

HOUSE BILL REPORT

ESHB 1261

As Passed House:
February 12, 2020

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

Brief History:

Committee Activity:

Environment & Energy: 2/4/19, 2/14/19 [DPS].

Floor Activity:

Passed House: 2/12/20, 60-35.

Brief Summary of Engrossed Substitute Bill

- Prohibits motorized or gravity siphon aquatic mining or discharge of effluent from such an activity within the ordinary high water mark of certain waters of the state.

HOUSE COMMITTEE ON ENVIRONMENT & ENERGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. 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.

Staff: Robert Hatfield (786-7117).

Background:

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.

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, state law 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, the United States Fish and Wildlife Service, or the National Marine Fisheries Service, depending on the species, 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 to not destroy or adversely modify that habitat.

Waters of the State.

Waters of the state means all salt and freshwaters waterward of the ordinary high water line and within the territorial boundary of the state.

Summary of Engrossed Substitute 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 and the state Water Pollution Control Act.

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 Clean Water Act. Such an offense is subject to enforcement under the Water Pollution Control Act. Before Ecology may take any enforcement action based on such an offense, Ecology must first attempt to achieve voluntary compliance. As part of this first response, Ecology must offer information and technical assistance to the person identifying one or more means to accomplish the person's purposes within the framework of the law.

"Motorized or gravity siphon aquatic mining" is defined in the Water Pollution Control Act and 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 within the ordinary high water mark of waters of the state.

The definition of "small scale prospecting and mining" in the Hydraulic Code is amended to refer to nonmotorized concentrators.

A complete application for a Hydraulic Project Approval to undertake mineral prospecting using motorized or gravity siphon equipment, or to discharge effluent from such an activity to the waters of the state, requires proof of compliance with the requirements of the federal Clean Water Act as administered by Ecology.

The prohibition on motorized or gravity siphon aquatic mining does not apply to the following:

- aquatic mining using nonmotorized methods, such as gold panning, if the nonmotorized method does not involve the use of a gravity siphon suction dredge;
- mining operations where no part of the operation or discharge of effluent from the operation is to the waters of the state;
- surface mining operations regulated by the Department of Natural Resources under Title 78 RCW;
- activities related to an industrial facility, dredging related to navigability, or activities subject to a Clean Water Act Section 404 individual permit;
- dredging operations undertaken by a diking or drainage district pursuant to Title 85 RCW; and
- metals mining and milling operations as defined in chapter 78.56 RCW.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) A motorized suction dredge is a motor on the back of a raft that sucks up streambeds looking for gold. The state's position is that it is the scientific consensus that suction dredge mining poses a high risk to fish. Other states have stepped up to address this harm. The bill is modeled after Oregon law, which was affirmed by the Ninth Circuit Court of Appeals. California prohibits suction dredge mining throughout the state. This bill does not go that far: mining would be allowed in critical habitat areas, but it would have to be non-motorized mining. The concentration of motorized mining activity occurs in water bodies where the state is spending the most money on salmon protection, such as the Yakima River, the Methow River, the Skagit River, and the Nooksack River. Passing this bill is one of the things within the power of the Legislature to do to protect salmon.

This bill is the minimum the state should be doing to improve salmon habitat. It will help salmon stocks to recover, especially in the face of climate change.

California has spent millions of dollars on peer-reviewed science to study the range of harms caused by motorized suction dredge mining. It harms endangered salmon and other fish. In addition to direct impacts to fish, suction dredges release contaminants that impair water

quality. The Department of Fish and Wildlife (WDFW) hire a team to review current regulations, and the current regulations do not provide adequate protection for critical habitat. Issuing individual permits is not enough, and would not result in change on the ground because critical habitat would still be harmed. The science on this issue has been decided and it has been upheld in court.

