

**STATE OF CALIFORNIA
DEPARTMENT OF FISH AND WILDLIFE**

INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION

**Adopt Section 228, Subdivision (a),
Title 14, California Code of Regulations**

Re: Definition of Suction Dredging

I. Date of Initial Statement of Reasons: February 14, 2014

II. Dates and Locations of Scheduled Hearing:

(a) Public Hearing:

Date: April 1, 2014

Time: 3:30 – 5:00 p.m.

Location: Resources Building Auditorium

California Natural Resources Building

1416 9th Street

Sacramento, CA 95814

III. Description of Regulatory Action:

(a) State of Specific Purpose of Regulation Change and Factual Basis for Determining that the Regulatory Change is Reasonably Necessary:

The California Department of Fish and Wildlife (CDFW) proposes to adopt through regular noticed rulemaking the existing regulatory definition of “suction dredging” currently in effect. (Cal. Code Regs., tit. 14, § 228, subd. (a).) CDFW adopted the existing definition through an emergency rulemaking action with approval by the Office of Administrative Law (OAL) in June 2013. (Cal. Reg. Notice Register 2013, No. 28-Z, pp. 1034-1035; OAL File No. 2013-0618-02E.) In December 2013 CDFW readopted the emergency definition and, with approval by OAL, the existing regulation will remain in effect until March 27, 2014, unless extended for a final period not to exceed 90 days. (Cal. Reg. Notice Register 2014, No. 2-Z, pp. 60-61; OAL File No. 2013-12-16-01EE.)

CDFW exercises regulatory authority under the Fish and Game Code governing the use of any vacuum or suction dredge equipment in California rivers, streams, and lakes.

(Fish & G. Code, § 5653 et seq.; see also Cal. Code Regs., tit. 14, §§ 228, 228.5.) Absent a permit from CDFW, the use of any such equipment is prohibited in California. (Fish & G. Code, § 5653, subd. (a).) In addition, and notwithstanding CDFW's permitting authority, the use of any motorized vacuum or suction dredge equipment for instream mining is currently prohibited throughout California, as it has been by statute since August 2009. (*Id.*, § 5653.1, subd. (b).) CDFW is currently prohibited by the same authority from issuing any suction dredging permits. (*Id.*, subd. (a).)

In general, CDFW administers its suction dredge permitting authority by regulation as directed by the Fish and Game Code. (See generally Fish & G. Code, §§ 5653, subd. (b), 5653.9.) CDFW adopted updated regulations governing its permitting program in March 2012, the first comprehensive update since 1994. Those regulations, as approved by the Office of Administrative Law (OAL), took effect in April 2012. (Cal. Code Regs., tit. 14, §§ 228, 228.5; Cal. Reg. Notice Register 2012, No. 19-Z, p. 641; OAL File No. 2012-0316-06S.) CDFW's 2012 regulations are the subject of ongoing litigation pending in San Bernardino County. (*Suction Dredge Mining Cases*, Sup.Ct. San Bernardino County, Judicial Council Proceeding No. JCPDS4720.)

The 2012 regulations adopted by CDFW included an updated definition of suction dredging. (See former Cal. Code Regs., tit. 14, § 228, subd. (a)(1), effective April 27 - June 27, 2013.) However, in June 2013 CDFW amended that definition by emergency action under the Administrative Procedure Act (APA) in order to close a regulatory loophole. (Cal. Code Regs., tit. 14, § 228, subd. (a), effective June 28, 2013; Cal. Reg. Notice Register 2013, No. 28-Z, pp. 1034-1035.) CDFW amended the 2012 regulatory definition of suction dredging in response to evidence indicating that members of the mining community were modifying their equipment and instream practices based on the prior definition to evade CDFW's regulatory authority and the related state-wide moratorium prohibiting the use of any motorized vacuum or suction dredge equipment for instream mining purposes. (See OAL File No. 2013-0618-02E.) CDFW readopted its emergency definition of suction dredging effective December 28, 2013, with related approval by OAL. (Cal. Reg. Notice Register 2014, No. 2-Z, pp. 60-61; OAL File No. 2013-12-16-01EE.) CDFW's emergency definition of suction dredging found in Title 14, section 228, subdivision (a), of the California Code of Regulations is currently in effect.

