



COUNTY OF SISKIYOU

COUNTY ADMINISTRATIVE OFFICE

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May 12, 2011

California Department of Fish and Game
Attn: Mark Stopher
Suction Dredge Program Draft DSEIR Comments
601 Locust Street
Redding, CA 96001

RE: Suction Dredge comments

Dear Mark:

Enclosed or attached, please find Siskiyou County's comments on the Suction Dredge SEIR. I am sorry that this packet is beyond the deadline, but greatly appreciate your email assuring me that these comments will be fully considered. This issue is too important to our county to have fallen victim to complications from the multitude of critical matters on my plate!

Sincerely,

Ric Costales, Natural Resource Policy Specialist
County of Siskiyou



COUNTY OF SISKIYOU

Board of Supervisors

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May 10, 2011

California Department of Fish and Game
Attn: Mark Stopher
Suction Dredge Program Draft DSEIR Comments
601 Locust Street
Redding, CA 96001

Mr. Stopher:

Nothing speaks better to Siskiyou County's interest in the matter of the Suction Dredge Program Draft Supplemental Environmental Impact Report (DSEIR) than the miner depicted in the gold County Seal at the top of this page. Historically, culturally, and economically, gold mining has been central to our county since it was established. While diminished from the height of its glory, gold mining is still a significant aspect of life here. Most notably relative to the proposed regulations, gold mining in the form of suction dredging is vital to the local economy throughout a large portion of the county's land base. The current proposal will devastate this last vestige of a once thriving component of our natural resource economy.

Due to its public health and safety, planning and public works responsibilities, County government has much in-house expertise relative to the DSEIR. However, due to the complexity of the issue and the magnitude of the effect on Siskiyou County, the County feels that expertise available to us from interested citizens is necessary to augment our contribution to the record. Thus, the County directs the California Department of Fish and Game (DFG) to consider the attached comments as part of our own.

For purposes of clarity, the County's concerns are best broken down into two categorical levels: thematic and specific.

Thematic Issues: *Issues permeating discussion and analysis throughout the DSEIR*

- **"Conservative" Approach:**

Though appearing to have studiously avoided any direct mention of it, the DSEIR seems to embrace the controversial "Precautionary Principle" on far too many critical points. In the document, this seems to be euphemistically called a "conservative approach." Throughout, whenever negative environmental effects have "may," "might," "could," "potential" or other such conditional qualifiers attached, the Department consistently imposes mitigations as if these effects were in fact likely and significant. The document is replete with proposed mitigation where there is "some" evidence of the potential for a negative impact, but virtually no evidence that this detrimental potential is ever realized to a level "deleterious to fish (*F&G Code 5653*)," especially in light of the fact of the voluminous effort that has been made to study suction dredging that has consistently found *de minimus* impact.

In the DSEIR it would further appear that the DFG thinks that "conservative" applies

only to the environment. Many mandates exist throughout California environmental law such as Fish and Game (F &G) Code §2052.1 (“...measures or alternatives required shall be roughly proportional in extent to any impact [of the project]...”), and §2053 ([Protect species] while at the same time maintaining the project purpose to the maximum extent possible”). Such expressed legislative intent would seem to demand balance between envirocentric conservatism and anthropocentric conservatism. Unfortunately, in issue after issue the DSEIR takes an extremely conservative approach on behalf of the environment with only the barest concessions to the mining community. While the DSEIR does allow the DFG to claim that suction dredging will still be permitted, the result seems to show the effort made to minimize mining rather than show any concern for its vitality.

The attached documents give numerous examples of where this occurs in the DSEIR. Suffice now to say that Siskiyou County feels that the reasonableness and balance sought by the California Environmental Quality Act (CEQA) is arbitrarily and capriciously denied when “better safe than sorry” becomes a regulatory consideration imposed without statutory mandate or guidelines. The feasibility issue as discussed later is part of the reasoning on this position.

