



RON CHAPMAN, MD, MPH  
Director & State Health Officer

State of California—Health and Human Services Agency  
California Department of Public Health



EDMUND G. BROWN JR.  
Governor

MAR 20 2013

Mr. Charlton H. Bonham, Director  
Department of Fish and Wildlife  
1416 Ninth Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814

Dear Mr. Bonham:

Thank you for your recent letter inviting the California Department of Public Health's (CDPH) consultation with the Department of Fish and Wildlife regarding suction dredge mining pursuant to Fish and Game Code section 5653.1. CDPH has primary responsibility for the regulation of public water systems and our comments will be confined to that area.

CDPH believes the regulation of suction dredge mining must take into account the impacts this activity could have on public water systems which use surface water sources. Adequate provision should be made for assessment of the impacts on raw surface water quality, the proximity of this activity to public water system raw water intakes, and the impacts any degradation in raw water quality will have on a public water system's ability to treat water to meet required drinking water quality standards. Any change to existing law should adequately protect the quality of drinking water sources and provide the resources necessary to carry out that mandate.

Impacts to water quality are assessed by the State Water Resources Control Board (SWRCB) because it has primary responsibility for protection of water of the state for all beneficial uses. Drinking water is one of those beneficial uses that the SWRCB must consider. CDPH consults and works with SWRCB in matters concerning water quality which have the potential to impact drinking water supplies.

Sincerely,

Mark Starr, DVM, MPVM, DACVPM  
Deputy Director for Environmental Health

cc: See Next Page

Mr. Charlton H. Bonham

Page 2

MAR 20 2013

cc: Mr. Tom Howard  
Executive Officer  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Ms. Vicky Whitney  
Deputy Director  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

**CALIFORNIA STATE  
LANDS COMMISSION**

**EXECUTIVE OFFICE**  
 100 Howe Avenue, Suite 100-South  
 Sacramento, CA 95825-8202

**JENNIFER LUCCHESI, Executive Officer**  
 (916) 574-1800 Fax (916) 574-1810  
 California Relay Service TDD Phone 1-800-735-2929  
 Voice Phone 1-800-735-2922

**RECEIVED**
**MAR 15 2013**
**DFW Director's Office  
RECEIVED**
**MAR 19 2013**

 DFG  
 Office of the General Counsel

 Charlton H. Bonham, Director  
 Department of Fish and Wildlife  
 1416 Ninth Street, 12<sup>th</sup> Floor  
 Sacramento, CA 95814

**Subject: Agency Consultation Pursuant to Fish and Game Code Section 5653.1**

Dear Mr. Bonham:

The California State Lands Commission (CSLC) staff has reviewed your request for consultation, pursuant to section 5653.1 of the Fish and Game Code, concerning the statewide Suction Dredge Permitting Program (Program). Specifically, the California Department of Fish and Wildlife (CDFW) has identified the CSLC as an agency whose management of sovereign and school lands, as described below, is potentially affected by suction dredge mining activities. As such, the CDFW is requesting the CSLC's input regarding amendments to statutes or regulations necessary to ensure suction dredge mining activities do not result in significant impacts to the environment. CSLC staff has prepared these comments consistent with its management obligations on school lands in the State as well as with its trust responsibility for activities that could directly or indirectly affect sovereign lands, their accompanying Public Trust resources or uses, and the public easement in navigable waters.

In providing the below comments, CSLC staff acknowledges the limits of CDFW's statutory and regulatory authority, in their current form, to impose measures needed to avoid or mitigate most of the effects the CDFW determined to be significant in the subsequent environmental impact report (SEIR)(Clearinghouse No. 2009112005) prepared and certified for the Program. While the issues of greatest importance to the CSLC, identified below, are beyond CDFW's current statutory authority, we believe the comments will be helpful to the CDFW, other agencies with jurisdiction, and the State Legislature in discussing the value of calling for statutory or regulatory changes to the management and oversight of suction dredge mining activities, particularly with regard to identifying the appropriate agency or agencies to administer the Program to achieve the most effective level of environmental protection.

**CSLC Jurisdiction**

The CSLC has jurisdiction and management authority over all ungranted tidelands, submerged lands, and the beds of navigable lakes and waterways. The CSLC also has



certain residual and review authority for tidelands and submerged lands legislatively granted in trust to local jurisdictions (Pub. Resources Code, §§ 6301, 6306). All tidelands and submerged lands, granted or ungranted, as well as navigable lakes and waterways, are subject to the protections of the Common Law Public Trust.

