OFFICE OF ADMINISTRATIVE LAW

FOR THE STATE OF CALIFORNIA

In re: Suction Dredging: Use of Vacuum and Suction Dredge Equipment	OAL File No. 2013-0618-02E **COMMENTS OF THE NEW 49'ERS, INC**

Preliminary Statement

These comments are submitted on behalf of The New 49'ers, Inc., pursuant to Government Code § 11349.6(b) and 1 Cal. Code Regs. § 55. We urge the Office of Administrative Law (OAL) to disapprove the regulations on the primary ground that there is no emergency justifying suspension of normal APA procedures.

The Department of Fish and Wildlife claims that an "emergency amendment to existing regulation is necessary to avoid serious harm to the public peace, health, safety or general welfare". (Statement of Emergency at 1.) The Department's Statement of Emergency is devoid of any specific facts demonstrating an emergency and the need for immediate action, as required by law, and the Office of Administrative Law should reject the Statement and the proposed regulation.

Background

This dispute concerns the operation of extremely small-scale motorized equipment to remove gold and gold-bearing gravels from California waterways, primarily in the Klamath River

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97214
Tel: 503-227-1011
Fax: 503-573-1939

and its tributaries, with most activity focused in Siskiyou County, California. (*See* Declaration of David McCracken ¶ 6 (attached hereto as Exhibit 1).) For many decades, miners were permitted to utilize equipment known as suction dredges, consisting of a vacuum pump and suction hose that continuously delivered streambed materials to a sluice box. The material would flow down the sluice box, gold would fall to the bottom, and the balance of the material would fall back into the stream.

The only potentially-significant environmental impact of the activity, under standards which persisted for decades, was the possibility that a miner might suck up gravel containing fish eggs. Inasmuch as the miners work underwater closely observing the material that goes into the hose to avoid clogs and waste of time, this potentially-adverse effect was far-fetched, but the miners operated under regulations that restricted them from operating the suction dredges when fish eggs were present in the gravels.

In 1994, the Department of Fish and Wildlife completed a comprehensive Environmental Impact Review (EIR), concluding that "[s]uction dredging under this proposed regulation would not be deleterious to yolk sac fry and eggs because the seasonal closures would protect these life stages from any adverse impacts from suction dredging". (Exhibit 2: Excerpt from 1994 FEIR.) The Department's initial regulations were fashioned in at least attempted compliance with a large body of law that requires the Department to use the least intrusive approach required to vindicate environmental concerns, and impose restrictions only commensurate with impacts caused. *E.g.*, Fish & Game Code §§ 2052.1, 2053; Public Resources Code § 21168.9(b).

In or about 2005, the Karuk Tribe of California commenced a long-term litigation and lobbying campaign against mining in what it characterized as its ancestral territory.[1] One product

[1] The Karuk Tribe pursues extensive logging and unlawful dipnet fishing in the Klamath River and its tributaries and would be understood to have "unclean hands" in any action concerning the environmental effects of mining. Surveys even demonstrate a substantial and illegal consumption of endangered fish by the Tribe; the Department suffers this conduct to occur while focusing its regulatory efforts on miners *never shown to have killed so much as a single fish.*

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

of the campaign was a consent decree requiring the Department to reevaluate the practice of suction dredge mining under CEQA. Unfortunately, the Department faithlessly failed to perform its obligations in the consent decree, leading to further litigation in which the Department was preliminarily enjoined from issuing further permits for suction dredging.

Perhaps knowing that there were grave legal deficiencies in the preliminary injunction (subsequently vacated), which was entered without any evidentiary hearing, the Tribe next managed to procure legislation barring the Department from issuing permits for suction dredging: Senate Bill 670, which took effect August 9, 2009. SB 670 put a temporary moratorium on suction dredging permits until the Department completed its CEQA process and issued new regulations, if necessary.

The Department continued its work to update its CEQA analysis, concluding (incorrectly, in our view) that a statewide supplemental EIR was required. As it became clearer that the Department would continue to issue permits for suction dredging, the Tribe and its allies returned to the Legislature and procured AB 120, a bill which became effective on July 26, 2011. It demanded two impossible acts from the Department: fully mitigating all identified significant environmental impacts and certifying that the fees collected were sufficient, among other things, to cover the enormous costs the Tribe was imposing upon the Department.[2] As a practical matter, this created a permanent moratorium on the issuance of further permits pending further legislative action, though the bill ostensibly expires on June 30, 2016.

