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February 17, 2016

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

Mr. Frank A. McGuire
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

RE: *People v. Rinehart*, Case No. S222620
Response to Order Requiring Briefing Regarding Effect of SB 637

Dear Mr. McGuire:

The People respectfully submit this letter in response to the Court's January 27, 2016 order directing the parties to file letter briefs regarding the effect on this case of the recent enactment of Senate Bill 637 (SB 637).

SB 637 was signed into law on October 9, 2015, and went into effect on January 1, 2016. (See Stats. 2015, ch. 680 [attached].) The enactment of SB 637, by further refuting Rinehart's contention that the moratorium amounts to a permanent ban on suction dredge mining, permits the Court to focus on the only relevant issue in its preemption analysis: whether it is impossible to comply with both the challenged state law and federal mining law.

Rinehart has argued that California's temporary moratorium on issuing suction dredge mining permits should be viewed, in effect, as a permanent ban, and that as such it is preempted by federal law. (See Rinehart Answering Brief, pp. 49-50.) Indeed, he characterizes the relevant permit restrictions as permanent, despite the fact that the statute in effect at the time of Rinehart's conduct had a definite sunset date of June 30, 2016. (See People's Reply Brief, p. 21.) As the People have demonstrated, characterizing California's permitting ban as temporary or permanent should not make a difference: because federal mining laws indicate an intent to preserve state and local laws rather than preempt them – as evidenced by *California Coastal Commission v. Granite Rock Co.* (1987) 480 U.S. 572 and the United States' position in this case – the relevant question for preemption purposes is whether it is impossible to comply with both the state law and federal mining law. (See People's Opening Brief, pp. 11-29; People's Reply Brief, pp. 2-20.) Because simultaneous compliance would not be impossible here, California's statute is not preempted regardless of whether the moratorium is viewed as temporary or as permanent. (*Ibid.*)

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Nevertheless, to whatever extent the temporary versus permanent nature of California's regulations has importance, SB 637 further confirms that California's moratorium on permits is, indeed, a temporary measure. Rinehart argues that Fish and Game Code section 5653.1 constitutes a permanent ban on suction mining because the Department will never be able to fulfill one of the conditions that must be met before permits can be issued: the requirement that new regulations "fully mitigate all identified significant environmental impacts." (Fish & G. Code, § 5653.1, subd. (b); see Rinehart Answering Brief pp. 6-10.)¹

Even before SB 637, there was no permanent ban. (See People's Opening Brief, pp. 31-34; People's Reply Brief, pp. 21-25.) In 2012, the Legislature modified the terms of the moratorium by eliminating the 2016 sunset date, but it also required the Department to "consult with other agencies. . . and, on or before April 1, 2013, . . . prepare and submit to the Legislature a report with recommendations on statutory changes or authorizations that . . . are necessary to develop the suction dredge regulations required by paragraph (2) of subdivision (b), including, but not limited to, recommendations relating to the mitigation of all identified significant environmental impacts and a fee structure that will fully cover all program costs." (Stats. 2012, ch. 39, § 7, amending Fish & G. Code, § 5653.1, subd. (c)(1).) The Legislature thus showed a clear intention to eliminate the obstacles to lifting the moratorium.

SB 637 is the fulfillment of that intent, providing ample authority under which the Department will be able to fulfill the requirements that suction dredge mining regulations mitigate environmental impacts, allowing the Department to issue suction dredge mining permits in the future.²

¹ The moratorium specifies four additional conditions that must be certified as met for the Department to resume issuing permits: (1) that the Department has completed its environmental review; (2) that new regulations have been adopted; (3) that those new regulations "are operative"; and (4) that a fee structure be in place "that will cover all costs to the department related to the administration of the program." (Fish & G. Code, § 5653.1, subd. (b).) The first three items were already completed before the enactment of SB 637. (See Appellant's Unopposed Motion to Correct the Record, filed in the Court of Appeal on Oct. 24, 2013 and granted on Nov. 1, 2013, Exh. A ("Legislative Report").) And SB 637, by providing explicit authority for the Department to adjust suction dredge mining permit fees, eliminates any concerns about the Department's ability to impose a permit fee structure that would meet the requirements for permits to resume. (Stats. 2015, ch. 580, § 2, amending Fish & G. Code, § 5653, subd. (d)(2).)

