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## **BY FIRST CLASS MAIL**

Commissioners  
Fish and Wildlife Commission  
600 Capitol Way North  
Olympia, WA 98501-1091

Re: *Gold and Fish Rulemaking Misconduct Continues*

Dear Commissioners:

I write on behalf of my client the Resources Coalition and Washington State miners generally (hereafter, “Miners”). Those Commissioners then serving may recall that the rulemaking process commenced with the Miners’ request to adopt rules they petitioned for, which the Commission then rejected on the basis that any revisions to the rule required the prolonged and enhanced procedural protections of RCW 34.05.328, because the revisions would constitute “significant legislative rules”.

That prolonged process, involving extensive participation by stakeholders including the Miners and the National Marine Fisheries Service (NMFS), U.S. Forest Service, U.S. Fish and Wildlife, the Tribes, and environmental groups, ultimately resulted in a revised Gold and Fish pamphlet issued April, 2009. Notwithstanding the absence of any evidence that prior mining had killed or injured so much as a single fish in the State of Washington—and a great weight of evidence to the contrary—the Commission adopted stringent rules based on attenuated evidence of various asserted risks from mining activity.

We understand that the NMFS, having apparently observed in a television news report that a group of miners worked in the Nooksack River on April 4, 2009, has now advised the Director of the Department of Fish and Wildlife that the existing rules that the agency participated in developing are not adequately protective of listed salmonid species.

After one miner correctly complained that NMFS’ communication to the Director was materially inaccurate, he received a letter from Mr. Greg Hueckel, dated January 11, 2010, which raises far greater concerns. First, Mr. Hueckel asserts that “to ensure that neither WDFW nor prospectors operating under our rules violate the Endangered Species Act, WDFW will work closely with NOAA Fisheries to modify the rule”.

The notion that either WDFW or prospectors could possibly be held liable to violate the Endangered Species Act for activities in compliance with the present Gold and Fish pamphlet is at best far-fetched. As the Supreme Court has emphasized, the Act's "takings" prohibition must be reserved for "*significant* habitat modification or degradation that actually kills or injures wildlife".<sup>1</sup> Miners who wash small quantities gold-bearing gravels *by hand* in a swiftly-running river, can scarcely be said to modify or degrade habitat in any "significant" way, much less in a manner that "actually kills or injures wildlife". (Only one operator was utilizing powered equipment, and, apparently unknown to NMFS (and many within the Department), was operating under an individual HPA issued by the Department.) This is confirmed by the Department's own internal agency e-mails concerning the incident.<sup>2</sup>

Nor is there the slightest chance that WDFW could be held liable under the Act.<sup>3</sup> Indeed, to assert that small groups of miners operating by hand violate the Act makes a mockery of the serious purposes of the Endangered Species Act. A single motorboat or fisherman operating in any river bearing listed species manifestly imposes far more (but still utterly insignificant) risk to listed salmonid species.

Second, Mr. Hueckel advises "we will be recommending that the Commission initially adopt these changes as emergency rules". Because there is manifestly no necessity of adopting any such changes "for the preservation of the public health, safety or general welfare," we can only construe the Department's desire to work privately with NMFS as an attempt to exclude the participation of the most immediate stakeholder in the regulations: the Miners themselves. Washington courts have emphasized that "[w]hen an agency must announce its reasons for declaring an emergency that requires protection of the public health or welfare, and attempts to justify dispensing with public notice and comment, the reasons should be truly emergent and persuasive to the reviewing court".<sup>4</sup> The Miners will not stand having the long and painstaking work of the stakeholders in developing the rules cast aside in favor of private deals between the Department and NMFS, and will immediately commence legal action against the Department and Commission if any such emergency rules are adopted which threaten to interfere with the key summer mining season.

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<sup>1</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *see generally* 50 C.F.R. § 17.3 (regulatory definition of prohibited "harm").

<sup>2</sup> As one e-mail acknowledges: "It would be very difficult to show the volume of sediment released in connection with the work and its direct or indirect impact on fish life in this instance. . . . In the photos, most mineral prospectors are using pans so the total volume of material processed wouldn't be more than a cubic foot or two, and the area where work is occurring doesn't appear to be spawning habitat (larger cobble and slack water)."

<sup>3</sup> State agencies have almost never been held liable under the Act. The only remotely analogous case of which the Miners are aware involved a State agency's affirmative practice of stocking goats and sheep for sport hunting purposes in a tiny volcano habitat, which threatened to cause the immediate extinction of a rare bird. *See Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (9<sup>th</sup> Cir. 1988). NMFS could not possibly assemble a comparable case here, above all else because of the absence of any tangible harm to listed species.

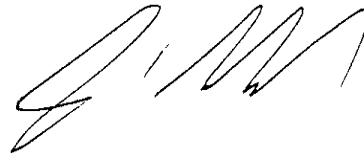
<sup>4</sup> *Mauzy v. Gibbs*, 44 Wash. App. 625, 630-31 (1986).

Finally, in response to a Public Records Act request, the Miners have received copies of an internal WDFW e-mail which reports that the "Deputy Chief wants a collection of habitat (Hydraulics and especially mining) violations in order to document our efforts for a number of different reasons". This is still further confirmation of the blatant anti-mining bias of the Department and its lawless disregard of the public policies of this state,<sup>5</sup> and calls into question the accuracy and legitimacy of the Department's representations before this Commission. Thankfully, staff has thus far resisted the improper pressure to charge baseless violations.

This Commission's mandate is, above all else, to manage and supervise the Department. The Department's astonishing assertion that its own rules are so manifestly defective as to generate an "emergency" just nine months after adoption threatens to cast discredit on the Commission in its own supervisory role. We therefore call upon the Commission to rein in the Department, and require careful, deliberate and fully transparent consideration of any asserted deficiencies in the new rules before taking action. As Washington's fiscal situation continues to deteriorate, immediate reinitiation of a protracted and expensive rulemaking process seems particularly questionable.

Thank you for your consideration of these comments

Sincerely,



James L. Buchal  
Attorney for Resources Coalition

cc: Attorney General McKenna  
Director Phil Anderson  
Asst. Dir. Habitat Greg Hueckel  
Interested Legislators

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<sup>5</sup> "The legislature finds that small scale prospecting and mining: (1) Is an important part of the heritage of the state; (2) provides economic benefits to the state; and (3) can be conducted in a manner that is beneficial to fish habitat and fish propagation. Now, therefore, the legislature declares that small scale prospecting and mining shall be regulated in the least burdensome manner that is consistent with the state's fish management objectives and the federal endangered species act." (1997 c 415 § 1.)