As general background, the State of California acquired sovereign ownership of all tidelands and submerged lands and beds of navigable lakes and waterways upon its admission to the United States in 1850. The State holds these lands for the benefit of all people of the State for statewide Public Trust purposes, which include but are not limited to waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation, and open space. On navigable non-tidal waterways, including lakes, the State holds fee ownership of the bed of the waterway landward to the ordinary low water mark and a Public Trust easement landward to the ordinary high water mark, except where the boundary has been fixed by agreement or a court. Such boundaries may not be readily apparent from present day site inspections. The CSLC also has leasing jurisdiction, subject to certain conditions, over mineral extraction from State property owned and managed by other State agencies (Pub. Resources Code, § 6890, subd. (b)).

Shortly after becoming a State, California was also granted Sections 16 and 36 (2 square miles), or lands in lieu thereof, out of each township (36 square miles) then held by the federal government. The lands, classified as "school lands," were given to the State to help support public education. While many of the school lands were sold off over the years, the State retains an interest in approximately 1.3 million acres of fee owned and split estate lands, mostly desert and forest lands. The State's school lands and lieu lands are also under the jurisdiction of the CSLC. Since 1938, the State has reserved back one hundred percent (100%) of the mineral interest in these lands when they are sold, resulting in a split estate. Thus, there can be instances in which the State has an interest, either solely mineral or both surface and mineral, in the bed of a non-navigable waterway on a school land parcel that is subject to the State's permitting and leasing authority.

### **Activities on Sovereign Lands**

#### **Background:**

From surveys of permitted suction dredgers who operated before the 2009 moratorium, CDFW identified the California bodies of water that likely experience the heaviest suction dredging activity (Appendix F of the SEIR); the beds of the lower reaches of many of these, including the South Yuba, Feather, American, Klamath, Merced and Stanislaus Rivers, as well as Suisun Bay, are sovereign lands under CSLC's jurisdiction.

Because the previous permitting program did not require permittees to submit locational information for dredging activities to CDFW, it is not possible to know the intensity or number of annual suction dredging occurrences on sovereign or school lands under the jurisdiction of the CSLC. From Geographical Information Systems (GIS) data produced from the results of CDFW's voluntary survey of dredgers permitted under the previous



program, it appears that at least some suction dredging takes place on State lands. Direct, unauthorized use, alteration or exploitation of public lands or resources is of obvious interest to the CSLC; however, given the findings of the SEIR's analysis of fluvial transport of mercury (Hg) and other heavy metals downstream from dredging, even activities upstream of the CSLC's jurisdiction, permitted under the Program, may affect State lands and resources and future activities located thereon. Under Division 6 of the California Public Resources Code, the CSLC reserves the right to require a lease or permit for the occupation or use of any lands under its jurisdiction, as well as negotiate royalties for mineral resources extracted from lands, including those lands subject to the proposed suction dredging permit program area.

Comments:

CSLC staff will continue to consult with CDFW to further understand the scope of the Program and its effects on lands under the CSLC's jurisdiction. CSLC staff also supports the legal requirement, consistent with the CDFW's March 2012 regulations that, when the CDFW issues a suction dredge permit pursuant to Fish and Game Code section 5653, nothing in that permit "relieves the permittee of responsibility to comply with [other] applicable federal, State, or local laws or ordinances." (Cal. Code Regs., tit. 14, § 228, subd. (n)). CSLC staff would further support development of an educational pamphlet or other disclosure to be provided to permittees regarding the CSLC's sovereign land jurisdiction and the Public Trust.

**Mercury and Methylmercury**

Background:

On April 22, 2010, the Central Valley Regional Water Quality Control Board (RWQCB) identified the CSLC as both a State agency that manages open water areas in the Sacramento-San Joaquin Delta Estuary and a nonpoint source discharger of methylmercury (Resolution No. R5-2010-0043), because subsurface lands under the CSLC's jurisdiction are impacted by mercury from legacy mining activities dating back to California's Gold Rush. Pursuant to a RWQCB Total Maximum Daily Load (TMDL), the RWQCB is requiring various local, State and federal agencies (stakeholders), including the CSLC and the CDFW, to develop a Delta Mercury Control Program, inclusive of studies to identify potential methylmercury control methods in the Delta and to participate in an Exposure Reduction Program (ERP). The goal of the studies is to evaluate existing control methods and evaluate options to reduce methylmercury in open waters under jurisdiction of the CSLC. The goal of the ERP is to increase understanding of fish contamination issues and reduce exposure to mercury in fish from the Delta. Consequently, any activity by suction dredge miners that results in continued Hg and methylmercury moving from upstream areas to the Sacramento-San Joaquin Delta Estuary may affect the CSLC's efforts to comply with the TMDL.

