



December 9, 2013

UPDATED STATEMENT OF EMERGENCY

(Gov. Code, § 11346.1, subd. (b); Cal. Code Regs., tit. 1, § 52)

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

Proposed Action to Readopt 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 persists and the proposed re adoption of an 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.

The proposed re adoption of California Code of Regulations, Title 14, section 228, subdivision (a), follows prior emergency action by CDFW to amend the same provision, effective June 28, 2013. (Cal. Reg. Notice Register 2013, No. 28-Z, pp. 1034-1035.) Unless readopted as amended previously, CDFW's existing regulatory definition of suction dredging will expire on December 27, 2013. As readopted, if approved by the Office of Administrative Law (OAL), the existing definition will remain in effect for a period of time not to exceed 90 days. (See generally Gov. Code, § 11346.1, subds. (e), (h); Cal. Code Regs., tit. 1, § 52.) The re adoption as approved will preserve the existing status quo as a matter of law and on the ground in anticipation of the existing definition becoming permanent through regular noticed rulemaking by CDFW under the Administrative Procedure Act (APA).

As part of the proposed re adoption, the APA and related implementing regulations direct CDFW to consider and update, as appropriate, the emergency circumstances since the amended definition took effect in June 2013. This Updated Statement of Emergency serves that purpose. In so doing as permitted under the APA, CDFW incorporates by reference the entire rulemaking record (OAL File No. 2013-0618-02E) previously submitted to OAL as part of the June 2013 emergency adoption of the now in-effect regulatory definition of suction dredging. (Cal. Code Regs., tit. 1, § 52, subd. (c).) Specifically for purposes of this Updated Statement of Emergency, CDFW incorporates by reference its related Statement of Emergency dated June 7, 2013. The latter statement is attached hereto and otherwise available electronically at the following web address: www.dfg.ca.gov/suctiondredge.

Specific Facts Demonstrating an Emergency and the Need for Readoption

For purposes of this Updated Statement, the specific facts demonstrating an emergency and the need to readopt the existing regulatory definition of suction dredging are set forth in detail in CDFW's June 2013 Emergency Statement, as incorporated by reference. In short, CDFW took emergency action in June 2013 to close a "loophole" being exploited by certain members of the mining community to avoid regulation under Fish and Game Code sections 5653 and 5653.1, specifically. Section 5653, originally enacted in 1961, prohibits unpermitted use of vacuum or suction dredge equipment for instream mining activities to safeguard against deleterious effects to fish. (Fish & G. Code, § 5653, originally enacted by Stats. 1961, ch. 1816, § 1.) Section 5653.1, originally enacted as an urgency measure in August 2009, prohibits the use of any vacuum or suction dredge equipment for instream mining purposes in all rivers, lakes, and streams throughout California. (Fish & G. Code, 5653.1, subd. (b), originally enacted by Stats. 2009, ch. 62, § 1.) In fact, California enacted the ongoing moratorium prohibiting the issuance of permits by CDFW and the use of any related equipment to protect the environment and the people of this state, finding in 2009 that the use of vacuum or suction dredge equipment for instream mining purposes results in various adverse environmental impacts to protected fish species, the water quality of the state, and the public health. (Stats. 2009, ch. 62, § 2.) Indeed, the adverse environmental, cultural, and public health impacts caused by the unregulated use of vacuum or suction dredge equipment are well-documented as detailed in CDFW's June 2013 Statement of Emergency. Action by CDFW to readopt the existing regulatory definition of suction dredging and related approval by OAL is necessary to ensure the "loophole" prompting emergency action in June 2013 does not reopen. (Cal. Code Regs., tit. 1, § 52, subd. (b)(2).)

