

SENATE BILL REPORT

2SHB 1579

As Reported by Senate Committee On:
Agriculture, Water, Natural Resources & Parks, April 2, 2019

Title: An act relating to implementing recommendations of the southern resident killer whale task force related to increasing chinook abundance.

Brief Description: Implementing recommendations of the southern resident killer whale task force related to increasing chinook abundance.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Fitzgibbon, Peterson, Lekanoff, Doglio, Macri, Stonier, Tharinger, Stanford, Jinkins, Robinson, Pollet, Valdez, Cody, Kloba, Slatter, Frame and Davis; by request of Office of the Governor).

Brief History: Passed House: 3/07/19, 59-39.

Committee Activity: Agriculture, Water, Natural Resources & Parks: 3/19/19, 4/02/19 [DPA-WM, DNP].

Brief Summary of Amended Bill

- Authorizes the Department of Fish and Wildlife (DFW) to serve stop work orders for violations of hydraulic project approvals that may cause significant harm to fish life.
- Changes the civil penalty for violations of the hydraulic code from \$100 per day per violation to \$10,000 per violation if a section authorizing three demonstration projects to test the effectiveness and costs of river management is enacted by June 30, 2019.
- Removes the requirement that DFW issue permits with or without conditions for single-family residential bulkheads and rock walls.
- Authorizes a recreational fishing license for smelt and liberalizes catch limits for bass, walleye, and channel catfish.

SENATE COMMITTEE ON AGRICULTURE, WATER, NATURAL RESOURCES & PARKS

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.

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 Van De Wege, Chair; Salomon, Vice Chair; McCoy and Rolfes.

Minority Report: Do not pass.

Signed by Senators Warnick, Ranking Member; Honeyford and Short.

Staff: Jeff Olsen (786-7428)

Background: The Governor issued an executive order in 2018 convening the Southern Resident Killer Whale Task Force (task force). The task force was directed to identify, prioritize, and support implementing a plan to address threats to Southern Resident orca whales including prey availability, contaminants, and disturbance from vessel noise.

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. HPAs are issued by DFW to ensure the proper protection of fish life.

A violation of an HPA permit is punishable by a civil penalty of up to \$100 per day per violation. DFW must provide notice of the imposed penalty in writing. Any person incurring a penalty may choose to informally appeal it to DFW, or may file a formal appeal to the Pollution Control Hearings Board, within 30 days of receiving the violation notice. Unless an appeal is filed, any penalties are due and payable 30 days after receiving the notice. If an appeal is filed, the penalty is due upon completion of appeal proceedings and a final order issued confirming the penalty either in whole or in part. If the penalty is not paid, the state must bring an action in Thurston County Superior Court or the superior court of the county in which the person owing the penalty does business.

DFW must approve, within 45 days and with or without additional conditions, applications for bulkhead and rock wall projects designed for single-family residences that meet certain conditions. For example, projects must not be located more than 6 feet waterward of the ordinary high water line, and must not result in permanent loss of food fish or shellfish habitat. Projects replacing or repairing an existing bulkhead or rock wall must be in the same place as the bulkhead or rock wall they are replacing, unless removal of the existing structure would result in environmental degradation or other removal problems. Permits for projects not meeting the conditions in statute must be processed by DFW in the same manner as other HPA permits.

DFW is responsible for managing the state's fish and wildlife resources and establishing basic rules and regulations governing the time, place, manner, and methods used to harvest fish and wildlife. A fishing license is not required to fish for smelt, carp, or crawfish. Game fish are fish that may not be fished except by rule of the Fish and Wildlife Commission. Game fish are classified in statute and include several species, including catfish, trout, bass, and walleye.

The Department of Ecology (Ecology) is required to manage the state's flood plains and to establish minimum state requirements for flood plain management that equal the minimum federal requirements for the national flood insurance program.

The Department of Natural Resources (DNR) has authority over aquatic lands and is required to establish rules that govern the use or modification of any river system, including gravel removal projects.

Summary of Bill: The bill as referred to committee not considered.

Summary of Amended Bill: A person may file a hydraulic project pre-application with DFW to determine whether a project landward of the ordinary high water line requires a hydraulic project permit. DFW must provide tribes and local governments a seven-calendar-day review and comment period for pre-applications. If DFW determines a complete application is required, the applicant would then be required to submit a complete application.

The hydraulic code enforcement provisions are repealed and replaced with new provisions. When DFW identifies a violation of the hydraulic code, DFW must first seek voluntary compliance from the project proponent and may offer technical assistance to correct the violation. If the violation is not corrected, DFW may issue a notice of correction, notice of violation, stop work order, notice to comply, or a civil penalty. A project proponent is a person who has applied for a HPA, is identified as an authorized agent on an HPA application, or has undertaken a hydraulic project without an HPA.

DFW may disapprove an HPA application for persons who have failed to comply with either a final stop work order or notice to comply. DFW may disapprove applications for up to one year, or until all civil penalties are paid and outstanding notices are complied with, whichever is longer. DFW must provide written notice of its intent to disapprove applications to the applicant and to any authorized agent or landowner identified in the application. The disapproval period begins 30 days following the notice of intent, or when all administrative or judicial appeals have been exhausted.

DFW may apply for an administrative inspection warrant in Thurston County Superior Court or the superior court of the county in which a hydraulic project is located:

- to inspect a site to verify compliance with the hydraulic code; or
- if there is probable cause to believe a violation of the hydraulic code is occurring or has occurred.

Violations of the hydraulic code or its rules do not limit or abrogate any other civil or criminal penalty, remedy, or right.