- **Baseline**

Within the DSEIR, the Department of Fish and Game (DFG) described the history behind the DSEIR to justify why the “No Dredging” condition imposed by SB 670 was selected as the baseline. But let’s use a layman’s description of the situation:

- This entire state of affairs arose because the 1994 suction dredging regulations may have needed some changes.
- The Alameda Superior Court directed the DFG to do a DSEIR to evaluate the need and, if necessary update the regulatory program.
- SB 670 was a moratorium, not an elimination that was imposed because the legislature got tired of the DFG not doing the job it was required to do by the Court.
- Because there was no dredging going on thanks to the moratorium the DFG’s “conservative approach” (*DSEIR p. 1-7, line 11*) adopted a No Dredging baseline.
- Thus, because the DFG didn’t do its Court-ordered job, an entirely different contextual scheme for CEQA analysis results.

There is no dispute that had the DSEIR been done without the moratorium, the “1994” regulatory conditions would have been the baseline. Thus instead of analyzing the activity against a backdrop where that activity doesn’t occur, suction dredging impacts would have been measured against being already taking place. Had the Legislature intended to evaluate suction dredging as a new activity, the Legislative Counsel’s Digest would not have termed the legislative action a “suspension.” It is also reasonably likely that had the Legislature or the Governor understood in advance that the DFG would adopt the No Dredging baseline, an entirely different fate would have met SB 670.

The view that the moratorium has provided the DFG with discretion or compulsion to ignore the mandate to assume the “1994” baseline poses an interesting future run-around to CEQA. Legislative bodies could take the politically canny path for a controversial project of imposing a moratorium on that heretofore approved type of discretionary project. According to the DFG’s logic on the DSEIR, then, the project thus could conceivably be evaluated as if nothing of the sort had ever occurred.

The effect of this reasoning is painfully evident in the DSEIR where it rates the access to placer gold deposits resulting from the proposed program as "beneficial" relative to the baseline because it "...would lift an existing ban on suction dredging and would increase the potential access to placer gold deposits using this mining method (DSEIR, p. 4.10-9, lines 10-13)." Had the "1994" baseline been used, the proposed regulations would **severely decrease** access and thus would have had a negative effect. An entirely different analysis and therefore outcome resulted from suction dredging's "suspension" which the DFG took as an opportunity for discretion regarding the baseline.

Siskiyou County feels that the selection of a No Dredging baseline for purposes of the CEQA analysis is an abuse of a discretion to which the DFG is not entitled in this matter. (See: *Communities for a Better Environment vs. South Coast Air Quality Management District* (2010) 48 Cal 4th 310, 328: "A temporary lull or spike in operations that happens to occur at the time environmental review for a new project [in the DSEIR's case, the new rules] begins should not depress or elevate the baseline.")

- **Feasibility**

Much confusion about CEQA exists concerning the economic analysis required for purposes of an environmental document such as the DSEIR. Economic studies are mandated by CEQA only to the extent that they have been identified as having significant or potentially significant environmental effects or consequences. The confusion may result in large part because under the Administrative Procedures Act (APA) that affects the adoption of regulations such as are proposed, there must be an Economic and Fiscal Impact Statement (Standard Form 399).

Contributing in no small part to the confusion is CEQA's repeated reference to insuring balance between people and the environment and, most specifically, feasibility. For example, Public Resources Code (PRC) §21001 (g) states:

"[It is the policy of the state to c]reate and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations."

Further, PRC §21081 and subsections state:

"...no public agency shall approve or carry out a project...(a)[when T]he public agency makes one or more of the following findings with respect to each significant effect: ... (3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make **infeasible** the mitigation measures or alternatives identified in the environmental impact report."
(Emphasis added)

Thus, feasibility becomes an issue under CEQA and therefore in the documents that it mandates. CEQA defines feasibility as "...capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors. (PRC §21061.1)"

It is apparent in many of the comments and examples from the accompanying

documents that feasibility relative to the preferred alternative has been given short shrift. For example, the 3' spacing from banks makes for an infeasible alternative for huge swaths containing gold for which suction dredging is the most environmentally friendly means of production.