² SB 637 also provides a definition of suction dredging: "the use of a mechanized or motorized system for removing or assisting in the removal of, or the processing of, material from the bed, bank, or channel of a river, stream, or lake in order to recover minerals," which does not include "nonmotorized recreational mining activities, including panning for gold." (Stats. 2015, ch. 580, § 2, enacting Fish & G. Code, § 5653, subd. (g); Stats 2015, ch. 580, § 3, enacting Water Code, § 13172.5, subd. (a).)

The only significant environmental effects that the Department had previously believed it lacked legal authority to fully mitigate were in four areas: water quality (i.e., “resuspension and discharge of mercury and trace metals” and “[t]urbidity and ... suspended sediment”), birds, cultural resources, and noise. (Stats. 2015, ch. 680, § 1, subd. (d); Legislative Report, *supra*, pp. 3 & fn. 4, 14.) SB 637 addresses each of these areas:

- With respect to water quality, the bill provides direction to the State Water Resources Control Board (and the regional water quality control boards) as to the adoption of water quality permits for suction dredge mining. (Stats. 2015, ch. 680, § 3, enacting Water Code, § 13172.5; see also Stats. 2015, ch. 680, § 2, amending Fish & G. Code, § 5653, subd. (b) [requiring those agencies to take action before the Department can issue permits under the Fish and Game Code].)
- With respect to birds, the bill requires the Department to adopt regulations so that suction dredge mining “does not cause any significant effects to fish and wildlife.” (Stats. 2015, ch. 680, § 2, amending Fish & G. Code, § 5653, subd. (c).) The bill thus fills a gap in the previous version of the statute, which only authorized regulations to prevent activity that was “deleterious to fish.” (See Stats. 1994, ch. 775, § 1, amending Fish & G. Code, § 5653, subd. (c).)
- With respect to cultural resources and noise, the bill allows the Department to address those issues with reference to existing “applicable federal, state, or local laws or ordinances.” (Stats. 2015, ch. 680, § 4.)

In short, the new enactment confirms the moratorium’s nature as a temporary measure by explicitly providing a path by which the agency may satisfy all of the conditions for the issuance of permits to resume. Even if the Court were to adopt Rinehart’s theory about the impermissibility of a permanent ban on suction dredge mining, therefore, California’s regulation of suction dredge mining would be permissible as a temporary delay in the permitting process in order to achieve reasonable environmental goals. (See People’s Opening Brief, p. 32; People’s Reply Brief, pp. 21, 25 & fn. 14.)

Although the passage of SB 637 reinforces the shortcomings in Rinehart’s appeal of his conviction, the new statute does not moot this case or eliminate the need for this Court’s review. Rinehart’s challenge to his conviction for mining without a permit in 2012 presents a live case or controversy regardless of the effect that SB 637 will have on his ability to mine with a permit in the future. Moreover, California’s interim moratorium will continue to affect Rinehart’s and others’ ability to mine until the regulatory developments envisioned by SB 637 come to fruition.

We appreciate this opportunity to address the impact of SB 637 on this case, and we stand ready to provide any other information that may assist the Court in reaching a decision.³

Sincerely,



MARC N. MELNICK
Deputy Attorney General

JOSHUA A. KLEIN
Deputy Solicitor General

For KAMALA D. HARRIS
Attorney General

Attachment (SB 637)

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³ In light of the Court's order to submit briefing regarding this development in California's statutory law, the People also respectfully inform the Court of two additional developments.

First, on January 20, 2016, the judge assigned to the coordinated civil cases (entitled *Suction Dredge Mining Cases*, Coord. Case No. JCCP4720) pending in San Bernardino County Superior Court stayed those cases pending this Court's resolution of Rinehart's criminal case.

