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**SUBSTITUTE SENATE BILL 5322**

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**State of Washington**

**66th Legislature**

**2019 Regular Session**

**By** Senate Environment, Energy & Technology (originally sponsored by Senators Palumbo, Carlyle, Wellman, Hunt, McCoy, Hasegawa, Kuderer, Nguyen, and Saldaña)

READ FIRST TIME 02/21/19.

1 AN ACT Relating to ensuring compliance with the federal clean  
2 water act by prohibiting certain discharges into waters of the state;  
3 amending RCW 77.55.021; reenacting and amending RCW 77.55.011; adding  
4 a new section to chapter 90.48 RCW; creating a new section; and  
5 prescribing penalties.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 NEW SECTION. **Sec. 1.** The legislature finds that under RCW  
8 90.48.260, the department of ecology is directed to implement and  
9 comply with the federal clean water act. The legislature further  
10 finds that Washington state, unlike other states and the  
11 environmental protection agency, has taken no action to regulate or  
12 limit water quality impacts from motorized or gravity siphon aquatic  
13 mining. The legislature also finds that federal courts have  
14 determined that discharges from this activity require regulation  
15 under the clean water act and that Washington's attorney general has  
16 supported such regulations in other states as necessary to protect  
17 water quality and fish species, even though such protections do not  
18 exist in Washington state. The legislature further finds that harmful  
19 water quality impacts are occurring in areas designated as critical  
20 habitat for threatened or endangered steelhead, salmon, and bull

1 trout, including spawning areas for chinook salmon relied on by  
2 southern resident orcas.

3 NEW SECTION. **Sec. 2.** A new section is added to chapter 90.48  
4 RCW to read as follows:

5 (1) A discharge to waters of the state from a motorized or  
6 gravity siphon aquatic mining operation is subject to the  
7 department's authority under this chapter and the federal clean water  
8 act.

9 (2) The following act or acts are prohibited: Motorized or  
10 gravity siphon aquatic mining or discharge of effluent from such  
11 activity to any waters of the state that has been designated under  
12 the endangered species act as critical habitat, or would impact  
13 critical habitat for salmon, steelhead, or bull trout. This includes  
14 all fresh waters with designated uses of: Salmonid spawning, rearing,  
15 and migration.

16 (3) A person commits the offense of unlawful motorized or gravity  
17 siphon aquatic mining if the person engages in such an activity in  
18 violation of this chapter or the federal clean water act. Such an  
19 offense is subject to enforcement under this chapter.

20 (4) For the purposes of this section, "motorized or gravity  
21 siphon aquatic mining" means mining using any form of motorized  
22 equipment, including but not limited to a motorized suction dredge,  
23 or a gravity siphon suction dredge, for the purpose of extracting  
24 gold, silver, or other precious metals, that involves a discharge  
25 within the ordinary high water mark of waters of the state.

26 (5) This section does not apply to:

27 (a) Aquatic mining using nonmotorized methods, such as gold  
28 panning, if the nonmotorized method does not involve use of a gravity  
29 siphon suction dredge;

30 (b) Mining operations where no part of the operation or discharge  
31 of effluent from the operation is to waters of the state;

32 (c) Surface mining operations regulated by the department of  
33 natural resources under Title 78 RCW;

34 (d) Metals mining and milling operations as defined in chapter  
35 78.56 RCW; or

36 (e) Activities related to an industrial facility, dredging  
37 related to navigability, or activities subject to a clean water act  
38 section 404 individual permit.

1       **Sec. 3.** RCW 77.55.011 and 2012 1st sp.s. c 1 s 101 are each  
2 reenacted and amended to read as follows:

3       The definitions in this section apply throughout this chapter  
4 unless the context clearly requires otherwise.

5       (1) "Bed" means the land below the ordinary high water lines of  
6 state waters. This definition does not include irrigation ditches,  
7 canals, stormwater runoff devices, or other artificial watercourses  
8 except where they exist in a natural watercourse that has been  
9 altered artificially.

10       (2) "Board" means the pollution control hearings board created in  
11 chapter 43.21B RCW.

12       (3) "Commission" means the state fish and wildlife commission.

13       (4) "Date of receipt" has the same meaning as defined in RCW  
14 43.21B.001.

15       (5) "Department" means the department of fish and wildlife.

16       (6) "Director" means the director of the department of fish and  
17 wildlife.

18       (7) "Emergency" means an immediate threat to life, the public,  
19 property, or of environmental degradation.

20       (8) "Emergency permit" means a verbal hydraulic project approval  
21 or the written follow-up to the verbal approval issued to a person  
22 under RCW 77.55.021(12).

23       (9) "Expedited permit" means a hydraulic project approval issued  
24 to a person under RCW 77.55.021 (14) and (16).

