

**KARUK TRIBE OF CALIFORNIA
CALIFORNIA TROUT
FRIENDS OF THE NORTH FORK
THE SIERRA FUND**

December 26, 2008

Donald Koch, Director
Department of Fish and Game
1416 Ninth Street
Sacramento, CA 95814

SUBJECT: Petition for administrative rulemaking (Gov. Code Sections 11340.6, 11340.7, 11346.1, 11346.4)

Dear Mr. Koch:

The Karuk Tribe of California, California Trout (aka "CalTrout"), the Friends of the North Fork, and the Sierra Fund (collectively "Petitioners") hereby petition the Department of Fish and Game ("Department") to add to the California Code of Regulations, Title 14, Sections 228.6 and 228.7, as provided herein. Petitioners make this request pursuant to Section 11340.6 of the Government Code, which provides that "any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation..." Further, Section 11340.7, subdivision (a) provides that:

Upon receipt of a petition requesting the adoption, amendment or repeal of a regulation pursuant to Article 5 (commencing with Section 11346), a state agency shall notify the petitioner in writing of the receipt and shall within 30 days deny the petition indicating why the agency has reached its decision on the merits of the petition in writing, or schedule the matter for public hearing in accordance with the notice and hearing requirements of that article.

Accordingly, Petitions request that this matter be noticed for adoption as an emergency rule by the Department, pursuant to Gov. Code Sec. 11346.1, at a location, date and time to be determined of mutual convenience and within the parameters prescribed by Section 113401.

The amendments Petitioners request would establish interim restrictions to minimize and mitigate the impact of suction dredging operations on coho salmon, green sturgeon and lamprey within segments of the Klamath, Scott and Salmon Rivers, plus enumerated tributaries, specifically to avoid and minimize the potential for such operations that will or may cause "take" of these species. The proposed regulatory amendments in this Petition would also facilitate and promote the recovery of coho salmon by delaying the start date and moving up the closure date for seasonal dredging operations on these

waters, and by totally closing enumerated side stream tributaries to suction dredging that provide thermal “refugia” necessary to ensure the survival of juvenile coho salmon.

Additionally, the amendments Petitioners request would temporarily close to suction dredging segments of five streams along the western slope of the Sierra Nevada for the protection of self-supporting populations of native trout from the adverse environmental affects of such instream mining activities. We note that the Department recently agreed to cease all planting of hatchery-produced fish within streams along the west slope of the Sierra Nevada (and elsewhere) where populations of native trout species are known to exist, as well as sensitive species of amphibians (red-legged and yellow-legged frogs).

Coho salmon are listed as “threatened” and “endangered” species under the California Endangered Species Act and under the Federal Endangered Species Act. The existing Department regulations fail to prevent harm or take of coho salmon because they were adopted in 1994 which was before the state and federal listing of these species. Department officials have filed declarations in connection with the 2005 lawsuit filed by the Karuk Indian Tribe (*Karuk Tribe of California, et. al. v. Department of Fish and Game, Super Ct. Alameda County Case No. RG 05 211597*). In the declaration filed by DFG Deputy Director Banky Curtis dated October 2, 2006, he states:

*“The Department believes suction dredge mining under the existing regulations in the Klamath, Scott and Salmon River watersheds is resulting in deleterious impacts on coho salmon (*Oncorhynchus kisutch*), a species currently protected by the California Endangered Species Act (“CESA”) (Fish and Game Code, Sec. 2050 et seq.). Because of this, the Department also believes its current suction dredge permitting program is not in compliance with California Fish and Game Code Section 5653, subdivision (b), and Section 5653.9.”*

In an accompanying October 2, 2006, declaration filed by Neil Manji, the Fisheries Branch Chief for DFG, Mr. Manji stated:

“...based on a review of the scientific literature, data available to the Department, and my experience as a fishery biologist, it is my professional opinion, as the Fisheries Branch Chief for the Department that suction dredge mining under the existing regulations in the Klamath, Scott and Salmon River watersheds is having deleterious effects on coho salmon, a species currently protected by the California Endangered Species Act.”

