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ENGROSSED SUBSTITUTE HOUSE BILL 1261

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State of Washington

66th Legislature

2019 Regular Session

By House Environment & Energy (originally sponsored by Representatives Peterson, Fitzgibbon, Stanford, Tarleton, Ortiz-Self, Lekanoff, Doglio, Macri, and Pollet)

READ FIRST TIME 02/19/19.

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. The department shall evaluate whether the number of dischargers  
9 subject to this section warrants the adoption of a general permit for  
10 motorized or gravity siphon aquatic mining. If so, the department is  
11 directed to minimize the cost to permit applicants by basing general  
12 permit provisions on existing general permits adopted in other states  
13 to comply with the federal clean water act.

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

21 (3) A person commits the offense of unlawful motorized or gravity  
22 siphon aquatic mining if the person engages in such an activity in  
23 violation of this chapter or the federal clean water act. Such an  
24 offense is subject to enforcement under this chapter. Before the  
25 department may take any enforcement action against a person pursuant  
26 to this section, the department shall first attempt to achieve  
27 voluntary compliance. As part of this first response, the department  
28 shall offer information and technical assistance to the person in  
29 writing identifying one or more means to accomplish the person's  
30 purposes within the framework of the law.

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

37 (5) This section does not apply to:

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

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

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

8 (d) Metals mining and milling operations as defined in chapter  
9 78.56 RCW; or

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

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

15 The definitions in this section apply throughout this chapter  
16 unless the context clearly requires otherwise.

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

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

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

25 (4) "Date of receipt" has the same meaning as defined in RCW  
26 43.21B.001.

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

28 (6) "Director" means the director of the department of fish and  
29 wildlife.

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

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

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

37 (10) "Forest practices hydraulic project" means a hydraulic  
38 project that requires a forest practices application or notification  
39 under chapter 76.09 RCW.

1 (11) "Hydraulic project" means the construction or performance of  
2 work that will use, divert, obstruct, or change the natural flow or  
3 bed of any of the salt or fresh waters of the state.

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

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

11 (14) "Marine terminal" means a public or private commercial wharf  
12 located in the navigable water of the state and used, or intended to  
13 be used, as a port or facility for the storing, handling,  
14 transferring, or transporting of goods to and from vessels.

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

19 (16) "Ordinary high water line" means the mark on the shores of  
20 all water that will be found by examining the bed and banks and  
21 ascertaining where the presence and action of waters are so common  
22 and usual, and so long continued in ordinary years as to mark upon  
23 the soil or vegetation a character distinct from the abutting upland.  
24 Provided, that in any area where the ordinary high water line cannot  
25 be found, the ordinary high water line adjoining saltwater is the  
26 line of mean higher high water and the ordinary high water line  
27 adjoining fresh water is the elevation of the mean annual flood.

28 (17) "Pamphlet hydraulic project" means a hydraulic project for  
29 the removal or control of aquatic noxious weeds conducted under the  
30 aquatic plants and fish pamphlet authorized by RCW 77.55.081, or for  
31 mineral prospecting and mining conducted under the gold and fish  
32 pamphlet authorized by RCW 77.55.091.

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

35 (19) "Permit modification" means a hydraulic project approval  
36 issued to a person under RCW 77.55.021 that extends, renews, or  
37 changes the conditions of a previously issued hydraulic project  
38 approval.

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

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

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

8 (23) "Stream bank stabilization" means those projects that  
9 prevent or limit erosion, slippage, and mass wasting. These projects  
10 include, but are not limited to, bank resloping, log and debris  
11 relocation or removal, planting of woody vegetation, bank protection  
12 using rock or woody material or placement of jetties or groins,  
13 gravel removal, or erosion control.

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

16 (25) "Waters of the state" and "state waters" means all salt and  
17 fresh waters waterward of the ordinary high water line and within the  
18 territorial boundary of the state.

19 (26) "Motorized or gravity siphon aquatic mining" means mining  
20 using any form of motorized equipment including, but not limited to,  
21 a motorized suction dredge or a gravity siphon suction dredge, for  
22 the purpose of extracting gold, silver, or other precious metals,  
23 that involves a discharge to waters of the state, but does not  
24 include metals mining and milling operations as defined in RCW  
25 78.56.020.

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

28 (1) Except as provided in RCW 77.55.031, 77.55.051, 77.55.041,  
29 and 77.55.361, in the event that any person or government agency  
30 desires to undertake a hydraulic project, the person or government  
31 agency shall, before commencing work thereon, secure the approval of  
32 the department in the form of a permit as to the adequacy of the  
33 means proposed for the protection of fish life.

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

36 (a) General plans for the overall project;

37 (b) Complete plans and specifications of the proposed  
38 construction or work within the mean higher high water line in salt  
39 water or within the ordinary high water line in fresh water;

1 (c) Complete plans and specifications for the proper protection  
2 of fish life;

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

6 (e) (~~Payment of all applicable application fees charged by the~~  
7 ~~department under RCW 77.55.321~~) In the event that any person or  
8 government agency desires to undertake mineral prospecting or mining  
9 using motorized or gravity siphon equipment or desires to discharge  
10 effluent from such an activity to waters of the state, the person or  
11 government agency must also provide proof of compliance with the  
12 requirements of the federal clean water act issued by the department  
13 of ecology.

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

17 (4) The department may accept complete, written applications as  
18 provided in this section for multiple site permits and may issue  
19 these permits. For multiple site permits, each specific location must  
20 be identified.