Siskiyou County feels that speculative and overly optimistic undocumented assumptions have been made as to the feasibility of critical components of the preferred alternative.

- **Federal land vs. private land**

In an underlying assumption throughout the DSEIR, the DFG has determined that there is no distinction between federal or private lands. If the DSEIR merely analyzed the impact of suction dredging on the environment, this would be a reasonable approach. However, the DSEIR proposes a regulatory program that the DFG plans to enforce. As the attached documents extensively highlight, differences between the assumptions, conclusions and regulations made by the federal and state agencies are often at considerable and irreconcilable odds.

The DFG must feel this is a minimal issue given that only §4.10 (10 pages) of a 1200+ page document covers the subject. Implied though not directly stated as such in §4.10, the DFG apparently feels that California's Surface Mining and Reclamation Act (SMARA) sets the precedent whereby the state can override federal law. The DFG has reached this conclusion even though by closing many streams and imposing broad scale prohibitive restrictions, the DFG has essentially withdrawn many areas from mining. Federal law has its own process for withdrawal of mineral exploration and mining.

Private land presents its own complications. The DFG has stated at public meetings that it cannot evaluate the "takings" issue within an environmental document. Nevertheless, when areas of private property whose sole reason for investment was for mining (such as patented claims along streams), there is a very significant affect that needs to be analyzed. This was not done.

Siskiyou County feels that numerous federal policies, regulations and laws as well as state laws including the taking of private property were given insufficient consideration that in turn has led to severe defects in the DSEIR's proposed regulatory program. These defects run the gamut of being analytically insufficient, infeasible and, in some cases, unlawful.

Specific Issues: *Specific points of concern within the DSEIR*

- **Economic analysis including cumulative economic and social effects**

As stated in the DSEIR and in the discussion on "feasibility" above, the CEQA mandate regarding economic and social analysis is confusing. Nevertheless, the DSEIR did include a socio-economic report (DSEIR, Appendix H).

While making an attempt to survey miners to determine the value of their gold mining activities, the economic analysis is appalling for its lack of effort, particularly relative to Siskiyou County wherein lie the Scott, Salmon and much of the Klamath watersheds. Mining is the last significant legal economic activity left in these remote areas. The new regulations will severely undermine the overall economic viability not only of the miners, but the businesses and service-providers in these

communities.

Despite Siskiyou County's Natural Resource Policy Specialist making a specific request at the Redding Scoping meeting for the contractors to survey businesses, this was not done. Further, the contractors did not seek publicly available information on economic data from the County. Finally, the County's requirements for such a project as the DSEIR were not met (See Supervisor Armstrong's attached comments).

Both for purposes of determining feasibility as well as the Standard Form 399 Economic and Fiscal Impact Statement, Siskiyou County feels that insufficient analysis has been done.

- **Three foot "No dredging" zone along banks**

As mentioned earlier, on many watercourses that are 6' or less in width, this is a taking of private property that renders the alternative infeasible, not to mention unlawful. Also, as mentioned earlier this is a severe conflict with federal law in that this regulation is a *de facto* withdrawal of land in the federal estate from mining activity.

- **Fish and Game (F & G) Code §1602**

Much of the controversy locally with this section of the F & G Code has resulted from the DFG's recent efforts relative to the Watershed-wide Permitting Program (known also as the Incidental Take Permit program) attempted in the Scott and Shasta valleys. Years of public meetings with the DFG has had the DFG ***consistently and fervently*** emphasizing the difficulty, time and expense of securing individual §1602 permits for irrigators that would almost certainly require full-blown EIRs even for existing previously approved diversion structures however minimal the diversion. The DFG portrayed the §1602's attendant EIR as a prohibitive but usually necessary requirement for virtually all diverters. An added burden was that the permit could only last for a maximum of 5 years before it would have to be done all over again. The DFG was using this code section as a virtual imperative for diverters to enroll in the ITP program by virtue, essentially, of the infeasibility of individual §1602 permits.

