

HOUSE BILL REPORT

ESSB 5322

As Reported by House Committee On:
Environment & Energy

Title: An act relating to ensuring compliance with the federal clean water act by prohibiting certain discharges into waters of the state.

Brief Description: Ensuring compliance with the federal clean water act by prohibiting certain discharges into waters of the state.

Sponsors: Senate Committee on Environment, Energy & Technology (originally sponsored by Senators Palumbo, Carlyle, Wellman, Hunt, McCoy, Hasegawa, Kuderer, Nguyen and Saldaña).

Brief History:

Committee Activity:

Environment & Energy: 3/14/19, 3/28/19 [DPA].

Brief Summary of Engrossed Substitute Bill
(As Amended by Committee)

- Prohibits motorized or gravity siphon aquatic mining, or the discharge of effluent from such activity to certain waters of the state.
- Exempts certain activities from the prohibition.
- Requires the Department of Ecology to evaluate whether the number of dischargers from motorized or gravity siphon aquatic mining activities warrants the adoption of a general permit for motorized or gravity siphon aquatic mining, and to take certain actions depending on the outcome of the evaluation.

HOUSE COMMITTEE ON ENVIRONMENT & ENERGY

Majority Report: Do pass as amended. Signed by 7 members: Representatives Fitzgibbon, Chair; Lekanoff, Vice Chair; Doglio, Fey, Mead, Peterson and Shewmake.

Minority Report: Do not pass. Signed by 4 members: Representatives Shea, Ranking Minority Member; Dye, Assistant Ranking Minority Member; Boehnke and DeBolt.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Robert Hatfield (786-7117).

Background:

Water Pollution Regulation in Washington State under Federal and State Laws.

The federal Clean Water Act establishes the National Pollutant Discharge Elimination System (NPDES), which regulates discharges of pollutants to surface waters. In Washington, NPDES permitting authority is delegated to the state, allowing the Department of Ecology (Ecology) to issue NPDES permits. In addition to delegated NPDES permitting authority, the Water Pollution Control Act provides Ecology with parallel authority to regulate discharges to state waters, which includes a more expansive scope of waters than are covered under the federal Clean Water Act, including groundwater.

Endangered Species Act—Critical Habitat.

When a species is proposed for listing as endangered or threatened under the Endangered Species Act, depending on the species, the United States Fish and Wildlife Service or the National Marine Fisheries Service must consider whether there are areas of habitat believed to be essential to the species' conservation. Those areas may be proposed for designation as critical habitat. A critical habitat designation requires federal agencies to ensure that actions they plan to undertake, fund, or authorize do not destroy or adversely modify that habitat.

Waters of the State.

Under the Water Pollution Control Act, waters of the state are defined to mean inland waters, underground waters, salt waters, and all other surface waters and watercourses within the jurisdiction of the State of Washington.

Summary of Amended Bill:

A discharge to waters of the state from a motorized or gravity siphon aquatic mining operation is subject to the authority of the Department of Ecology (Ecology) pursuant to the federal Clean Water Act (CWA) and the state Water Pollution Control Act.

Ecology must evaluate whether the number of dischargers from motorized or gravity siphon aquatic mining activities warrants the adoption of a general permit for motorized or gravity siphon aquatic mining. If so, Ecology must minimize the cost to permit applicants by basing general permit provisions on existing general permits adopted in other states to comply with the federal CWA.

Motorized or gravity siphon aquatic mining or discharge of effluent from such an activity is prohibited to any waters of the state that have been designated under the Endangered Species Act as critical habitat, or that would impact critical habitat for salmon, steelhead, or bull trout. This prohibition includes fresh waters with the designated uses of salmonid spawning, rearing, and migration.

A person commits the offense of unlawful motorized or gravity siphon aquatic mining if the person engages in such an activity in violation of the Water Pollution Control Act or the CWA. Such an offense is subject to enforcement under the Water Pollution Control Act.

The prohibition on motorized or gravity siphon aquatic mining or discharge of effluent from such an activity to certain waters of the state does not apply to the following activities:

- aquatic mining using nonmotorized methods;
- mining operations where no part of the operation or discharge of effluent from the operations is to waters of the state;
- surface mining operations regulated by the Department of Natural Resources;
- metals mining and milling operations;
- activities related to an industrial facility, dredging related to navigability, or activities subject to a CWA permit for the discharge of dredged or fill material; or
- dredging activities undertaken by a diking or drainage district.

"Motorized or gravity siphon aquatic mining" is defined in the Water Pollution Control Act as mining using any form of motorized equipment, including but not limited to a motorized suction dredge or a gravity siphon suction dredge for the purpose of extracting gold, silver, or other precious metals, that involves a discharge to the waters of the state, but does not include metals mining and milling operations.

"Motorized or gravity siphon aquatic mining" is defined in the Hydraulic Code as mining using any form of motorized equipment, including but not limited to a motorized suction dredge or a gravity siphon suction dredge for the purpose of extracting gold, silver, or other precious metals, that involves a discharge to the waters of the state, but does not include metals mining and milling operations.