This bill would aid in the recovery of both salmon and orcas. Both species are facing a death by a thousand cuts. Suction dredge mining has been banned or severely restricted in several states, including California, Oregon, Idaho, and Alaska. When miners dredge in streambeds, they often dredge down to bedrock, which results in the suspension of sediments and the formation of sediment plumes which can extend several hundred yards or even miles downstream, which has been documented. Turbidity has been reported to be two or three times higher than natural background levels. Mercury is also suspended by suction dredge mining. This has been studied extensively in California and elsewhere. The bill is not likely an unconstitutional taking, because it is still possible to mine, it is just not possible to do motorized mining. Courts have ruled that the Clean Water Act is not preempted by the 1872 Mining Act.

The bill is a step in the right direction to preserve and bolster needed habitat.

The life history of salmon is very complex. It is hard to understand it in the context of a legislative hearing. Suction dredge miners are not the enemy of salmon but they do represent an obvious and egregious impact. Suction dredge mining is jeopardizing salmon recovery efforts.

The debate on this issue has been going on for a decade or longer. There are great people on all sides of this issues. It is important to take bold action given current fish populations. Stocks from Eastern Washington are a critical part of orca forage; this is not just a Puget Sound issue. This is one of many activities that have an effect on the population of fish listed under the Endangered Species Act (ESA).

Aquatic mining must include necessary safeguards to protect threatened and endangered species. Other states have acted, but Washington has not.

The WDFW is in the process of adopting rules regarding suction dredge mining, but the rule-making does not recognize the importance of critical habitat for ESA-listed species in Washington. In one stream, suction dredge mining is occurring on top of spawning beds within weeks of the time that the eggs were laid.

One tribe has freshwater and salt water treaty rights. The tribe has never consented to having its waters for a hobby that devastates ecosystems. Allowing this activity is inconsistent with the health of the state's fisheries and inconsistent with treaty rights.

It has been reliably demonstrated that suction dredge mining negatively affects habitat and the entire food web. It changes the physical structure of the streambed. Washington lags behind all neighboring states in allowing this activity, and fisheries and orcas are paying the price. The Washington Attorney General supported a suction dredge ban in Oregon.

Allowing tribal dredge mining in streams where tribes have fished for centuries makes a mockery of sovereignty. If the state cares about fisheries and cultural resources, 2019 is the year that the Legislature needs to stop a microscopic minority from damaging the state's resources.

Suction dredge mining allows one person to do what it used to take a whole crew of people to do. One suction dredge manufacturer claims that its suction dredge allows a miner to move 17 cubic yards of gravel in one hour. There is an outlaw faction within the suction dredge community. One suction dredge miner was dredging at the head of a pool while there were salmon in the lower part of the pool. There has to be a change to protect what still remains.

This bill clarifies that discharges to state waters from suction dredge mining requires a permit under the Clean Water Act. A permit would provide assurance to miners that they are in compliance. A permit would significantly limit or prohibit certain activities. The bill does not apply to nonmotorized mining activities. The references to "ordinary high water" should be removed in order to clarify that the bill applies to all waters of the state.

The 2018 State of the Salmon report shows that after 20 years of salmon recovery efforts, salmon are still losing ground. Very few populations are meeting recovery goals. There has been nearly \$1 billion spent on salmon recovery since 1999. Suction dredge mining unravels riparian habitat. It is not good for juvenile fish. This bill safeguards investments made in salmon recovery. It makes little sense to spend additional money on salmon recovery without eliminating a source of degradation. The bill would eliminate the state from potential ESA/Clean Water Act litigation.

Many gold miners ignore the Gold and Fish pamphlet put out by the WDFW concerning suction dredge mining. Dredging reduces the quality of spawning gravels and can kill eggs if they're in the gravel.

One river has been compromised by past mining operations, both suction dredge mining and larger scale mining operations. Silt makes the river shallower, broader, and warmer. The small creeks and side channels provide a cold water refuge for juvenile salmonids.