Within the DSEIR the DFG is apparently reversing itself and downplays the magnitude of §1602. There is no formal implication one way or the other in the DSEIR how the DFG will treat §1602 applications for suction dredgers. However, how §1602 is interpreted, whether with relatively low-cost, short time frame Mitigated Negative Declarations based on Best Management Practices (BMPs) or with full-blown EIR, is absolutely critical to the feasibility of the proposed regulatory program.

Based on the feasibility issue, Siskiyou County feels that the §1602 aspect of the DSEIR should not have escaped analysis and discussion. Further, the County feels that the proposed regulatory scheme should have included some sort of assuredly feasible §1602 approach rather than kicking the can down the road by glossing over the §1602 issue.

- **4 inch nozzle restriction**

It is extremely common for valuable deposits to require greater than a 4" nozzle to access them in a single season. Beyond a single season, that season's work is very

likely to be covered up again by the subsequent winter's transportation of the bed load. As well, certain types of substrate require larger nozzles. The DFG acknowledges these aspects of suction dredging and figures that a §1602 permit will cover it.

For reasons explained in the previous discussion on §1602, the County feels this is infeasible. As well, the County feels that the additional environmental consequences of the larger sizes are not sufficient to justify such an onerous requirement.

- **In-stream winching**

In-stream power winching is unavoidable for the vast majority of serious suction dredging operations. As well as access to valuable deposits, winching is often critical to safety. Again, the DFG acknowledges this and includes the §1602 permit as the remedy.

Again, for reasons explained in the previous discussion on §1602, the County feels this is infeasible. Similarly, the County feels that the additional environmental consequences of power winching are not sufficient to justify such an onerous requirement.

- **4000 statewide permits**

California contains an almost uncountable number of watercourse miles on which suction dredging could take place. Accounting for the size of some rivers that could require a dredge to be in virtually one place for several years, the area available for mining is vast. 4000 annual permits is absurd given that opportunity. Mining is not like coping with game species that justify limits on permit numbers in order to manage "take." The valuable deposits are property that belongs to the miners to take however quickly and in whatever quantities they choose.

Siskiyou County feels that the limitation statewide on permits is arbitrary and done without sufficient justification. Further, the County feels that this results in an undue restriction of the rights of people to be secure in their property. For example, the elderly person wanting that 4001st permit may have just lost the value of his investment for the rest of his life.

Like the "3 Foot Rule," Siskiyou County feels that this is another *de facto* withdrawal of land in the federal estate from mining activity.

- **Returning dredging site to pre-mining grade**

This is a prime example of envirocentric conservatism completely overwhelming any concern for conservatism on behalf of the mining community. Why is this even included in the regulations when it is virtually impossible to move material back upstream and when a normal winter would probably make it impossible to even tell where the mining took place? As well, holes caused by suction dredging provide refugia for cold water species of fish.

Siskiyou County feels that this is an entirely superfluous and infeasible requirement.

- **Further seasonal restrictions on suction dredging**

Siskiyou County feels that there is insufficient justification for shortening the

dredging season in our area over what the 1994 regulations prescribed, particularly the Klamath River mainstem. As such, the County feels that the DFG is arbitrary in determining new seasonal closures.

It is imperative that the suction dredge mining community get back to work as soon as possible. Siskiyou County urges the Department of Fish and Game to incorporate changes into the Final Environmental Impact Report that address the above comments and provide for a feasibly workable permitting program more along the lines of the 1994 regulations than the radical departure from balance proposed in the DSEIR.

Sincerely,



Jim Cook, Chairman
Siskiyou County Board of Supervisors

Enclosures: Comments from Siskiyou County District 5 Supervisor Marcia Armstrong; Comments from Dave McCracken, President New 49ers Prospecting Association