Second, on December 3, 2015, this Court issued an opinion, in *Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, with relevance to the parties' disputes on two subjects: the presumption against preemption, and the relevance of federal regulatory agencies' views on preemption. (See *id.* at pp. 312-13 [stating that, "[h]istorically, the United States Supreme Court and this court have conducted the search for congressional intent through the lens of a presumption against preemption," and that "[t]he strength of the presumption is heightened in areas where the subject matter has been the longstanding subject of state regulation in the first instance"]; *id.* at p. 317 [concluding that, in that case, the federal agency's views on preemption were "entitled to considerable weight" where "some aspects of the subject matter are recondite and the [federal agency], as the entity responsible for preparing regulations under the statutory scheme, has relevant technical expertise"].)



Senate Bill No. 637

CHAPTER 680

An act to amend Section 5653 of the Fish and Game Code, and to add Section 13172.5 to the Water Code, relating to dredging.

[Approved by Governor October 9, 2015. Filed with
Secretary of State October 9, 2015.]

LEGISLATIVE COUNSEL'S DIGEST

SB 637, Allen. Suction dredge mining: permits.

Existing law prohibits the use of any vacuum or suction dredge equipment by any person in any river, stream, or lake of this state without a permit issued by the Department of Fish and Wildlife. Existing law requires, before any person uses any vacuum or suction dredge equipment in any river, stream, or lake of this state, that person to submit an application for a permit for a vacuum or suction dredge to the department specifying certain information. Existing law requires the department to issue a permit, if the department determines that the use of a vacuum or suction dredge will not be deleterious to fish, upon the payment of a specified fee. Existing law designates the issuance of permits to operate vacuum or suction dredge equipment to be a project under the California Environmental Quality Act and suspends the issuance of permits and mining pursuant to a permit until the department has completed an environmental impact report for the project as ordered by the court in a specified court action. Existing law prohibits the use of any vacuum or suction dredge equipment in any river, stream, or lake of this state until the Director of Fish and Wildlife makes a prescribed certification to the Secretary of State, including certifying that new regulations fully mitigate all identified significant environmental impacts and that a fee structure is in place that will fully cover all costs to the department related to the administration of the program.

This bill would require the department to issue a permit if the department determines that the use does not cause any significant effects to fish and wildlife and would authorize the department to adjust the specified fee to an amount sufficient to cover all reasonable costs of the department in regulating suction dredging activities. This bill would prohibit the department from issuing a permit until the permit application is deemed complete, as prescribed. The bill would prohibit the permit from authorizing any activity in violation of other applicable requirements, conditions, or prohibitions governing the use of vacuum or suction dredge equipment, and would require the department, the State Water Resources Control Board, and the regional water quality control boards to make reasonable efforts to share information among the agencies regarding potential violations of requirements, conditions, or prohibitions.

Under existing law, the State Water Resources Control Board and the California regional water quality control boards prescribe waste discharge requirements in accordance with the Federal Water Pollution Control Act and the Porter-Cologne Water Quality Control Act (state act). The state act, with certain exceptions, requires a waste discharger to file certain information with the appropriate regional board and to pay an annual fee. The state act additionally requires a person, before discharging mining waste, to submit to the regional board a report on the physical and chemical characteristics of the waste that could affect its potential to cause pollution or contamination and a report that evaluates the potential of the mining waste discharge to produce acid mine drainage, the discharge or leaching of heavy metals, or the release of other hazardous substances.

This bill would, after prescribed public hearings and workshops, as specified, authorize the state board or a regional board to adopt waste discharge requirements or a waiver of waste discharge requirements that address water quality impacts of specified issues, specify certain conditions or areas where the discharge of waste or other adverse impacts on beneficial uses of the waters of the state from the use of vacuum or suction dredge equipment is prohibited, or prohibit particular use of, or methods of using, vacuum or suction dredge equipment, or any portion thereof, for the extraction of minerals, as specified.

