ADDITIONAL COMMENTS OF THE NEW 49'ERS, INC.

The Fundamental Nature of the Document

The entire premise of the additional CEQA review, as established in the consent decree, was that "new information" had become available as to the significance of the ongoing activities. We strongly suggest that the proper focus of the SEIS should be to assess the significance of the "new information," not to start from scratch to re-do the 1994 FEIS.

As we have previously noted, we do not believe that any full-blown supplemental EIR is required at all, insofar as the listing of coho salmon species, while arguably "new information," is not associated with any real-world changes in environmental impact beyond those previously evaluated in 1994. Moreover, there is no additional "new information" of which we are aware meeting the standards in Guideline § 15162 to justify a supplemental EIR, as opposed to an addendum. In particular, we have yet to find evidence of any significant effects which were not discussed in the previous EIR, evidence of substantially more severe effects, or newly-available mitigation measures. To us, the NOP appears as if you have decided to re-evaluate all of the information which was already settled during the earlier EIR, rather than assess the impact of new data.

The 1994 FEIR provides ample consideration of the ongoing impacts of suction dredge mining under the existing regulations; the scope of the SEIS need only consider the "new information" since 1994, and the environmental impacts of any proposed changes to the regulations. As the California courts have explained, even a supplemental EIR is "not an occasion to revisit environmental concerns laid to rest in the original analysis". *Save our Neighborhood v. Lishman* (2006) 140 Cal. App.4th 1288, 45 Cal. Rptr.3d 306.

The presence of the existing FEIR distinguishes this case from cases such as *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 51 Cal. App.4th 1165, 61 Cal. Rptr.2d 447, in which the absence of an existing EIR provided a rationale for additional environmental analyses even for existing facilities.

We do not believe that the Superior Court and Legislative Assembly's actions with respect to suction dredge mining, arising by reason of the Department's failure to complete CEQA processes sooner, have any bearing on the appropriate scope of the environmental analysis required. (*Cf.* NOP at 21.) Rather, we believe that the Department needs to tightly focus this CEQA upon genuinely new information which was not previously considered in the 1994 EIR. A $60 million industry relies upon the foundations established in the 1994 EIR, which ought not to be disturbed absent any genuine reason to revisit environmental concerns which were exhaustively ventilated in the prior CEQA process.

Issues Concerning the Environmental Baseline

Section 15125 of the CEQA Guidelines sets forth the general rule that environmental conditions existing at the time environmental analysis is commenced "normally" constitute the baseline for purposes of determining whether an impact is significant. Indeed, pursuant to Public Resources Code § 21060.5, the "environment" means "the physical conditions which exist within the area which will be affected by a proposed project".

Here the Department proposes to adopt a "conservative" approach of using an environmental baseline which assumes no suction dredging in California. We believe this is inconsistent with the definition of the proposed project: "continued implementation of the permitting program, and, if necessary, proposed amendments to the Department's existing regulations . . .". (NOP at 2.) A proper baseline approach would assume continued dredging operations at recent permit issuance levels. From that baseline, the Department might appropriately assess impacts of any alternative from no further permits (not legally feasible) to substantial increases in the number of permits.

A large body of law supports the notion that in the context of ongoing and longstanding activities such as suction dredge mining, the baseline analysis should ordinarily evaluate the significance of incremental impacts of any changes in such activity that might result from project changes, *not* the significance of the baseline level of activity. *Cf., e.g., Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal. App.4th 1170, 31 Cal. Rptr.3d 901 ("the physical impacts of established levels of a particular use have been considered part of the existing environmental baseline"); *Fat v. County of Sacramento* (2002), 97 Cal. App.4th 11270, 119 Cal. Rptr.2d 402 (affirming negative declaration with baseline of existing airport usage); *Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001), 87 Cal. App.4th 99, 104 Cal. Rptr.2d 326 (appropriate to use baseline of existing water usage); *Fairview Neighbors v. County of Ventura*, 70 Cal. App.4th 238, 82 Cal. Rptr.2d 436 (using baseline traffic impacts from "ongoing mining operation"); *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal. App.3d 847, 237 Cal. Rptr. 723 (applying "existing facility" categorical exemption).