Petitioners also note that a February 2008 National Marine Fisheries Service (“NMFS”) report found that, across the range of coho salmon on the coast of California, there has been a 73% decline in returning adults in 2007-08 compared to the same cohort in 2004-05 (“Coho and Chinook Salmon Decline in California during the Spawning Seasons of

2007/08,” by R.B. MacFarlane, S. Hayes, B. Wells, **(Exhibit A)**. An April 2008 report released by the National Oceanic and Atmospheric Administration (“NOAA”) finds that the lack of demonstrably viable coho populations, lack of redundancy in viable populations, and substantial gaps in coho distribution, all “strongly indicate that (the coho) is currently in danger of extinction.” (“A Framework for Assessing the Viability of Threatened and Endangered Salmon and Steelhead in the North-Central California Coast Recovery Domain.” By NOAA National Marine Fisheries Service **(Exhibit B)**). This dramatic and recent decline constitutes an emergency situation.

With respect to the impact of suction dredge mining on native trout populations in the Sierra Nevada, in September 1998 DFG prepared a biological and aquatic resources assessment of Brushy Creek and the North Fork American River in Placer County **(Exhibit C)**. In that study, the Department concluded that suction dredging in this area is having adverse environmental consequences and deleterious effects on fish:

The channel of North Fork American River was disturbed in numerous areas by suction dredge activities. There was evidence of "high banking" and "pot holes" along the right bank of the river in the surveyed reach. These areas were being utilized by foothill yellow-legged frogs and juvenile fish were trapped in isolated holes. The frogs will be able to survive, but the fish are not likely to.

The large numbers of foothill yellow-legged frogs present in the surveyed reaches may lead to the conclusion that there is no adverse effect by suction dredge activities. However, 1995 through 1998 have been above normal water years and there is some indication that other drainages (Butte Creek) have seen a large increase in foothill yellow-legged frog numbers in recent years (K. Hill, DFG pers. communication). In below normal water years, low flows will reduce year. There is some evidence that the egg masses of this species are highly susceptible to suspended particulates, e.g. sediment, however to what extent is unknown (Jennings and Hayes, 1994). Disruption of channel bedload in breeding areas and rearing areas will have an adverse effect upon this species.

The Department’s North Fork assessment report went on to make specific recommendations to the Department:

The current season for this reach of the North Fork American River is from the last Saturday in May extending thru October 15. In some years the existing season may not be adequate to protect the breeding period (of the yellow-legged frog), e.g. below normal water years. Therefore a modification of the existing season is warranted to allow a majority of the tadpoles to reach sub-adult stage where they would be able to escape any suction dredge activity. This drainage has unique characteristics for both ichthyofauna and herpetofauna, evidenced by strong populations of native minnows and amphibians. The development of more restrictive regulations that would protect these resources is warranted.

Thus, adverse environmental effects and deleterious effects on fish were specifically documented by the Department on the North Fork of the American, yet no action was taken to modify the regulations. In fact, the North Fork is one of the waters in which, with no analytical basis in the environmental documentation for the 1994 regulations, eight-inch dredges are permitted. These jumbo dredges are operated every year on the North Fork. Allowing suction hoses up to eight inches in diameter is one of several areas where last minute changes in the 1994 regulations brought them out of compliance with DFG's 1993 biological opinion on the regulations. Among the conditions to avoid jeopardy to special status species and species of special concern were a maximum hose size (six inches), closure of all designated Wild Trout Waters (didn't happen), use of emergency closure authority (which the Department to date has refused to exercise), and the periodic review of the regulations to ensure that suction dredging will not jeopardize any state or federally-listed species (hasn't happened).

As further evidence as to the need for emergency interim restrictions on suction dredge mining to be adopted immediately, Petitioners also bring to your attention the report entitled, "SOS: California's Native Fish Crisis – Status of and solutions for restoring our vital salmon, steelhead and trout populations," published November 19, 2008, and commissioned by California Trout, Inc. This report is based on 32 peer reviewed full life history accounts that were prepared by Dr. Peter Moyle, Dr. Joshua Israel, and Ms. Sabra E. Purdy, and published concurrently as "Salmon, Steelhead and Trout in California: status of an emblematic fauna." These accounts, which have been subject to extensive peer review and comment, can be viewed and downloaded from California Trout's website (www.caltrout.org).

