



June 7, 2013

STATEMENT OF EMERGENCY
(Gov. Code, § 11346.1, subd. (b))

Subject: Definition of Suction Dredging; Use of Any Vacuum or Suction Dredge Equipment for Instream Mining Purposes

Proposed Emergency Action to Amend California Code of Regulations, Title 14, Section 228, subdivision (a).

The Director of the California Department of Fish and Wildlife (CDFW) has determined as set forth below that an emergency exists and the proposed emergency amendment to existing regulation is necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare.

Specific Facts Demonstrating an Emergency and the Need for Immediate Action

CDFW regulates the use of vacuum and suction dredge equipment in California rivers, streams, and lakes pursuant to Fish and Game Code section 5653. In March 2012, for the first time since 1994, CDFW updated and adopted regulations to implement its related permitting program. (Cal. Code Regs., tit. 14, §§ 228, 228.5; see also Fish & G. Code, § 5653.9.) Consistent with statute, the updated regulations implement Section 5653.¹ Importantly, CDFW adopted the updated regulations as part of an environmental review effort required by a court order entered with the consent of CDFW and various other parties in December 2006. That order and ongoing litigation related to, among other things, the CDFW environmental review and rulemaking effort that culminated in March 2012 are part of a longstanding controversy related to CDFW and its regulation of instream vacuum and suction dredge mining under the Fish and Game Code. Of the fourteen related civil lawsuits filed against CDFW since May 2005, seven are still pending in San Bernardino County Superior Court as a coordinated proceeding by order of the California Judicial Council. (*Suction Dredge Mining Cases*, Sup.Ct. San Bernardino County, Judicial Council Proceeding No. JCPRS4720.)

When CDFW adopted its updated regulations in March 2012, later effective in April 2012 with the approval of the Office of Administrative Law (OAL), the use of any vacuum or suction dredge equipment for instream mining purposes had been prohibited

¹ All unspecified "section" references are to the Fish and Game Code.

throughout California pursuant to a statutory moratorium enacted as an urgency measure in August 2009. (Stats. 2009, ch. 62 (Sen. Bill 670), §§ 1-2, enacting former Fish & G. Code, § 5653.1.) Consistent with the consent order and its obligations pursuant to Section 5653.9, CDFW's March 2012 regulations prescribe time, place, and manner restrictions to ensure the use of vacuum and suction equipment for instream mining purposes is not deleterious to fish. (Fish & G. Code, § 5653, subs. (a), (b); Cal. Code Regs., tit. 14, § 228.) In promulgating its updated regulations, however, CDFW acknowledged that unavoidable significant impacts related to water quality, cultural resources, noise, and certain riparian habitat-associated bird species would also result.

CDFW's regulations implementing Section 5653 define related statutory language regarding the use of vacuum or suction dredge equipment for mining purposes. (Cal. Code Regs., tit. 14, § 228, subd. (a).) The identical statutory language that appears in Section 5653 (i.e., "use of any vacuum or suction dredge equipment") also appears in Section 5653.1, the latter section being the statutory moratorium. The emergency action at issue here concerns that statutory language specifically and the existing regulatory definition.

Beginning in early 2013, but in earnest in March and April 2013, evidence began to surface that miners might be modifying vacuum and suction dredge equipment to evade CDFW's regulatory authority under Section 5653 and, importantly, the statewide moratorium prohibiting the use of any vacuum or suction dredge equipment for instream mining purposes. Interestingly, CDFW adopted its regulatory definition of "suction dredging" in March 2012 without any controversy, notwithstanding ongoing litigation with various tribal and environmental, and mining interest stakeholders, essentially codifying by regulation, informed by various equipment manufacturers, what CDFW and interested members of the public across the stakeholder spectrum had understood suction dredge mining to entail perhaps since Section 5653 was first enacted in the early 1960s. In short, in the last few months evidence has surfaced that various members of the mining community are modifying equipment and related practice to exploit CDFW's specific definition of suction dredging to avoid regulation pursuant to Section 5653 and, importantly, to evade the letter and spirit of the statutory moratorium codified in Section 5653.1. Those efforts, limited as they may be, have put CDFW law enforcement personnel in the tenuous position of encountering individuals using vacuum or suction dredge equipment for instream mining purposes that could not be cited for violating other provisions of the Fish and Game Code or Sections 5653 and 5653.1, specifically.

