameda County Superior Court issued an order with the consent of all parties, directing CDFG to "conduct further environmental review pursuant to CEQA of its suction dredge mining regulations and to implement, if necessary via rulemaking, mitigation measures to protect coho salmon and/or other special status fish species in the watershed of the Klamath, Scott, and Salmon rivers, listed as threatened or endangered after the 1994 EIR" (hereafter, the December 2006 Court Order).

The use of vacuum or suction dredge equipment for instream mining is currently prohibited in California by state law. (Fish & G. Code, § 5653.1, added by Stats. 2009, ch. 62, § 1 (SB 670 (Wiggins).) As signed into law by Governor Schwarzenegger and effective August 6, 2009, SB 670 established a temporary moratorium on instream suction dredge mining in California, even with an existing permit issued by CDFG. The law also prohibits CDFG from issuing any new permits under the previous regulations. The statewide moratorium on instream suction dredge mining and the related prohibition on the issuance of new permits will remain in place until CDFG completes the environmental review required by the December 2006 Court Order; CDFG adopts, as necessary, updates to the previous regulations; and any such updates become effective. (Fish & G. Code, § 5653.1, subd. (b).)

CDFG is also subject to a separate court order prohibiting the issuance of any new suction dredge permits under the previous regulations. Issued by the Alameda County Superior Court as a preliminary injunction on July 9, 2009, the order specifically prohibits CDFG from expending any money from the California General Fund in connection with the suction dredge permitting program. The court clarified on July 27, 2009, that the order and preliminary injunction prohibits CDFG from issuing any new permits under the previous regulations. The order and preliminary injunction will remain in place pending further court order or other direction from the Alameda County Superior Court. (*Hillman et al. v. California Dept. of Fish and Game*, Super. Ct. Alameda County, 2009, No. RG09434444, order filed July 10, 2009.)

Methods of suction dredging include a range of equipment sizes, particularly with respect to the capacity of the motor, the hose size, and nozzle size. There are also a number of activities which are practiced to facilitate the operation of a suction dredge including, for example, moving existing boulders and woody debris within the stream and obstructing or diverting the natural flow. Further, the hydraulic characteristics of a lake or reservoir are inherently different than the flowing water conditions in a river or stream, leading to a difference in the geomorphic recovery times of the mined site. In several instances, specified in the proposed amended regulations, the Department has determined that an on-

site inspection will be necessary to evaluate whether the specific suction dredge operation will or will not be deleterious to fish.

Further, under some circumstances, suction dredge mining may substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel or bank of any river, stream or lake. These same activities fall within the scope of Fish and Game Code Section 1602, which requires that the entity proposing the activity must notify CDFG. CDFG will then follow the procedures specified in Fish and Game Code Section 1602. In the proposed amended regulations, CDFG has specifically identified suction dredging methods and related activities which trigger the requirement to notify under Fish and Game Code Section 1602.

CDFG is promulgating the proposed regulations as statutorily mandated by Fish and Game Code section 5653.9. This section requires CDFG to adopt regulations to carry out a suction dredge permitting program pursuant to Section 5653. The pertinent part of Section 5653 provides that, "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." (Fish & G. Code, § 5653, subd. (b).) CDFG is promulgating the proposed regulations pursuant to this statutory mandate based on a technical analysis and related determinations that suction dredging consistent with the proposed regulations will not be deleterious to fish as the phrase appears to be intended to be used in Fish and Game Code section 5653.

CDFG's effort to promulgate the proposed regulations and make the determination required by Section 5653, subdivision (b), is limited to this section in the Fish and Game Code and to suction dredging as specifically defined in the proposed regulations. Moreover, CDFG must act to establish regulations in the absence of any definition of the word "deleterious" or the term "deleterious to fish" as used in Section 5653 or as otherwise provided in existing regulations pertaining to suction dredging specifically. Indeed, there is no definition of "deleterious" in the Fish and Game Code generally even though the word appears in seven different sections in three different divisions of the Fish and Game Code. The term "deleterious to fish" is also not defined.