On or about March 20, 2012, the Department released its Final Statement of Reasons and CEQA Findings of Fact, and Final Supplemental Environmental Impact Review (FSEIR). It also posted final regulations, which OAL approved on April 27, 2012 (OAL File No. 2012-0316-06 S). Under those final regulations, but for the statutory bar on permits, the Department would issue up to

[2] By the time AB 120 was engineered, the Tribe knew that the Department was taking the position that some assertedly-significant impacts, like noise, were beyond its jurisdiction to address. Hence the statute barring any permits until they were fully mitigated. The Legislature also knew that the fees were limited by statute, and could not possibly cover the enormous legal fees imposed and demanded by the Tribe.

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

1,500 permits annually for suction dredging, and use of up to 4-inch dredges (the nozzle size) was certified to cause no significant and adverse environmental impact within the jurisdiction of the Department to address. In particular, the regulations were crafted to ensure that issuance of permits "will not be deleterious to fish"[3] within the meaning of § 5653 of the Fish and Game Code. The miners have filed multiple lawsuits challenging the new regulations and the FSEIS, because, among other things, no adverse impacts had ever been documented under operations governed by the prior regulations—even with much larger dredges.[4]

On June 27, 2012, the Tribe procured the enactment of SB 1018, which removed the pseudo-expiration date of June 30, 2016. This ensured that even if the miners prevailed in ongoing challenges to the Department's CEQA determinations of "significance," the Department would still not be able to issue permits.

In all its iterations through SB 670, AB 120 and SB 1018, the Legislature made it clear that much larger-scale dredging "for regular maintenance of energy or water supply management infrastructure, flood control, or navigational purposes" was not covered by any prohibition on issuing permits. § 5653.1(d). Rather, the ban on permits applies only to "instream mining". *Id.* Insofar as the Department and Legislature see no problem with much larger dredging projects going on all over California, it is apparent that tiny, one-man mining operations cannot remotely be causing an "emergency". There is ongoing litigation in which the miners are contending that singling out dredging for instream mining as the sole type of activity which requires full mitigation of "all identified significant environmental impacts" is an unlawful discrimination against federally authorized mining.

[3] "Fish" is broadly defined to mean "wild fish, mollusks, crustaceans, invertebrates, or amphibians, including any part, spawn, or ova thereof." Fish and Game Code § 45.

[4] The Draft SEIR had proposed 4,000 annual permits based on a 15-year statewide average of 3,650 permits, and the Department failed to provide any lawful explanation of its radical reduction in the number of annual permits. (FSEIR, at 3-59.)

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

The mining community considered carefully the new regulations issued by the Department, and one leader in the community, David McCracken, posted an article on the Internet describing how miners might continue to operate, albeit at a reduced scale, consistent with law. (Exhibit 1 to Exhibit 1.) Miners then sought and obtained guidance from the responsible individual at the Department concerning the meaning of the new regulations and what motorized operations would not run afoul of the regulatory definition. Specifically, Mark Stopher, the Department's Habitat Conservation Program Manager, provided written guidance stating:

> "I carefully read (today) the information that McCracken provides on his website. I believe Dave McCracken's description of the legal requirements and application of the regulations is accurate. If practiced as he describes, this is not a violation of the moratorium and is not prohibited."

(Exhibit 3: E-mails, M. Stopher to J. Clark, Jan. 2, 2013.) In denying the Karuk Tribe's initial petition for emergency relief, the Department's Director emphasized that "the current definition [in the regulations] represents a reasonable exercise of discretion by the Department in light of historic practice, the legislative history of Fish and Game Code section 5653, and use of the equipment as described in recent federal case law." (Exhibit 4: Director's Letter of April 19. 2013, at 3-4.)

In reliance upon the Department's interpretation of its own regulations and law, some miners have commenced using motorized devices to collect gold and gold-bearing gravels within the State of California, primarily within Siskiyou County. As set forth below, these activities are limited in scope, and do not remotely constitute an emergency.

