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TENNESSEE WILDLIFE RESOURCES AGENCYELLINGTON AGRICULTURAL CENTER  
P.O. BOX 40747  
NASHVILLE, TENNESSEE 37204VIA FACSIMILE AND U.S. MAIL  
615-741-4472

November 4, 2008

The Honorable Judge Tom Stovall  
Administrative Procedures Division, Office of the Secretary of State  
312 Rosa L. Parks Avenue  
8th Floor, Snodgrass Tower  
Nashville, TN 37243-1102

**RE: Petition for Declaratory Order before the Tennessee Wildlife Resources Commission**

Dear Judge Stovall:

Enclosed please find a copy of the letter to Mr. James McKoon regarding his clients' Petition in the above-referenced matter. The Commission held an emergency telephonic meeting on this date and unanimously voted to convene a contested case hearing in this matter.

In an effort to expedite this matter and accommodate Mr. McKoon and his clients, the Commission voted to schedule the contested case hearing for 1:00 p.m. on Thursday, November 20, 2008. This would coincide with the regularly scheduled meeting of the Commission on the same date. Further, this meeting would be the last meeting of the 2008 year for the Commission, as there will be no December meeting. The Agency is requesting an Administrative Law Judge sit at this meeting as well. If there is a scheduling issue with the time and date chosen by the Commission, please do not hesitate to inform me so that I may work with Mr. McKoon on rescheduling at a mutually agreeable time.

The Agency received this Petition last week while both attorneys were out of the office therefore the Agency has not yet finished its response in this matter. The Agency's response will be delivered to you and to Mr. McKoon before week's end. If there are any questions regarding this matter, please contact Sheryl Holtam, General Counsel, at 615-781-6606.

Sincerely,

  
Tracey E. Boyers  
Attorney

W/Encl.

Cc: James R. McKoon, Esq.

The State of Tennessee

AN EQUAL OPPORTUNITY, EQUAL ACCESS, AFFIRMATIVE ACTION EMPLOYER

2008-03-15 15:15

**PETITION FOR DECLARATORY ORDER BEFORE THE FISHERIES  
MANAGEMENT DIVISION OF THE TENNESSEE  
WILDLIFE RESOURCES AGENCY**

1. NAMES OF PETITIONERS: TENNESSEE COMMERCIAL ROE FISHERMAN'S ASSOCIATION and TENNESSEE COMMERCIAL FISHERMEN'S ASSOCIATION
  
2. ADDRESS OF PETITIONERS:  
c/o James R. McKoon, Esquire  
McKoon, Williams & Haun  
633 Chestnut Street  
Suite 1300, Republic Centre  
Chattanooga, TN 37450  
(423) 756-6400 telephone  
(423) 756-8600 facsimile
  
3. PROVISION ON WHICH DECLARATORY ORDER IS SOUGHT: WILDLIFE PROCLAMATION 08-01
  
4. STATEMENT OF FACTS:

The Petitioners are trade organizations that have associational standing to petition or sue to seek redress for their respective members. Petitioners aver that their memberships are comprised solely of commercial fishermen, including buyers of commercial fish products, and the interests sought to be protected herein are germane to the purposes of the Petitioners. Their respective members, or any individual members, will suffer immediate or threatened harm and injury by the manner in which Wildlife Proclamation 08-01 was passed and upon the terms of said Proclamation becoming effective, such that this Petition raises a justiciable case had their members initiated it individually.

At the January meeting of the Tennessee Wildlife Resources Commission ("TWRC" or "Commission"), the Commission adopted Wildlife Proclamation 08-01, which governs commercial fishing in the State of Tennessee and is now due to take effect on April 17, 2008.

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Petitioners are trade organizations comprised of commercial fishermen who fish the waters of the State of Tennessee and whose primary purpose is to promote and protect the professional interests of their members. The above mentioned Proclamation contains numerous changes from previous regulations which greatly curtail and restrict the rights of these fishermen to continue making their living at the trade which they have chosen. Petitioners assert that there are questions surrounding the legality of both (i) the procedure used in the adoption of Proclamation 08-01 and (ii) the substantive content of the regulations contained within said Proclamation, and seek a declaratory ruling from the Agency regarding the same.