Changed circumstances since June 2013 provide further support for CDFW to readopt the existing definition. (*Id.*, subd. (b)(3).) Although the traditionally more busy summer/autumn mining season is transitioning to the winter mining season, unregulated use of vacuum or suction dredge equipment for instream mining purposes is possible, indeed likely, absent readoption. For example, under CDFW suction dredge regulations adopted in March 2012 (stayed, practically speaking, because of the statutory moratorium), the use vacuum or suction dredge equipment for instream mining purposes would be authorized year-round under a CDFW permit in certain water bodies in 33 different counties throughout California. (See generally Cal. Code Regs., tit. 14, § 228.5.) Although the statutory moratorium prohibits CDFW from issuing any permits that would authorize such activity, the year-round openings highlight at least the prospect, should the existing regulatory definition not be readopted, that certain miners might modify their equipment and engage in instream "loophole" mining activities in these and other waters, just as some did prior to CDFW's June 2013 emergency action. Absent readoption of the existing regulatory definition and related approval by OAL, "loophole" mining could begin anew in California and, in so doing, individuals engaged

in such operations could evade both the letter and spirit of the environmental safeguards underlying Fish and Game Code sections 5653 and 5653.1.

In terms of other changed circumstances, CDFW explained in June 2013 that emergency action was necessary at that time to let related litigation and possible legislative action unfold. Consequently, to the extent the prospect of judicial or legislative action factored into CDFW's June 2013 emergency action, that interest persists today. As to the Legislature, the first half of the 2013/2014 legislative session ended on September 13, 2013 without related action and the second half of the session will not begin until January 6, 2014. CDFW has no indication at this time whether suction dredging will be addressed by the Legislature in the second half of the 2013/2014 legislative session.

Although no final substantive action has occurred in the litigation, the potential for such action since June 2013 has increased and the litigation itself has expanded. Eight different civil actions, as opposed to seven in June 2013, are currently pending as coordinated by order of the Judicial Council of California in San Bernardino County. (*Suction Dredge Mining Cases*, Sup.Ct. San Bernardino County, Judicial Council Proceeding No. JCPRS4720.) No substantive rulings in the coordinated proceedings are expected until mid-2014, at the earliest. The same is true for two related appeals pending in the Third and Fourth Appellate Districts, respectively. The former appeal, for example, concerns an August 2013 criminal conviction for illegal suction dredging in Plumas County (*People v. Rinehart*, C074662, app. pending); the latter concerns an August 2013 order in the coordinated civil proceedings in San Bernardino denying a mining interest request for a preliminary injunction to enjoin the related statutory moratorium (*Suction Dredge Mining Cases*, E059864, app. pending). In short, significant legislative or judicial action reasonably expected in June 2013 has not occurred and does not appear likely at present before mid-2014, at the earliest.

Finally, one additional development factors into CDFW's proposed readoption of its existing regulatory definition of suction dredging. Effective January 1, 2014, the State of Oregon has enacted new legislation and its own moratorium on instream, motorized mining activities. (Oregon Revised Stats. 2013, ch. 783, § 5.) Oregon enacted "Senate Bill 838," in part, finding the use of motorized mining equipment in the beds and banks of its rivers had increased significantly between 2007 and 2013; and that such activities can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, and the state's investments in habitat enhancement and areas of cultural significance to Indian tribes. Information regarding Oregon's enactment of Senate Bill 838 is available through the following web link: <http://www.oregon.gov/dsl/Pages/Suction-Dredge-Mining-Rulemaking-Implementation-of-Senate-Bill-838.aspx>.

Oregon's recent legislative action and its own recently initiated, related rulemaking reflects similar concern shared by California and CDFW, specifically. With Oregon's

recent action, the readoption proposed here by CDFW is all the more important. Absent CDFW readoption of the existing regulatory definition of suction dredging, motorized instream mining activity recently restricted in Oregon may be directed to California. Recent legislative action in Oregon, in this respect, could indirectly increase the likelihood and perhaps the extent that “loophole,” motorized instream mining in California could occur absent the action the proposed here by CDFW.

Authority and Reference Citations

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

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

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The regulatory language for the proposed readoption 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 readoption, 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 regulations@wildlife.ca.gov.