The Department's Statement of Emergency now characterizes lawful activity in furtherance of the advice of its own employee as an attempt to "evade reasonable regulations designed to protect important natural resources" and to "evade the letter and spirit of the statutory moratorium". Yet the Director had just two months before, in denying the initial petition for relief presented by the Tribe, stated that the mining methods "could highlight the need for related *changes to existing*

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

law". (Exhibit 4, at 4; emphasis added.) The Department's unexplained reversals of position should cast serious doubts on its credibility in this matter.[5]

The Department properly interpreted its own regulations to permit the activity, and because the activity fell outside the definition of "suction dredge," it properly advised that the activity was lawful. Now, under political pressure from the Tribe and other activists, the Department disparages those who relied on its advice and attempts unlawfully to change the law. This behavior is offensive to the rule of law itself.

Legal Issues Concerning the Exercise of Emergency Powers

The Department may argue that in promulgating SB 670, the Legislature characterized the bill as an "urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution" so that it could take effect immediately. (SB 670, § 2.) No such finding, however, was made with respect to AB 120 and SB 1018, which superceded SB 670. (*See* AB 120, § 76 (takes effect immediately as a budget bill); SB 1018, § 131 (same). In any event, the Legislature's now-superceded emergency proclamation concerning the need to stop suction dredge mining has no bearing on the question mining with underwater gravel transport systems which is addressed by the emergency regulation.

More importantly, the standards for a legislative proclamation under Article IV and the Department's duties under Government Code § 11346.1(b)(2) are entirely distinct. Urgency statutes are reviewed under entirely different standards of review. *See generally California Medical Ass'n v. Brian* (1973) 30 Cal. App.3d 637, 652 & n.21. The legislature has made it abundantly clear

[5] The Department's unprincipled reversal of its initial denial of the Karuk's Petition and the findings and conclusions therein is also a textbook case of arbitrary and capricious administrative conduct. *Cf., e.g., Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 ("implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order").

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

that agency declarations of emergency may be disputed and their validity tested in the courts without regard to any prior statutory declarations. Thus § 11346.1(b)(2) provides that

> "Any finding of an emergency shall include a written statement that contains the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of Section 11346.5[ ] and a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency. The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies. *The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.*
>
> "A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations adopted in accordance with the provisions of Article 5 (commencing with Section 11346), the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations." (Emphasis added.)

We have some concern that OAL's website declares: "*Unless a situation is expressly deemed in a statute to be an emergency,* an agency must make a finding of emergency by describing specific facts supported by substantial evidence . . .".[6] While the Legislature has made no findings with respect to the operations targeted by the proposed emergency regulation, the italicized portion of the Government Code above expressly acknowledges that an agency cannot rely upon the existence of an urgency statute to substitute for compliance with § 11346.1(b)(2). OAL should correct its website to clarify that no statutory enactment excuses the Department or others from presenting a complete and properly-supported finding of emergency.

Moreover, Government Code § 11350(a) specifically provides that interested parties may petition the courts for an order repealing emergency regulations "upon the ground that the facts recited[ ] in the finding of emergency prepared pursuant to subdivision (b) of Section 11346.1 do not constitute an emergency within the provisions of Section 11346.1." Permitting a mere reference

[6] http://www.oal.ca.gov/emergency_regulation_process.htm#agency (accessed 6/18/13).

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

to a prior urgency statute to substitute for a factual determination of emergency would, in substance, remove petitioners' rights to judicial review.

The Government Code defines "emergency" as "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare". Government Code § 11342.545. In the environmental context, however, the Legislature has clarified that "emergency" should constitute

> "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. 'Emergency' includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage."

Public Resources Code § 20160.3. As set forth below, there is no serious "harm" to be addressed by any emergency regulation, much less any "clear or imminent danger" causing "loss of, or damage to, life, health, property, or essential public services".

There Is No Evidence of Any Emergency Related to Small-Scale Underwater Gravel Transport Activities

Much of the argument in favor of emergency regulation arises from assertions concerning effects imagined to arise from suction dredge mining. The activity here, however, does not involve suction dredging. It involves underwater suction gravel transfer systems.

The attached Declaration from Mr. McCracken contains both the initial article describing the design of the machines (Exhibit 1 to the Declaration) and testimony concerning how miners have implemented the ideas in the article. He notes that the volume capacities of these underwater gravel transfer systems will most often be substantially smaller than suction dredges, because the material collected must be directed into a portable container. Efficiency is also lost because time must be taken out from operation of the motorized transport system to pan or otherwise process the collected materials. In substance, the operations amount to a substitute for miners operating underwater by hand, collecting the gravels in canvas bags, and taking it back ashore for processing.