The SEIR noted that permitted suction dredging under the proposed requirements may transfer heavy metals from deeper or sheltered sediment upstream onto State sovereign lands downstream, potentially affecting future uses of or projects on lands held in trust for Californians. The case study cited in the SEIR of Hg transport from

suction dredging on the South Yuba River upriver of Englebright Lake estimated that 60% of smaller Hg particles (<63 $\mu$ m, those more prone to methylation and subsequent bioaccumulation) stirred up by dredging traveled at least downriver of Englebright Dam and, eventually, as far as the Delta. The bed of much of the river between Englebright Dam and the Delta, as well as much of the Delta itself, on which these particles would settle, is sovereign.

Further buildup of Hg and other heavy metals on CSLC-managed riverbeds and bays resulting from continued suction dredge mining, which are beyond whatever occurred under CDFW's previous permit program, may constrain future CSLC actions proposed or taken in the interest of the State. These settled particles, both in the lower South Yuba River and, presumably, other major rivers such as the American, Feather, and Klamath, become a liability or responsibility for projects which may be implemented by the CSLC or others on sovereign land. Future efforts to enhance and support Public Trust uses, including but not limited to navigation, water-related recreation, public access, habitat restoration and invasive species management, would potentially have to mitigate for disturbance of Hg and other metallic particles originating from upstream suction dredging. Such impacts and mitigation could add substantial costs or controversy to future projects that benefit Californians, their enjoyment of public lands and waterways, and the habitat values of these areas.

#### Comments:

CDFW's amended regulations are likely not sufficient to adequately limit suction dredging's contributions to Hg loading, increased methylation of disturbed Hg, and bioaccumulation of methylmercury in certain California waters; however, the State Water Resources Control Board (SWRCB) and the RWQCBs are currently vested, via sections 401 and 402 of the Clean Water Act, with the regulatory authority that CDFW lacks, and may mitigate these impacts to safer levels than CDFW can alone.

CSLC staff believes that statutory changes that would allow or require CDFW to regulate Hg and other water quality impacts, as would be likely under the requirements of Fish and Game Code section 5653.1 (i.e., "...fully mitigate all impacts..."), could create confusion and inefficiency in the management and remediation of Hg pollution, particularly with regard to the TMDL, as it would create duplicative, if not conflicting, jurisdictional agencies for water quality. Rather a mechanism by which the SWRCB and RWQCBs could engage more effectively on the water quality aspects of suction dredging, given that those agencies already have operating sediment management and Hg control programs, along with the relevant staff expertise, may be worth exploring.

#### Summary

Pursuant to Fish and Game Code section 5653, subdivision (b), the CDFW is *required* to issue permits for suction dredge mining activities if it determines, under the adopted Program regulations, that the activities would not be deleterious to fish. In promulgating regulations in 2012 to update the Program, CDFW determined several conditions and limitations were necessary in order to reduce such potential deleterious impacts to fish,

including: equipment specifications (i.e., nozzle size, hose size, and pump intake screens); method of operation; seasonal and year-round closures for various water bodies; and maximum number of permits to be issued annually. Other significant impacts identified in the SEIR do not concern fish and wildlife resources, and as an agency with limited, statutorily-derived jurisdiction, the CDFW does not currently possess the authority to impose non- fish and wildlife related conditions on suction dredge applicants; instead, control of these impacts are under the jurisdictions of other public agencies with the relevant expertise and existing regulatory authority.

CSLC staff understands that section 5653.1 of the Fish and Game Code, as amended in June 2012, directs the CDFW to, among other things, recommend to the Legislature statutory and regulatory changes necessary to "fully mitigate" *all* significant impacts resulting from suction dredging authorized under section 5653 of the Fish and Game Code. We are encouraged by the Legislature's desire to regulate suction dredge mining activities such that there is more effective oversight of the entire spectrum of environmental effects; however, we remain concerned that the current focus on CDFW and the Fish and Game Code alone may not result in a well-managed, efficient Program, primarily because there already exist other agencies with jurisdiction over the relevant resource impacts (e.g., water quality, cultural resources, and noise). For example, the above-described Hg and methylmercury impacts should and can be regulated under the existing authorities of the SWRCB and RWQCBs; to create a separate, duplicative authority for water quality under CDFW's control would likely increase confusion and conflict, and decrease effectiveness of overall regulation of these pollutants. As a result, CSLC staff recommends any statutory or regulatory changes considered continue to limit the CDFW's authority under the Fish and Game Code to fish and wildlife resources, and not broaden its substantive authority to issues and resources already under another agency's purview.

