



February 3, 2017

TO: House Agriculture and Natural Resources Committee

FROM: Washington Council of Trout Unlimited

RE: HB 1106 & HB 1077 – Regulating Motorized Suction Dredge Mining

Thank you for your time and willingness to hear HB 1106 and HB 1077 on Tuesday, January 17th. On behalf of Trout Unlimited's 5,000 members in Washington State, we would like to express our appreciation for your careful consideration of this proposed legislation – we feel reforms to current motorized suction dredge mining regulations are necessary step for ensuring critical protections for Washington's native fish species, especially those with struggling populations protected by the Endangered Species Act (ESA).

The State of Washington is at a critical time regarding how it chooses to regulate motorized suction dredge mining. As discussed at the public hearing, the Departments of Ecology and Fish & Wildlife have received a 60-day notice of intent to sue under the Clean Water Act and Endangered Species Act. The contents of this notice identify a number of ways in which Washington State's regulatory structure falls far short of what is necessary to comply with federal laws – based on both federal court decisions and the permitting requirements for motorized suction dredge mining in other states.

HB 1106 and HB 1077 provide mechanisms for the state to comply with federal law, protect its fish and fish habitat, and avoid spending public money in expensive litigation that it is likely to lose. While motorized miners may oppose HB 1106 and HB 1077, and seek to avoid a regulatory structure that other states, the EPA, and the federal courts have deemed necessary – in the end, court-ordered rather than state-developed regulations will be imposed.

Based on the information presented at the hearing, we would like to clarify some key points for the committee:

1. Motorized Suction Dredge operations create a “discharge” that requires a permit to comply with the federal Clean Water Act.

Testimony and questions during the hearing appeared to imply that because no material from outside the stream or river is added to the waterbody from motorized suction dredge operations, that there is no “discharge of pollutants” as that term is used in the federal Clean Water Act.

In fact, the law on this question is settled - a number of federal court decisions have concluded that stream bed materials processed and returned to the waterbody resulted in an “addition” and that the “resuspension may be interpreted an addition of a pollutant.” *Rybachek v. E.P.A.*, 904 F.2d 1276, 1285-86 (9th Cir. 1990). Under the Clean Water Act, a discharge of a pollutant requires a permit. In *Trustees for Alaska v. Environmental Protection Agency*, the 9th Circuit again held that NPDES permits were required for the activities of gold placer miners. 749 F.2d 549, 552, 558 (9th Cir. 1984). The 11th Circuit also reached this conclusion in *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985)

Thus, the requirement in HB 1106 that Ecology develop and issue an NDPES General Permit for motorized suction dredge mining **would require only what federal courts and the EPA have already determined is necessary to comply with the federal Clean Water Act.**

2. WDFW has acknowledged that the Gold & Fish Pamphlet Does Not Prevent the Unlawful “Take” of Species Under the Endangered Species Act.

WDFW’s White Paper on the Gold & Fish Pamphlet concluded that all small-scale mineral prospecting activities have the potential for some “take” under the ESA, unless none of the potentially covered species occur in a project area, including the areas upstream and downstream that may be impacted by the mining operations. *WDFW Small-Scale Mineral Prospecting White Paper*, at 9-6. National Marine Fisheries Service (NMFS), the agency that implements the Endangered Species Act for certain listed fish species in Washington State, has consistently urged WDFW to make significant changes to the state’s regulation of motorized suction dredging to avoid ESA violations.

HB 1077, which would remove motorized suction dredge mining from coverage under the Gold & Fish Pamphlet. This would allow WDFW to review the activity just like it reviews any other activity that disturbs the bed of Washington’s rivers and streams, **enabling the state to comply with the ESA** and protect our fish resources.

CONCLUSION

We were greatly alarmed at some of the comments at the public hearing implying that fish may actually benefit from the discharge of sediment, heavy metals, bank erosion, or other common impacts from motorized suction dredging. Such comments are directly refuted by a number of state reports and studies, numerous court decisions, and permit decisions by the EPA and other agencies. But, this issue is obviously past the point where a discussion over the science can be had.

More importantly, Washington State is at an important crossroads and has the opportunity to make the right choice for protecting our native fish populations and to protect itself against an expensive and lawsuit, which (if legal precedent is any indication) it is likely to lose.

Linked below are recent articles from the both the Seattle Times and Spokesman Review regarding the need for state leadership and action on this issue.
<http://www.seattletimes.com/opinion/stop-suction-dredging-the-life-out-of-washington-waterways/>
<http://www.spokesman.com/blogs/outdoors/2017/jan/30/bills-see-reform-suction-dredging-washington/>

We greatly appreciate your careful consideration of this issue and strongly urge you to vote “yes” on HB 1106 and HB 1077.

Sincerely,



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