



May 10, 2011

Mark Stopher
Environmental Program Manager
California Department of Fish and Game
601 Locust Street
Redding, CA 96001

Re: California Trout, Trout Unlimited, and the Northern California Council of Federation of Fly Fishers Comments on Draft SEIR Suction Dredge Permitting Program

Dear Mr. Stopher:

California Trout (CalTrout), Trout Unlimited (TU) and the Northern California Council of Federation of Fly Fishers (NCCFF) provide the following comments on the Department of Fish and Game's Draft Subsequent Environmental Impact Report (DSEIR).

We appreciate the Department of Fish and Game's (Department or CDFG) effort to comply with Senate Bill 670 and update suction dredge regulations. However, we believe the DSEIR falls short in providing the necessary protections for California waters and will hasten the decline of already tenuous trout, steelhead and salmon populations. The DSEIR identifies a number of significant and unmitigated environmental impacts that must be addressed. Further, the suction dredge program fee structure is not self-sustaining. The result has been—and will continue to be according to the DSEIR—that California's anglers and the general public subsidize a program that is damaging to our waterways, fish, and the health of our rivers.

Senate Bill (SB) 670 was signed into law in 2009 and imposed an immediate moratorium on suction dredge mining until the Department of Fish and Game completed a court ordered environmental review. For our organizations, we would like to express two core principles as you continue the review process: **For the moratorium to be lifted:**

(1) Existing regulations and any new regulations must fully mitigate all identified significant environmental impacts; and,

2) A fee structure must be developed that fully covers the costs of the suction dredge program.

BACKGROUND

CalTrout, TU, and NCCFFF members use and enjoy the rivers of California. Together our groups represent anglers and their pursuit of fishing for California's diverse trout, steelhead and salmon. Angling stimulates local economies and is an important driver of local economies in many rural areas.

California Trout's mission is to protect and restore wild trout, steelhead and salmon and their waters throughout California. California Trout is supported by approximately 7,500 members and approximately 60 affiliate organizations representing approximately another 10,000 members. California Trout is headquartered in San Francisco and operates 5 field offices throughout the state.

Trout Unlimited (TU) is the nation's oldest and largest coldwater fisheries conservation organization. TU is a non-profit corporation organized under the laws of the state of Michigan. Its national office is in Arlington, Virginia, and it maintains California offices in Berkeley, Salinas, Fort Bragg, and Truckee, California. TU has more than 140,000 members nationwide, and is dedicated to protecting, conserving, and restoring North America's trout and salmon resources. In California alone, TU has more than 10,000 members.

The Northern California Council, Federation of Fly Fishers represents fly fishers from Fresno north to the Oregon Border, and northern Nevada. We have 32 member fly fishing clubs, with a membership of over 7,000. The NCCFFF is focused on promoting the sport of fly fishing through education and conservation of our California fisheries and their habitats. Of primary importance is protecting and enhancing our fisheries for future generations to enjoy.

The current state of California's trout, steelhead and salmon is bad and worsening. Suction dredge mining impacts only exacerbate that declining trend, and those impacts must be considered in the context of the current status of our state's fisheries. The diversity of salmonids (trout, steelhead, and salmon) in California is truly remarkable. Our state is the southern end of the range of all anadromous (ocean-going) trout and salmon species. It is also home to many distinctive inland forms of these fish, such as three golden trout subspecies of the southern Sierra Nevada. California's dynamic and varied geology, climate, and size, as well as proximity to the nutrient-rich California current just offshore, all contribute to this amazing diversity of coldwater fish.

The sobering fact is, if present trends continue, 65% of California's salmonids will be gone within the next 100 years, and maybe sooner. There are 13 different kinds of steelhead and salmon in California that may be gone by the year 2100.¹ Coho salmon and southern steelhead

¹ SOS Report: California's Native Fish Crisis *SOS: California's Native Fish Report* by Dr. Peter Moyle, Dr. Josh Isreal, and Sabra Purdy, UC Davis Watershed Center. Report Commissioned by California Trout. 2008. Available at www.caltrout.org

are the most at-risk, where returning adult numbers in some watersheds are in the single digits. Seven of California's nine resident trout species are in trouble, mostly because they are endemic to a few streams in small isolated areas, where they are vulnerable to hybridization with introduced species as well as to impacts from grazing, old logging roads, and other factors.

The "fish don't lie." And, what they tell us is that they are not doing well. In his expert report on suction dredging, Dr. Peter Moyle states "in my professional opinion, suction dredging should only be allowed in areas where it can be demonstrated there will no immediate or cumulative impact on the anadromous fishes. It should be assumed there is harm, unless it can be proven otherwise."²

Below we highlight specific comments on the DSEIR. We also incorporate by reference the comprehensive comments submitted by the Karuk tribe and the Foothill Anglers Coalition.