In closing, CSLC staff believes that the impacts resulting from suction dredge mining activities do affect the environment, including State sovereign lands and Public Trust resources and activities. We urge the Legislature to consider these impacts and options for regulating the activity; however, we do not believe that simply expanding the scope of the CDFW's statutory and regulatory authority to non-fish and wildlife related issues is the appropriate or most efficient solution. We recommend instead the Legislature focus on facilitating the development of a Program administration structure that can regulate suction dredge mining activities to a specific, defined standard (e.g., define "fully mitigate" as used in § 5653.1) in a coordinated, organized, and streamlined manner. This could, for example, involve creating a separate oversight entity or working group consisting of staff from all the affected jurisdictional agencies. Regardless of the eventual implementation approach the Legislature sees fit to pursue, the CSLC staff strongly supports providing the entity or entities with adequate authority, as well as adequate funding and staff resources, to effectively minimize and mitigate the spectrum of impacts caused by suction dredge mining activities.



Thank you for consulting the CSLC and for the opportunity to provide comments on potential improvements to the administration of the Program. Please do not hesitate to contact me at (916) 574-1800 or Jennifer DeLeon, Environmental Program Manager, at 916-574-0748 or by email at [Jennifer.DeLeon@slc.ca.gov](mailto:Jennifer.DeLeon@slc.ca.gov), with any questions about our input or for additional information about the CSLC's jurisdiction.

Sincerely,

  
JENNIFER LUCCHESI  
Executive Officer

cc: Jennifer DeLeon



*Matthew Rodriguez*  
Secretary for  
Environmental Protection



## Department of Toxic Substances Control

Deborah O. Raphael, Director  
1001 "I" Street  
P.O. Box 806  
Sacramento, California 95812-0806



*Edmund G. Brown Jr.*  
Governor

RECEIVED

MAR 21 2013

DFW Director's Office

March 6, 2013

Mr. Charlton H. Bonham  
Director  
California Department of Fish and Wildlife  
1416 Ninth Street, 12<sup>th</sup> Floor  
Sacramento, California 95814

### AGENCY CONSULTATION REQUEST - SUCTION DREDGING REGULATIONS

Dear Mr. Bonham:

Thank you for your letter dated February 7, 2013, regarding the California Department of Fish and Wildlife's (CDFW) request for the Department of Toxic Substances Control (DTSC) to provide consultation to CDFW pursuant to Fish and Game Code Section 5653.1. CDFW is seeking input from DTSC regarding amendments to the Fish and Game Code or other law necessary to ensure that suction dredging in California does not result in any significant impacts to the environment or human health.

#### Background

A legislative moratorium on suction dredging was established by SB 670 (August 6, 2009) and extended in 2011 by AB 120, and in 2012 by SB 1018. CDFW is currently prohibited by court order from issuing suction dredge permits. The use of vacuum or suction dredge equipment in any river, stream, or lake in California is currently prohibited by statute. (Fish & G. Code, § 5653.1, subd. (b).)

Section 56531, as amended in June 2012, requires that CDFW submit a report to the Legislature with recommendations on statutory changes or authorizations needed for CDFW to adopt suction dredging regulations that include measures to mitigate all identified significant environmental effects.

On April 27, 2012, under the Administrative Procedure Act (APA), the Office of Administrative Law (OAL) approved updated regulations adopted by CDFW governing suction dredge mining under Fish and Game Code section 5653 et seq.

In response to CDFW's request, DTSC performed a cursory review of:

- "Final Statement of Reasons - Title 14, California Code of Regulations, Amended Sections 228 and 228.5, March 16, 2012;

Mr. Charlton H. Bonham  
March 6, 2013  
Page 2

- "Findings of Fact of the California Department of Fish and Game as a Lead Agency under the California Environmental Quality Act (CEQA), Suction Dredged Permitting Program, as Analyzed in the Suction Dredge Permitting Program, Subsequent Environmental Impact Report," dated March 16, 2012;
- Chapter 4.2, Water Quality and Toxicology and Chapter 4.4 Hazards and Hazardous Materials of the "Suction Dredge Permitting Program, Draft Subsequent Environmental Impact Report (DSEIR)", dated February 2011; and
- "Final Updated Regulations - Title 14. Natural Resources; Division 1, Fish and Game Commission - Department of Fish and Game; Subdivision 1, Fish, Amphibians and Reptiles; Chapter 8, Miscellaneous; Section 228 and 228.5, Suction Dredging", approved by OAL on April 27, 2012.