In April 2013, CDFW denied two petitions for emergency rulemaking related to this very issue. In so doing, CDFW indicated at the time that it lacked specific on-the-ground evidence of "loophole" mining activities involving the use of vacuum and suction dredge equipment. (Cal. Reg. Notice Register 2013, No. 18-Z, pp. 691-693.) CDFW now has such evidence, in its opinion, from both members of the public and its Law Enforcement Division. That evidence is detailed specifically in the "Documents Incorporated by

Reference” section below, particularly the letter to Charlton H. Bonham et al., from Lynne R. Saxton, dated May 28, 2013; and the “Petition for Administrative Rulemaking” from the Center for Biological Diversity et al., dated March 20, 2013. CDFW’s Law Enforcement Division has similar evidence indicating various individual miners are exploiting the current regulatory definition of “suction dredging” by modifying equipment with an apparent intent to evade regulation under Section 5653 and, importantly, the ongoing statutory moratorium established by Section 5653.1.

With the ongoing statutory moratorium prohibiting the use of any vacuum or suction dredge equipment throughout California for instream mining purposes, and with ongoing litigation and related controversy, an emergency exists requiring CDFW to amend its regulatory definition of suction dredging, particularly with the traditional summer and fall mining season looming. As the CDFW Director indicated in early May 2013, with on-the-ground evidence CDFW has no intention to stand by and watch a very limited number of individual members of the public exploit what was at the time of adoption a non-controversial regulatory definition of suction dredging as way to evade reasonable regulations designed to protect important natural resources and, importantly, a statewide moratorium on the use of any vacuum or suction dredge equipment for instream mining purposes. Doing so consistent with the letter and spirit of controlling law will also allow California to further consider the future of instream suction dredge mining throughout the State, which CDFW addressed in a report to the California Legislature dated April 1, 2013.

As to the proposed emergency amendment of California Code of Regulations Title 14, section 228, subdivision (a), it is designed and intended by CDFW to address only the demonstrated emergency. (Gov. Code, § 11346.1, subd. (b)(2).) The amendment is cast in terms entirely consistent with Section 5653 (i.e., “use of any vacuum and suction dredge equipment”). It is also consistent, in this respect, with identical language in, and the letter and spirit of the related statutory moratorium codified in Section 5653.1. Most important, the emergency action will address and safeguard against the well-documented adverse environmental effects to California fish and wildlife, and other important natural and cultural resources motivating the enactment of Section 5653 in the early 1960s and the ongoing statutory moratorium in 2009.

Authority and Reference Citations

Authority: Sections 5653 and 5653.9, Fish and Game Code.

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

Informative Digest/Policy Statement Overview

A. Existing Laws and Regulations Directly Related to the Proposed Emergency Action

In general, the use of any vacuum or suction dredge equipment by any person in any river, stream, or lake in California is prohibited, except as authorized under a permit issued by CDFW. (Fish & G. Code, § 5653, subd. (a).) To that end, CDFW regulates the use of vacuum or suction dredge equipment for mining purposes in California rivers, streams, and lakes under Fish and Game Code section 5653 et seq. Related regulations to implement Section 5653, specifically, as required by Section 5653.9, are found in the California Code of Regulations, Title 14, sections 228 and 228.5. CDFW updated its regulations implementing Section 5653 in March 2012, effective with approval by the Office of Administrative Law on April 27, 2012. (Cal. Reg. Notice Register 2012, No. 19-Z, p. 641.) The regulations, consistent with statute, designate waters or areas wherein vacuum or suction dredges may be used pursuant to a permit issued by CDFW, waters or areas closed to those dredges, and the maximum size of and time of year when those dredges may be used, all to ensure that use of the equipment, as permitted, will not be deleterious to fish. (Fish & G. Code, § 5653, subd. (b); Cal. Code Regs., tit. 14, § 228.)