DFW may issue a stop work order or a notice to comply when there is a severe violation of the hydraulic code or a deviation from an HPA that may cause significant harm to fish life. A stop work order may require a project proponent to take corrective action to prevent, correct, or compensate for adverse impacts to fish. A project proponent or an owner of land on which the project is located may informally appeal stop work orders and notices to comply by filing with DFW, in accordance with rules established by DFW, or by filing a formal appeal with the Pollution Control Hearings Board (board).

Stop work orders and notices to comply must contain a citation of the specific law or rule that applies to the violation; the date by which DFW requires compliance; a notice of ways to

contact any technical assistance; and a notice of when, where, and to whom a request for extension of time to achieve compliance must be filed. Stop work orders and notices to comply must be authorized by senior or executive level DFW personnel, and DFW must identify in rule the appropriate level of senior or executive staff, taking into consideration the financial effect on the violator and the scope of the impact to fish.

Civil penalties are changed from \$100 per violation per day to up to \$10,000 per violation, contingent upon establishment of three demonstration projects to test the effectiveness and costs of river management including floodplain management, sediment accumulation, improving habitat, and sustaining agriculture. Proceeds from the civil penalties are deposited into the general fund; however, DFW may seek and retain, if awarded, attorney fees and any costs awarded if it must litigate to recover civil penalties. The board has jurisdiction to hear appeals based on civil penalties.

The requirement that DFW issue an HPA within 45 days for single-family bulkhead projects is repealed. Those undertaking such projects must follow the HPA process established in the hydraulic code.

DFW must liberalize catch limits for bass, channel catfish, and walleye in anadromous waters of the state. A recreational fishing license is required to fish for saltwater smelt.

The State Conservation Commission (SCC), shall convene and facilitate the Department of Agriculture, DNR, Ecology, and DFW must jointly identify and assess demonstration projects that test the effectiveness and costs of river management to achieve protection of agricultural lands, restoration or enhancement of fish runs, and protection of public infrastructure. The SCC must convene a stakeholder group with the four departments, plus agricultural organizations, land conservation organizations, and local governments to develop and assess three demonstration projects. The demonstration projects must be located in Whatcom County, Snohomish County, and Grays Harbor County. The projects must examine setting back levees, providing fish habitat, removing excess sediment and gravel, protecting treed riparian zones, and providing stable river banks. The departments must report to the Legislature by December 31, 2020, and annually thereafter regarding the demonstration projects. The demonstration projects expire on June 30, 2030.

EFFECT OF AGRICULTURE, WATER, NATURAL RESOURCES & PARKS COMMITTEE AMENDMENT(S):

- Specifies that DFW may levy civil penalties up to \$10,000 if the section authorizing three demonstration projects is enacted into law by June 30, 2019.
- Provides if the section authorizing three demonstration projects is not enacted into law by June 30, 2019, DFW may levy civil penalties up to \$100.
- Clarifies the process for convening state agencies and stakeholders to conduct three demonstration projects and report findings to the Legislature by December 31, 2020.
- Provides that agencies must implement the demonstration projects within the amounts appropriated in the omnibus operating appropriations act and expires the demonstration projects on June 30, 2030.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 14, 2019.

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 Proposed Striking Amendment: *The committee recommended a different version of the bill than what was heard.* PRO: This bill implements some of the recommendations of the Southern Resident Orca Task Force that improve habitat and forage fish populations. The bill contains changes to protect orcas by improving salmon and salmon food sources. DFW needs better tools to protect critical habitat for salmon and orcas. The current enforcement mechanism is a \$100 penalty and a gross misdemeanor, and is not an effective tool. This approach includes voluntary compliance, and has enforcement mechanisms that are similar to other natural resource agencies. The stop work order language should be modified to make it more effective. There have been changes to the original bill to address concerns about stop work orders and penalties. There are proposed changes to the pilot projects section to clarify state agency roles. The provision declaring a violation of the hydraulic code to be a public nuisance has also been removed. There are some concerns about the pilot projects proposed in the striking amendment to the bill.

CON: The HPA permit varies by region and is not a predictable process. The pre-application process is an improvement to the bill. Funds from penalties should be used to improve the permitting process and certain projects that improve state waters. The bill should more clearly define senior management that is responsible for issuing stop work orders and penalties. Single family bulkhead permitting should not be changed. Starting with voluntary compliance is great, and the enforcement mechanisms should be progressive from there. There is concern about the jurisdiction of the HPA and that it is not applied consistently. Local jurisdictions already cover residential bulkheads through their shoreline management plans. DFW already has civil enforcement, and this bill raises the penalties significantly. DFW has already begun planning to implement the bill.

OTHER: There are some concerns about the pilot projects proposed in the striking amendment to the bill. The projects place equal weight on public access, farm lands, and habitat. Changes to the HPA program from criminal to civil enforcement are long overdue. Relying on criminal enforcement means no enforcement. There needs to be side boards that apply to stop work orders, notices to comply, and fines that go up to \$10,000.

Persons Testifying: PRO: Bruce Wishart, Sound Action; Danielle Shaw, Washington Environmental Council; Jeff Davis, DFW; Alison Halpern, Washington State Conservation Commission.

CON: Michael Ennis, Association of Washington Business; Paul Jewell, Washington State Association of Counties; Jan Himebaugh, Building Industry Association of Washington; Josie Cummings, Building Industry Association of Washington.

OTHER: Daryl Williams, Tulalip Tribes; Tom Davis, Washington Farm Bureau.

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