



March 14, 2013

**STATEMENT REGARDING
INCORPORATION BY REFERENCE OF THE RULEMAKING RECORDS
FOR THE INITIAL AND FIRST READOPTION OF THE EMERGENCY REGULATORY
ACTION AND PENDING REGULAR NOTICED RULEMAKING**

(Cal. Code Regs., tit. 1, § 52, subds. (b)(1), (c))

**Subject: Second Readoption of Emergency Regulatory Definition of Suction
Dredging**

(Cal. Code Regs., tit. 14, § 228, subd. (a))

The California Department of Fish and Wildlife (CDFW) has prepared this statement to address two issues related to its second readoption of the now in-effect regulatory definition of suction dredging. That initial definition initially became effective as an emergency action on June 28, 2013 (Cal. Reg. Notice Register 2013, No. 28-Z, pp. 1034-1035) and was first readopted effective December 26, 2013 (Cal. Reg. Notice Register 2014, No. 2-Z, p. 65.)

As to the first issue, in requesting related approval from the Office of Administrative Law (OAL), CDFW hereby incorporates by reference the rulemaking records for the initial emergency action (OAL File No. 2013-0618-02E) and for the first readoption (OAL File No. 2013-1216-01 EE) in their entirety. In so doing, CDFW has not provided a new "Form 399," and incorporates by reference and resubmits the same form previously signed, as appropriate, and submitted to OAL in June 2013.

As to the second issue, regulations implementing the Administrative Procedure Act (APA) direct CDFW to describe its progress and diligence to comply with Government Code section 11346.1, subdivision (e). (Cal. Code Regs., tit. 1, § 52, subd. (b)(1).) This statutory provision provides that no regulatory amendment initially adopted as an emergency under the APA shall remain in effect for more than 180 days unless the adopting agency completed regular noticed rulemaking on or before the expiration of that period. OAL may approve not more than two readoptions of the same amendment, however, each for a period not to exceed 90 days, if the agency has made substantial progress and proceeded with diligence with respect to regular noticed rulemaking during the 180-day period. (Gov. Code, § 11346.1, subd. (h).) As set forth below, CDFW has proceeded reasonably over the years and with diligence in exercising its suction dredge rulemaking authority under the Fish and Game Code, and OAL should approve the second of two 90-day extensions of the emergency regulatory amendment at issue here as authorized by the APA.

CDFW's diligence and substantial compliance regarding regular noticed rulemaking, including the timing to initiate formal public notice for that action, should be considered against the backdrop of the considerable, ongoing public controversy surrounding suction dredging. The use of any vacuum or suction dredge equipment for instream mining purposes is prohibited by statute throughout California, as it has been since August 2009. (Fish & G. Code, § 5653.1, subd. (b).) As explained in its June 7, 2013 Statement of Emergency for the initial regulatory action (incorporated here by reference), CDFW amended its prior definition of suction dredging at that time to close a "loophole" being exploited by certain members of the mining community to avoid the letter and spirit of the statutory moratorium and, importantly, related regulation under Fish and Game Code section 5653. Likewise as explained in CDFW's December 9, 2013 Updated Statement of Emergency submitted to OAL, the emergency prompting the need for initial action in June 2013 persisted; indeed, it had expanded in significance and duration beyond what CDFW reasonably expected nearly six months before. In short, CDFW requested the first 90-day extension to ensure the "loophole" at issue did not reopen on December 27, 2013, and to maintain the status quo anticipating the Department's initiation of regular rulemaking on February 14, 2014.

In addition, CDFW explained in June 2013 that one of the factors relevant to emergency action at that time was the prospect of substantive action by the judiciary in related pending litigation or action by the California Legislature during the first half of the 2013/2014 legislative session. As to the litigation, eight civil actions, not seven as was the case in June 2013, are currently coordinated by order of the Judicial Council of California in San Bernardino County Superior Court. Two related appeals are also pending in the Third and Fourth Appellate Districts, respectively. However, no substantive rulings relevant to CDFW's rulemaking authority specifically are expected until mid-2014, at the earliest.¹

As to legislative action, in June 2013 CDFW explained it had just submitted a detailed report required by statute to the Legislature, underscoring the need for comprehensive reform of the suction dredging regulatory framework in California.² (See Fish & G. Code, § 5653.1, subd. (c).) The first half of the current legislative session ended without related action. To date, there has been no suction dredge related activity in the second

¹ See *Suction Dredge Mining Cases*, Sup.Ct. San Bernardino County, Judicial Council Proceeding No. JCPRS4720; *People v. Rinehart*, C074662, app. pending; and *Suction Dredge Mining Cases*, E059864, app. pending. With the eight civil actions coordinated as the *Suction Dredge Mining Cases* in San Bernardino, CDFW has been named in fifteen different lawsuits involving suction dredging since May 2005.

² CDFW's "SB 1018 Report" submitted to the Legislature in April 2013 and incorporated by reference in the rulemaking file for the initial emergency action in June 2013 is also available online at the following web link: www.dfg.ca.gov/suctiondredge (last visited March 14, 2014).

half of the legislative session. In contrast to June 2013, CDFW currently has no indication that the Legislature will take action related to suction dredging during the remainder of the 2013/2014 legislative session.

In sum, in June 2013 and during the intervening months CDFW reasonably expected that the Legislature or judiciary would issue an opinion that would obviate the need for CDFW to readopt the emergency definition of suction dredging. In June 2013 CDFW also reasonably expected that legislative or judicial action would clarify some of the important issues relevant to a related rulemaking, including the substantive scope of CDFW's legal authority under Fish and Game Code section 5653 and the authority of the State of California to regulate the activity generally where federal mining interests are implicated. Although substantive legislative or judicial action has not yet occurred, those processes' schedules have evolved to be more congruent with initiation of regular rulemaking.

Accordingly, on February 14, 2014, CDFW initiated regular noticed rulemaking to make permanent the now in-effect and recently readopted regulatory definition of suction dredging. A public hearing will be held on April 1, 2014.

Against this backdrop, CDFW believes it has acted reasonably, proceeded with diligence and made substantial progress with respect to its emergency regulatory action and related, regular noticed rulemaking. In so doing, CDFW respectfully requests that OAL approve the request for a second readoption of the existing regulatory definition, extending the deadline for CDFW. Doing so in light of the now-expanded emergency will prevent the "loophole" that prompted emergency action as an initial matter from reopening and provide CDFW time to complete the pending related, regular noticed rulemaking.

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If you have any questions regarding this statement or the emergency 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 suctiondredge@wildlife.ca.gov.