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

The evidence in the record before the Department concerning operation of these machines was submitted on March 28, 2013 by the Karuk Tribe.[7] It submitted videos, pictures and other evidence to the Department which it contended demonstrated a need for emergency action. For the most part, they consist of video showing miners engaged in activities with no adverse consequences whatsoever, with voiceover narrations claiming the activity is illegal. *See, e.g.*, http://www.youtube.com/watch?v=kRigmPsfSnE. In fact, the person in the video was sucking gravel into fixed containers; he and his brother spend much more time panning the collected material than sucking it up. (Exhibit 1, ¶ 5: McCracken Decl.)

Neither the Tribe's evidence nor the Department's Statement of Emergency contains evidence concerning the scope of machine operations. The total scope of such activity is quite small, and cannot remotely constitute an "emergency". Most of it is occurring within Siskiyou County, including represents licensees of The New 49'ers, Inc. (*See* Exhibit 1, ¶¶ 2, 6.) Extensive license conditions are imposed to prevent any adverse effects of significance. (*Id.* ¶ 3.)

Attached as Exhibit 5 is a Declaration from Richard Krimm, a former California law enforcement officer, who is familiar with much of the activity going on in the Klamath River basin. There are only 15 gravel transfer units (GTS) currently in operation on nearly a hundred miles of river, and they do not operate continuously. (*Id.* ¶ 4.) Most of those coming for the mining season are not mining at all, as it represents a sort of spectator sport for retirees and others. (*Id.*, ¶ 8.) The photographs attached to the Krimm Declaration make it clear that the scale of these GTS activities is utterly insignificant in the context of the Klamath River watershed as a whole.

The County is the governmental body with the most direct knowledge and experience with both suction dredging and the use of underwater suction gravel transport systems. We understand the County is separately filing comments concerning the Department's proposed emergency

[7] As noted above, the Tribe has been engaged in ongoing litigation targeting Mr. McCracken's licensees as part and parcel of a general strategy of seeking Tribal hegemony in economic activities in the areas over which it seeks jurisdiction.

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

regulations, in which they urge OAL to reject the regulations because there is manifestly no emergency. Among other things, the County also finds that the current activities are certainly of a lesser degree than the *de minimis* impacts of suction dredging itself.

Also submitted here as Exhibits 6, 7 and 8 are additional Declarations from other individuals and interests within Siskiyou County confirming the absence of any "emergency"—other than the economic emergency threatened by the Department's emergency attack upon the mining community. The President of the local Chamber of Commerce and other business owners explain how the moratorium on suction dredge permits devastated the local communities. (Exhibit 6: Declaration of Schmalzbach; Exhibit 7: Declaration of King; Exhibit 8: Declaration of Collum.) The prevailing local sentiment is captured by one local business owner, Ms. King: "The only emergency here is an economic one caused by politically-motivated regulation that is destroying our country's economy. For the love of God, please, just give us a season to start to get back on our feet." (Exhibit 7, ¶ 10.)

Even the Department has recognized that the activities subject to the emergency regulation are of smaller scale. As the Department's Mr. Stopher explained, "such a system will be less efficient, and less excavation will occur, than if you were using a suction dredge since there is no sluice box and miners will need to use some other system to sort through the material." (Exhibit 3.) The Department offers nothing in its Statement of Emergency to explain why the lesser impacts of these underwater suction gravel transport systems would constitute an emergency.

The Department may argue that underwater gravel transport activities avoid regulation entirely, thus posing risks that the regulation of suction dredging was designed to minimize. This is wrong as a matter of fact and a matter of law. As a matter of fact, the fish salmonid eggs present in gravels have now hatched out. No new eggs will be laid until the autumn months. The activity that

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

is occurring now, and on which the Department purportedly relied to issue this emergency rule, is not outside any generally-recognized in-water work window intended to protect fish.[8]

It is also incorrect as a matter of law to suggest that the operation of underwater motorized gravel transport systems is not subject to regulation, Mr. Stopher had also pointed out many months ago that, "as McCracken notes, Fish and Game Code section 1602 could apply if the streambed alteration is substantial, that is, you create a big hole." (*Id.*) Section 1602 prohibits anyone from "substantially chang[ing] or us[ing] any material from the bed, channel, or bank of, any river, stream, or lake, or deposit[ing] or dispos[ing] of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake" without a permit from the Department.

