

Summary

Meeting dates: January 5, 2017

Agenda item: Trout Unlimited Petition to Amend Mineral Prospecting Rules, WAC 220-660-300

Presenter(s): Jeff Davis and Randi Thurston, Habitat Program

Background summary:

The legislature passed a bill in 1997 (codified as RCW 77.55.091) that required the department to develop rules for the Gold and Fish Pamphlet which would minimize the number of permits (individual HPAs) issued for small scale prospecting and mining. In 1998 when the rules were adopted the only Endangered Species Act (ESA) listings were in the Snake River. These fish populations spawn in Idaho and Oregon. Although the statutory definition of small-scale prospecting and mining did not include motorized methods the statute didn't prohibit including other methods in the pamphlet. Motorized methods were added to streamline the permitting process and reduce regulatory burden. Including motorized methods in the pamphlet also decreased the number of individual HPAs issued by ~400 a year. Additional restrictions were added in 1998, 2005 and 2014 to mitigate the risk of motorized method to fish life. For example, the use of motorized methods was and is restricted based on the best available science for individual water bodies to times of the year when salmonids aren't spawning and incubating.

On November 10, 2017, Trout Unlimited filed a petition that requests:

- The Commission remove motorized suction dredging as an authorized activity in the Gold & Fish Pamphlet, and instead, require individual applications for standard Hydraulic Project Approval (HPAs).
- HPA requirements, provide for protection of fish life and habitat necessary to comply with federal law, namely the Endangered Species Act and Clean Water Act (CWA).
- The Commission prohibit motorized suction dredging in rivers and creeks designated as critical habitat for ESA-listed fish species.

Cascadia Wildlands also petitioned Department of Ecology on October 28, 2017 requesting a declaratory order stating that motorized placers miners who discharge into state waters are subject to the National Pollution Discharge System permit requirement. Ecology denied that petition.

Policy issue(s) you are bringing to the Commission for consideration:

There are several policy questions raised by the Trout Unlimited petition the Commission should consider. These include the following:

- Does the proposal allow members of the public affected by the proposed rule change an opportunity for a meaningful role in the rule development?
 - Are the policy decisions requested appropriate for agency rulemaking?
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- Does issuing a permit for a hydraulic project undertaken voluntarily mean the department is authorizing a person(s) to violate other federal, state and local regulations?
- How will the department fund the increased cost associated with a major rulemaking?
- Should the department undertake rulemaking when persons on both sides are litigating the current rules?

Public involvement process used and what you learned:

The department has not done public outreach specific to the petition. However, it appears based on the number of letters of support sent to the Commission that Trout Unlimited did extensive outreach. Some prospectors are aware of the petition but the prospectors have not actively voiced their opposition. Prominent prospecting community leaders who rallied members in the past have recently retired. Based on the high level of participation of prospectors and environmental advocates in the department's prior rule-makings, the department does not view the lack of voiced opposition as support for or disinterest in the petition.

Action requested:

Motorized suction dredging is and has historically been a contentious issue. There are new Commissioners who haven't been exposed to this subject. Additionally, important and controversial policy decisions deserve a rigorous, inclusive, defensible and transparent process. In response, we recommend that the Commission deny the current petition and instead request that staff provide an in-depth presentation at a future Commission meeting about the science related to mineral prospecting; potential risks to fish life; avoidance, minimization, and compensation options; and policy considerations. We also recommend that the Commission hear from the public before deciding whether to direct agency staff to initiate rulemaking.

Draft motion language:

I move to deny the Trout Unlimited petition at this time. I request that staff schedule sufficient time at a future Commission meeting to provide an in-depth briefing on the science related to mineral prospecting; potential risks to fish life; avoidance, minimization and compensation options; and policy considerations. We also request that representatives from Trout Unlimited and the mineral prospecting community be given an opportunity to present at that meeting. The Commission will decide what action to take after the briefing.

Justification for Commission action:

The department is recommending the denial of the petition for the following reasons:

- Outright adoption of the petition would minimize the mining community's opportunity for a meaningful role in the development of the proposed rules. The legislative finding in RCW
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34.05.328 states “members of the public affected by administrative rules must have the opportunity for a meaningful role in their development...”

- Prohibiting motorized suction dredging in rivers and creeks designated as critical habitat for ESA-listed fish species would be a significant change in the department’s business practices and a substantial policy decision affecting the mining community. Outright adoption of the petition is contrary to the legislative finding (RCW 34.05.328) that states “unless otherwise authorized, substantial policy decisions affecting the public be made by those directly accountable to the public, namely the legislature, and that state agencies not use their administrative authority to create or amend regulatory programs.” The department believes additional investigation into the specific areas of concern would allow the commission to make an informed decision about whether rulemaking is warranted based on the best available science.
- The hydraulic code rules do not require those to whom it applies to take an action that violates requirements of another federal or state law. All hydraulic projects undertaken are done so voluntarily. In addition, authorization to conduct any hydraulic project, including mineral prospecting, does not exempt a person from the requirements of other regulatory authorities or landowners. This is stated in the rules and is further detailed in the gold and fish pamphlet.
- An Environmental Impact Statement and a statewide cost/benefit analysis would be needed. Department staff do not have the required expertise so consultants will be necessary to complete these documents. A major rulemaking will also result in additional staff workload.
- The department is currently in litigation with both Cascadia Wildlands (superior court) and the members of the mineral prospecting community (superior court and Court of Appeals) challenging previous rulemakings modifying WAC 220-660-300. Final decisions could result in additional rulemaking or affirm the department’s approach to regulation of small scale mineral prospecting. Using limited staff resources to initiate a rulemaking which addresses the same issues raised in active litigation is inefficient.
- The department places a high priority on the current rulemaking, which proposes to modify the prospecting rule to protect spawning salmonids in the Sultan River. The department adopted an emergency rule in June 2017, and the rulemaking will result in permanent protections for this river stretch. Dedicating the department’s limited staff resources to completing this rulemaking to protect known spawning salmonids is a high priority to comply with the department’s mandate to protect fish life.

Communications Plan:

The Commission will send a decision letter to Trout Unlimited.