According to the SOS report, most populations of California's native salmon, steelhead and trout are in serious trouble. The report projects that 65 percent of our state's native salmonid species will be extinct within the next 100 years if present trends continue. Fully 65 percent of the species headed toward extinction are found only in California (**Exhibit D**). One of the keynote salmonid species is most danger of extinction is the

Southern Oregon/Northern California Coast Coho Salmon. The SOS Report indicates that total wild coho spawners for this subspecies in California each year are currently between 2,000 and 30,000 fish, probably more often closer to the lower estimate. These fish comprise about 250 isolated populations that show evidence of genetic and demographic problems likely to lead to extinction. Major factors affecting coho salmon include: (1) dams, (2) water diversions, (3) logging, (4) grazing and agriculture, (5) mining, (6) estuary alteration, (7) pollution, (8) alien species, and (9) hatcheries. According to the SOS report, because of their long residence time in fresh water, coho salmon populations are strongly affected by negative changes in water flows and by water and habitat quality” (Page 39).

Within the past year, the state and federal government have taken emergency actions to completely close all ocean waters off the California coast to both recreational and commercial salmon fishing. With very few exceptions, all inland waters of California were also closed in 2008 to recreational salmon fishing. According to the emergency fishing disaster proclamation issued on April 10, 2008, by Governor Schwarzenegger, these restrictions caused severe economic losses throughout the state, including an estimated \$255 million economic impact and loss of an estimated 2,263 jobs. As part of his emergency proclamation, the Governor directed numerous state agencies and departments to take various actions to respond to this crisis, including directing DFG and the Resources Agency to “address the long-term restoration and management of salmon in California.” (April 10, 2008, press release from the Office of the Governor, entitled, “Gov. Schwarzenegger Takes Action to Address Impacts of Vote to Close Commercial and Recreational Salmon Fisheries” (**Exhibit E**)). The Department must take action.

Although the proposed regulatory amendments may impose some potential costs to individual recreational miners, these costs would be minor in comparison to those already being born by the tribal, commercial and recreational fisheries and related economies. DFG has a moral obligation to take similar emergency action to curb suction dredge mining practices that harm salmonid habitat and to aid in the recovery of the state- and federally-listed coho salmon.

The proposed regulatory amendments would provide substantial protection to listed aquatic species like coho salmon, as well as to native wild trout populations that exist in portions of the Klamath, Scott and Salmon River watersheds, as well as certain waters within the western slope of the Sierra Nevada.

Petitioners contend that Section 5653 of the Fish and Game Code allows DFG to only issue a permit if it determines that the operation will not be deleterious to fish. Petitioners contend that, since DFG has already filed declarations in connection with the 2005 Karuk lawsuit admitting that suction dredge mining under its existing regulations is having deleterious harm to fish, these regulations are invalid. If anything, no further

permits should be issued by DFG until new regulations are adopted and become operative. Exceptions should be granted only if DFG makes an individual determination with respect to issuance of a particular permit that the manner and site locations where the suction dredge mining will occur will not harm fish. But Petitioners are requesting less draconian interim measures.

Petitioners further contend that the Department also has authority to immediately amend its existing suction dredge regulations in order to prevent “take” of coho salmon by suction dredge mining operations in violation of Section 2080 of the Fish and Game Code.

Petitioners also contend that the regulations may be immediately amended to protect and prevent harm to wild trout populations pursuant to the Trout and Steelhead Conservation and Management Planning Act of 1979, as recently amended by Chapter 432, Statutes of 2007. Among other things, this law provides that it is the policy of the state to “establish and maintain wild trout stocks in suitable waters of the state that are readily accessible to the general public as well as in those waters in remote areas” (Fish and Game Code Sec. 1726, subdivision (a)).

