

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

**INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION  
(Pre-publication of Notice Statement)**

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

**Re: Definition of Suction Dredging**

I. Date of Initial Statement of Reasons: April 15, 2014

II. Dates and Locations of Scheduled Hearing:

No public hearing has been scheduled at this time. The Department will hold a public hearing if a written request is received by the CDFW no later than 15 days prior to the close of the written comment period.

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, OAL approved CDFW’s first request to readopt the emergency definition (Cal. Reg. Notice Register 2014, No. 2-Z, pp. 60-61; OAL File No. 2013-12-16-01 EE). On March 24, 2014, OAL approved the second and final request for readoption and the existing regulation will remain in effect until June 26, 2014 (Cal. Reg. Notice Register 2014, No. 14-Z, pp. 639-640; OAL File No. 2014-0314-01 EE).

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. 2013-0618-02 E.) 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. 2013-12-16-01 EE.) 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 as an emergency regulation, sets forth CDFW’s definition of suction dredging for purposes of Sections 228 and 228.5, and Fish and Game Code section 5653. The proposed 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).)

The Department has determined that the following specific amendments to Section 228, subdivision (a), are necessary to ensure consistency with controlling statute. The specific amendments are also necessary to close a loophole that some members of the mining community previously exploited with the prior regulatory definition of suction dredging to avoid related permitting authority by the Department, and to evade the letter and spirit of the statutory moratorium prohibiting the use of any motorized vacuum or suction dredge equipment for instream mining purposes throughout California. (See generally Fish & G. Code, § 5653.1, subd. (b).)

The Department proposes to add the word “any” to the description of vacuum or suction dredge equipment in Section 228, subdivision (a), to ensure consistency with Fish and Game Code section 5653, subdivision (a), which provides specifically that “the use of *any* vacuum or suction dredge equipment” is prohibited, except as authorized under a permit issued by the Department. (Italics added for emphasis.) The statutory moratorium also speaks in terms of the use of “any” such equipment. (Fish & G. Code, § 5653.1, subd. (b).)

Likewise, the Department is proposing to add the language indicating specifically that the proposed regulatory definition of suction dredging does “not apply to, prohibit or restrict nonmotorized recreational mining activities, including panning for gold.” This language appears verbatim in Fish and Game Code section 5653.1, subdivision (e). Signed into law by Governor Schwarzenegger as an urgency measure in August 2009, the language is part of and otherwise defines, in part, the scope of the ongoing moratorium prohibiting the use of any vacuum or suction dredge equipment throughout

California. (See Stats. 2009, ch. 62, § 1, adding former Fish & G. Code, § 5653.1.) With the same section of the Fish and Game Code also prohibiting the issuance of any related permits, the statutory language regarding “nonmotorized recreational mining” informs the scope of the Department’s regulatory authority under Fish and Game Code section 5653, which the proposed regulations implement. (See Fish & G. Code, §§ 5653, 5653.9.) Accordingly, the Department is proposing the language regarding “nonmotorized recreational mining” as part of the regulatory definition of suction dredging to ensure consistency with controlling statute.

The Department is proposing to delete text in Section 228, subdivision (a), for similar reasons. In short, the text the Department proposes to delete is more narrow and therefore inconsistent with broader, controlling statute. Again, Fish and Game Code section 5653, subdivision (a), speaks in terms of the “use of any vacuum or suction dredge equipment in any river, stream, or lake of this state[.]” (See also Fish & G. Code, § 5653.1, subd. (b).) The Department is proposing to strike text in Section 228, subdivision (a), as a result, that defines suction dredging more narrowly using the terms “motorized”; “from the bottom of” a river, stream or lake; and with respect to “return[ing] all or some portion of that material to the same river, stream or lake[.]” These changes improve consistency with Fish and Game Code section 5653. The changes are also necessary to ensure that a more narrow, equipment-focused regulatory definition of suction dredging does not drive equipment modifications and instream mining practices to evade Department regulation, and the letter and spirit of the statutory moratorium.

For similar reasons, the Department proposes to delete the provisions of existing Section 228, subdivision (a) (1), which currently provide that a person is suction dredging as defined only when all of the following components are operating together: (A) a hose which vacuums sediment from a river, stream or lake; (B) a motorized pump; and (C) a sluice box. Again, Fish and Game Code section 5653 speaks in terms of the “use of any vacuum or suction dredge equipment,” as opposed to the more narrow language the Department proposes to delete. Doing so, as proposed, is necessary to ensure the Department’s regulatory definition of suction dredging is consistent with controlling statute.

In addition, minor editorial corrections are proposed to identify individual sections for the reference citation.

(c) Authority and Reference:

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

Reference: Sections 5653, 5653.1, 5653.3, 5653.5, 5653.7, 5653.8, 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, 2013-12-16-  
01 EE, and 2014-0314-01 EE.

(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](http://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](http://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 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.

## 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.<sup>1</sup>

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

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<sup>1</sup> All unspecified "section" references are to the Fish and Game Code.

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 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.