SPECIFIC COMMENTS

Comment 1: The issuance of suction dredge permits must be considered on a stream-by-stream *and* a permit-by-permit basis.

The DSEIR assumes a statewide approach to the issuance of suction dredge permits. This approach does not take into account the many site specific and stream specific variables to adequately determine impacts of the action (*see e.g.*, comment 3 regarding the McCloud River). We believe the issuance of 1600 streambank alteration permits is a better model, where each permit is subject to CEQA with site specific, negotiated terms and conditions.

We concur with the Karuk Tribe and others that compliance with Fish and Game Code §§ 5653, 5653.9 as well as the California Environmental Quality Act (CEQA) require: (1) the adoption of regulations that comply with CEQA and (2) a determination upon the issuance of each permit that the permitted activity will not cause deleterious impacts to fish. In addition, the Department's regulations must clearly state that the Department has the right to revoke, suspend, or refuse to renew a permit should it discover evidence showing that deleterious impacts are occurring, or will occur to fish.

Comment 2: Proper definition of *deleterious effects*

The definition of '*deleterious effects*' is of critical importance in this review because Fish & Game Code Section 5653 provides that "If the department determines, pursuant to the regulations adopted pursuant to Section 5653.9, that the operation will not be deleterious to fish, it shall issue a permit to the applicant." Suction dredge mining has deleterious effects on trout, steelhead and salmon according to declarations by Department officials Banky Curtis and Neil

² Peter Moyle, Expert Report before Superior Court of California, Alameda County, RG0521197.

Manji filed in connection with the 2005 lawsuit filed by the Karuk Indian tribe³. In the declaration filed by (at the time) DFG Deputy Director Banky Curtis:

*“The Department believes suction dredge mining under the existing regulations in the Klamath, Scott and Salmon River watersheds is resulting in deleterious impacts on coho salmon (*Oncorhynchus kisutch*), a species currently protected by the California Endangered Species Act (“CESA”) (Fish & G. code, Sec. 2050 et seq.). Because of this, the Department also believes its current suction dredge permitting program is not in compliance with California Fish and Game Code section 5653, subdivision (b), and section 5653.9.”*

In the accompanying October 2, 2006 declaration filed by Neil Manji, then the Fisheries Branch Chief for DFG, Mr. Manji stated:

“...based on a review of the scientific literature, data available to the Department, and my experience as a fishery biologist, it is my professional opinion, as the Fisheries Branch Chief for the Department that suction dredge mining under the existing regulations in the Klamath, Scott and Salmon River watersheds is having deleterious effects on coho salmon, a species currently protected by the California Endangered Species Act.”

The Department’s prior and irrefutable recognition of deleterious effects underscores the importance of properly defining the term now.

Generally, CDFG concludes in the DSEIR that an effect which is deleterious to Fish, for purposes of section 5653, is one which manifests at the community or population level and persists for longer than one reproductive or migration cycle. This approach is inconsistent with the legislative history of section 5653. The history establishes that, in enacting section 5653, the Legislature was focused principally on protecting specific fish species from suction dredging during particularly vulnerable times of those species’ spawning life cycle. The Department’s proposed approach in the DSEIR conflates impacts up to the population level, which would “under-protect” fish by casting the impact net at the population level.

We believe this definition of ‘deleterious’ is inconsistent with how it has been applied historically to section 5653. Fortunately, the Friends of the North Fork documented the legislative history of section 5653 and specifically how ‘deleterious effects’ was interpreted. We summarize below.

- In 1961, “deleterious to fish” found its way into the first California statute regulating suction dredge mining, Fish and Game Code Section 5653, in Assembly Bill 1459 (Arnold). In his letter to the governor requesting a signature on the bill, Assemblyman Arnold used terms like “damage” and “disturb”. He said dredging should be done so as not to cause anything other than “minimal damage” to fish, from which he specifically

³ Karuk Tribe of California, et.al. v. Department of Fish and Game, Superior Court Ct. Alameda County Case No. RG 05 211597.

excluded disturbing eggs, disturbing fish food organisms and stirring up silt to cause an “aesthetic problem” and cover eggs.

