

# SENATE BILL REPORT

## ESHB 1261

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As Passed Senate, March 5, 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:** Passed House: 2/12/20, 60-35.

**Committee Activity:** Environment, Energy & Technology: 2/20/20, 2/25/20 [DP, w/oRec, DNP].

**Floor Activity:**

Passed Senate: 3/05/20, 37-10.

### Brief Summary of Engrossed First 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.
- Requires Ecology to provide information and technical assistance prior to taking enforcement actions.

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## SENATE COMMITTEE ON ENVIRONMENT, ENERGY & TECHNOLOGY

**Majority Report:** Do pass.

Signed by Senators Carlyle, Chair; Lovelett, Vice Chair; Das, Hobbs, Lias, McCoy, Nguyen, Stanford and Wellman.

**Minority Report:** That it be referred without recommendation.

Signed by Senators Fortunato, Assistant Ranking Member, Environment; Sheldon, Assistant Ranking Member, Energy & Technology.

**Minority Report:** Do not pass.

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*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.*

Signed by Senators Ericksen, Ranking Member; Brown and Short.

**Staff:** Jan Odano (786-7486)

**Background:** Endangered Species Act—Critical Habitat. When a species is proposed for listing as endangered or threatened under the federal Endangered Species Act (ESA), 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 not destroy or adversely modify that habitat. Under the ESA, Chinook, Chum, Coho, Sockeye, and Bull trout are listed as threatened species, with the Chinook upper Columbia River spring run and Sockeye Snake River listed as endangered.

Water Pollution Regulation in Washington State Under Federal and State Laws. The federal Clean Water Act (CWA) establishes the National Pollutant Discharge Elimination System (NPDES), which regulates discharges of pollutants to surface waters. The CWA the definition of the term pollutant includes dredge spoil, solid waste, sewage, rock, sand, and industrial, municipal and agricultural waste discharged into water.

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. For waste discharges to waters, Ecology typically issues a state waste discharge permit for discharges to groundwater, while a joint federal NPDES and state discharge permit is issued under dual authority for discharges to surface waters.

Suction Dredge Mining. Suction dredge mining is the use of a mechanized or motorized system to remove or process material from a stream bed, bank or river channel, or lake to recover minerals. California and Oregon require water quality permits for mining or prospecting and ore processing operations that discharge wastewater to land and state waters.

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.

Metals Mining and Milling Operations. Mining and milling operations extracting metal ores or other precious minerals are regulated by DOE. These operations are subject to certain requirements such as discharge permits, performance securing, and quarterly inspections.

Hydraulic Project Approval. A person must obtain a hydraulic project approval (HPA) prior to commencing any construction project that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state. The Washington Department of Fish and Wildlife (DFW) issues HPAs to ensure the proper protection of fish life.

**Summary of Engrossed First Substitute Bill:** Motorized or gravity siphon aquatic mining operations discharging into state waters are subject to the authority of Ecology, in compliance with the CWA and the state Water Pollution Control Act.

Effluent discharge and motorized or gravity siphon aquatic mining is prohibited in any waters of the state that have been designated under the ESA 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. DOE must evaluate if the number of dischargers warrants a general permit for motorized or gravity siphon aquatic mining. If Ecology determines a general permit is warranted, the general permit provisions must be based on other states' existing permits so as to minimize the cost to permit applicants.

A person commits the offense of unlawful motorized or gravity siphon aquatic mining when engaging 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. Ecology must attempt to achieve voluntary compliance by providing technical assistance and offering information before taking enforcement action.

DFW's issuance of an HPA requires confirmation of compliance with CWA requirements, in areas where motorized mining is allowed, except for metals mining and milling operations.

"Motorized or gravity siphon aquatic mining" is defined 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 prohibition on motorized or gravity siphon aquatic mining does not apply to:

- 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 within the ordinary high water mark of waters of the state;
- surface mining operations regulated by the Department of Natural Resources;
- metals mining and milling operations; or
- activities related to an industrial facility, dredging for navigability, or dredging subject to a CWA permit.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: Suction mine dredging has been studied a lot and we know the damage it does. Unfortunately the damage is not just to fish but from the bugs on up. This is another step in restoring streams and rivers. Passage of this bill would

give habitat managers another tool to assist the endangered steelhead. We are lagging behind our neighboring states. Almost always occurs with a high probability that will disturb cultural sites. We do not understand why Washington State would let this continue to happen. This would take off critical habitat while leaving open many sites. The use of motorized dredging would still be allowed in other stream areas. Placer mining can coexist with salmon but motorized does not and this one simple sanction will help endangered species. It will facilitate the work of Ecology and WDFW.

CON: We have property rights. Our leases and agreements with government are considered property rights. This seems contradictory—goes against basic tenants of law for the protection of property. We do not add mercury to the system at all. We are conservationists, we are not polluters. We remove pollutants. Suction dredge mining does help fish. We are in compliance with the CWA. We are being picked on. This bill tries to use the CWA to ban suction dredge mining. The discharge by any person is prohibited and requires an NPDES permit. Without a discharge, there is no need for a permit. The dredging we do is de minimus. Small scale placer moves some materials but it does not create a disturbance.

**Persons Testifying:** PRO: Brad Throssell, State Council, Trout Unlimited; Steve Jones, Clark-Skamania Fly Fishers; Matt Baerwalde, Snoqualmie Indian Tribe; Pat Hesselgesser, citizen; Jim Byrne, Vancouver Trout Unlimited; Bruce Wishart, Sierra Club & CELP; Michal Rechner, DNR; Dawn Vyvyan, Yakama Nation Puyallup Tribe Sauk-Suiattle Tribe; Donald Kohler, Clark-Skamania Flyfishers.

CON: Dennis Petersen; William Brown, Resources Coalition; Cindy Alia, Citizens Alliance for Property Rights; Thomas Bemis, Bedrock Prospectors; Mark Boote, citizen.

**Persons Signed In To Testify But Not Testifying:** No one.