Notwithstanding CDFW's regulations and permitting authority under Section 5653, the use of any vacuum or suction dredge equipment in any river, stream, or lake in California is currently prohibited by statute. (Fish & G. Code, § 5653.1, subd. (b), as amended by Stats. 2012, ch. 39 (Sen. Bill 1018), § 7.) California enacted the existing moratorium on instream suction dredge mining as an urgency measure in August 2009, finding the activity results in various adverse environmental impacts to protected fish species, the water quality of the State, and the health of the people of California. (Stats. 2009, ch. 62 (Sen. Bill 670), §§ 1-2, enacting former Fish & G. Code, § 5653.1.) Nonmotorized recreational mining activities, including panning for gold, is not prohibited or restricted by the statutory moratorium. (Fish & G. Code, § 5653.1, subd. (g).)

B. Difference from Existing, Comparable Federal Regulation or Statute

The Director of CDFW has determined for purposes of the proposed emergency amendment of California Code of Regulations, Title 14, section 228, subdivision (a), that there are no existing, comparable federal regulations or statutes. Absent such federal regulation or statute, there is no basis for comparison with and nothing related to compare to the proposed emergency action. Likewise, importantly, CDFW's substantive authority to regulate the use of vacuum or suction dredge equipment for instream mining is statewide; that is, CDFW's regulatory authority extends to any river, stream, or lake in California. (*Id.*, § 5653, subs. (a), (b).)

C. Policy Statement Regarding Specific and Broad Objectives

The Director of CDFW has determined that the following broad policy objectives are the purpose and goal of the proposed emergency action to amend California Code of Regulations, Title 14, section 228, subdivision (a):

- To protect against and minimize the prospect of adverse impacts, and aid in the conservation of fish and wildlife resources held in trust for the people of California by and through CDFW (Fish & G. Code, § 1802);
- To protect against and minimize the prospect of adverse impacts to other important natural and cultural resources in California, and the water quality of the State;
- To protect and conserve those important resources, and the health, safety, and welfare of the people of California, consistent with the letter and spirit of the existing statutory moratorium on vacuum and suction dredging activities conducted for instream mining purposes;
- To ensure the use of any vacuum and suction dredge equipment in any river, stream, or lake in California for the extraction of minerals will not be deleterious to fish as defined by Fish and Game Code section 45; and
- To end the current practice and foreclose the prospect during the existing statutory moratorium of individuals invoking the CDFW regulatory definition of what it means to use any vacuum or suction dredge equipment in a river, stream, or lake to extract minerals as a basis to modify related equipment in order to avoid or otherwise attempt to evade CDFW's substantive regulatory authority or the statewide moratorium established by Fish and Game Code sections 5653 and 5653.1, respectively.

The Director of CDFW has also determined the broad policy objectives as just described in terms of the proposed emergency action will result in, once effective following OAL review and approval, and otherwise provide similar, related, benefits to the people of California through the protection of the natural, cultural, and fish and wildlife resources of the State.

In terms of other benefits, the Director has also determined the emergency action, once effective, will result in fair and open transparency for law enforcement personnel, which is particularly important given the spirit of the ongoing moratorium, and related criminal and civil litigation that has been the hallmark of significant, related controversy

concerning CDFW and its regulatory authority related to instream suction dredge mining since at least 2005.

D. Inconsistency or Incompatibility with Existing State Regulations

The Director of CDFW has determined the proposed emergency amendment of California Code of Regulations, Title 14, section 228, subdivision (a), is neither inconsistent nor incompatible with existing state regulations. The proposed emergency action, in fact, is consistent and compatible with CDFW's related regulations currently found in California Code of Regulations, Title 14, section 228, subdivisions (b) through (p), and section 228.5, as adopted by CDFW and approved by OAL in March and April 2012, respectively.

