

# WESTERN MINING ALLIANCE JUNE 2018

## THE LONG ROAD TO LEGAL DREDGING

Dredging is legal in California if you have a permit, which is unobtainable, but assuming you could get one you could legally dredge.

Will there be dredging permits in 2019?

We don't know, but a lot of things must happen to make this possible.

The law currently requires a "complete" application prior to the California Department of Fish and Wildlife (CDFW) issuing a dredge permit. That complete application includes a federal water quality permit; a state water quality permit; any other such permit as may be required, and finally a CDFW permit.

CDFW maintains the sole jurisdictional authority over suction dredging. This authority, under Section 5653 of the Fish and Game Code was provided by the legislature in 1961. Current law requires a state water quality permit, but that is not a dredge permit.

The Clean Water Act requires a permit for any activity which may discharge pollutants into Waters of the United States (WOTUS). There's a lot of argument over whether suction dredges are actually subject to the Clean Water Act and whether they discharge any type of pollutant. Whether they are, or not, isn't the subject of this article.

### The Permitting System

Why do we need permits anyways? Simple, the law says we do. We've heard people say the State has no authority to require any permits for suction dredging. Typically the argument is based on the belief the State has no authority over mining and the belief the 1872 Mining Law preempts State regulation of mining.

Those beliefs aren't supported by fact.

The concern over the environmental effects of suction dredges began in the 1950's. The fear escalated with the ability to buy a production dredge for a few hundred dollars and the dredges were soon up and down the state with no regulation as to location or season. It soon became obvious dredges had the ability to destroy salmon eggs and the legislature commissioned a study to determine the potential negative effects of dredging. The report found, not surprisingly, that left unregulated suction dredges could harm salmon.

The legislature required CDFW to begin permitting suction dredging and the initial regulations required the operator to inform CDFW the location of the operation and the size dredge. If CDFW determined the operation wouldn't harm fish, then they would issue a permit. A permitting system which remained relatively unchanged until 2009.

The authority to permit suction dredging rests with CDFW. The law currently requires multiple permits prior to applying to CDFW for a suction dredge permit. These permits include a federal water quality permit; a state water quality permit; and any other permit as may be required. This catch all of "any other" could include things like stream bed alteration permits or even permits to operate in scenic corridors - who knows what they could demand of you under the current law.

# THE LONG ROAD TO LEGAL DREDGING

## Water Quality Permitting

Whether you believe you need a Clean Water Act permit, or not, doesn't matter. The law requires it. If you disagree with the law, then challenge it in court, it would be an important issue to resolve, but our objective isn't to discuss whether you need one or not, but to simply acknowledge the law currently requires it.

We've heard these arguments for 10 years now, yet the people who argue the most vocally aren't out there dredging without a permit and fighting this in court - they're simply advising others to go out there and not request a permit, to date no one has done that.

Even if you had the desire to go fight the Water Board and the EPA over whether your dredge needs a permit you're still left with a California law known as Porter-Cologne which requires a permit for the discharge of sand or gravel, even if that sand and gravel doesn't contain a pollutant.

You may win your fight in federal court, but how will you win the Porter-Cologne argument without somehow arguing the Clean Water Act completely preempts state water quality regulations? If you feel this is the way you want to spend your next 10 years you may want to first read the part in the Clean Water Act which specifically provides the states the authority to implement regulations more restrictive than the Clean Water Act . You will not find a basis for preemption in the Clean Water Act.

From 1995 to 2000 suction dredging operated under a Section 404 Clean Water Act permit (dredge and fill).

The Clean Water Act broadly permits two types of activities: a discharge (US EPA) or dredge and fill (US Army Corps of Engineers).

The US EPA permit is called a Section 402 permit, and the Army Corps permit is a Section 404 permit. Dredging in California used to be covered under a Section 404 permit. These permits are good for only 5 years and in 2000 when the permit expired no one in the dredging community pushed for a renewal, so the state permit also expired.

With either permit the Clean Water Act requires the states to "certify" the permit through what's known as Section 401 certification. In 1995 we had that certification. They certified the Army Corps general permit within days of it being issued .

Senate Bill 637 explicitly states the federal and state permits are required, so whether you believe a permit isn't required is irrelevant - the law requires it. Either challenge the law, or go get your permit.

Since no one in 18 years has challenged the law we believe the best course of action is to just get the permits. Three years ago we submitted a request to the Army Corps of Engineers - Sacramento District for a general regional permit for suction dredging. This permit would cover all suction dredge activity and individuals wouldn't need to apply for separate permits. Our last correspondence with them indicated they were working on it (yeah, right, but at least we are trying).

In the meantime you can also apply for your own individual federal permit under Section 404 by submitting an application for a Nationwide Permit #18 or #44 to the US Army Corps of Engineers. We know of several people who have done that, ourselves included, and we're making some progress in this area. We just had another Section 404 permit issued last week and the permit holder will be submitting for state Section 401 certification (NPS #44 permit). If he obtains 401 certification then he has his water quality permits for the next 5 years, and all that's left is a CDFW permit.

# THE LONG ROAD TO LEGAL DREDGING

## DREDGE PERMITTING

To the best of our knowledge CDFW doesn't have a permitting system, and it's unlikely they'll move forward with a permitting system unless forced to do so. Even if we assume there will be legal suction dredging in 2019 then that dredging will be permitted by CDFW and as it stands now it will be under the 2012 regulations.