(Opposed) Suction dredge miners are not polluters; they do not add anything to the water that was not already there. Suction dredge miners remove pollutants, by picking up lead bullets, trash, and lead weights. Tailing piles formed by suction dredge mining are clean, and what is left behind is basically perfect habitat for spawning trout and salmon. The Gold and Fish pamphlet sets out rules for not hurting salmon. The WDFW is moving toward requiring individual permits, which would also ensure that suction dredge mining does not affect fish habitat. There are better ways for the Legislature to spend its time; for example, several sewage treatment plants have recently discharged untreated sewage into Puget Sound, which damages habitat for orcas. It would be better to stop that instead of stopping miners.

The Clean Water Act is a federal law. It does not make sense to enact a law to enforce a federal law. One United States Supreme Court case held, essentially that if you have a bowl of soup, and pick up a ladle of soup and pour the soup back into the bowl, you have not changed the soup at all. If something is already there, using a suction dredge mine is not adding anything additional. There are no placer mines involving dredging in the South

Sound; there is no impact to orcas. This bill is fundamentally about getting miners out of the water.

One Court of Appeals decision found that miners use different portions of the stream than anadromous fish do. Suction dredge mining is properly regulated under Section 404 of the Clean Water Act. There is no case to be made that any suction dredge miner in Washington in compliance with the rules is in violation of either the ESA or the Clean Water Act. The mining claims of suction dredge miners are on federal lands, not in navigable waters. The State of Washington only owns navigable waters. If there is a jurisdiction issue, it must be decided in court. Suction dredge miners are limited to a 4-inch nozzle in Washington. Turbidity travels 30 feet downstream at most. Running water over a dam creates more turbidity than a suction dredge. Downstream of a 10-acre timber harvest, the water was chocolate brown 10 to 15 miles downstream of the harvest, yet nonetheless there were salmon fry swimming in the creek.

The right to mine for gold comes from the United States Constitution. It is not possible to just use a pan to mine for gold; that would be like telling a fly fisherman to throw away their pole and just use a line and a hook. Suction dredge miners operate high in the river systems. Fish sometimes swim right behind a suction dredge and feed during the mining activity. Suction dredging breaks up the hard pan that forms the bed of some water bodies.

Gold miners are not the only ones who use motorized suction dredges. The WDFW owns two dredges that they use for plant removal. The WDFW dredges are doing the same things the miners are doing: removing the top layer of the beds of creeks. The Fish and Gold pamphlet has a companion pamphlet about plant removal, but nobody ever says anything about plant removal. Gold miners do not go on tribal lands. The ban on suction dredge mining in California is going to be lifted this spring and miners will be back in the streams. An actual study should be done to determine the facts before any decision is made.

(Other) It does not make sense to allow this activity without significant regulation, given the investment in salmon recovery and fish passage, but it is hard to accept an outright ban. Rural communities benefit economically from activities like these. A permitting system would be preferable to an outright ban.

Persons Testifying: (In support) Representative Peterson, prime sponsor; Nick Chambers, Wild Steelheaders United; Nicole Bodine, Cascade Forest Conservancy; Michael Ross and Matt Baerwalde, Snoqualmie Indian Tribe; Matthew Randazzo, Quinault Indian Nation; Jeff Davis, Department of Fish and Wildlife; Heather Bartlett, Department of Ecology; Michael Rechner, Department of Natural Resources; Bill Clark, Jim Byrne, and Paul Sparks, Trout Unlimited; Dennis Potter, Trout Unlimited and Salmon Creek Fishers; Bruce Wishart, Sierra Club and Puget Soundkeeper Alliance; Michelle Swope, Native Fish Society; Jason Lundgren; Al Aldvrich, Tulalip Tribes; and Emilia Jones, Office of the Attorney General.

(Opposed) Dennis Petersen; Allen Comstock; William Brown; James Franklin, North American Mining Association; and Lee Hines, Bedrock Prospectors.

(Other) Paul Jewell, Washington State Association of Counties.

Persons Signed In To Testify But Not Testifying: None.