25       (10) "Forest practices hydraulic project" means a hydraulic  
26 project that requires a forest practices application or notification  
27 under chapter 76.09 RCW.

28       (11) "Hydraulic project" means the construction or performance of  
29 work that will use, divert, obstruct, or change the natural flow or  
30 bed of any of the salt or freshwaters of the state.

31       (12) "Imminent danger" means a threat by weather, water flow, or  
32 other natural conditions that is likely to occur within sixty days of  
33 a request for a permit application.

34       (13) "Marina" means a public or private facility providing boat  
35 moorage space, fuel, or commercial services. Commercial services  
36 include but are not limited to overnight or live-aboard boating  
37 accommodations.

38       (14) "Marine terminal" means a public or private commercial wharf  
39 located in the navigable water of the state and used, or intended to

1 be used, as a port or facility for the storing, handling,  
2 transferring, or transporting of goods to and from vessels.

3 (15) "Multiple site permit" means a hydraulic project approval  
4 issued to a person under RCW 77.55.021 for hydraulic projects  
5 occurring at more than one specific location and which includes  
6 site-specific requirements.

7 (16) "Ordinary high water line" means the mark on the shores of  
8 all water that will be found by examining the bed and banks and  
9 ascertaining where the presence and action of waters are so common  
10 and usual, and so long continued in ordinary years as to mark upon  
11 the soil or vegetation a character distinct from the abutting upland.  
12 Provided, that in any area where the ordinary high water line cannot  
13 be found, the ordinary high water line adjoining saltwater is the  
14 line of mean higher high water and the ordinary high water line  
15 adjoining freshwater is the elevation of the mean annual flood.

16 (17) "Pamphlet hydraulic project" means a hydraulic project for  
17 the removal or control of aquatic noxious weeds conducted under the  
18 aquatic plants and fish pamphlet authorized by RCW 77.55.081, or for  
19 mineral prospecting and mining conducted under the gold and fish  
20 pamphlet authorized by RCW 77.55.091.

21 (18) "Permit" means a hydraulic project approval permit issued  
22 under this chapter.

23 (19) "Permit modification" means a hydraulic project approval  
24 issued to a person under RCW 77.55.021 that extends, renews, or  
25 changes the conditions of a previously issued hydraulic project  
26 approval.

27 (20) "Sandbars" includes, but is not limited to, sand, gravel,  
28 rock, silt, and sediments.

29 (21) "Small scale prospecting and mining" means the use of only  
30 the following methods: Pans; nonmotorized sluice boxes; nonmotorized  
31 concentrators; and minirocker boxes for the discovery and recovery of  
32 minerals, but does not include metals mining and milling operations  
33 as defined in RCW 78.56.020.

34 (22) "Spartina," "purple loosestrife," and "aquatic noxious  
35 weeds" have the same meanings as defined in RCW 17.26.020.

36 (23) "Stream bank stabilization" means those projects that  
37 prevent or limit erosion, slippage, and mass wasting. These projects  
38 include, but are not limited to, bank resloping, log and debris  
39 relocation or removal, planting of woody vegetation, bank protection

1 using rock or woody material or placement of jetties or groins,  
2 gravel removal, or erosion control.

3 (24) "Tide gate" means a one-way check valve that prevents the  
4 backflow of tidal water.

5 (25) "Waters of the state" and "state waters" means all salt and  
6 freshwaters waterward of the ordinary high water line and within the  
7 territorial boundary of the state.

8 (26) "Motorized or gravity siphon aquatic mining" means mining  
9 using any form of motorized equipment including, but not limited to,  
10 a motorized suction dredge or a gravity siphon suction dredge, for  
11 the purpose of extracting gold, silver, or other precious metals,  
12 that involves a discharge to waters of the state, but does not  
13 include metals mining and milling operations as defined in RCW  
14 78.56.020.

15 **Sec. 4.** RCW 77.55.021 and 2012 1st sp.s. c 1 s 102 are each  
16 amended to read as follows:

17 (1) Except as provided in RCW 77.55.031, 77.55.051, 77.55.041,  
18 and 77.55.361, in the event that any person or government agency  
19 desires to undertake a hydraulic project, the person or government  
20 agency shall, before commencing work thereon, secure the approval of  
21 the department in the form of a permit as to the adequacy of the  
22 means proposed for the protection of fish life.