The bill would specify that the use of vacuum or suction dredge equipment is defined as the use of a mechanized or motorized system for removing or assisting in the removal of, or the processing of, material from the bed, bank, or channel of a river, stream, or lake in order to recover minerals.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) In August 2009, Governor Arnold Schwarzenegger signed Senate Bill 670 (Chapter 62 of the Statutes of 2009) which established a temporary ban on the use of vacuum or suction dredge equipment until after the Department of Fish and Wildlife completed a court-ordered environmental review of its related permitting program and existing regulations.

(b) In July 2011, Governor Schwarzenegger signed Assembly Bill 120 (Chapter 133 of the Statutes of 2011), extending the prohibition on the use of vacuum or suction dredge equipment to June 2016 or, if earlier, until the Director of Fish and Wildlife certified five conditions to the Secretary of State, including completion of the court-ordered environmental review, the adoption of and operation of any updated regulations implementing Section 5653 of the Fish and Game Code, full mitigation of all identified significant environmental effects, and the existence of a permit fee structure that would fully cover all costs incurred by the department to administer its permitting program.

(c) In March 2012, the Department of Fish and Wildlife completed the court-ordered environmental review and rulemaking effort, certifying the

environmental impact report and adopting updated regulations to implement and administer its related permitting program pursuant to Section 5653 of the Fish and Game Code. In certifying the environmental impact report and adopting the regulations, the department found, for purposes of the California Environmental Quality Act (CEQA), that, among other things, significant effects on the environment had to be mitigated to the extent feasible consistent with enabling statutory authority directing the department to promulgate the updated regulations, but the use of vacuum or suction dredging equipment to extract minerals would result in various significant and unavoidable environmental effects beyond the substantive reach of the department in promulgating the regulations. The department considers the environmental impact report it certified in March 2012 to be the most comprehensive, technical review of suction dredge mining ever prepared in California.

(d) As to significant and unavoidable effects, in March 2012, the Department of Fish and Wildlife determined, for purposes of CEQA, that the use of vacuum or suction dredge equipment, consistent with the updated regulations implementing Section 5653 of the Fish and Game Code, could result in effects associated with the following:

- (1) The resuspension and discharge of mercury and trace metals.
- (2) Turbidity and total suspended sediment.
- (3) Substantial adverse changes, when considered statewide, in the significance of historical and unique archaeological resources.
- (4) Riparian habitat of special status passerines.
- (5) Effects on nonfish wildlife species and their habitat.
- (6) Exposure of the public to noise levels in excess of city or county standards.

(e) In June 2012, Governor Brown signed Senate Bill 1018 (Chapter 39 of the Statutes of 2012), which eliminated the sunset provision from Assembly Bill 120. Senate Bill 1018 also directed the department to consult with various agencies and to provide recommendations to the Legislature by April 1, 2013, regarding statutory changes or authorizations necessary for the department to promulgate suction dredge regulations. Those recommendations were to include ways to fully mitigate all identified significant environmental impacts and a fee structure to cover the department's costs of administering the program.

(f) On April 1, 2013, the department submitted the required report to the Legislature. The report provides specific recommendations for statutory amendments necessary to modernize the regulation of suction dredge mining under the Fish and Game Code, and reflects the department's efforts to consult with, and includes related additional recommendations from, various other state agencies, including the State Water Resources Control Board. The State Water Resources Control Board in its related letter appended to the department's report emphasized that the State Water Resources Control Board and its sister agencies, the regional water quality control boards, are tasked with the protection, control, and utilization of all waters of the state and may regulate any activity or factor that may affect water quality.

(g) In January 2015, the California Supreme Court granted a petition for review to consider whether the federal Mining Act of 1872 (30 U.S.C. Sec. 22 et seq.) preempts Sections 5653 and 5653.1 of the Fish and Game Code with respect to the use of vacuum and suction dredging equipment (People v. Rinehart, Case No. S222620).