21 (5) With the exception of emergency permits as provided in  
22 subsection (12) of this section, applications for permits must be  
23 submitted to the department's headquarters office in Olympia.  
24 Requests for emergency permits as provided in subsection (12) of this  
25 section may be made to the permitting biologist assigned to the  
26 location in which the emergency occurs, to the department's regional  
27 office in which the emergency occurs, or to the department's  
28 headquarters office.

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

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

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

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

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

5 (iii) The applicant requests a delay; or

6 (iv) The department is issuing a permit for a stormwater  
7 discharge and is complying with the requirements of RCW  
8 77.55.161(3)(b).

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

12 (d) The period of forty-five calendar days may be extended if the  
13 permit is part of a multiagency permit streamlining effort and all  
14 participating permitting agencies and the permit applicant agree to  
15 an extended timeline longer than forty-five calendar days.

16 (8) If the department denies approval of a permit, the department  
17 shall provide the applicant a written statement of the specific  
18 reasons why and how the proposed project would adversely affect fish  
19 life.

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

24 (b) Issuance, denial, conditioning, or modification of a permit  
25 may be informally appealed to the department within thirty days from  
26 the date of receipt of the decision. Requests for informal appeals  
27 must be filed in the form and manner prescribed by the department by  
28 rule. A permit decision that has been informally appealed to the  
29 department is appealable to the board within thirty days from the  
30 date of receipt of the department's decision on the informal appeal.

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

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

37 (c) A permit remains in effect without need for periodic renewal  
38 for hydraulic projects that divert water for agricultural irrigation  
39 or stock watering purposes and that involve seasonal construction or  
40 other work. A permit for stream bank stabilization projects to

1 protect farm and agricultural land as defined in RCW 84.34.020  
2 remains in effect without need for periodic renewal if the problem  
3 causing the need for the stream bank stabilization occurs on an  
4 annual or more frequent basis. The permittee must notify the  
5 appropriate agency before commencing the construction or other work  
6 within the area covered by the permit.

7 (10) The department may, after consultation with the permittee,  
8 modify a permit due to changed conditions. A modification under this  
9 subsection is not subject to the fees provided under RCW 77.55.321.  
10 The modification is appealable as provided in subsection (8) of this  
11 section. For a hydraulic project that diverts water for agricultural  
12 irrigation or stock watering purposes, when the hydraulic project or  
13 other work is associated with stream bank stabilization to protect  
14 farm and agricultural land as defined in RCW 84.34.020, the burden is  
15 on the department to show that changed conditions warrant the  
16 modification in order to protect fish life.

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

28 (12)(a) The department, the county legislative authority, or the  
29 governor may declare and continue an emergency. If the county  
30 legislative authority declares an emergency under this subsection, it  
31 shall immediately notify the department. A declared state of  
32 emergency by the governor under RCW 43.06.010 shall constitute a  
33 declaration under this subsection.

34 (b) The department, through its authorized representatives, shall  
35 issue immediately, upon request, verbal approval for a stream  
36 crossing, or work to remove any obstructions, repair existing  
37 structures, restore stream banks, protect fish life, or protect  
38 property threatened by the stream or a change in the streamflow  
39 without the necessity of obtaining a written permit prior to  
40 commencing work. Conditions of the emergency verbal permit must be

1 reduced to writing within thirty days and complied with as provided  
2 for in this chapter.

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

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

9 (13) All state and local agencies with authority under this  
10 chapter to issue permits or other authorizations in connection with  
11 emergency water withdrawals and facilities authorized under RCW  
12 43.83B.410 shall expedite the processing of such permits or  
13 authorizations in keeping with the emergency nature of such requests  
14 and shall provide a decision to the applicant within fifteen calendar  
15 days of the date of application.

16 (14) The department or the county legislative authority may  
17 determine an imminent danger exists. The county legislative authority  
18 shall notify the department, in writing, if it determines that an  
19 imminent danger exists. In cases of imminent danger, the department  
20 shall issue an expedited written permit, upon request, for work to  
21 remove any obstructions, repair existing structures, restore banks,  
22 protect fish resources, or protect property. Expedited permit  
23 requests require a complete written application as provided in  
24 subsection (2) of this section and must be issued within fifteen  
25 calendar days of the receipt of a complete written application.  
26 Approval of an expedited permit is valid for up to sixty days from  
27 the date of issuance. The department may not require the provisions  
28 of the state environmental policy act, chapter 43.21C RCW, to be met  
29 as a condition of issuing a permit under this subsection.

30 (15)(a) For any property, except for property located on a marine  
31 shoreline, that has experienced at least two consecutive years of  
32 flooding or erosion that has damaged or has threatened to damage a  
33 major structure, water supply system, septic system, or access to any  
34 road or highway, the county legislative authority may determine that  
35 a chronic danger exists. The county legislative authority shall  
36 notify the department, in writing, when it determines that a chronic  
37 danger exists. In cases of chronic danger, the department shall issue  
38 a permit, upon request, for work necessary to abate the chronic  
39 danger by removing any obstructions, repairing existing structures,  
40 restoring banks, restoring road or highway access, protecting fish

1 resources, or protecting property. Permit requests must be made and  
2 processed in accordance with subsections (2) and (7) of this section.

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

9 (16) The department may issue an expedited written permit in  
10 those instances where normal permit processing would result in  
11 significant hardship for the applicant or unacceptable damage to the  
12 environment. Expedited permit requests require a complete written  
13 application as provided in subsection (2) of this section and must be  
14 issued within fifteen calendar days of the receipt of a complete  
15 written application. Approval of an expedited permit is valid for up  
16 to sixty days from the date of issuance. The department may not  
17 require the provisions of the state environmental policy act, chapter  
18 43.21C RCW, to be met as a condition of issuing a permit under this  
19 subsection.

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