

SENATE BILL REPORT

ESSB 5322

As Passed Senate, March 4, 2019

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 & Technology: 2/05/19, 2/06/19, 2/20/19 [DPS, DNP, w/oRec].

Floor Activity:

Passed Senate: 3/04/19, 30-17.

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.

SENATE COMMITTEE ON ENVIRONMENT, ENERGY & TECHNOLOGY

Majority Report: That Substitute Senate Bill No. 5322 be substituted therefor, and the substitute bill do pass.

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

Minority Report: Do not pass.

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

Minority Report: That it be referred without recommendation.

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

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: 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 (DOE) to issue NPDES permits. In addition to delegated NPDES permitting authority, state law provides DOE 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, DOE 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 DOE, 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 DOE 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.

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 on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The state is currently out of compliance with the federal CWA. This will make the state consistent with the rest of the west coast. The critical habitat is very important to bring back the salmon. A lot of money is going into the restoration of habitat. This would aid in the recovery of salmon and orca. We want everyone to have the same requirements to access the rivers to ensure no harm. There is little oversight to these activities which are happening when fish are there. This would provide assurance to miner that they are in compliance.

CON: Suction dredging does not affect fish habitat. DFW provides guidance for mining so that it won't affect fish. This is unconstitutional and inconsistent approach to current regulation. This is an outright ban on suction mine dredging. It does not cause turbidity.

OTHER: There needs to be an exemption for maintenance dredging for docks and navigability.

Persons Testifying: PRO: Michal Rechner, DNR; Bruce Wishart, Sierra Club; Emilia Jones, Attorney General's Office; Heather Bartlett, Water Quality Program Manager, Ecology.

CON: Lee Hines, Bedrock Prospectors; Thomas Bemis, Western Petroleum Marketers Association.

OTHER: Steve Gano, Cal Portland.

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