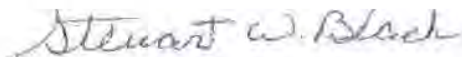
Since a final Environmental Impact Report (2012 EIR)<sup>[1]</sup> has been issued and amended/updated regulations have been approved by OLA, DTSC is not offering comments on the scientific adequacy of the 2012 EIR or the subsequent Final Statement of Reasons and Findings of Fact presented in support of the Updated Title 14, Section 228 and 228.5 Suction Dredge Regulations.

The final EIR explores issues concerning environmental and human health concerns in regards to suction dredge activities. The Notice of Determination (NOD) for the Subsequent Environmental Impact Report (SEIR) acknowledges that there will be significant impacts to the environment, that mitigation measures were not made a condition of the approval of the project, and a statement of overriding considerations was adopted for this project.

DTSC believes that outstanding issues identified in the CEQA documents should be examined in additional detail. At this time, DTSC welcomes the opportunity to participate in any discussions to revisit the updated regulations in order to more fully consider and further address mitigation measures that may reduce potential adverse impacts to the environment or human health.

Please contact me at (916) 324-3148 if you have any questions.

Sincerely,



Stewart W. Black, P.G.  
Deputy Director  
Brownfields and Environmental Restoration Program

<sup>[1]</sup> For the purposes of the Final Statement of Reasons, the 2012 EIR consists of the Draft Sequential EIR and the Sequential EIR. A Notice of Determination (NOD) for the Sequential EIR was filed on March 16, 2012.



**NATIVE AMERICAN HERITAGE COMMISSION**

915 CAPITOL MALL, ROOM 364  
SACRAMENTO, CA 95814  
(916) 653-6251  
Fax (916) 657-5390  
Web Site [www.nahc.ca.gov](http://www.nahc.ca.gov)



March 12, 2013

Mr. Chuck Bonham, Director  
Department of Fish and Game  
Suction Dredge Program  
Revisions to Proposed Amendments  
DFG Northern Region  
601 Locust Street  
Redding, CA 96001

**Re: Agency Consultation Pursuant to Fish and Game Code Section 5653.1**

Dear Director Bonham:

The Native American Heritage Commission (NAHC) has received your letter of February 7, 2013, initiating consultation with the NAHC in compliance with Fish and Game Code §5653.1. This code prohibits the use of vacuum and suction dredge equipment in any river, stream, or lake until certain requirements are met. Subsection (b) (4) stipulates that any new regulations concerning vacuum or suction dredge mining permits fully *mitigate all identified significant environmental impacts*. Subsection (5) (1) states; to comply with Subsection (b) (4), the Department of Fish and Wildlife (DF&W) must consult with the other agencies, including the NAHC, on or before April 1, 2013.

In a letter dated April 21, 2011, the NAHC commented on the Draft Subsequent Environmental Impact Report (SEIR), SCH # 2005-09-2070, for the Suction Dredge Permitting Program. In its original comments the NAHC stated that the mitigation described in the document for *Historical Resources, Traditional Cultural Properties, Unique Archaeological Resources*, and Native American human remains and associated grave items were inadequate. The Suction Dredge Permitting Program regulations, approved April 27, 2012, do nothing to change our original assessment of the program.

The SEIR states *Riverine settings are considered highly sensitive for the existence of significant archaeological resources* (p. 4.5 – 14). The document clearly indicates that suction dredge mining has the potential to impact significant *Historical Resources*, including *Traditional Cultural Properties* (mitigation measure CUL-1, p. 4.5-11), and *Unique Archaeological Resources* (mitigation measure CUL-2, p. 4.5-14) *through riverbed suctioning and screening activities that could disturb or destroy cultural materials which may be located just below the surface of the riverbed or along its banks* (p. 4.5-14). The SEIR states that these impacts are *Significant and Unavoidable*. The SEIR also does not adequately mitigate program impacts to Native American human remains and associated grave goods, pursuant Health and Safety Code §7050.5 and PRC §5097.98 (CUL-3, p. 4.5-15).

The Department's solution to protecting these one-of-a-kind cultural resources is to provide an *informational packet*, acknowledged to be *advisory*, to suction dredge operators describing their obligation to follow state law regarding the impacts of their activities. Even if suction dredge operators had the will to actively protect *Historical Resources* and *Unique Archaeological Resources* from their activities, they do not have the knowledge and expertise required to do so. In the vast majority of cases, it is far more likely that if these resources are encountered and recognized that they will be subjected to looting.