Where, as here, the question concerns review of a private activity conducted pursuant to private property rights, we believe it would be much more appropriate for the Department to consider the impacts of changes to the activity and new information, not to waste public resources through a "fresh look" from the beginning. For example, in *Bloom v. McGurk* (1994) 26 Cal. App.4th 1307, 31 Cal. Rptr.2d 914, the question concerned "ongoing operation of a medical waste treatment facility under a new regulatory scheme", and the Court of Appeals rejected attempts to nullify the applicability of a categorical exemption on the basis of the absence of prior environmental documentation.

The choice of an appropriate baseline recognizing ongoing dredging is especially important because the present environmental conditions include the proven positive impacts of suction dredge mining for many years under the existing regulations, and whatever adverse impacts are imagined to arise from many years of suction dredge mining under the existing regulations. Indeed, all or substantially all of the data available to the Department will consist of studies and evaluations of the environmental conditions under ongoing suction dredge mining.

In substance, the Department is proposing to adopt an artificial baseline as to which no real-world data concerning environmental conditions is available. But "[a]n EIR must focus on impacts to the existing environment, not hypothetical situations". *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App.4th 931, 91 Cal. Rptr.2d 66; *see also Riverwatch v. County of San Diego* (1999), 76 Cal. App.4th 1428, 91 Cal. Rptr.2d 322 (trial court "abused its discretion by requiring that the EIR account for prior illegal activity by using an early baseline from which impacts could be measured").

To the extent that the Department proposes to go forward by imagining a hypothetic set of non-existent physical conditions associated with "no dredging," it will be especially important to reconstruct those conditions inimical to the salmonid species that are a focal point of the SEIR, and the listing of which provided the legal predicate for the "new information" finding in the Consent Decree. In particular, the Department will be required to assemble historical data concerning the natural, concretized state of the Lower Salmon and other California rivers prior to years of suction dredging, during which time large stretches of the Klamath and other river systems in California contained little or not suitable spawning habitat for salmon species because of the concretized nature of the river bed.[1] The Department should also consider how hypothesized global climate changes would tend to reduce the hydraulic energy available for natural reconditioning of spawning beds, making the adverse impacts of the "no project" condition even more significant.

We do understand that the Guidelines (§ 15125(a)) refer to the physical conditions "at the time the notice of preparation is published"—here October 26, 2009. But the Guidelines also recognize that "[t]his environmental setting will *normally* constitute the baseline physical conditions by which a lead agency determines whether an impact is significant" (*id.*; emphasis added), affording discretion to use common sense to adopt a baseline appropriate to the circumstances. We believe it would be unreasonable for the Department to utilize an environmental baseline premised on a single instant in time, a time of year during which many California rivers and streams are closed to suction dredging. The Department has discretion to adopt a common sense approach based on consideration of baseline suction dredging activity during the dredging season. The

[1] The Department describes suction dredge mining's impact of loosening spawning gravel only in terms of a potential initial effect of creating unstable spawning areas. There is no empirical evidence whatsoever of any incremental risk of scouring from spawning in suction dredge mining tailings, and any instability from elevated piles (not attractive to the fish in any event), would vanish after the first year, leaving behind useful spawning habitat for many years. (*Cf.* NOP at 39.)

reasonable direction would be to use a baseline which reflects recent suction dredging activity supported by the regulations which are in question.

While we doubt the Department has enough discretion to attempt to re-create imaginary conditions absent ongoing suction dredging, the Department has not articulated, and cannot articulate, any explanation that would support such a deviation. The action of the Superior Court and Legislative Assembly to impose a temporary moratorium on suction dredge mining during the CEQA analysis was plainly not intended to affect the scope of that analysis by creating an entirely distinct environmental baseline. Moreover, the positive impacts of suction dredging will clearly persist through the moratorium, as it takes many years for stream beds to become "concretized" though sedimentation.

The Miners understand that the Department believes its "baseline" approach will provide a "'fresh look' at the impacts of suction dredge mining on the environment generally," but the Department is confusing the question of the environmental baseline with the scope of the project. The Department might properly include a "no project" alternative in the SEIR, but analyze the environmental impacts of such an alternative against the real, existing environmental baseline with ongoing suction dredging.

