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March 2, 2016

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
Reply to Defendant-Appellant Rinehart's Letter Brief Regarding Effect of SB 637

Dear Mr. McGuire:

Pursuant to the Court's January 27, 2016 order, the People respectfully submit this letter brief responding to Defendant-Appellant Rinehart's supplemental letter brief regarding the effect on this case of the recent enactment of Senate Bill 637 (SB 637).

The People agree with Rinehart that "[s]trictly speaking, [SB 637] has no effect whatsoever on Mr. Rinehart's misdemeanor conviction." (Rinehart Supp. Ltr. Brf., p. 1.) As Rinehart states, SB 637 "did not make any changes ..., prospectively or retrospectively," to the statute under which Rinehart was convicted. (*Ibid.*) This acknowledgement – that the constitutionality of Rinehart's conviction depends fundamentally on the law in place at the time of his offense – leads to a further consequence which Rinehart does not acknowledge: the moratorium in effect at the time of Rinehart's offense had a definite sunset date of June 30, 2016, which negates, in Rinehart's case, any assertion that he was convicted under a permanent mining ban. (See People's Opening Brief, p. 32.)

Rinehart contends that SB 637, along with other revisions to the moratorium after his arrest, reinforces his argument that the State's moratorium is now effectively permanent. (See Rinehart Supp. Ltr. Brf., pp. 1-3.) Specifically, Rinehart claims that SB 637 does not change the Department's ability to fully mitigate significant adverse environmental effects, and that the moratorium thus will never end. (See *ibid.*) This argument relies on a substantial misunderstanding of the moratorium and SB 637. As the People explained in their supplemental letter brief, previous amendments directed the Department to suggest statutory changes that could remove the legal barriers to the Department resuming the issuance of permits; SB 637 effectively follows through on those recommendations. Once the State Water Resources Control Board issues a general, state-wide water quality permit, and the Department adopts revised

regulations and conducts associated environmental review addressing the bird, noise, cultural resources, and permit-fee issues, the Department will be in a position to be able to begin issuing permits.[1] SB 637 thus provides a specific road forward to lifting the moratorium.

There is no evidence to support Rinehart's assertion that the Legislature is "attempting to destroy" and "put an end" to small-scale prospecting and mining. (See Rinehart Supp. Ltr. Brf., p. 4.) Given the Legislature's focus on significant adverse environmental effects (and permit fees), the most natural inference from SB 637 (as well as from earlier versions of the moratorium) is that the Legislature simply wants to ensure that the environmental effects of such mining are mitigated and that the permit program is paid for. (See People's Reply Brief, pp. 21-25.)

Contrary to Rinehart's claims (Rinehart Supp. Ltr. Brf., p. 4), the continued statutory exemption for dredging activities for "regular maintenance of energy or water supply management infrastructure, flood control, or navigational purposes" (Fish & G. Code, § 5653.1, subd. (d)) does not indicate special hostility to mining per se. Rather, it recognizes that such large-scale dredging operations already receive individualized scrutiny for each particular project's compliance with the California Environmental Quality Act, the Clean Water Act, the Endangered Species Act, and other laws. (*See ibid.* ["This section does not expand or provide new authority for the department to close or regulate suction dredging conducted for regular maintenance of energy or water supply management infrastructure, flood control, or navigational purposes *governed by other state or federal law.*"], emphasis added.) In contrast, small-scale motorized in-stream mining operations are unlikely to receive extensive review for compliance with those laws on a case-by-case basis; the Legislature reasonably concluded that, under those circumstances, it would be both more efficient and more effective for the Department to adopt general regulations to achieve the desired environmental goals. (See Fish & G. Code, § 5653, subd. (c) [requiring Department to issue a permit based on compliance with its own regulations].) Nor does the Legislature's exemption for nonmotorized mining activities deserve special scrutiny, given the common sense expectation that nonmotorized mining will create less disturbance than motorized activity. In any case, the Legislature was not required to treat all problems identically, and was entitled to address the perceived problem incrementally. (*Ry.*

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[1] Rinehart complains that the Department has not yet adopted new permit fees. (Rinehart Supp. Ltr. Brf., p. 2.) But, especially in light of pending litigation on the moratorium as a whole, it was not unreasonable for the Department to wait until the Legislature cleared the other legal obstacles to lifting the moratorium, so the Department could initiate one comprehensive rulemaking. Rinehart additionally contends that section 4 of SB 637 "imposes consultation requirements that may be unconstitutionally implemented." (Rinehart Supp. Ltr. Brf., p. 3.) That cursory charge, for which Rinehart provides no legal or factual support, is without basis.