In its *Findings* pursuant to *CEQA Guidelines* §15091(a), the California Department of Fish and Wildlife (CDF&W) states regarding the revised regulations for the Suction Dredge Permit Program:

*the significant and unavoidable effects expected with the revised regulations will still persist beyond the existing substantive legal reach of the Department relevant in the narrow circumstances at hand....*

*All things considered, the Department finds on balance that the benefits of final action outweigh the significant and unavoidable effects expected to occur with suction dredging as authorized under the revised regulations. The Department is mandated by statute and court order to complete the environmental review and rulemaking effort under existing law. Moreover, in fulfilling that mandate from a substantive perspective, the Department's legal authority is prescribed in narrow terms based on Fish and Game Code section 5653, subdivision (b), specifically. Though unpalatable and inconsistent with the Public Trust Doctrine and its trustee charge under the Fish and Game Code, the Department believes it can do no more.*

The NAHC does not believe that the Suction Dredge Permit Program's benefits outweigh the potential unavoidable adverse environmental impacts this statewide program will have on *Historical Resources*, *Unique Archaeological Resources* and Native American human remains and associated grave items. This program jeopardizes California's historical and archaeological heritage for what are essentially hobbyist gold miners. When considered statewide, with individual permits potentially in the thousands the impacts of the Suction Dredging Permit Program will be considerable.

The SEIR does not identify or mitigate the potential impacts of the suction dredging permit program on contemporary Native American communities. As they were in pre-contact times, California waterways, whether they are springs, creeks, rivers, or ocean and the wildlife in and around it continue to be vital elements in Native American spiritual and ceremonial life. The SEIR only discusses the physical impacts of this program on Native American cultural resources. It does not address the noise and visual impacts suction dredging will have on Native American spiritual and ceremonial pursuits. The disruption caused by suction dredging could make places along California's waterways that have been used for Native American spiritual and ceremonial activities for hundreds of years unusable. While, Fish and Game Code §5653.1 states that the Department must consult with the NAHC regarding this program, the NAHC believes that the only legitimate avenue to resolve the impacts of this program is through consultation with the Native American community, which did not occur in the preparation of the SEIR.

In the SEIR (p. 4.5 – 15), it states that DF&W does *not have the jurisdictional authority to adopt or enforce mitigation for impacts to unique archaeological resources. Therefore, impacts to such resources are considered significant and unavoidable.* In fact, it appears no state agency has a clear line of authority to mitigate impacts to Native American cultural resources in such cases. CEQA Guidelines §15091, regarding *Findings (a)(1)* states:

*(a) No public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant environmental effects of the project unless the public agency makes one or more written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding. The possible findings are:*

*(1) Changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR.*

*(2) Such changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding. Such changes have been adopted by such other agency or can and should be adopted by such other agency.*

The NAHC does not have that *responsibility and jurisdiction* for Native American cultural resources under state law. It is not considered a state *Trustee Agency*, as described in *CEQA Guidelines* 15386 for the protection of these resources. The appellate court decision in *Environmental Protection Information Center (EPIC) v. Johnson* (170 Cal. App. 3d 604, 216 Cal. Rptr.502) ruled that the NAHC:

*has special expertise on the subject of Native American historical sites. The commission has jurisdiction to identify sites of special religious and spiritual significance to Native Americans [170 Cal. App. 3d 626] and their heritage, to make recommendations regarding sacred places located on private lands, and to consider the environmental impact on property identified or reasonably identified as a place of special religious significance to Native Americans*

The NAHC believes that the decision in this case should have resulted in changes to state law that would give the NAHC *trustee* authority.

There is one legal avenue in state law that the NAHC could pursue to protect Native American cultural resources from the impacts that may be caused by the DF&W Suction Dredge Permitting Program. After reviewing California Public Resources Code and California Civil Code, it is probable that both the State Lands Commission and the NAHC have the authority to protect and mitigate the potential impacts of the Suction Dredge Permitting Program on Native American cultural resources on public land.



California Public Resources Code §6301 gives the California State Lands Commission exclusive jurisdiction over all ungranted tidelands and submerged lands owned in the state and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits, including tidelands and submerged lands or any interest therein, whether within or beyond the boundaries of the State.

California Civil Code, §830 describes the State's ownership of tidelands, submerged lands and beds of navigable waterways includes lands laying below the ordinary high water mark of tidal waterways and below the ordinary low water mark of non-tidal waterways. It states the area between the ordinary high and low water marks on non-tidal waterways is subject to a *public trust easement*, which is under State Lands Commission jurisdiction. These codes and case law would apply to permits issued by DF&W on public lands through the Suction Dredge Permitting Program.