A completed application for a Hydraulic Project Approval for mineral prospecting or mining involving motorized or gravity siphon, or involving a discharge of effluent from such an activity to waters of the state, must include proof of compliance with the requirements of the federal CWA.

Amended Bill Compared to Engrossed Substitute Bill:

References to "ordinary high water mark" are removed. An exemption is added for dredging operations undertaken by a diking or drainage district.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The bill puts Washington in line with other western states. It does not prevent people from prospecting for gold in waters that are not protected as critical habitat under the Endangered Species Act (ESA).

Suction dredge mining is scientifically proven to harm water quality. Washington is the only state with ESA-listed populations that does not have reasonable measures in place to reduce the harm from suction dredge mining.

A 2006 study showed definitively that suction dredge mining causes incidental take of salmonids. No credible source shows that suction dredge mining is good for fish; in fact, there is clear evidence to the contrary.

If this legislation passes, miners will still be able to mine their claims, they just will not be able to use motorized suction dredges in critical habitat areas. The Department of Fish and Wildlife (WDFW) has closed a number of streams to fishing because of ESA concerns, yet those streams remain open to mining. Commercial fishermen are severely restricted in the gear they can use; this bill just represents a gear restriction on mining activities. Every other industry has made concessions to restore salmon.

There have been instances of suction dredge activity happening while salmon are spawning.

Salmon habitat restoration activities have to undergo extensive scientific review before they can take place in a stream; suction dredge mining should have the same level of oversight.

The bill would bring Washington into compliance with the Clean Water Act (CWA). Washington currently has no standards for suction dredge mining. The bill is not a constitutional taking. Sediment plumes extend downstream from suction dredge mining activities.

It makes little sense to establish steelhead gene banks and then allow mechanical mining in the middle of those areas. The bill would shield Washington from potential CWA or ESA lawsuits.

A lot of suction dredge mining activity occurs off federal mining claims, on aquatic lands managed by the Department of Natural Resources.

Studies indicate that suction dredge mining increases turbidity as much as two or three times beyond background levels. The plume can extend hundreds of yards downstream. It is possible to remove pockets of mercury, but when mercury gets hit with a dredge, it is often resuspended in the water column, which then transforms into methyl mercury, which then impacts fish and humans.

An irreplaceable resource has been damaged by a very small group of hobby miners. Washington tribes have not been consulted on the issue of suction dredge mining, and Washington tribes are the co-managers of fish.

(Opposed) Washington does not have the authority to implement National Pollutant Discharge Elimination System (NPDES) permits on federal or tribal lands. All claims are

federally maintained and registered. The largest nozzle that can be used in Washington is a 5-inch nozzle. On federal claims, only 4-inch or smaller nozzles are allowed. A 4-inch nozzle can only move 1.5 cubic yards of gravel per day using a 6.5 horsepower motor.

There have been claims that a suction dredge miner can move 17 yards of gravel in an hour, but in reality, a suction dredge miner could not move that much gravel in a week. Two miners took 500 pounds of lead out of one stream over two days.

Washington has always had severe restrictions on mining activities. Neither Oregon nor California have the type of regulations found in WDFW's Gold and Fish pamphlet.

Miners are not polluting waters and they are not damaging essential salmon habitat. Instead, miners open up cracks and crevices that are essential to fish development.

Prohibiting an activity does not result in compliance with the CWA. Suction dredge activities should be regulated under Section 404 of the CWA. A judge in one case determined that suction dredge mining does not affect fish life. The WDFW has worked with miners for 25 years to come up with the best rules for fish.

One miner was injured at work and cannot pan for gold by hand, so he has to use a motorized dredge. He relies on the income he earns from mining for gold.

The bill represents an outright attack on the mining community. Mining is permitted under the nationwide Section 404 permit. Fishing is a privilege, and gold mining is a right given by the General Mining Act of 1872.

People with kids want to have an outside activity, and it is a great activity to play in the sand and mud, get dirty, and have a good time—this is what mining is about. Teenagers are not playing video games but are instead developing a work ethic. This bill takes that away.

Persons Testifying: (In support) Senator Palumbo, prime sponsor; Bill Clark, Jim Byrne, and Pat Hesselgesser, Trout Unlimited; Crystal Elliot, Wild Steelheaders United; Kim McDonald, Fish Not Gold; Sophia Ressler, Center for Biological Diversity; Donald Kohler; and Steve Jones, Clark-Skamania Flyfishers; Michal Rechner, Department of Natural Resources; Bruce Wishart, Sierra Club and Puget Soundkeeper; Brad Throssler, Washington Council of Trout Unlimited; Emilia Jones, Office of the Attorney General; AJ Dotzauer, Tulalip Tribes; Matthew Randazzo, Quinault Indian Nation and Snoqualmie Indian Tribe; and Dennis Potter, Salmon Creek Fishers.

(Opposed) Dennis Petersen; Harley Edwards; William Brown, Resources Coalition; Cindy Alia, Citizens Alliance for Property Rights; Christopher Navolynski, North American Prospectors Association; Thomas Bemis, Washington Prospectors Mining Association; Lee Hines, Bedrock Prospectors and Resource Coalition; and Phil Lato, Gold Prospectors Association of America.

Persons Signed In To Testify But Not Testifying: None.