Section 1602 demonstrates that notwithstanding any claims of a "loophole" that must be remedied by emergency regulation, the Department has full power to address any *significant* operations within the State. The Director endorsed these conclusions in denying the Karuk Tribe's initial petition for relief, stating that § 1602 and other "laws as enforced by the Department and other relevant agencies will safeguard against and significantly reduce the prospect that any instream mining operation that falls outside the current definition will adversely affect California fish and wildlife resources, or the environment[] generally". (Exhibit 4, at 4.)

In short, the Department previously admitted that there is no emergency here. The emergency regulation is best understood as being aimed at operations insubstantial to any unbiased person of reason, operations which by their nature can never create anything approaching an "emergency". The emergency regulation is a gross misuse of the regulatory power to prohibit

[8] The Department eventually developed a theory that fish already hatched might be stressed by dredging. There is no evidence for this whatsoever, as it is common knowledge among miners and knowledgeable biologists that the fish congregate near suction dredges to watch the material coming off the sluice for bits of food. (*See, e.g.*, Exhibit 9, at 3: Hassler (1986) (excerpt).) Potential "stress" to fish is not in any event an emergency.

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

entirely, without due process of law, activities that the Department cannot show in any enforcement context are causing any harm to anyone or anything.

Suction Dredge Mining Itself Would Cause No Emergency

At the outset, the Department was required in its Statement of Emergency to "identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies". Government Code § 11346.1(b)(2). The Legislature manifestly sought proof of *facts*, and the Department has cited instead cited very general CEQA analyses and reports to the Legislature which summarize (misleadingly and incorrectly, in most cases), the primary technical, theoretical and empirical studies. The obvious purpose of requiring the Department to identify the primary studies is so that opponents of the asserted emergency can refute them. *See, e.g.*, Government Code § 11347.1.

Proponents of the emergency regulation rely principally upon the Department's CEQA analysis for support. The Karuk Tribe, for example, argued in its petition to the Department that the Department's Environmental Impact Review (EIR), which found what the Tribe characterizes as "nine separate significant impacts, which the report states are non-mitigable". *It should be noted that the only potentially reasonable concern about the mining—effects on fish—was found to be less than significant, even on a cumulative basis. See* Draft SEIR (DSEIR) § 5.5.3 (discussion of "Impact CUM-1"). [9] The Department expressly found that suction dredging regulations were designed such that statewide operation of dredges "would not make a cumulatively considerable contribution to the decline of any fish species". *Id.* It should be noted that the best, large-scale, quantitative study of the fishery-related impacts of suction dredge mining—*including the effects of*

[9] The Department did issue a Final Environmental Impact Report, but it took the form of identifying changes and corrections to the DSEIR, and made no pertinent changes with respect to the material discussed herein. The cited materials from the DSEIR are available at http://www.dfg.ca.gov/suctiondredge/.

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

illegal mining conducted, by definition, beyond any regulation—could find no statistically-significant effects on fish populations. (Exhibit 10, at 15.)

As set forth above, the SEIR focused on suction dredge mining, not the operation of the machines at issue here. And a significant impact for purposes of CEQA is not the equivalent of "serious harm to the public peace, health, safety or general welfare". This is true both legally and factually with respect to assertedly "significant impacts" found by the Department.

As a legal matter, while the CEQA regulations define a significant effect as a "substantial adverse change in the physical conditions which exist in the area" (14 CCR § 15002(g)), in practice a significant impact for purposes of CEQA is any "direct physical change" in the environment, even mere dust or noise (*see* 14 CCR § 15064(d)(1)). In other words, for CEQA purposes any physical change may be deemed significant by Sacramento, irrespective of significant effects on health, safety or general welfare. CEQA significant impacts are not emergencies at all.

None of the "nine separate significant impacts" the Department identified from suction dredging provide substantial evidence of any emergency relating to suction dredging, much less operation of underwater gravel transport systems.

1. Noise. "Impact NZ-1" warns of potential exposure to noise levels in excess of city or county standards, which of course could be enforced by cities and counties to avoid any impact. As the DSEIR notes, "use of a motor boat, ATVs" and even "ringing telephones" may violate these standards (DSEIR at 4.7-9), yet the Department found that "suction dredge activities have potential to generate noise in excess of local noise standards" and "the impact cannot be discounted". (DSEIR at 4.7-9 to 4.7-10.) Whatever that may mean, the DSEIR contains nothing to suggest any more threat than that posed by a ringing telephone.