Public Resources Code §5097.9 delegate certain *Powers and Duties* to the NAHC, for the protection of Native American cultural resources on public property, stating:

*No public agency, and no private party using or occupying public property, or operating on public property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977, shall in any manner whatsoever interfere with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; nor shall any such agency or party cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require....*

The provisions of this code are enforced by the NAHC, pursuant to PRC §§5097.94 and 5097.97, which authorize the Commission, after being advised by *any Native American organization, tribe, group, or individual* that and action by a *public agency may cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, or may bar appropriate access thereto...* authorizes the NAHC to conduct an investigation and if it finds, after a public hearing, that the proposed action will result in *damage or interference*, the Commission *may recommend mitigation measures for consideration by the public agency proposing to take such action. If the agency fails to accept the mitigation measures, the commission may assist the Attorney General to take appropriate legal action pursuant to subdivision (g) of Section 5097.94.*

While these statutes may give the NAHC a way to mitigate the impacts of the Suction Dredge Permitting Program on Native American cultural resources, including Native American human remains and associated grave items, efforts to do so will place the NAHC in an adversarial position with another state agency. A position the NAHC would prefer to avoid. The NAHC would rather work with the legislature, the Native American community, and the DF&W to, as the DF&W suggested in their statement of *Findings* to achieve a *comprehensive regulatory reform to address and resolve the complex issues associated with the future of suction dredging in California.*

The NAHC encourages the legislature to provide a clear line of authority in cases such as the one presented by the Suction Dredging Permit Program, as well as other programs and projects that impact the protection of Native American cultural resources, which includes Native American human remains and associated grave items. In these cases, the NAHC should have the same *responsibility and jurisdiction* as a *trustee agency* for California Native American cultural resources, as the DF&W has for California's wildlife. The Suction Dredging Permit Program is just one example of how current state law limits NAHC ability with address the protection of these dwindling resources.

Sincerely,



Cynthia Gomez  
Executive Secretary  
Native American Heritage Commission



## State Water Resources Control Board

MAR 11 2013

Mr. Charlton H. Bonham, Director  
Department of Fish and Wildlife  
1416 Ninth Street, 12th Floor  
Sacramento, CA 95814

Dear Mr. Bonham:

Thank you for the opportunity to share our concerns and recommendations on behalf of the State Water Resources Control Board (State Water Board). The State Water Board and our sister agencies, the regional water quality control boards, are tasked with the protection, control, and utilization of all waters of the state. Through our delegated authority set forth in the Porter-Cologne Water Quality Act (Wat. Code, § 13000 et seq.) and the federal Clean Water Act (33 U.S.C. § 1251, et seq.), the State Water Board may regulate any activity or factor which may affect water quality. As such, below are the State Water Board's recommendations for the Legislature on how to fully mitigate all identified significant environmental impacts from recreational suction dredge mining as identified in the Department of Fish and Wildlife's (Department) Final Subsequent Environmental Impact Report (FSEIR).

Based on the water quality impacts of recreational suction dredging, we recommend that the existing moratorium be continued indefinitely, or that this activity be permanently prohibited. Given the current scientific understanding of this activity's impacts, this is the only and the most cost-effective method to fully mitigate all significant water quality impacts. The FSEIR identifies two significant and unavoidable water quality impacts: mercury resuspension and discharge, and effects from resuspension and discharge of other trace metals (e.g., copper, lead, zinc, cadmium, chromium, arsenic).

The resuspension and discharge of mercury is a potent neurotoxin that is harmful to both humans and wildlife. Mercury builds up in the bodies of fish that live in waters with even small amounts of mercury; and in the bodies of humans who eat contaminated fish. Because much of our state's in-stream mercury is a result of historic gold mining activities, recreational suction dredging activities specifically target these locations and resuspend mercury from many known and unknown "hotspots."

Recreational suction dredging as a whole has a disproportionately greater effect on mercury resuspension when compared to other natural events or human activities. Suction dredging operators often target deep sediments, resulting in the mobilization of mercury that may not be mobilized by typical winter high-flow events. This leads to substantially increased mercury

CHARLES R. HOPPIN, CHAIRMAN | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 [www.waterboards.ca.gov](http://www.waterboards.ca.gov)



loading in the downstream water body. According to the peer-reviewed findings in the FSEIR, a single 4-inch dredge could discharge up to 10 percent of an entire watershed's mercury loading during a dry year. Additionally, recreational suction dredging occurs in the summer months when water temperatures are higher and oxygen levels are lower. These conditions are conducive to increased rates of methylation of mercury; the process by which elemental mercury binds with organic molecules and becomes more readily absorbed by living tissue and significantly more toxic to humans and wildlife.