The word "deleterious" as it appears in seven sections in the Fish and Game Code is used in every instance in a different way, in a distinct context. Section 1505, for example, which appears in Division 2 of the Fish and Game Code in the chapter addressing Fish and Game Management generally, directs CDFG's Director to "disapprove any stream alterations of any prime salmon and steelhead spawning areas when ... such alterations would prove deleterious to fishlife." Sections 5948 and 6100, both of which appear in Division 6 of the Fish and Game Code in the chapter addressing Dams, Conduits, and Screens, does so in the context of debris accumulation and artificial barriers which are "deleterious to fish," and with respect to new diversions of water "deleterious to salmon and steelhead," respectively. In the same Division, Section 6303 addresses Infected or Diseased Fish, directing CDFG to destroy any such fish, except in limited circumstances, when CDFG determines they are "merely deleterious to fish, amphibian, aquatic plants, or aquatic animal life." Differences in word choice and context in each of these instances suggests the Legislature intended the term "deleterious" to be construed in the specific context of the particular circumstance at issue. Stated another way, the different context and related word choice in each of the sections highlighted above suggests to CDFG that, in the absence of any other statutory

definition, the Legislature intended something specific and unique to suction dredging as the term “deleterious to fish” is used in Section 5653, subdivision (b).

The two other references to the word “deleterious” in the Fish and Game Code amplify the same point. One such section, Section 5650, appears in Division 6, Part 1, Chapter 2, Article 1, of the Fish and Game Code. Section 5650 appears, in this respect, in the portion of the Fish and Game Code addressing fish generally, within a chapter pertaining to pollution generally. The same is true of Section 5653, the Fish and Game Code provision that pertains to suction dredging specifically. Section 5650, however, which is not specific to suction dredging, speaks in terms of broader context and with word choice different than that found in Section 5653. Section 5650, for example, declares it unlawful “to deposit in, permit to pass into, or place where it can pass into the waters of this state” various substances and materials, including any “substance or material deleterious to fish, plant life, mammals, or bird life.” (See Fish & G. Code, § 5650, subd. (a)(6).) Similar language appears in a related provision in Division 9 in the Fish and Game Code governing fines and penalties generally. This provision, Section 12016, provides for civil penalties payable to CDFG from any person who, generally speaking, discharges any substance or material into the waters of the state that is “deleterious to fish, plant, bird, or animal life or their habitat[.]” (*Id.*, § 12016, subd. (a).) The same provision also provides, “[f]or purposes of this section, ‘deleterious substance or material’ does not include substances or materials otherwise expressly permitted or authorized to be deposited or discharged into waters of the state by law.” (*Id.*, subd. (b).) In a case involving the discharge of material into the North Fork of the Middle Fork of the American River from upslope hydraulic gold mining, the Appellate Department of the Placer County Superior Court determined “specifically for purposes of 5650” that a substance or material is deleterious if, because of its nature or quantity, it has a harmful effect on fish, plant life or bird life when it is deposited in the waters of the State of California. (*People v. Guntert* (1981) 126 Cal.App.3d Supp. 1, 5.) Again, the context and wording of Sections 5650 and 12016 suggest that the Legislature intended the meaning of the word “deleterious” in this context to be specific to the particular substance and material at issue, as opposed to a particular activity. This also supports the conclusion that the term “deleterious to fish” as used in Section 5653 has meaning specific and unique to suction dredging, and that Section 5653 should be interpreted and applied in the present context as it pertains and is limited to suction dredging. It would be otherwise impossible to implement regulations as mandated by the Legislature since suction dredging in any river, stream or lake will inevitably have some effect on fish, particularly considering that invertebrates are “fish” pursuant to Fish and Game Code section 45. For this reason, CDFG believes the term “deleterious to fish” for purposes of Section 5653 and suction dredging specifically should be and is distinguishable from other sections in the Fish and Game Code where the term “deleterious” also appears.