Express Agency, Inc. v. New York (1949) 336 U.S. 106, 110; *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 482).[2]

Rinehart complains that SB 637's requirement that suction dredge miners obtain an permit under the federal Clean Water Act is somehow unreasonable. (Rinehart Supp. Ltr. Brf, pp. 4-6; see Stats. 2015, ch. 680, § 2, amending Fish & G. Code, § 5653, subd. (b).) But that requirement is nothing new. (*Rybachek v. U.S. Envtl. Prot. Agency* (9th Cir. 1990) 904 F.2d 1276, 1285-86 [Clean Water Act requires a permit for suction dredge mining because "even if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act"]; *United States v. Moses* (9th Cir. 2007) 496 F.3d 984, 991 ["simply dredging up and redepositing what was already there is sufficient to run afoul" of the Clean Water Act]; *Northwest Envtl. Defense Center v. Envtl. Quality Com.* (2009) 232 Or.App. 619, 223 P.3d 1071 [discussing application of Clean Water Act sections 402 and 404 to small suction dredge mining operations].) Indeed, Rinehart acknowledges that suction dredge mining until 2000 was carried out pursuant to a general Clean Water Act permit issued by the U.S. Army Corps of Engineers. (Rinehart Supp. Ltr. Brf., p. 5.) Although Rinehart speculates that the Clean Water Act permitting process will create an insurmountable obstacle to the resumption of mining, it is not appropriate to presume, in advance, that state agencies will exercise their authority illegitimately – or that any illegitimate denials of permits could not be dealt with through judicial review of those denials. When miners apply for permits, agencies implementing the federal Clean Water Act will consider the evidence that is presented to them as to suction dredge mining's environmental effects, and will make their determinations under applicable state and federal legal standards.

Rinehart uses the Court's question regarding SB 637 as a reason to reassert his arguments that there are no adverse environmental effects due to vacuuming up the bottoms of rivers and streams – going so far as to say that the process could not ever have harmed even a single fish egg. (Rinehart Supp. Ltr. Brf., pp. 6-7.) But as the People have explained, the Department's environmental impact report – which was based on research by the U.S. Geological Survey, and

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[2] Rinehart contends that an unenacted prior version of SB 637 would have "jettison[ed] a requirement for full mitigation of the so-called significant impacts." (Rinehart Supp. Ltr. Brf., p. 3.) Rinehart appears to believe that the alternative version would simply have declared all environmental effects of suction dredge mining mitigated, thus satisfying the preexisting statutory requirements for the Department to resume issuing permits. But Rinehart misunderstands what the unenacted version of the statute would have done. That version would not have declared the conditions of Fish and Game Code section 5653.1, subdivision (b) (the moratorium) as met. (If those drafting that proposed language had considered the statutory mitigation requirements to be no longer relevant, they would simply have deleted that subdivision; they would not have maintained the conditions but declared them met as a matter of law.) Instead, at most, the unenacted language was intended to ratify the validity of the Department's 2012 regulations, which were then under court challenges from both sides. (See Rinehart Supp. Ltr. Brf., p. 2.)

which was subject to peer review by four independent experts – found that there were significant water quality impacts due to suction dredge mining. (People's Supplemental Request for Judicial Notice, filed June 11, 2015, Exhs. R, U (pp. 54-56); see also http://www.waterboards.ca.gov/water_issues/programs/peer_review/peer_review_dfg.shtml [providing peer review information].) Although the miners have challenged those findings in the pending coordinated civil proceedings in the San Bernardino Superior Court, where the issues have been fully briefed, that court has not yet ruled on the miners' challenge to the Department's findings. For purposes of this case, the Court should accept the Department's findings. (See *Citizens for Responsible Dev. v. City of W. Hollywood* (1995) 39 Cal.App.4th 490, 505 ["California courts have consistently held that an administrative decision which has not been overturned through administrative mandamus is absolutely immune from collateral attack."].)

At its core, SB 637 is evidence of the conservative, common-sense approach focused on mitigating environmental effects that California has taken as to suction dredge mining. Of course, as the People have demonstrated, all of Rinehart's allegations about legislative motive are irrelevant, and so are his allegations about the duration of the moratorium: federal mining laws indicate an intent to preserve state and local law rather than preempt them, and state laws are preempted in this area only where compliance with state law would make it impossible to comply with federal law. (See People's Opening Brief, pp. 11-29; People's Reply Brief, pp. 2-20.)

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.

Sincerely,

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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 March 2, 2016, I served the attached **Reply to Defendant-Appellant Rinehart's Letter Brief 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 March 2, 2016, at Oakland, California.

Sylvia Wu
Declarant

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Signature

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