



DEPARTMENT OF FISH AND GAME

<http://www.dfg.ca.gov>

1416 9th Street
Sacramento, CA 95814



January 26, 2009

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California Trout
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San Francisco, CA 94102

Michael Garabedian, President
Friends of the North Fork
7143 Gardenvine Avenue
Citrus Heights, CA 95621

Leaf Hillman, Vice Chair
Karuk Tribe of California
64236 Second Avenue
PO Box 1016
Happy Camp, CA 96039

Elizabeth Marin, Chief Executive Officer
The Sierra Fund
432 Broad Street
Nevada City, CA 95959

Re: Petition for Emergency Rulemaking

Dear Messrs. Feierabend, Garabedian, and Hillman and Ms. Marin:

On January 8, 2009, the Department of Fish and Game ("Department") acknowledged receipt by letter of the above-referenced petition, stating it would inform you in writing of its determination concerning the petition no later than January 26, 2009.

The Department shares your concern about the fish species that are the subject of the petition. However, for the reasons explained below, the Department must respectfully **deny the petition because there is not substantial evidence to support a finding** that an emergency exists as a matter of law. Although emergency action is not supported, please know that the Department is working on many fronts to recover and protect coho salmon and other salmonids, native trout, and other aquatic resources throughout the state. With respect to suction dredging, the Department is in the process of hiring a consultant to conduct an environmental review of the existing suction dredge mining regulations. Based on that review, the Department will propose amendments, as appropriate, to the regulations through the normal rulemaking process to ensure that suction dredge mining is not deleterious to fish.

The Department's determination is driven by the legal requirements of the Administrative Procedure Act ("APA") (Gov. Code, § 11340 et seq.). Under the APA, for an emergency regulation to be approved, the adopting agency must make a finding that an emergency exists. "'Emergency' means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (Gov. Code, § 11342.545.) To make a finding

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of emergency, the agency must describe the specific facts supported by substantial evidence that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation. A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, is not adequate to demonstrate the existence of an emergency. (*Id.*, § 11346.1, subd. (b)(2).)

As the petition explains, the emergency rulemaking it proposes “. . . would establish interim measures to minimize and mitigate the impact of suction dredging operations on coho salmon, green sturgeon, and lamprey within segments of the Klamath, Scott, and Salmon rivers, plus enumerated tributaries, specifically to avoid and minimize the potential for such operations that will or may cause ‘take’ of these species[,] . . . and also facilitate and promote the recovery of coho salmon.” (Petition at p. 1.) The petition explains further that the emergency rulemaking is necessary to protect “self-supporting populations of native trout [in segments of five streams along the western slope of the Sierra Nevada] from the adverse environmental effects of [suction dredge mining].” (*Ibid* at p. 2.)

As required by law, the Department reviewed the petition and supporting exhibits to assess the evidence regarding what is asserted to be an emergency as defined by the APA. Generally speaking, the petition is based on the argument that coho salmon are in decline, suction dredge mining is having a deleterious effect on coho salmon and native trout (the petition does not include any information on green sturgeon or lamprey), and, as a result, the Department must take immediate action to prohibit suction dredge mining in certain river segments to protect those species.¹

The Department continues to believe, as documented in the cited Department declarations by Banky Curtis and Neil Manji, that suction dredging is having deleterious effects on fish, including coho salmon. To say that deleterious effects will occur in the interim during the required environmental review is not the same thing as concluding that these effects constitute an emergency under the APA that requires immediate action prior to the completion of the court-ordered environmental review. Furthermore, coho salmon are state listed as threatened and endangered. As such, they receive the protections afforded by the California Endangered Species Act (CESA).

However, even if we were to assume that the situation the petition describes (e.g., the “adverse environmental effects of . . . instream mining activities on native trout” (Petition at p. 2) or the “dramatic and recent decline” in coho salmon populations (*ID.* at p. 3)) constitutes an emergency generally, the petition does not provide and the Department does not have, substantial evidence that the proposed immediate restrictions on suction dredge mining would actually address what is claimed to be an emergency.

¹By way of correction, the Department notes that two of the exhibits submitted do not support the petition. Specifically, the petition states there has been a “dramatic and recent decline” in coho salmon populations, and such a decline “constitutes an emergency situation.” (Petition at p. 3.) As evidence of the decline, the petition paraphrases the authors’ conclusion in Exhibit B that “. . . (the coho) is currently in danger of extinction.” (Petition at p. 3.) However, that conclusion pertains to coho salmon in the Central California Coast Evolutionarily Significant Unit (“CCC ESU”). CCC ESU coho salmon do not occupy the river segments to which the petition applies. As a result, the proposed restrictions on suction dredge mining would have no effect on those coho salmon. Similarly, in Exhibit E, Governor Schwarzenegger directed the Department to “address the long-term restoration and management” not of coho salmon or salmon in general, but instead, specifically, “the Sacramento River Fall Run Chinook Salmon.”

As to coho salmon, the information in the petition and exhibits indicates that the proposed restrictions would do nothing to address ocean conditions, "suspected as a main causative agent" of the recent (2007/08) decline in coho salmon returns (Petition, Exhibit A), or that the restrictions should be adopted immediately, without public participation, to address what the petition asserts is an emergency. Similarly, the conclusion that "'65 percent of our state's native salmonid species will be extinct *within the next 100 years* if present trends continue[.]" and that suction dredge mining is one among at least nine (unweighted) major factors (Petition at p. 4, citing Exhibit D (emphasis added)) does not support the petition's underlying argument that the proposed restrictions must be adopted immediately to avoid the extinction of those species.

As to native trout, the petition includes Exhibit C, a biological and aquatic resources assessment the Department completed in 1998, to support the proposed interim restrictions on suction dredge mining in segments of five streams along the western slope of the Sierra Nevada. The petition states, "[i]n that study, the Department concluded that suction dredging in Brushy Creek and the North Fork American River is having adverse environmental consequences and deleterious effects on fish." That statement does not accurately represent the Department's conclusion in the study. The Department noted that the "high banking" and "pot holes" the Department observed along the right bank of the North Fork American River could have an adverse effect on "juvenile fish," but its principal concern was the effects of suction dredge mining on foothill yellow-legged frogs. In regard to those effects, the Department notes that its existing suction dredge regulations prohibit suction dredging into the bank of a river. (See Cal. Code Regs., tit 14, § 228, subd. (f)(2).) As a result, promulgating the emergency regulations as proposed by the petition is not necessary to immediately prevent such impacts from occurring. Further, as noted in the study, the Department's related recommendation to modify the existing suction dredge regulations represented a "cautious approach" to protect foothill yellow-legged frogs, rather than the native trout that are the subject of the petition. Finally, unlike the petition, the Department's recommendation in the study did not call for a complete closure of the North Fork American River to suction dredge mining, but rather a modification of the existing (year-round) season. This recommendation will be considered in the environmental review that is currently underway.

Given the foregoing, the Department must deny the petition because there is no substantial evidence to support a finding of emergency under the APA, including the need to immediately adopt the petition's proposed restrictions on suction dredge mining.

If you have any questions regarding this matter, please contact Mark Stopher, Environmental Program Manager, at (530) 225-2275.

Sincerely,



Donald Koch
Director