

TITLE 14. DEPARTMENT OF FISH AND WILDLIFE

[Notice published February 14, 2014]

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the Department of Fish and Wildlife (CDFW or Department) proposes to adopt the regulations described below after considering all comments, objections, and recommendations regarding the proposed action. The Department invites interested persons to present statements or arguments with respect to alternatives to the regulations at the scheduled hearing or during the written comment period.

PUBLIC HEARING

The Department will hold a public hearing meeting on April 1, 2014, from 3:30 p.m. to 5:00 p.m. in the Resources Building Auditorium of the Resources Agency Building located at 1416 9th Street, Sacramento, California. The Resources Building Auditorium is wheelchair accessible. At the public hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The Department requests, but does not require, that the persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department. All written comments must be received by the Department at the office below not later than 5:00 p.m. on April 1, 2014. All written comments must include the true name and mailing address of the commenter. When submitting comments, please indicate whether you agree to accept subsequent notices for this rulemaking electronically.

Written comments may be submitted by mail, fax, or e-mail as follows:

California Department of Fish and Wildlife
Helen Birss, Branch Chief
Habitat Conservation Planning Branch
1416 9th Street,
Sacramento, CA 95814
Fax: (916) 653-2588
E-mail: suctiondredge@wildlife.ca.gov

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

REFERENCE: 5653-5653.9, Fish and Game Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing Laws and Regulations Related Directly to the Proposed Amendment to Section 228(a):

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 comprehensive 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

On June 28, 2013, OAL approved an emergency action by CDFW under the Administrative Procedure Act (APA) to amend the regulatory definition of suction dredging. (See Cal. Reg. Notice Register 2013, No. 28-Z, pp. 1034-1035; Cal. Code Regs., tit. 14, 228, subd. (a).) On December 26, 2013, OAL approved CDFW's proposed emergency rulemaking action to readopt the definition. (Office of Administrative Law, Notice of Approval of Emergency Regulatory Action, OAL File No. 2013-1216-01 EE.) Thus, the new definition is now in effect statewide. Under the Administrative Procedure Act (APA), the emergency regulatory definition can remain in effect by law for no more than 360 days following the initial emergency action. (Gov. Code, § 1346.1, subs. (e), (h).) Even if readopted by CDFW for a second time and approved by OAL, the existing emergency definition of suction dredging currently found in Title 14 will expire by law in June 2014. The proposed amendment would thus adopt through regular rulemaking a definition that is already in effect but that will expire.

Under the existing and proposed definition, the use of any vacuum or suction dredge equipment (i.e., suction dredging) is defined for purposes of Sections 228 and 228.5 of Title 14, as well as Fish and Game Code section 5653, as the use of a suction system to vacuum material from a river, stream or lake for the extraction of minerals. (Cal. Code Regs., tit. 14, § 228, subd. (a), effective June 28, 2013.) The definition also provides that, for purposes of the same sections, that the definition and the regulations do not apply to, prohibit or restrict nonmotorized recreational mining activities, including panning for gold. (Cal. Code Regs., tit. 14, § 228, subd. (a).)

Difference from Existing, Comparable Federal Regulation or Statute

The Director of CDFW has determined for purposes of the proposed 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 amendment. Likewise, importantly, CDFW's substantive authority to regulate

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

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, subds. (a), (b).)

Policy Statement Regarding Specific and Broad Objectives

The Director of CDFW has determined that the following specific and broad policy objectives are the purpose and goal of the proposed amendment to the 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 practice and foreclose the prospect during the existing statutory moratorium of individuals invoking the 2012 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 amendment 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 amendment, 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.

Benefits of the Proposed Action

CDFW's 2012 update to the regulations occurred 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 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, subds. (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 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 proposed amendment will address through regular rulemaking 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.

Inconsistency or Incompatibility with Existing State Regulations

The Department has reviewed the Title 14, CCR, and conducted a search of any similar regulations on this topic and has concluded that the proposed amendments to subsection 228(a) are neither inconsistent nor incompatible with existing state regulations. No other state agency has the authority to promulgate regulations governing suction dredging. The proposed amendment, in fact, is identical to the

emergency regulation now in effect, and, moreover, 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.

DISCLOSURES REGARDING THE PROPOSED ACTION:

Mandate on local agencies or school districts: None

Costs or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None

Other nondiscretionary costs or savings imposed on local agencies: None

Costs or savings in federal funding to the state: None

Significant effect on housing costs: None

Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states:

The proposed action to adopt, through regular rulemaking, the definition already in effect since June 2013 will have no adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Results of the Economic Impact Analysis

The results of the Economic Impact Analysis do not indicate any impacts on the creation or elimination of jobs, the creation of new business, the elimination of existing businesses, the expansion of businesses in California, or benefits to the health and welfare of California residents or worker safety.

Cost impacts on a representative private person or business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Business reporting requirement: None.

Effect on small business: It has been determined that the adoption of these regulations may affect small business. The Department has drafted the regulations in Plain English pursuant to Government Code sections 11342.580 and 11346.2(a)(1).

CONSIDERATION OF ALTERNATIVES:

The Department must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective as and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

MITIGATION MEASURES REQUIRED BY REGULATORY ACTION:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

CONTACT PERSONS

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Please direct requests for copies of the proposed text (the “express terms”) of the regulations, the initial statement of reasons, the modified text of the regulations, if any, or other information upon which the rulemaking is based to Helen Birss at the above address.

AVAILABILITY OF THE INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE:

The Department will have the entire rulemaking file available for inspection and copying at its office at 1416 9th Street, Room 1208, Sacramento. As of the publication date of this notice, the rulemaking file consists of this notice, the proposed text of the regulations, the Economic Impact Analysis, the Economic and Fiscal Impact Assessment (STD. Form 399) and the Initial Statement of Reasons. Please direct requests for copies of the rulemaking file to Helen Birss as indicated above.

AVAILABILITY OF CHANGED OR MODIFIED TEXT:

After holding the hearing and considering all timely and relevant comments received, the Department may adopt the proposed regulations substantially as described in this notice. If the Department makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Helen Birss as indicated above. The Department will accept written comments on any modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS:

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Helen Birss as indicated above.

AVAILABILITY OF DOCUMENTS ON THE INTERNET:

Website Access: The entire rulemaking file can be found at <http://www.dfg.ca.gov/suctiondredge/>