Conclusion

For the reasons outlined above, it is the position of the Petitioners that the regulatory status quo is harming both state- and federally-listed endangered fish species as well as native wild trout populations, and therefore should not be allowed to continue indefinitely. While we note that the Department is already legally obligated, under a December 2006 court-sanctioned settlement to the 2005 Karuk lawsuit, to complete an environmental review and overhaul of its suction dredge regulations by July 1, 2008. However, DFG has failed to meet this deadline and therefore continues to allow suction dredge mining activities the Department acknowledges are causing harm to fish, if not illegal “take” of coho salmon, in violation of both Sections 2080 and 5653 of the Fish and Game Code

In addition, under its existing regulatory standards, the Department is continuing to issue permits that allow individuals to conduct suction dredge mining activities in violation of Sections 402 and 404 of the federal Clean Water Act. The only 404 permit ever issued by the U.S. Army Corps of Engineers for suction dredge activities covered just part of the state, and expired in May of 2000. To our knowledge, no section 402 permit has ever been issued, either on a general or individual basis.

Petitioners further contend that Section 21084 of the California Environmental Quality Act (CEQA) authorizes you to approve the proposed regulatory amendments without first completing an environmental impact report (EIR). Please see Article 19 of the CEQA Guidelines which describe the relevant Categorical Exemptions, specifically Section 15307 of Title 14 of the California Code of Regulations (CAC):

15307. Actions by Regulatory Agencies for Protection of Natural Resources

Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.

Amendments

Petitioners hereby request that the Department amend the California Code of Regulations, Title 14, by adding Sections 228.6, and 228.7 as follows:

14 CCR 228.6 (2009)

228.6. (a) As used in this section, "thermal refugia" means an area within 500 feet up the named tributary from the confluence with the main stem and 500 feet upstream and downstream on the main stem from the confluence of the tributary with the main stem.

(b) Notwithstanding any other provision of law, suction dredge mining is not permitted in the following areas:

(1) On the main stem of the Klamath River from its confluence with the Trinity River to Iron Gate Dam, except for a period of each year commencing July 1 and ending September 15.

(2) On the following tributaries of the Klamath River at any time of the year:

- (A) Indian Creek.
- (B) Elk Creek.
- (C) Dillon Creek.
- (D) Independence Creek.
- (E) Bluff Creek.
- (F) Red Cap Creek.
- (G) Camp Creek.
- (H) Clear Creek.

(3) On all other Klamath River tributaries, except for a period of each year commencing July 1 and ending September 15.

(4) On the main stem of the Salmon River from its confluence with the Klamath River to the Forks of the Salmon River (the confluence of the North and South Forks of the Salmon River) at any time during the year.

(5) On the North and South Forks of the Salmon River at any time of the year.

(6) On the following tributaries of the Salmon River at any time of the year:

- (A) Butler Creek.
- (B) East Fork Knownothing Creek.
- (C) Indian Creek.
- (D) Kelly Gulch.
- (E) Knownothing Creek.
- (F) Little North Fork.
- (G) Methodist Creek.
- (H) Negro Creek.
- (I) Nordheimer Creek.
- (J) Specimen Creek.

(7) On the Scott River from its mouth to headwaters, except for a period of each year commencing July 1 and ending September 15.

(8) On the following tributaries of the Scott River at any time of the year:

- (A) Big Mill Creek (East Fork).
- (B) Boulder Creek (South Fork).
- (C) Canyon Creek.
- (D) Etna Creek.
- (E) French Creek.
- (F) Kangaroo Creek (East Fork).
- (G) Kelsey Creek.
- (H) Kidder Creek.
- (I) McAdam Creek.
- (J) Mill Creek (Scott Bar).
- (K) Mill Creek (also known as Shackleford/Mill Creek).
- (L) Miners Creek.
- (M) Moffett Creek.
- (N) Patterson Creek.
- (O) Shackleford Creek.
- (P) South Fork Scott River.
- (Q) Sugar Creek.
- (R) Tompkins Creek.
- (S) Wildcat Creek.
- (T) Wooliver Creek.