CDFW is initiating this rulemaking action in order to adopt the existing emergency regulatory definition of suction dredging through regular noticed rulemaking. 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, § 11346.1, subds. (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. This regular noticed rulemaking action is necessary to ensure the regulatory “loophole” prompting prior emergency action by CDFW does not reopen.

(b) Proposed Regulation:

Section 228, Subdivision (a). This provision, currently in effect, sets forth CDFW’s definition of suction dredging for purposes of Sections 228 and 228.5, and Fish and Game Code section 5653. The existing definition provides that, for purposes of these sections, the use of any vacuum or suction dredge equipment (i.e., suction dredging) is defined as the use of a suction system to vacuum material from a river, stream or lake for the extraction of minerals. The definition also provides for purposes of the same sections, that the definition of suction dredging and CDFW’s related regulations do not apply to, prohibit or restrict nonmotorized recreational mining activities, including panning for gold. (Cal. Code Regs., tit. 14, § 228, subd. (a).)

(c) Authority and Reference:

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

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

(d) Specific Technology or Equipment Required by Regulatory Change: None.

(e) Identification of Reports or Documents Supporting Regulatory Change:

(1) Economic Impact Analysis:

Economic Impact Assessment, Amend Section 228 (a), Title 14 CCR;
Socioeconomic Report: Suction Dredge Permit Program Environmental
Impact Report, TCW Economics, Nov. 19, 2010.

(2) Related OAL Rulemaking Files:

OAL Rulemaking Files 2012-0316-06S, 2013-0618-02E, and 2013-12-16-01EE.

(3) CDFW Report to the Legislature:

California Department of Fish and Wildlife Report to the Legislature
Regarding Instream Suction Dredge Mining Under the Fish and Game
Code (April 1, 2013) (available at www.dfg.ca.gov/suctiondredge).

(4) Environmental Impact Analysis:

Suction Dredge Permitting Program Subsequent Environmental Impact Report (SCH No. 2009112005), as certified by CDFW on March 16, 2012 (available at www.dfg.ca.gov/suctiondredge).

(f) Public Discussions of Proposed Regulation at the Time of Intent to Publish:

CDFW scheduled no public meetings or hearings prior to the notice publication. The 45-day public comment period provided by the APA as part of the regular noticed rulemaking action provides adequate time for public review of the proposed adoption of existing Section 228, subdivision (a).

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Proposed Regulatory Action:

No alternatives were identified. The intent of the proposed adoption of existing Section 228, subdivision (a), is to ensure that a “loophole” prompting prior emergency regulatory action by CDFW remains closed. Doing that is consistent with controlling statute, including the prohibition on the use of any motorized vacuum or suction dredge equipment for instream mining purposes throughout California. (Fish & G. Code, §§ 5653, subd. (a), 5653.1, subd. (b).)

(b) No Change Alternative:

The no change alternative would result in the existing emergency regulatory definition of suction dredging expiring by law in March 2014, at the earliest, and no later than June 28, 2014. In so doing, members of the mining community will likely modify their equipment and instream mining practices to evade CDFW’s regulatory authority under Fish and Game Code section 5653 and the ongoing statutory moratorium prohibiting the use of any motorized vacuum or suction dredge equipment in California for instream mining practices. Absent the current moratorium and related regulation by CDFW, the California Legislature, CDFW and other state agencies, including the State Water Resources Control Board, have concluded that the use of motorized vacuum or suction dredge equipment for instream mining purposes results in various adverse environmental impacts to protected fish species, the water quality of this state, and the People of California.