23 (2) A complete written application for a permit may be submitted  
24 in person or by registered mail and must contain the following:

25 (a) General plans for the overall project;

26 (b) Complete plans and specifications of the proposed  
27 construction or work within the mean higher high water line in  
28 saltwater or within the ordinary high water line in freshwater;

29 (c) Complete plans and specifications for the proper protection  
30 of fish life;

31 (d) Notice of compliance with any applicable requirements of the  
32 state environmental policy act, unless otherwise provided for in this  
33 chapter; and

34 (e) ~~((Payment of all applicable application fees charged by the~~  
35 ~~department under RCW 77.55.321)) In the event that any person or~~  
36 government agency desires to undertake mineral prospecting or mining  
37 using motorized or gravity siphon equipment or desires to discharge  
38 effluent from such an activity to waters of the state, the person or  
39 government agency must also provide proof of compliance with the

1 requirements of the federal clean water act issued by the department  
2 of ecology.

3 (3) The department may establish direct billing accounts or other  
4 funds transfer methods with permit applicants to satisfy the fee  
5 payment requirements of RCW 77.55.321.

6 (4) The department may accept complete, written applications as  
7 provided in this section for multiple site permits and may issue  
8 these permits. For multiple site permits, each specific location must  
9 be identified.

10 (5) With the exception of emergency permits as provided in  
11 subsection (12) of this section, applications for permits must be  
12 submitted to the department's headquarters office in Olympia.  
13 Requests for emergency permits as provided in subsection (12) of this  
14 section may be made to the permitting biologist assigned to the  
15 location in which the emergency occurs, to the department's regional  
16 office in which the emergency occurs, or to the department's  
17 headquarters office.

18 (6) Except as provided for emergency permits in subsection (12)  
19 of this section, the department may not proceed with permit review  
20 until all fees are paid in full as required in RCW 77.55.321.

21 (7)(a) Protection of fish life is the only ground upon which  
22 approval of a permit may be denied or conditioned. Approval of a  
23 permit may not be unreasonably withheld or unreasonably conditioned.

24 (b) Except as provided in this subsection and subsections (12)  
25 through (14) and (16) of this section, the department has forty-five  
26 calendar days upon receipt of a complete application to grant or deny  
27 approval of a permit. The forty-five day requirement is suspended if:

28 (i) After ten working days of receipt of the application, the  
29 applicant remains unavailable or unable to arrange for a timely field  
30 evaluation of the proposed project;

31 (ii) The site is physically inaccessible for inspection;

32 (iii) The applicant requests a delay; or

33 (iv) The department is issuing a permit for a stormwater  
34 discharge and is complying with the requirements of RCW  
35 77.55.161(3)(b).

36 (c) Immediately upon determination that the forty-five day period  
37 is suspended under (b) of this subsection, the department shall  
38 notify the applicant in writing of the reasons for the delay.

39 (d) The period of forty-five calendar days may be extended if the  
40 permit is part of a multiagency permit streamlining effort and all

1 participating permitting agencies and the permit applicant agree to  
2 an extended timeline longer than forty-five calendar days.

3 (8) If the department denies approval of a permit, the department  
4 shall provide the applicant a written statement of the specific  
5 reasons why and how the proposed project would adversely affect fish  
6 life.

7 (a) Except as provided in (b) of this subsection, issuance,  
8 denial, conditioning, or modification of a permit shall be appealable  
9 to the board within thirty days from the date of receipt of the  
10 decision as provided in RCW 43.21B.230.

11 (b) Issuance, denial, conditioning, or modification of a permit  
12 may be informally appealed to the department within thirty days from  
13 the date of receipt of the decision. Requests for informal appeals  
14 must be filed in the form and manner prescribed by the department by  
15 rule. A permit decision that has been informally appealed to the  
16 department is appealable to the board within thirty days from the  
17 date of receipt of the department's decision on the informal appeal.

18 (9) (a) The permittee must demonstrate substantial progress on  
19 construction of that portion of the project relating to the permit  
20 within two years of the date of issuance.

21 (b) Approval of a permit is valid for up to five years from the  
22 date of issuance, except as provided in (c) of this subsection and in  
23 RCW 77.55.151.

24 (c) A permit remains in effect without need for periodic renewal  
25 for hydraulic projects that divert water for agricultural irrigation  
26 or stock watering purposes and that involve seasonal construction or  
27 other work. A permit for stream bank stabilization projects to  
28 protect farm and agricultural land as defined in RCW 84.34.020  
29 remains in effect without need for periodic renewal if the problem  
30 causing the need for the stream bank stabilization occurs on an  
31 annual or more frequent basis. The permittee must notify the  
32 appropriate agency before commencing the construction or other work  
33 within the area covered by the permit.

34 (10) The department may, after consultation with the permittee,  
35 modify a permit due to changed conditions. A modification under this  
36 subsection is not subject to the fees provided under RCW 77.55.321.  
37 The modification is appealable as provided in subsection (8) of this  
38 section. For a hydraulic project that diverts water for agricultural  
39 irrigation or stock watering purposes, when the hydraulic project or  
40 other work is associated with stream bank stabilization to protect

1 farm and agricultural land as defined in RCW 84.34.020, the burden is  
2 on the department to show that changed conditions warrant the  
3 modification in order to protect fish life.