Recreational suction dredging also has the significant effect of resuspending and discharging sediment containing mercury and other trace metals. Many of these other trace metals are detrimental to aquatic life and are regulated under the California Toxics Rule (CTR), as is mercury. The toxicity of resuspended metals is determined, in part, by the aquatic pH value in which the metals occur. Metals in waters with a low aquatic pH value are more toxic than metals in waters with a higher pH value. Historic copper, lead, and silver mines are located throughout the Sierra Nevada and Klamath-Trinity Mountains. These locales are also the sites associated with many acid mine draining issues; i.e., locations with low aquatic pH values. Dredging at these locales has the potential to increase the level of one or more trace metals in a water body such that they exceed the levels allowed under the CTR.

As stated above, the indefinite continuation of the existing moratorium is the State Water Board's recommendation and is the only option that fully mitigates all environmental impacts. However, within the State Water Board's existing authority, the Board can adopt one or more general orders regulating the discharges associated with recreational suction dredging. The general order(s) could prohibit the activity in any water body impaired for mercury, sediment, or any trace metal, along with its tributaries.

This option raises a number of concerns. First, while such a prohibition will likely encompass many of the waters containing mercury and other trace metal hotspots; it will not account for those hotspots that are unknown. To fully account for such hotspots, the State Water Board would need to conduct a lengthy, resource-intensive inventory of all water bodies within the state. Also, any general order would not fulfill the Legislature's mandate to "fully mitigate all identified significant environmental impacts" as set forth in Fish and Game Code section 5653.1. Lastly, any such general order is likely to require a significant amount of State Water Board resources to develop the order; execute and enforce the terms of the order; and, defend the order from inevitable legal challenges. In essence from the State Water Board's perspective, this option would create a new and unfunded regulatory program.

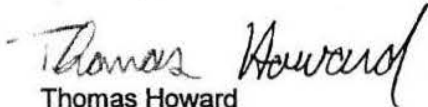
Regardless of what action the Legislature takes pursuant to the Department's report, we respectfully request that any action taken provide clear authority and sufficient resources to fulfill the Legislature's directive. Any authority and accompanying resources should provide for robust scientific research, implementation, and enforcement by the Department and/or any sister agencies deemed necessary by the Legislature. Additionally, any action taken should provide flexibility for the regulatory agency to adapt to the ever-evolving nature of the activity and our understanding of the environmental conditions and scientific understanding behind recreational suction dredging activities.

For example, it has come to the State Water Board's attention that the suction dredging community is conducting dredging activities without the use of a sluice box. Absent the use of a sluice box, their activities are not considered "suction dredging" pursuant to the Department's regulations (see Cal. Code Regs., tit. 14, § 228, subd. (a)(1).) Unfortunately, whether or not a sluice box is used, the detrimental effect on water quality, and subsequently humans and

aquatic life, remains the same. This is an example of the evolving nature of the activity. In order to adapt under the current regulatory scheme, the Department needs to undertake a cumbersome rulemaking proceeding subject to the requirements of the California Environmental Quality Act, the Administrative Procedures Act, and involve the Office of Administrative Law. Alternatively, the Legislature could consider a statutory amendment to block this or other attempts to circumvent environmental regulation of this activity.

Again, the State Water Board thanks you for the opportunity to share our concerns and recommendations. If you have any questions, please contact Deputy Director, Elizabeth Haven at (916) 341-5457 or [Liz.Haven@waterboards.ca.gov](mailto:Liz.Haven@waterboards.ca.gov)

Sincerely,



Thomas Howard  
Executive Director

cc: Michael A.M. Lauffer, Esq. [via email only]  
Office of Chief Counsel  
State Water Resources Control Board  
1001 I Street, 22<sup>nd</sup> Floor [95814]  
P.O. Box 100  
Sacramento, CA 95812-0100  
[Michael.Lauffer@waterboards.ca.gov](mailto:Michael.Lauffer@waterboards.ca.gov)

Jonathan Bishop, [via email only]  
Chief Deputy Director  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor [95814]  
P.O. Box 100  
Sacramento, CA 95812-0100  
[Jonathan.Bishop@waterboards.ca.gov](mailto:Jonathan.Bishop@waterboards.ca.gov)