We know from our talks with CDFW the dredge regulations will only become more restrictive over time. We also know the State has said returning to the 1994 regulations will not happen. Well...that's for the court to decide.

Unless we can force CDFW back to the negotiating table then the 2012 regulations is what you have. If our lawsuit dies, then your baseline is the 2012 regulations, but remember the CDFW directive - the regulations will never get more lax, only more restrictive.

## Permitting Costs

There's been some numbers thrown out there and right now, today, no one really knows because the government hasn't published a permitting fee schedule, we can, however, make some assumptions and estimate the costs.

There may, or may not be a Water Quality permit cost. Ideally we'd like to push for a Section 401 certification of the Section 404 Army Corps of Engineers permit like we had in 1995 - 2000. If this is the route the Water Board takes then it will cost you nothing. The Section 401 certification would be a statewide certification.

It's possible the Water Board may decide a dredge discharges and is therefore subject to Section 402 permitting, or the State may decide a dredge can be permitted under Section 404 and they could also require a state water quality permit under Porter Cologne – there are a lot of variables which are unknown right now in regards to state water quality permitting, and until we know what type of permitting, and see the program and fees, we won't know the cost.

The law requires CDFW to fully cover all their program costs, so let's just do the quick math on the potential costs based on the information we have.

From discussions with the Department we've been told they want to hire full time dredge enforcement officers. Let's assume they hire 4 and each costs them \$150,000 a year including salary and benefits so that would be \$600,000. From the Alameda court case we know the Department said they spent about \$150,000 a year in permitting costs so the total program cost would be \$750,000.

The regulations limit the number of permits to 1,500 so do the quick math and you have a permit price of \$500 per dredger. If we were able to increase the number of permits to a more normal 4,500 then the cost per dredger would be \$166.

If you want to dredge with more than a 4" or if you plan on moving boulders with a winch then you'll need to pay the Section 1602 streambed alteration permit. The cost of this permit is either \$577 or \$1,446 depending on which way they decide to classify suction dredging. The good news is the Section 1602 permit is good for 5 years.

## Summary

Will we have a legal dredging season? Maybe, it's not certain. We need a federal permit (we are currently working with the Army Corps of Engineers); we need a state permit which we hope will be Section 401 certification; we need a CDFW permit and we'll more than likely need a Section 1602 permit. Even with the cost, if we don't fix the regulations it's unlikely you'll be able to buy a permit because the total number of permits is limited to 1,500.

Comments? E-Mail us at: [theminingalliance@theminingalliance.com](mailto:theminingalliance@theminingalliance.com)

# THE 2012 DREDGING REGULATIONS

*We do a lot of assuming around here. We assume everyone knows why the current lawsuit is so important, because we assume everyone knows why we have to overturn the regulations, or at the very least get back to the negotiating table so we can fix the regulations. Here's a quick summary of the 2012 regulations – as they stand right now. You can download the full, final, marked up copy on our website in the research – dredging section.*

- (1) Maximum permits issued - 1,500 regardless of whether you are a claim owner or have previously been issued a permit. First come, first served. The average number of permitted dredgers prior to the ban was 4,000 per year. In the 1980's there were over 12,000 dredgers. At a minimum 2,500 people who want to dredge, won't.
- (2) Submission of an annual report card by January 15<sup>th</sup> of each year. Requirement to keep the report card on you while in the field dredging and to record activities daily.
- (3) If you're cited by the Department and your permit is revoked and you decide to challenge this decision in court you'll need to pay the Department a fee for them to prepare and deliver the record to the court.
- (4) Maximum dredge nozzle of 4" unless you obtain a streambed alteration permit.
- (5) Motorized winching is prohibited unless the Department has conducted an on-site inspection and you have a streambed alteration permit on hand.
- (6) You may not dredge within 3' of the bank meaning all creeks and rivers 6' or less in width are closed to the use of any size dredge.
- (7) You can't "damage" streamside vegetation. Presumably this means you can't cut branches or twigs out of the way, nor clear weeds out of the way without potential for citation.
- (8) Fuel and oil must be stored 100' from the water. We believe they think that's horizontal feet, but if you're dredging in the canyons we do we'd probably have to do about 1,000 feet vertical to get 100' horizontal.
- (9) You have to level all tailings piles .
- (10) No dredge can operate within 500' of another dredge.
- (11) You can only dredge between 10:00 a.m. and 4 p.m.
- (12) Class A Closures - according to our research over 1,400 rivers and creeks which were open in the 1994 regulations are now closed in the 2012 regulations.

The catch all phrase for the Class A closures is "...and all tributaries." We asked CDFW to define this and they said it included every tributary which drained to the tributary no matter the distance. So if they closed a river to protect a frog, and you want to dredge on a tributary, to the tributary, to the tributary which is 20 miles from the main stem - you are prohibited.

Even if your particular river is open for dredging you'd better check your open dates. If you're up on Long Valley Creek in Plumas county (a popular area) then you can start dredging on September 1<sup>st</sup> and dredge through January 31<sup>st</sup>.

The only way to fix the regulations is to maintain a lawsuit and try to win something, or force the state to settle.