4 (11) A permittee may request modification of a permit due to  
5 changed conditions. The request must be processed within forty-five  
6 calendar days of receipt of the written request and payment of  
7 applicable fees under RCW 77.55.321. A decision by the department is  
8 appealable as provided in subsection (8) of this section. For a  
9 hydraulic project that diverts water for agricultural irrigation or  
10 stock watering purposes, when the hydraulic project or other work is  
11 associated with stream bank stabilization to protect farm and  
12 agricultural land as defined in RCW 84.34.020, the burden is on the  
13 permittee to show that changed conditions warrant the requested  
14 modification and that such a modification will not impair fish life.

15 (12)(a) The department, the county legislative authority, or the  
16 governor may declare and continue an emergency. If the county  
17 legislative authority declares an emergency under this subsection, it  
18 shall immediately notify the department. A declared state of  
19 emergency by the governor under RCW 43.06.010 shall constitute a  
20 declaration under this subsection.

21 (b) The department, through its authorized representatives, shall  
22 issue immediately, upon request, verbal approval for a stream  
23 crossing, or work to remove any obstructions, repair existing  
24 structures, restore stream banks, protect fish life, or protect  
25 property threatened by the stream or a change in the streamflow  
26 without the necessity of obtaining a written permit prior to  
27 commencing work. Conditions of the emergency verbal permit must be  
28 reduced to writing within thirty days and complied with as provided  
29 for in this chapter.

30 (c) The department may not require the provisions of the state  
31 environmental policy act, chapter 43.21C RCW, to be met as a  
32 condition of issuing a permit under this subsection.

33 (d) The department may not charge a person requesting an  
34 emergency permit any of the fees authorized by RCW 77.55.321 until  
35 after the emergency permit is issued and reduced to writing.

36 (13) All state and local agencies with authority under this  
37 chapter to issue permits or other authorizations in connection with  
38 emergency water withdrawals and facilities authorized under RCW  
39 43.83B.410 shall expedite the processing of such permits or  
40 authorizations in keeping with the emergency nature of such requests

1 and shall provide a decision to the applicant within fifteen calendar  
2 days of the date of application.

3 (14) The department or the county legislative authority may  
4 determine an imminent danger exists. The county legislative authority  
5 shall notify the department, in writing, if it determines that an  
6 imminent danger exists. In cases of imminent danger, the department  
7 shall issue an expedited written permit, upon request, for work to  
8 remove any obstructions, repair existing structures, restore banks,  
9 protect fish resources, or protect property. Expedited permit  
10 requests require a complete written application as provided in  
11 subsection (2) of this section and must be issued within fifteen  
12 calendar days of the receipt of a complete written application.  
13 Approval of an expedited permit is valid for up to sixty days from  
14 the date of issuance. The department may not require the provisions  
15 of the state environmental policy act, chapter 43.21C RCW, to be met  
16 as a condition of issuing a permit under this subsection.

17 (15)(a) For any property, except for property located on a marine  
18 shoreline, that has experienced at least two consecutive years of  
19 flooding or erosion that has damaged or has threatened to damage a  
20 major structure, water supply system, septic system, or access to any  
21 road or highway, the county legislative authority may determine that  
22 a chronic danger exists. The county legislative authority shall  
23 notify the department, in writing, when it determines that a chronic  
24 danger exists. In cases of chronic danger, the department shall issue  
25 a permit, upon request, for work necessary to abate the chronic  
26 danger by removing any obstructions, repairing existing structures,  
27 restoring banks, restoring road or highway access, protecting fish  
28 resources, or protecting property. Permit requests must be made and  
29 processed in accordance with subsections (2) and (7) of this section.

30 (b) Any projects proposed to address a chronic danger identified  
31 under (a) of this subsection that satisfies the project description  
32 identified in RCW 77.55.181(1)(a)(ii) are not subject to the  
33 provisions of the state environmental policy act, chapter 43.21C RCW.  
34 However, the project is subject to the review process established in  
35 RCW 77.55.181(3) as if it were a fish habitat improvement project.

36 (16) The department may issue an expedited written permit in  
37 those instances where normal permit processing would result in  
38 significant hardship for the applicant or unacceptable damage to the  
39 environment. Expedited permit requests require a complete written  
40 application as provided in subsection (2) of this section and must be

1 issued within fifteen calendar days of the receipt of a complete  
2 written application. Approval of an expedited permit is valid for up  
3 to sixty days from the date of issuance. The department may not  
4 require the provisions of the state environmental policy act, chapter  
5 43.21C RCW, to be met as a condition of issuing a permit under this  
6 subsection.

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