We are concerned that adoption of an improper baseline imagining no ongoing dredging may lead to improper findings of "significant effects," which may then require the Department to issue some statement of overriding considerations to outweigh such effects (Public Resources Code § 21081). The Department will have to make special efforts to support such overriding considerations, which will presumably include invaluable assistance to distressed rural economies, with substantial evidence in the record.

We note that the Department proposes to rely upon Appendix G guidelines for ascertaining significance, and note that Appendix G ascribes significance to the "loss of availability of a known mineral resource that would be of value to the region and the residents of the state." The Department should find that restrictions on suction dredging would give rise to such significant and adverse effect that should outweigh other, lesser factors. It is troubling to see that the Department has not identified "mineral resources" as among the environmental factors potentially affected by the project decisionmaking. (NOP at 28; *see also id.* at 78 (dismissing effects as "less than significant").) Insofar as there is a very wide range of permit issuance within the scope of the broadly defined "project"—presumably all the way down to no permit issuance—the effects of the loss of ability to mine the last commercially-significant deposits of placer gold cannot be dismissed as insignificant.

Issues Concerning "Deleterious Effect"

The Department correctly recognizes "the common sense meaning of the word deleterious such that deleterious effect generally means a wide-ranging or long-lasting consequence for a fish population that extends beyond the temporal or spatial context of a

specific direct impact". (NOP at 7.) Here, however, it is important to recognize that the project involves no specific direct impact on any fish species of any practical importance, with direct impacts only upon benthic invertebrates. The Department should reject the notion that a "deleterious impact" might involve any impact whatsoever upon species listed under the state or federal Endangered Species Act, insofar as those statutes merely impose a duty upon the State to avoid jeopardizing the continued existence of the listed species. Rather, the Department should require, consistent with regulatory guidance issued under those statutes, that "deleterious effects" mean an appreciable and negative impact on populations of listed species, similar to the language proposed for non-listed fish species: "a substantial reduction in the range of any species, and/or extirpation of a population". In focusing upon population-level effects, the Department should not address effects on units of protected species which are any smaller than the management units defined for purposes of the state or federal Endangered Species Act.

Issues Concerning Land Use and Planning

Other commentators have provided the Department with substantial information concerning the federal regulatory scheme for mining on federal land, which describes most suction dredge mining in California. The Appendix G Guidelines ask, among other things, whether the project would "conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project . . .". The present claim of no conflict with such regulations (NOP at 76) does not appear to take account of federal land management agencies and their mining regulations.

Scope of Literature Reviewed

We understand that the CEQA documents at this stage might necessarily contain more speculative, subjective and qualitative information, to be refined in the course of the study. However, in assessing the significance of asserted impacts, it will be important to have a *quantitative* sense of whether or not suction dredge mining has appreciable impacts on fish populations.

The U.S. Forest Service commissioned such as study, engaging Professor Peter B. Bayley, of the Department of Fish & Wildlife at Oregon State University, to conduct a comprehensive study to assess asserted cumulative impacts on fish populations in the Siskiyou National Forest. His Final Report was issued in April 2003, and represents the only scientific study of which we are presently aware that has attempted to *measure* the asserted cumulative impacts of suction dredge mining (as opposed to merely speculating about possible effects in a qualitative manner). He concluded:

> "Localized, short-term effects of suction dredge mining have been documented in a qualitative sense. However, on the scales occupied by fish populations such local disturbances would need a strong cumulative intensity of many operations to have a measurable effect. Local information reveals that most suction dredge miners adhere more or less to guidelines that have recently been formalized by the Forest Service and generally in . . . Oregon, but there are

> individual cases where egregious mismanagement of the immediate environment has occurred, particularly with respect to damaging river banks in various ways. This analysis cannot account for individual transgressions, and a study to do so at the appropriate scale would be very expensive if feasible.
>
> *"Given that this analysis could not detect an effect averaged over good and bad miners and that a more powerful study would be very expensive, it would seem that public money would be better spent on encouraging compliance with current guidelines than on further study"*.

This study corroborated the findings of numerous prior cumulative impact studies, all of which have previously been submitted to the Department in response to its October 2007 request for information. We trust that by the time the draft SEIR is issued, the Bayley study and other submitted materials will find their place above the more speculative references presently cited by the Department. *Cf., e.g.*, NOP at 95 (referencing "invertebrate productivity in subtropical black-water rivers"), 101 (fish behavior on "tropical reef").