Against this backdrop and as highlighted below, CDFG believes Section 5653 is intended to assure that the individual and cumulative impacts of permitted suction dredge operations do not substantially affect any species of fish as defined by Fish and Game Code section 45. This approach is consistent with existing State policy to maintain sustainable populations of fish and wildlife resources. (See, e.g., Fish & G. Code, §§ 1700, subd. (a), 1801, subd. (a).) The approach is also consistent with the legislative history of Section 5653. The history establishes that, in enacting Section 5653, the Legislature was focused principally on

protecting specific fish species from suction dredging during particularly vulnerable times of those species' spawning life cycle.

The proposed regulations are consistent with and meet the objective of safeguarding against substantial effects on fish as broadly defined in Fish and Game Code section 45 through a number of different mechanisms. The proposed regulations, for example, limit at 4,000 the total number of suction dredge permits that may be issued by CDFG and the term of any such permit is limited to the calendar year. The limit on the total number of permits annually is well below historic high numbers of permits issued by CDFG, but near recent levels of permits issued based on recent experience. The proposed regulations also safeguard against substantial effects through various species- and water body-specific closures and seasonal restrictions, and restrictions and limitations on the use of specific vacuum or suction dredge equipment. Finally, the proposed regulations meet the objective to avoid any substantial adverse impacts to fish in the context of suction dredging through required compliance with specific practices to avoid and minimize adverse effects to fish, including a requirement for on-site inspections and notification pursuant to Fish and Game Code section 1602 for certain proposed operations.

Fish and Game Sections 5653.5 and 5653.8 already specify restrictions on certain terms pertaining to suction dredging. Given legislative recognition that specific meaning is needed for certain terms relating to suction dredging, the guidance in existing State policy, the potential ambiguity caused by using the term "deleterious" differently in seven Fish and Game Code sections, and a review of the legislative history of Fish and Game Code Section 5653, CDFG believes the proper focus of the term "deleterious to fish" as it relates to and is limited to suction dredging is on minimizing any substantial adverse effects.

CDFG has determined, based on the environmental review conducted pursuant to the December 2006 Court Order, that amendments to the previous regulations are necessary to avoid deleterious effects to fish.

Technical and Empirical Studies, Reports, or Documents

Environmental Impact Report

CDFG has prepared a draft Subsequent Environmental Impact Report (SEIR) for the Suction Dredge Permitting Program (Program) to comply with the 2006 Court Order and to meet its broader obligations of environmental protection with respect to its existing suction dredge mining permitting program. The draft SEIR was prepared in compliance with CEQA and the State CEQA Guidelines (14 California Code of Regulations [CCR] 15000 et seq.) to provide the public, responsible agencies, and trustee agencies with information about the potential environmental effects of implementing the Program, as updated pursuant to the current rulemaking effort under the Administrative Procedure Act (APA)(Gov. Code, § 11340 et seq.).

The draft SEIR and related review under CEQA analyzes the new significant and substantially more severe environmental impacts that could occur under the 1994

permitting program that were not previously addressed by CDFG in the 1994 EIR. For the purposes of the draft SEIR, the Program consists of proposed amendments to CDFG's previous regulations governing suction dredge mining throughout California and the related suction dredging that would occur consistent with those amendments. (See generally Cal. Code Regs., tit. 14, § 228 et seq.)

To provide the public and regulatory agencies an opportunity to ask questions and submit comments on the scope of the SEIR and regulation amendments, public scoping meetings were held during the NOP review period. Because the suction dredge permitting program is a "project of statewide, regional, or area wide significance," the scoping meetings were conducted on consecutive days in three different locations throughout the State. The scoping meetings were held in Fresno on November 16, 2009; Sacramento on November 17, 2009; and Redding on November 18, 2009. During the scoping period, 284 comment letters were received. These comments were summarized and included in their entirety in the Scoping Report, which is an appendix to the draft SEIR.

In addition, while not strictly a part of the CEQA or rulemaking process, CDFG engaged in several activities as part of preparing the SEIR which supported the development and analysis contained within the SEIR. These activities are further described below and are also included as appendices to the draft SEIR.