(c) Consideration of Alternatives:

In light of the information currently possessed by CDFW, no reasonable alternative considered would be more effective in carrying out the purposes for which the adoption of the existing regulatory definition of suction dredging is proposed, or would be as effective as and less burdensome to affected private persons than the proposed regulation, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law

V. Duplication or Conflict with Federal Regulations

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

In making this initial determination CDFW highlights and is aware of ongoing related controversy. Certain stakeholders in the mining community contend CDFW and the State of California's regulatory authority governing the use of any vacuum or suction dredge equipment in California rivers, streams, or lakes generally is preempted by and, therefore, duplicative of, in conflict with, or that it otherwise compromises existing federal law or regulation. CDFW and the State of California disagree, however, and related litigation is pending. (*Suction Dredge Mining Cases*, Sup.Ct. San Bernardino County, Judicial Council Proceeding No. JCPDS4720; *People v. Rinehart*, C074662, app. pending; and *Suction Dredge Mining Cases*, E059864, app. pending.)

VI. Mitigation Measures Required by the Regulatory Action:

The proposed adoption of existing Section 228, subdivision (a), will have no negative impact on the environment; therefore, no mitigation measures are needed.

VII. Impact of the Change in Regulation:

The proposed adoption of existing Section 228, subdivision (a), is not expected to cause any impact whatsoever, particularly if the regulatory action as proposed is effective prior to the expiration by law of the existing emergency definition of suction dredging.

Considering the potential for significant statewide adverse economic impacts that might result from the proposed regulatory action, CDFW has made the following initial determinations relative to the required statutory categories set forth below.

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States.

CDFW expects no significant statewide adverse economic impact directly affecting businesses, including the ability of businesses in California to compete with businesses in other states as a result of the proposed regulatory action. The proposed regulatory action is limited to the adoption through regular noticed rulemaking of an existing emergency regulation in effect as previously adopted by the Department in June 2013, as recently readopted and extended in December 2013. Prior to late June 2013, a limited number of miners were found to be modifying their equipment and practices to evade the Department's regulatory authority, and the letter and spirit of the statutory moratorium codified in Fish and Game Code Sections 5653 and 5653.1, respectively. The economic contribution of the relatively few miners that sought to exploit an ambiguity in the adopted definition is not estimated to be sufficient to substantially change the volume of regional spending or the competitive conditions for business.

(b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Businesses, or the Expansion of Businesses in California; Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:

CDFW expects no impact on the creation or elimination of jobs within California, the creation of new businesses or the elimination of businesses, or the expansion of businesses in California as a result of the proposed regulatory action. The proposed regulatory action merely adopts the regulatory definition of suction dredging that has been in effect as an emergency regulation since June 2013. The economic impact of the limited amount of "loophole" mining that occurred prior to adoption of the emergency regulations is estimated to be insufficient in magnitude and duration to induce significant changes in total economic output.

Health and Welfare of California Residents:

CDFW expects the proposed regulatory action will benefit the health and welfare of California residents, consistent with legislative intent reflected by Fish and Game Code section 5653 and 5653.1. The unregulated use of motorized vacuum or suction dredge equipment for instream mining purposes is known to cause adverse effects to the health and welfare of California residents, including human health-related effects associated

with water quality and noise, and with respect to important Native American and other significant cultural resources.

Benefits to the Environment:

CDFW expects the proposed regulatory action will benefit the environment in California, consistent with legislative intent reflected by Fish and Game Code section 5653 and 5653.1. The unregulated use of motorized vacuum or suction dredge equipment for instream mining purposes is known to cause deleterious effects to fish and other adverse effects to other fish and wildlife generally, water quality, cultural resources, and noise-affected resources.

(c) Cost Impacts on Representative Private Persons or Businesses:

CDFW expects no significant cost impact to private persons or businesses that must comply with the proposed regulatory action. The proposed regulatory action merely adopts the regulatory definition of suction dredging that has been in effect as an emergency regulation since June 2013 and will impose no compliance costs.

(d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

There are no related costs or savings in Federal Funding to the State associated with the proposed regulatory action.

(e) Other Nondiscretionary Costs/Savings to Local Agencies: None.

(f) Programs Mandated on Local Agencies and School Districts: None.

(g) Costs Imposed on Any Local Agency or School District Required to Be Reimbursed under Part 7 (commencing with Section 17500 of the Government Code) of Division 4: None.

(h) Effect on Housing Costs: None.