First, no meaningful notice was provided to commercial fishermen, or the public in general, regarding Wildlife Proclamation 08-01 prior to its passage. Although proposed provisions for new commercial fishing regulations had been circulating for some time, and meetings had been held regarding previous incarnations of proposed regulations, the terms of Wildlife Proclamation 08-01 were held in secret until virtually the eve of its passage. As late as January 14, 2008, the Monday before the scheduled vote on the Proclamation on January 16 and 17, 2008, Petitioners requested a copy of the Proclamation from the Agency in order to prepare to make comments before the Commission. This request was summarily denied. Upon information and belief, not even the members of the Commission who would be voting on the measure had been informed as to what the specific contents of the Proclamation would be until the weekend of January 12-13, 2008. Although a draft was ultimately received, no time was available to craft meaningful comments. Under the Fourteenth Amendment of the United States Constitution, before the State may deprive an individual of liberty or property, the State must provide notice and opportunity to be heard. Petitioners have a constitutionally protected liberty

interest in the right to follow their chosen profession free from unreasonable government interference, and constitutionally protected property interest in exercising their commercial fishing licenses and in using their commercial fishing paraphernalia. Clearly, the failure to provide meaningful notice to the individuals whose protected interest were to be affected by the Proclamation regarding the specific provisions of the Proclamation and allowing them a reasonable hearing before depriving them of those interests raises a serious question regarding the validity of Wildlife Proclamation 08-01, as well as the procedures set forth in Title 70 of the Tennessee Code for the issuance of proclamations by the TWRC, and the exemption from notice and hearing requirements provided to the TWRC in the Uniform Administrative Procedures Act (T.C.A. § 4-5-101, *et seq.*).

Of particular concern with regard to notice are (i) the vacillating nature of the positions taken by the Agency prior to the January 16-17, 2008 Commission meeting and (ii) the several provisions of Wildlife Proclamation 08-01 which were never included in previously proposed commercial fishing regulations and were never discussed at any meeting between the Commission or the Agency and representatives of the commercial fishing industry. Such provisions include, but are not limited to, the prohibition of the use of fyke nets on Cherokee Reservoir, Douglas Reservoir, and Old Hickory Reservoir, and a change in minimum block length for paddlefish. Despite having circulated proposals for regulations, and having called meetings with representatives of the commercial fishing industry for the stated purpose of discussing concerns regarding proposed regulations, neither the Agency nor the Commission ever presented these issues to commercial fishers or to the public in general for consideration or comment prior to their passage as part of Wildlife Proclamation 08-01. These provisions place

undue burdens on commercial fishers by limiting where they may fish, the means that they may use to fish, and the fish that they may keep once harvested. It would be impossible to claim that anyone received a meaningful notice or opportunity to be heard on such matters, and as such they should not be enforced.

Second, Petitioners are concerned that the contents of Proclamation 08-01 are in violation of substantive due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution and the Law of the Land Clause of the Tennessee Constitution. While Petitioners recognize that the State has legitimate interests in conservation and public health issues, many provisions of Proclamation 08-01 bear no rational relationship to these legitimate government purposes. In particular, several provisions are directly adverse to the interests of the Petitioners and are not rationally related to legitimate government purposes. For example, Watts Bar Reservoir is closed to all commercial fishing despite a lack of evidence justifying the closure, and inconsistent treatment by the TWRC of other waterways, lakes, reservoirs that have similar advisories regarding fish consumption placed upon them. Other waters or areas of water are also removed from the list of waters permitted to be fished commercially, similarly without valid scientific justification. Moreover, Wildlife Proclamation 08-01 extends the closed period during which paddlefish may be taken commercially. Limiting the season for paddlefish places a severe burden on commercial roe fishermen by reducing the time on which they may be able to fish, and this change is again not backed by scientific authority. As much as an estimated 50% of many commercial fishers' egg harvest and revenue for the year is derived from paddlefish harvested during the two week period which is removed under Wildlife Proclamation 08-01 from the permitted season. Paradoxically, the change in season is inconsistent with sport

paddlefishing regulations. The Agency has stated concerns regarding continued viability of the species in support of limiting the commercial season for harvesting paddlefish, but such contentions cannot be logically borne out in consideration of the inconsistent treatment of paddlefish between the commercial and sport fishing regulations. Wildlife Proclamation 08-01 also changes the definition of a fish seine, limiting the length of the seine to 50 feet and changing the permitted mesh size. Again, such changes are without evidentiary basis or authority as to their effect, and serve to limit the viability of commercial fishing as a profession in the State of Tennessee.