Literature Review

A review of the scientific literature was conducted to develop a better understanding of the existing information associated with suction dredging and its effects (whether beneficial or adverse) on the environment. In particular, the literature review focused on information that has become available since the previous environmental analysis completed in 1994. As part of the literature review, relevant information was gathered, reviewed, and assessed, and the resulting body of data was used for the Initial Study assessment.

Public Advisory Committee

Based on suggestions received during the public scoping process, CDFG convened a Public Advisory Committee (PAC). The overall goal of the PAC was to assist CDFG in exploring potential regulatory approaches to help with development of proposed regulations for suction dredging. By establishing a collaborative environment, CDFG hoped the PAC would provide input on technical issues relevant to the regulatory development effort.

The PAC had a diverse membership, including 25 individuals representing federal agencies, county governments, conservation organizations, the Karuk tribe, independent scientists, suction dredgers, suction dredge advocacy organizations, mining equipment manufacturers, and retail mining equipment businesses. The group met on February 11th, 25th, and March 11th, 2010. The three meetings included presentations on a variety of topics including geomorphology, water quality, mercury, mining techniques, environmental changes since the 1994 regulations were adopted, CDFG enforcement history and capabilities, and Tribal fish allocations and harvesting techniques. All of the presentations were intended to help increase the PAC's collective understanding of issues pertinent to suction dredging.

This effort created a forum for sharing information and knowledge on a wide range of topics that collectively offered helpful insights for CDFG's consideration. In particular, the PAC provided valuable input and suggestions on which components of the 1994 regulations should be considered for inclusion in a future regulatory program.

Suction Dredge Survey

In 2010, CDFG conducted a voluntary survey of suction dredge permit holders similar to the one conducted in 1994. This updated survey was designed to gather current information regarding the general characteristics of suction dredging, and the expenditures made by suction dredgers as part of the activity. The information generated by the survey was used to support the CEQA and socio-economic analysis, as well as the development of proposed amendments to the regulations.

The survey was sent to a random selection of 1,100 California residents, and 500 non-residents, who purchased suction dredge permits in 2008. 734 residents and 337 non-residents returned the survey.

Socioeconomic Report

A Socioeconomic Report was prepared that provides socio-economic information to support the assessment of effects that the regulatory action would have on regional and local economies. The report is included as an addendum to the Economic and Fiscal Impact Statement (Standard Form 399), both of which are attached as Exhibit A and incorporated herein by reference. The information in this report focuses on the economic contribution that suction dredging activities make to regional and local economies in California. In addition, the report addresses the socio-economic implications of existing and potential conflicts between suction dredging activities and other beneficial uses. The report also addresses information on the amount of gold collected by dredgers, and related economic implications.

Reasonable Alternatives to the Proposed Regulatory Action and the Department's Reasons for Rejecting Those Alternatives

No Program Alternative

CDFG analyzed a No Program Alternative, in which no amendments to the 1994 regulations on suction dredging operations would be considered or adopted. Adoption of this alternative would make the current "temporary" moratorium permanent. However, this alternative has been dismissed by CDFG because it would not comply with the 2006 Court Order in which CDFG was directed to conduct further environmental review of its suction dredge mining regulations and implement new regulations as necessary to protect 'fish' species. In addition, this alternative would violate CDFG's mandate to issue suction dredge permits where the operation will not be 'deleterious to fish.' (Fish & G. Code, § 5653, subd. (b).)

1994 Regulations Alternative

Under this proposed alternative, CDFG would resume administering the Program under the 1994 Regulations, which were in place prior to the moratorium. This includes the operational requirements as outlined in those regulations as well as suction dredge use classifications for waterways unchanged from the 1994 specifications. Resuming dredging activities based on *Suction Dredge Use Classifications* from 1994 would not take into consideration current information regarding the life history, distribution, and abundance of species and habitats in California, nor the current legal status of fish species potentially affected by suction dredging. Since 1994, additional aquatic species have declined in abundance and distribution, including some that have been listed by the State or Federal governments as threatened or endangered. CDFG has determined that based on this new information and changed circumstance, the 1994 regulations would result in deleterious effects on fish, and hence would not allow for issuance of suction dredge permits.