E. Documents Incorporated by Reference

This Statement of Emergency and Informative Digest is supported by and relies on, among other things, the following documents, hereby incorporated by reference:

- Letter to Charlton H. Bonham, Director, and John Mattox, Senior Staff Counsel, Department of Fish and Wildlife, from Lynne R. Saxton; re: Request to Initiate Emergency Rulemaking for Suction Dredge Mining (14 CCR §228); May 28, 2013.
- Petition for Administrative Rulemaking to Amend the Suction Dredge Permitting Program Regulations Before the Director of the California Department of Fish and Wildlife; Jonathan Evans and Michael Callahan-Dudley, Center for Biological Diversity; March 20, 2013.
- Notice of Petition and Letter to Director Charlton H. Bonham, California Department of Fish and Wildlife, et al., from Craig A. Lindsay, President, Western Mining Alliance; March 27, 2013.
- Letter to Charlton H. Bonham, Director, California Department of Fish and Wildlife, et al., from James L. Buchal, Murphy & Buchal LLP; April 15, 2013.
- Letter to Jonathan Evans and Michael Callahan-Dudley, Center for Biological Diversity, and Craig A. Lindsay, President, Western Mining Alliance; from Charlton H. Bonham, Director, California Department of Fish and Wildlife; re: Instream Suction Dredge Mining Petitions for Rulemaking; April 19, 2013 (Cal. Reg. Notice Register 2013, No. 18-Z, pp. 691-693).
- California Department of Fish and Wildlife Report to the Legislature Regarding Instream Suction Dredge Mining under the Fish and Game Code; April 1, 2013.

Other Statutory Requirements

The Director of CDFW finds there are no other matters prescribed by statute applicable to CDFW related to the proposed emergency action, or to the regulation or class of regulations at issue for purposes of the proposed action.

Mandate on Local Agencies or School Districts

The Director of CDFW finds the proposed emergency amendment of California Code of Regulations, Title 14, section 228, subdivision (a), does not impose a policy or expenditure mandate on local agencies or school districts. With no such mandate, no state reimbursement pursuant to Part 7 (commencing with Section 17500), of Division 4, of the Government Code is necessary.

Fiscal Impact

A. Costs/Savings to Any State Agency

The proposed emergency amendment of California Code of Regulations, Title 14, section 228, subdivision (a), will not result in any costs or savings to any state agency. For purposes of costs and savings to state agencies as a result of the proposed emergency action, CDFW has considered both direct and indirect costs and savings that a public agency necessarily incurs in reasonable compliance with regulations.

B. Costs Imposed on Any Local Agency or School District

Because the proposed emergency amendment of California Code of Regulations, Title 14, section 228, subdivision (a), does not impose a cost mandate on any local agency or school district, no state reimbursement pursuant to Part 7 (commencing with Section 17500), of Division 4, of the Government Code is necessary.

C. Nondiscretionary Costs/Savings to Local Agencies:

The proposed emergency amendment of California Code of Regulations, Title 14, section 228, subdivision (a), will not result in any nondiscretionary costs or savings to any local agency.

D. Costs/Savings in Federal Funding to the State:

The proposed emergency amendment of California Code of Regulations, Title 14, section 228, subdivision (a), will not result in any costs or savings in federal funding to the State of California.

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The regulatory language for the proposed emergency amendment of California Code of Regulations, Title 14, section 228, subdivision (a), may be reviewed at and is available on CDFW's website at the following address: www.wildlife.ca.gov/suctiondredge.

If you have any questions regarding this proposed emergency action, please contact Craig Martz, CDFW Regulations Unit Manager, Wildlife and Fisheries Division, at (916) 653-4681. Related comments or questions to CDFW can also be submitted to suctiondredge@wildlife.ca.gov.