In light of the lack of evidence supporting many of the provisions of Wildlife Proclamation 08-01, the proclamation should also not be enforced as being an arbitrary and capricious exercise of governmental power. For example, changes in gear definitions and permitted locations for certain types of gear appear to be entirely based upon the caprice of individual representatives of the Agency, and without any scientific justification as to the purpose or benefit of such changes. Closure of waters to commercial fishing appears to be inconsistent based upon the advisories promulgated by TDEC and the most current scientific data available related to fish flesh and sediment sampling. Such arbitrary and capricious exercises of regulatory authority should not be enforced by this agency.

During the consideration of Wildlife Proclamation 08-01, upon motion, the Commission amended the Proclamation to continue to allow the commercial harvest of shovelnose sturgeon. However, Petitioners are concerned regarding the treatment of shovelnose:pallid sturgeon hybrids under current regulations. The Agency has continued to take the position that any

harvest of hybrids is prohibited under the regulations, and has cited the non-inclusion of such hybrids on the list of species permitted to be harvested commercially in support of this position. However, evidence presented to the Commission has shown that there is insufficient evidence that such hybrids are to be designated as a separate species, such that their inclusion on the list would be appropriate. Furthermore, under Rule 1660-1-18-.03(5) of the Rules and Regulations of the State of Tennessee, hybrids are to be regulated under the regulations for the least restrictive species involved. Petitioners would request that the Agency issue a declaratory order interpreting the regulations relative to the commercial harvest of shovelnose:pallid sturgeon hybrids, in as much as such hybrids should be subject to the same regulations as shovelnose sturgeon.

Finally, pursuant to **Tennessee Code Annotated §70-1-201(a)**, at least two persons serving on the TWRC are required to be female. The Commission which approved Wildlife Proclamation 08-01 is invalidly constituted by law, as there is only one female serving upon the Commission. As the Commission which approved the Proclamation is not comprised of the statutorily required composition of diverse individuals, the Proclamation itself is invalid and should not be enforced.

Petitioners reserve the right to amend this Petition as further evidence is uncovered and discovery received, and to conform to the evidence presented at any hearing on this matter. The use of examples to illustrate issues and/or arguments is not intended to limit those issues and arguments to those specific examples. More specific evidence regarding each of these issues and arguments will be presented at a contested case hearing regarding this Petition.

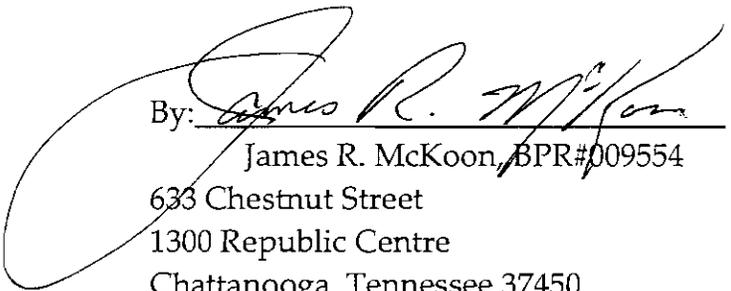
**DESCRIPTION OF REQUESTED RULING:**

Petitioners request that a Declaratory Order issue holding that Wildlife Proclamation 08-01 is invalid in its entirety, and that Wildlife Proclamation 06-22, as amended in 2007, which was superseded by Proclamation 08-01, is effective as the regulations governing commercial fishing in the State of Tennessee.

*Respectfully submitted,*

**McKoon, Williams, & Haun**

This 7<sup>th</sup> day of April, 2008.

By: 

James R. McKoon, BPR#009554

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1300 Republic Centre

Chattanooga, Tennessee 37450

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*Attorneys for Petitioners*