Therefore, this alternative was dismissed from further analysis as it does not meet the basic objectives of the 2006 Court Order, which mandates additional protection for 'fish' species if further environmental review concludes that the previous regulations are inadequate.

Water Quality Alternative

In addition to the seasonal and permanent closures of waterways in the proposed amendments to Fish and Game Section 228.5, this alternative would impose permanent closures on water bodies listed as impaired for sediment or mercury pursuant to Clean Water Act Section 303(d). These closures would help to avoid further degradation of these water bodies from dredging activities, and would result in a larger portion of the state which would be closed to dredging.

This alternative would have decreased the adverse effects of suction dredging activities for the majority of environmental resources. However, this alternative was dismissed by CDFG because such closures were determined to be unnecessary to avoid 'deleterious effects to fish,' and imposing regulations for effects without a nexus to the statutory directive to avoid actions 'deleterious to fish' is not within CDFG's regulatory authority.

Reduced Intensity Alternative

The Reduced Density Alternative proposed to incorporate a combination of additional restrictions on the total number of permits issued and general methods of operation to reduce the intensity of environmental effects in the state. Under this alternative, a maximum of 1,500 permits would be issued annually by CDFG, which would translate to a 53% decrease in dredging operations permitted annually compared to the historic average. Additional operational requirements under this alternative included density limitations, additional equipment restrictions, and restrictions on the total number of days each individual could dredge. The stipulations of this alternative were developed to decrease potential site disturbances and lessen overall adverse effects throughout the state.

This alternative was dismissed because CDFG has determined that the proposed amendments are sufficient to avoid 'deleterious effects to fish,' without the need to impose further restrictions.

Reasonable Alternatives to the Proposed Regulatory Action that Would Lessen any Adverse Socioeconomic Impacts and the Department's Reasons for Rejecting Those Alternatives

Without amending the regulations of Title 14 California Code of Regulations Section 228 or current law (see Fish & G. Code, § 5653.1), and in combination with stipulations of the 2006 Court Order and 2009 *Hillman* injunction, the current moratorium on suction dredging activity would continue to be imposed. As described in the Socio-Economic Report (Exhibit A), this prohibition has likely resulted in adverse socioeconomic impacts on individuals and businesses associated with suction dredging in California. The adoption of amended regulations would reverse the current moratorium on suction dredging in California and would allow for commerce associated with suction dredging activities to resume throughout the state. As such, the proposed amendments are expected to have a beneficial socioeconomic impact.

That said, alternatives that would result in greater levels of suction dredging activity relative to the proposed amendments would result in further increases in socioeconomic activity. This would be true of the 1994 Regulations Alternative described above. This alternative was rejected for the reasons identified in the discussion of that alternative.

Evidence Supporting the Department's Initial Determination that the Proposed Regulatory Action Will Not Have a Significant Adverse Socioeconomic Impact

The Department's initial determination that this proposed regulatory action would not result in a significant adverse socioeconomic impact is based on the findings of the Socioeconomic Report (see Exhibit A). As described above, adverse socioeconomic impacts are associated with the current prohibition on permit issuance rather than the regulatory action to amend Title 14 California Code of Regulations, Section 228. Amending the regulations in fulfillment of the 2006 Court Order would allow the Department to resume the issuance of permits pursuant to Fish and Game Code Section 5653 et seq., and would reinstate commerce associated with suction dredging activities throughout the state, which is a beneficial impact.

The economic impact that will result from the CDFG's proposed regulatory action is discussed in greater detail in the addendum to Std. Form 339 (Exhibit A).

Duplication or Conflict with Federal Regulations

The CDFG's proposed regulatory action does not duplicate, conflict with or compromise existing federal law or regulations.