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ENGROSSED 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. 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.

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

31 (5) This section does not apply to:

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

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

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

1 (d) Metals mining and milling operations as defined in chapter  
2 78.56 RCW; or

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

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

8 The definitions in this section apply throughout this chapter  
9 unless the context clearly requires otherwise.

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

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

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

18 (4) "Date of receipt" has the same meaning as defined in RCW  
19 43.21B.001.

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

21 (6) "Director" means the director of the department of fish and  
22 wildlife.

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

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

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

30 (10) "Forest practices hydraulic project" means a hydraulic  
31 project that requires a forest practices application or notification  
32 under chapter 76.09 RCW.

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

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

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

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

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

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

22 (17) "Pamphlet hydraulic project" means a hydraulic project for  
23 the removal or control of aquatic noxious weeds conducted under the  
24 aquatic plants and fish pamphlet authorized by RCW 77.55.081, or for  
25 mineral prospecting and mining conducted under the gold and fish  
26 pamphlet authorized by RCW 77.55.091.

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

29 (19) "Permit modification" means a hydraulic project approval  
30 issued to a person under RCW 77.55.021 that extends, renews, or  
31 changes the conditions of a previously issued hydraulic project  
32 approval.

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

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

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

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

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

11 (25) "Waters of the state" and "state waters" means all salt and  
12 freshwaters waterward of the ordinary high water line and within the  
13 territorial boundary of the state.

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

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

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

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

31 (a) General plans for the overall project;

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

35 (c) Complete plans and specifications for the proper protection  
36 of fish life;

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

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

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

12       (4) The department may accept complete, written applications as  
13 provided in this section for multiple site permits and may issue  
14 these permits. For multiple site permits, each specific location must  
15 be identified.

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

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

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

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

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

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

38       (iii) The applicant requests a delay; or

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

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

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

11 (8) If the department denies approval of a permit, the department  
12 shall provide the applicant a written statement of the specific  
13 reasons why and how the proposed project would adversely affect fish  
14 life.

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

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

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

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

32 (c) A permit remains in effect without need for periodic renewal  
33 for hydraulic projects that divert water for agricultural irrigation  
34 or stock watering purposes and that involve seasonal construction or  
35 other work. A permit for stream bank stabilization projects to  
36 protect farm and agricultural land as defined in RCW 84.34.020  
37 remains in effect without need for periodic renewal if the problem  
38 causing the need for the stream bank stabilization occurs on an  
39 annual or more frequent basis. The permittee must notify the

1 appropriate agency before commencing the construction or other work  
2 within the area covered by the permit.

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

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

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

30 (b) The department, through its authorized representatives, shall  
31 issue immediately, upon request, verbal approval for a stream  
32 crossing, or work to remove any obstructions, repair existing  
33 structures, restore stream banks, protect fish life, or protect  
34 property threatened by the stream or a change in the streamflow  
35 without the necessity of obtaining a written permit prior to  
36 commencing work. Conditions of the emergency verbal permit must be  
37 reduced to writing within thirty days and complied with as provided  
38 for in this chapter.



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

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

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

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

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

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

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

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