- The intent was clear. Any “damage” from dredging activities must be “minimal.” Clearly, the author’s view was that disturbing eggs, disturbing fish food organisms and stirring up silt to cause an "aesthetic problem" and cover eggs is more than minimal, and thus is “deleterious” to fish.
- In an analysis of AB 1459 provided to members of the Legislature in 1961, the Legislative Analyst’s Office said that, under the bill, “the department must then determine whether the operation will be safe for fish life and if so it will issue a permit to the applicant.” So, in that view of the intent of “not deleterious to fish,” legislators were informed that it meant the activity is “safe for fish life.”
- In a letter to the Governor requesting his signature on AB 1459, the Department of Fish and Game said, “The department shall issue a permit if it is judged that no damage will occur to fish, aquatic life, and the aquatic environment.” So in information on which the Governor based his decision to sign AB 1459 into law, “not deleterious to fish” meant “no damage” to “fish, aquatic life and the aquatic environment.”
- In the handful of bills since 1961 affecting this section, no legislation has ever used a term other than “deleterious to fish” nor offered any other interpretation of its meaning. Thus, we are left with the actual history which assigns “minimal” or “no” damage to fish as the criteria for determinations as to whether there is a “deleterious” effect.

The above accounts clearly indicate the Department’s interpretation of the meaning of ‘deleterious’ in the DSEIR is unsupported. We concur with Karuk et al. that the following language be included in the Fish and Game Code:

A vacuum or suction dredge operation and activities associated with its operation are deleterious to fish, mollusks, crustaceans, invertebrates, or amphibians if either (1) it deposits, alters, scours or re-suspends any substance or material in the river, stream or lake that has a harmful effect on any life stage of “fish” or (2) alters the behavior of “fish” so as to have a harmful effect or (3) results in the modification or alteration of instream or riparian habitats in a way that has a harmful effect on the ability of “fish” to successfully feed, reproduce or evade predators.

Comment 3: All Department of Fish and Game designated Heritage Wild Trout Waters should be closed to suction dredging.

The California Fish and Game Commission (Commission) established the Trout and Steelhead Conservation Management Act in 1977 thereby codifying into law the Wild Trout Program. In doing so, the Commission essentially recognized the importance of high quality habitat for the maintenance of wild trout populations. the Policy states: “All necessary actions, consistent with state law, shall be taken to prevent adverse impact by land or water development projects affecting designated Wild Trout Waters.”

There are over 40 designated Heritage and Wild Trout waters, representing the most pristine and popular trout and steelhead angling destinations in the state. There is absolutely no question that this state's anglers love and care deeply about the future of these designated waters. We highlight the need to close all Heritage and Wild Trout waters by making the case for one—the McCloud River.

The entire McCloud River watershed should be closed to suction dredge mining. We base this recommendation on 1) the protection afforded by the Public Resources Code for the McCloud as a state Wild and Scenic River, 2) the designation by the Fish and Game Commission of the McCloud River as a Wild Trout Water, 3) the status of the river as one of the state's most popular angling destinations, 4) the presence of rare McCloud River redband trout, a state Species of Special Concern, and 5) the identification of the McCloud River by the National Marine Fisheries Service (NMFS) for the reintroduction of winter-run Chinook and spring-run Chinook salmon, both federally-designated endangered species.

The McCloud River has protection equal to state Wild and Scenic River status through Public Resources Code Section 5093.5-5093.70. This protection directs '[a]ll state agencies exercising power under any other provision of law with respect to the protection and restoration of fishery resources shall continue to exercise those power in a manner to protect and enhance the fishery....[.] Suction dredge mining activities would clearly conflict with the state legislature's statement that the 'continued management of river resources in their existing natural condition represents the best way to protect the unique fishery of the McCloud River.'⁴

The DSEIR recommends closing the McCloud River from the southern boundary of section 36, T38N, R3W (the bottom of The Nature Conservancy Property) upstream to McCloud Dam. We strongly support this closure. This section of the river is a designated Wild Trout water by the Department of Fish and Game and is one of the most popular fly fishing destinations in California. Incorrectly, the reason stated in the DSEIR for closing this section of the McCloud River is the protection of redband trout, yet McCloud redband trout only occur in tributaries to the Upper McCloud River above McCloud Reservoir. Redband trout are a California Species of Special Concern. To adequately protect the redband trout, suction dredge mining should be banned in the entire upper watershed of the McCloud River above McCloud Reservoir. We embrace the logic in the DSEIR of protecting red band; however, we propose applying that logic to the facts and extending the ban to the entire upper watershed.

Moreover, in June 2009, NMFS issued a final biological opinion on the Bureau of Reclamation's operations of Shasta Dam. As a result, NMFS issued a Reasonable and Prudent Alternative (RPA) requiring the Bureau to pass listed winter-run Chinook salmon, spring-run Chinook salmon and steelhead above Shasta Dam. The McCloud River and the Upper Sacramento River are the two rivers targeted for reintroduction above Shasta Dam. The Department should close

⁴ Wild and Scenic River Chapter, Public Resources Code, Sections 5093.50-5093.70.

both of these waters to suction dredge mining to limit potential impacts to these endangered species given the potential event of reintroduction, which, if it occurs, would undoubtedly force the cessation of dredge mining anyway.