(c) Suction dredge mining is not permitted at any time in the following thermal refugia:

(1) The thermal refugia on all direct tributaries on the Klamath, Salmon, and Scott Rivers that are closed to suction dredge mining for the entire year as listed in subdivision (b).

(2) The thermal refugia areas at the confluence of the following tributaries with the main stem of the Klamath River:

- (A) Beaver Creek.
- (B) Bluff Creek.
- (C) Bogus Creek.
- (D) Boise Creek.
- (E) Camp Creek.
- (F) Clear Creek.
- (G) Coon Creek.
- (H) Elk Creek.
- (I) Grider Creek.
- (J) Hopkins Creek.
- (K) Horse Creek.
- (L) Hunter Creek.
- (M) Independence Creek.
- (N) Indian Creek.
- (O) Irving Creek.
- (P) Little Grider Creek.
- (Q) Peach Creek.
- (R) Pewan Creek.
- (S) Red Cap Creek.
- (T) Rogers Creek.
- (U) Salmon River.
- (V) Salt Creek.
- (W) Scott River.
- (X) Slate Creek.
- (Y) Swillup Creek.
- (Z) Thomas Creek.
- (AA) Ti Creek.
- (AB) Tom Marten Creek.
- (AC) Trinity River.
- (AD) Ukonom Creek.

(3) The thermal refugia at the confluence of all tributaries on the North Fork of the Salmon River from Eddie Gulch to the Forks of the Salmon (confluence of the North and South Forks of the Salmon River) and Crapo Creek on the mainstem below the Fork of the Salmon.

(d) Suction dredge mining on any water listed in this section during a period established in this section shall be permitted in accordance with Section 5653 of the Fish and Game Code.

(e) This section shall remain in effect only until the director certifies to the Secretary of State that all of the following have occurred, in which case this section shall be repealed on the date of that certification:

(1) The department has completed the environmental review of its existing suction dredge mining regulations, as ordered by the court

in the case of Karuk Tribe of California et al. v. California Department of Fish and Game et al., Alameda County Superior Court No. RG 05211597.

(2) The department has transmitted for filing with the Secretary of State pursuant to Section 11343 of the Government Code, a certified copy of the new regulations adopted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(3) The regulations described in subparagraph (2) are operative.

14 CCR 228.7 (2009)

228.7. (a) In addition to those waters where motorized suction dredging is not permitted at any time by 14 CCR 228.5, motorized suction dredging shall not occur within the following stream and river segments and lakes:

(1) Feather River, Middle Fork, from Oroville Reservoir upstream to the Sloat vehicle bridge, excluding tributaries (Butte and Plumas Counties).

(2) Lavezzola Creek (Sierra County).

(3) Nelson Creek, upstream from the confluence with the Middle Fork Feather River excluding tributaries (Plumas County).

(4) North Fork American River, from the Iowa Hill Bridge to the confluence with Lake Clementine (Placer County); the Middle Fork American River from Oxbow Powerhouse to the confluence with the North Fork American River.

(5) Rubicon River, from the confluence with the Middle Fork American River upstream to Hell Hole Dam excluding tributaries (Placer County).

(b) This section does not prohibit or restrict nonmotorized recreational mining activities, such as gold panning.

(c) This section shall remain in effect only until the director certifies to the Secretary of State that all of the following have occurred, in which case this section shall be repealed on the date of that certification:

(1) The department has completed the environmental review of its existing suction dredge mining regulations, as ordered by the court in the case of Karuk Tribe of California et al. v. California Department of Fish and Game et al., Alameda County Superior Court No. RG 05211597.

(2) The department has transmitted for filing with the Secretary of State pursuant to Section 11343 of the Government Code, a certified copy of the new regulations adopted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(3) The regulations described in subparagraph (2) are operative.

Thank you for your attention and consideration of our petition.

Sincerely,

LEAF HILLMAN
Vice Chair
Karuk Tribe of California

SCOTT FEIERABEND
Interim Executive Director
CALIFORNIA TROUT

MICHAEL GARABEDIAN
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