(h) Given the importance of protecting the water supply for all Californians from degradation, the need to protect what is left of California native cultural sites, and the value of protecting the state's wildlife, it is urgent that the Legislature act immediately to clarify the laws regulating suction dredge mining and other related forms of small scale motorized gold mining in the state's streams and waterways.

SEC. 2. Section 5653 of the Fish and Game Code is amended to read:

5653. (a) The use of vacuum or suction dredge equipment by a person in a river, stream, or lake of this state is prohibited, except as authorized under a permit issued to that person by the department in compliance with the regulations adopted pursuant to Section 5653.9. Before a person uses vacuum or suction dredge equipment in a river, stream, or lake of this state, that person shall submit an application to the department for a permit to use the vacuum or suction dredge equipment, specifying the type and size of equipment to be used and other information as the department may require pursuant to regulations adopted by the department to implement this section.

(b) (1) The department shall not issue a permit for the use of vacuum or suction dredge equipment until the permit application is deemed complete. A complete permit application shall include any other permit required by the department and one of the following, as applicable:

(A) A copy of waste discharge requirements or a waiver of waste discharge requirements issued by the State Water Resources Control Board or a regional water quality control board in accordance with Division 7 (commencing with Section 13000) of the Water Code.

(B) A copy of a certification issued by the State Water Resources Control Board or a regional water quality control board and a permit issued by the United States Army Corps of Engineers in accordance with Sections 401 and 404 of the Federal Water Pollution Control Act (33 U.S.C. Secs. 1341 and 1344, respectively) to use vacuum or suction dredge equipment.

(C) If the State Water Resources Control Board or the appropriate regional water quality control board determines that waste discharge requirements, a waiver of waste discharge requirements, or a certification in accordance with Section 1341 of Title 33 of the United States Code is not necessary for the applicant to use of vacuum or suction dredge equipment, a letter stating this determination signed by the Executive Director of the State Water Resources Control Board, the executive officer of the appropriate regional water quality control board, or their designee.

(c) Under the regulations adopted pursuant to Section 5653.9, the department shall designate waters or areas wherein vacuum or suction dredge equipment may be used pursuant to a permit, waters or areas closed to the use of that equipment, the maximum size of the vacuum or suction dredge equipment that may be used, and the time of year when the equipment may

be used. If the department determines, pursuant to the regulations adopted pursuant to Section 5653.9, that the use of vacuum or suction dredge equipment does not cause any significant effects to fish and wildlife, it shall issue a permit to the applicant. If a person uses vacuum or suction dredge equipment other than as authorized by a permit issued by the department consistent with regulations implementing this section, that person is guilty of a misdemeanor.

(d) (1) Except as provided in paragraph (2), the department shall issue a permit upon the payment, in the case of a resident, of a base fee of twenty-five dollars (\$25), as adjusted under Section 713, when an onsite investigation of the project size is not deemed necessary by the department, and a base fee of one hundred thirty dollars (\$130), as adjusted under Section 713, when the department deems that an onsite investigation is necessary. Except as provided in paragraph (2), in the case of a nonresident, the base fee shall be one hundred dollars (\$100), as adjusted under Section 713, when an onsite investigation is not deemed necessary, and a base fee of two hundred twenty dollars (\$220), as adjusted under Section 713, when an onsite investigation is deemed necessary.

(2) The department may adjust the base fees for a permit described in this subdivision to an amount sufficient to cover all reasonable costs of the department in regulating suction dredging activities.

(e) It is unlawful to possess a vacuum or suction dredge in areas, or in or within 100 yards of waters, that are closed to the use of vacuum or suction dredges.

(f) A permit issued by the department under this section shall not authorize an activity in violation of other applicable requirements, conditions, or prohibitions governing the use of vacuum or suction dredge equipment, including those adopted by the State Water Resources Control Board or a regional water quality control board. The department, the State Water Resources Control Board, and the regional water quality control boards shall make reasonable efforts to share information among the agencies regarding potential violations of requirements, conditions, or prohibitions governing the use of vacuum or suction dredge equipment.