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

In 1994, the Department had concluded that "suction dredging is a legitimate recreational activity[10] and is afforded equal rights to use public lands to participate in the activity". (DSEIR at 4.7-8.) The existence of selfish individuals who are offended at the notion that they may, for example, have to kayak within earshot of an operating gasoline engine, and are unwilling to share the National Forests with the miners, does not an emergency make.

2-3. Cultural and Historical Impacts. Two more assertedly significant impacts were termed "Impact CUL-1" and "Impact CUL-2," relating to potential impacts to historical and archeological resources. The idea behind these significant impacts was such resources "might be present in areas of suction dredge mining" and "potential damage to or destruction of such resources is unknown" but "cannot be entirely discounted". (*E.g.*, DSEIR at 4.5-12.) Mere speculation that a suction dredger might encounter a submerged vessel, for example, and damage it, does not begin to constitute an "emergency".

The Department's CEQA papers reflect extensive discussion and review of the concept of "Traditional Cultural Properties" (TCPs) advocated by the Tribe. According to the DSEIS, "one defined TCP is a 'riverscape,' or 'a river and its environs, including their natural and cultural resources, wildlife, and domestic animals,'" and such TCPs can be determined significant under CEQA. (DSEIS at 4.5-7.) The Tribe now claims that essentially the entire Klamath riverscape is a TCP, such that any non-Tribal activity is significant. In addition to constituting a pernicious misuse of historic preservation statutes, and a gross violation of equal protection of law, this contention does not remotely constitute an emergency.

4. Turbidity. Another assertedly significant impact was termed "Impact CUM-6," asserting that mining would cause turbidity from suction dredge discharges. Significantly, most of the photographic evidence supplied by the Tribe shows no turbidity plumes arising from gravel

[10] In fact, much of the mining takes place as a matter of statutory right on federal land that is not part of the public lands, where private mining claims have been granted by the U.S. Bureau of Land Management, and is of a commercial nature.

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

transport systems. Further, the Department has not suggested that there is anything approaching an emergency concerning turbidity from GTS systems. The fact is that it would be more of an turbidity "emergency" each time someone launched a powerboat in the State of California.

Although the Department found the physical change of turbidity arising from thousands of suction dredges to be "significant" for CEQA purposes, the Department emphasized that additional closures to reduce turbidity effects "are not believed to be necessary to avoid deleterious effects to fish". (*Id.* at 5-28.) An analysis of suction dredge mining and turbidity in the Siskiyou National Forest by the Forest Service, making every assumption to exaggerate the effects of the mining, concluded that a forest full of miners would move less than 0.7% of the riverbed materials moved annually each year. (Exhibit 11: 1995 Determination (retyped).) The handful of miners here operating much less efficient machines do not begin to show any serious harm.

5-6. Birds. Another impact "BIO-WILD-2" relates to imagined "effects on special status passerines associated with riparian habitat," an impact also considered to be cumulatively significant as "Impact CUM-2". The Department identified certain "very rare" bird species (Table 4.3-3) and concluded that allowing suction dredging "may lead to significant impacts on several of these species". (§ 5.5.3.) Specifically, the Department identified three species of Willow Flycatchers, the Least Bell's Vireo, and the Western Yellow-Billed Cuckoo, and asserted "the potential to disturb breeding" although regulations kept miners out of most of the critical habitat during the nesting season. (DSEIR at Table 4.3-3.)

There was no evidence whatever of the effects of miners working underwater on birds in the air, only general statements that human presence may interfere with birds. (DSEIR at 4.3-48.) There is no evidence in the pictures and photographs submitted by the Tribe that any miners are operating underwater gravel transport devices in the vicinity of the bird habitat—most of them are native to Southern California or found in large river deltas hundreds of miles downstream from where mining is occurring. (*Id.* Table 4.3-3.)

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

Any effects on birds are "speculation" within the meaning of Government Code § 11346.1(b)(2), and not even speculation concerning conditions amounting to an emergency. If this sort of evidence provided grounds for an emergency, most of humankind's activities within the State of California could be shut down by emergency regulation because of "potential to disturb" birds.