As the McCloud River focus indicates, California's Heritage and Wild Trout waters are recognized as important areas for the preservation of clean, cold water and the fish indicator species that they harbor. The importance and value of the 39 other designated waters in addition to the McCloud establishes sufficient grounds for the Department to ban suction dredge mining from them.

Comment 4: User fees do not cover the costs of the Departments suction dredge permitting program.

California's budget crisis could not be more severe. State agencies are searching for ways to cut programs and save costs. The suction dredge mining permitting program is subsidized by the California taxpayers due to the costs of running the program outweighing the revenue generated by fees. Legislative analysis of SB 670 in 2009 highlight the funding discrepancy; the suction dredge permit program costs DFG about \$1.3 million to operate compared to annual estimates of \$375,000 of revenue. We do not see how the program is budgetarily justifiable given the declining status of trout, steelhead and salmon, their importance culturally and economically, and the current fiscal crisis of California.

DFG has acknowledged in previous years that the current fees for suction dredge mining permits are inadequate to cover the full costs of the program. Under the new proposed regulations these shortfalls would continue at an estimated \$1.5 million per year. In the past, some or all of these subsidies have come from the Fish and Game Preservation Fund—a budget that is primarily built by fishing and hunting license sales. This money should be used to protect and restore economically valuable fisheries, not subsidize their destruction. The checkbooks and bank accounts of this state's hunters and anglers should not be used to underwrite a program that harms the very species we pay licenses to fish.

The moratorium on suction dredge mining as mandated by SB 670 must not be lifted until the Department can develop a fee structure that will fully cover all program costs.

Comment 5: Suction dredge mining should be closed in streams that meet one of the following criteria:

1. All river segments with historical gold mining activities in which mercury was utilized;
2. River segments listed as impaired under 303(d) of the Clean Water Act due to turbidity, water temperature, sediment, or mercury;
3. All river or stream segments designated as components of the National Wild and Scenic Rivers System or deemed eligible for protection by federal agencies. Federal rivers are to

be managed to protect their specific outstandingly remarkable scenic, recreation, historical/cultural, fish/wildlife, ecological, geological, and other values. In addition, water quality on federally protected rivers must meet or exceed federal criteria or federally approved state standards for aesthetics, fish and wildlife propagation, and primary contact recreation⁵

4. All rivers protected pursuant to provisions of the California Wild and Scenic Rivers Act (Chapter 1.4 (commencing with Section 5093.50) of Division 5 of the Public Resources Code). DFG has a responsibility in its permitting process to protect the free flowing character and extraordinary values of state designated rivers;⁶
5. All river or stream segments designated by the Fish and Game Commission as Wild Trout Waters or Heritage Trout Waters, or deemed suitable for designation pursuant to Section 1727 of the Fish and Game Code;
6. All river segments that provide critical, potential, and historical habitat for federally or state listed threatened species or endangered species, "Special Animals" (e.g. species at risk, special status species, species of special concern) and candidate/proposed species);
7. Rivers in Key Watersheds as identified by the Northwest Forest Plan;
8. All stretches of rivers in which miners' off-river activities (hauling supplies, camping, taking dredges on or off river, refueling, emptying sluices, sorting concentrates, etc.) will likely cause negative impacts to the immediate environment because it results in activities such as trampling of sensitive or culturally significant plants, impacts to cultural resources; fuel spillages, or handling of hazardous materials.

Comment 6: Mercury

We refer you to the comments on mercury in the Karuk, et al. comments, Comment # 6. We fully support this comment and its associated recommendations.

We also refer you to the Foothills Anglers Coalition comments, pages 17-18 in which they reference to SDEIR, p4.2-14, LL31-32, describing the pathway of methylmercury into wildlife and human consumption of Hg contaminated fish. Hence, any action, like suction dredging, that increases the exposure and intake of methyl-mercury in fish species should not be allowed.

CONCLUSION

CalTrout, TU and FFF appreciate the Department's efforts to address the mandates of SB 670. At this time, however, we believe the proposed regulation changes in the DSEIR fall short of fully mitigating for the impacts of suction dredge mining on California's trout, steelhead and

⁵ Public Resources Code, Chapter 1.4 (commencing with Section 5093.50) of Division 5.

⁶ Public Resources Code Section 5093.61.

salmon. Sadly, in fact, in many regards, these proposed regulations – in 2011 – are worse for fish than the 1994 regulations on suction dredge mining. Further, we believe a fee structure must be implemented that fully covers the costs of the program. California’s anglers, hunters and taxpayers should not be required to subsidize the suction dredge program.

Sincerely,



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