(g) For purposes of this section and Section 5653.1, the use of vacuum or suction dredge equipment, also known as suction dredging, is the use of a mechanized or motorized system for removing or assisting in the removal of, or the processing of, material from the bed, bank, or channel of a river, stream, or lake in order to recover minerals. This section and Section 5653.1 do not apply to, prohibit, or otherwise restrict nonmotorized recreational mining activities, including panning for gold.

SEC. 3. Section 13172.5 is added to the Water Code, to read:

13172.5. (a) For purposes of this section, the use of any vacuum or suction dredge equipment, also known as suction dredging, is the use of a mechanized or motorized system for removing or assisting in the removal of, or the processing of, material from the bed, bank, or channel of a river, stream, or lake in order to recover minerals. This section does not apply to,

prohibit, or otherwise restrict nonmotorized recreational mining activities, including panning for gold.

(b) In order to protect water quality, the state board or a regional board may take one or more of the following actions:

(1) Adopt waste discharge requirements or a waiver of waste discharge requirements that, at a minimum, address the water quality impacts of each of the following:

(A) Mercury loading to downstream reaches of surface water bodies affected by the use of vacuum or suction dredge equipment.

(B) Methylmercury formation in water bodies.

(C) Bioaccumulation of mercury in aquatic organisms.

(D) Resuspension of metals.

(2) Specify certain conditions or areas where the discharge of waste or other adverse impacts on beneficial uses of the waters of the state from the use of vacuum or suction dredge equipment is prohibited, consistent with Section 13243.

(3) Prohibit any particular use of, or methods of using, vacuum or suction dredge equipment, or any portion thereof, for the extraction of minerals that the state board or a regional board determines generally cause or contribute to an exceedance of applicable water quality objectives or unreasonably impact beneficial uses.

(c) (1) Before determining what action to take pursuant to subdivision (b), the state board shall solicit stakeholder input by conducting public workshops in the vicinity of the cities of San Bernardino, Fresno, Sacramento, and Redding. A regional board considering independent action pursuant to subdivision (b) shall solicit stakeholder input by conducting at least one public workshop in that board's region. To promote participation in the public workshops, the state board or regional board shall proactively reach out to mining groups, environmental organizations, and California Native American tribes, as defined in Section 21073 of the Public Resources Code.

(2) Before taking a proposed action pursuant to subdivision (b), the state board or regional board shall conduct at least one public hearing regarding that proposed action pursuant to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code).

(3) To avoid duplication of efforts between the state board and a regional board of a public workshop or public hearing that covers the same regional area, the state board and a regional board may work in collaboration to share information obtained through the public workshops or public hearing.

SEC. 4. The Legislature also finds and declares that, except for water quality, after complying with the Governor's Executive Order B-10-11 regarding tribal consultation and additional consultation requirements pursuant to Chapter 532 of the Statutes of 2014, also known as Assembly Bill 52 (Gatto), the Department of Fish and Wildlife may determine, for purposes of Section 5653.1 of the Fish and Game Code, that significant environmental impacts to resources other than fish and wildlife resources

caused by the use of vacuum or suction dredge equipment for the extraction of minerals are fully mitigated if a regulation adopted by the department to implement and interpret Section 5653 of the Fish and Game Code requires compliance with other laws and provides, in part, that nothing in a permit or amended permit issued by the department relieves the permittee of responsibility to comply with all applicable federal, state, or local laws or ordinances.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rinehart**
No.: **S222620**

I declare:

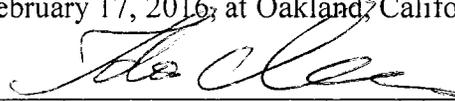
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 17, 2016, I served the attached Response to Order Requiring Briefing Regarding Effect of SB 637 by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550, addressed as follows:

Please see attached list.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 17, 2016, at Oakland, California.

Ida Martinac
Declarant


Signature

People v. Rinehart
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People v. Rinehart
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