7-9. Stirring Up Metals in the Streambeds. Three of the assertedly significant impacts of suction dredge mining related to effects imagined to arise from disturbing mercury left behind by historic miners or suspending other trace metals in the water. (Impact WQ-4, Impact WQ-5 and Impact CUM-7.) In finding that possible mercury discharges were cumulatively significant,[11] the Department emphasized that further closures to avoid or limit such discharges "are not believed to be necessary to avoid deleterious effects to fish, and are therefore considered infeasible". (*Id.* at 5-29.) The Statement of Emergency offers no explanation of what sort of emergency might exist.

There are occasional small deposits of mercury in some, but not all, California rivers and streams left over from historic mining practices. Neither suction dredgers or GTS operators use mercury. This mercury will eventually move downstream with the riverbed materials making their way to the ocean. (Exhibit 12, at 4-5) A single high-flow event in rivers with mercury deposits stirs up riverbed materials and puts more mercury in the river than suction dredgers possibly could. (Exhibit 14, at 24.) By contrast, repeated scientific studies have demonstrated that suction dredging has no significant environmental impact on heavy metals concentrations in streams. (Exhibit 13, at 3 & 4-6; Exhibit 14, at 5-8.)

Suction dredges recover approximately 98% of the mercury they encounter, providing a very significant net environmental benefit. (Exhibit 13, at 1-2; Exhibit 14, at 5.) Indeed, allowing suction dredge mining is the only practical way to catalog mercury "hotspots" in California rivers for potential remedial action. (Exhibit 12, at 6.)

[11] Cumulative impacts arising from other trace metals were found to be less than significant. *Id.* at 5-20 to 5-30.

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

While mercury is a potentially toxic element, mercury toxicity to humans from eating fish is an issue created by misunderstanding and exaggeration, since nearly all fish contain more selenium than mercury, and selenium destroys the effects of mercury toxicity by binding to the mercury.[12] Actual surveys of California fish show no significant mercury contamination in areas where suction dredge mining continued for years, and that the fish have more selenium than mercury.[13] Attached as Exhibit 15 is a copy of a PowerPoint presentation which two scientists gave to the Department in connection with preparation of the revised suction dredging regulations, confirming that there was no mercury-related risk to human health whatsoever, much less an emergency.

In any event, as these experts and others emphasize, mercury does not form the potentially toxic compound methylmercury in areas of high dissolved oxygen such as gold-bearing creeks where gold dredging occurs, but more in low-dissolved oxygen areas such as swamps and deltas. (Exhibit 13, at 4.)

Here the Department and its environmental consultant were involved in arbitrary and capricious conduct. A government scientist named Charles Alpers fostered concern over the tiny amount of mercury not removed by suction dredges on the basis of a comparisons that in any civil context would border on fraudulent. He conducted an "experiment" involving a massively contaminated area and equipment that recirculated mercury-contaminated water and sediments

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[12] This information is contained in a selenium and mercury fact sheet prepared to promote public awareness by the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce, and is available at http://www.undeerc.org/fish/pdfs/Selenium-Mercury.pdf (accessed 6/12/13; attached as Exhibit 18).

[13] This data is reported at http://www.waterboards.ca.gov/water_issues/programs/swamp/rivers_study.shtml (accessed 6/12/13, attached as Exhibit 16), which concludes that "[r]iver and stream locations outside the Delta region all had low or moderate methylmercury contaminations" with "low concentrations" in trout. (Report at 2.) Appendix 2 of the Report contains the river-by-river data, showing, for example, very low concentrations in the Klamath River, the focal point of suction dredge mining in California.

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

hundreds of times, unlike suction dredges. (*See* Exhibit 12, at 5-6; Exhibit 14, at 9.) Use of this data makes the Department's conclusions concerning mercury in its environmental analysis of suction dredging utterly false. (Exhibit 14, at 14-18.)

Ironically, the Department and ostensible opponents of suction dredging support the use of equipment to clean up mercury-contaminated sediments that leave far more mercury behind than suction dredges (Exhibit 12, at 7-8), and suggest that the Department's statements represent acquiescence to political pressure rather than evenhanded assessment of the facts before it.

In short, the potential that some miners might vacuum up a mercury deposit and recover 98% of it for proper disposal, while returning 2% back to the riverine environment, does not begin to constitute any sort of "serious harm to the public peace, health, safety or general welfare". That evidence concerns suction dredges; there is not a shred of evidence that operation of underwater gravel transport systems have any mercury-related effects at all, or that any present operations are posing any mercury-related risk whatsoever.

Other Legal Defects in the Department's Emergency Filing.

1. Jurisdiction. The Department has repeatedly taken the position that its regulatory authority does not extend beyond fish and wildlife, and indeed should not be extended beyond fish and wildlife. The Department never specifies whether and to what extent its imagined emergency constitutes a threat to fish and wildlife, or represents alleged threats it has just told the Legislature are "not subject to the Department's current authority under the Fish and Game Code".[14] It is inconceivable that the Department could have just adopted regulations certifying that thousands of suction dredges would not harm fish, yet now base its claims of emergency on harm to fish from a few dozen (at most) smaller-volume GTSs. By all appearances, the Department is acting lawlessly on the basis of sensitivity to Tribal demands *over which it has no jurisdiction whatsoever.*

[14] CDFW Report to the Legislature Regarding Instream Suction Dredge Mining under the Fish and Game Code, April 1, 2013, at 3.

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

2. Failure to Explain Comparable Regulations. Government Code § 11346.5(a)(2) requires, where "the proposed action differs substantially from an existing comparable federal regulation or statute, a brief description of the significant differences and the full citation of the federal regulations or statutes". All documented activities ongoing in Siskiyou County occur within National Forest lands under regulations set forth at 36 C.F.R. § 228.4. These federal regulations confirm that mining activities are generally authorized under federal law, and no notice is required to be given to the Forest Service of such activities unless the operations "might cause significant disturbance of surface resources". 36 C.F.R. § 228.4(a). In particular, operations which do not "involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees" do not require notice to the Forest Service. *Id.* § 228.4(a)(1)(vi).

The Forest Service has previously consulted with the National Marine Fisheries Service concerning the effect of Forest-wide suction dredging—*i.e.*, activities are much greater magnitude that covered by the emergency regulation—and concluded that they do not adversely affect endangered fish. (Exhibit 17.) The Department lacks any substantial evidence of adverse effects on fish arising from the activity here, much less an "emergency".

Insofar as the Department has made no reference to the comparable federal regulatory scheme governing these activities, its filing is manifestly defective and should be rejected out of hand irrespective of the absence of any predicate for a finding of "emergency".

3. *Failure to Explain Nonuse of Nonemergency Regulation Procedure.* Government Code § 11346.1(b)(2) requires that where, as here, "the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations," the agency must explain its "failure to address the situation through nonemergency regulations". The Department has known of the plans of the miners since at least January 2, 2013, the date on which Mr. Stopher opined that the practices proposed were lawful. (*See* Exhibit 3.)

James L. Buchal (SBN 258128)
MURPHY & BUCHAL LLP
3425 S.E. Yamhill, Suite 100
Portland, OR 97201
Tel: 503-227-1011
Fax: 503-573-1939

Thereafter, the Karuk Tribe filed its initial petition for agency rulemaking back on March 20, 2013, making the same arguments, in 28-page detail, as were contained in its May 28, 2013 petition ultimately granted by the Department. The Tribe even reprinted portions of Exhibit 1 to Exhibit 1, showing precisely what was at issue. The Department could have utilized the ordinary rulemaking process to respond to the Tribe's concern. Instead, the Department denied the Tribe's initial position, properly recognizing that there was no emergency and the matter could and would be addressed in ongoing litigation among the parties.

The Department's refusal to engage in ordinary rulemaking proceedings enables the Department to avoid all the ordinary rulemaking requirements, including requirements that are of vital importance in protecting against unjustified economic injury. The Department is evading Government Code § 11346.3, requiring an assessment of the adverse impact upon California businesses, and avoiding consideration of "alternatives that are proposed as less burdensome and equally effective in achieving the purposes of the regulation", *id.* § 11346.2(b)(4)(a).

Insofar as the Department's filings with OAL are devoid of any explanation why they could not have acted back in January, they should be rejected for that reason alone.

Conclusion

The OAL has a vital statutory duty to "shall disapprove the emergency regulations if it determines that the situation addressed by the regulations is not an emergency . . .". Government Code § 11349.6(b). There is no emergency here, and no legal or adequate factual basis for the regulation change. It should be disapproved.

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JAMES L. BUCHAL (SBN 258128)
MURPHY & BUCHAL LLP
3425 SE Yamhill Street, Suite 100
Portland, OR 97214
Telephone: (503) 227-1011
Facsimile: (503) 573-1939
Attorney for THE NEW 49'ERS, INC.