

HOUSE BILL REPORT

ESSB 5371

As Passed House - Amended:

April 11, 2023

Title: An act relating to protecting southern resident orcas from vessels.

Brief Description: Protecting southern resident orcas from vessels.

Sponsors: Senate Committee on Agriculture, Water, Natural Resources & Parks (originally sponsored by Senators Lovelett, Shewmake, Hasegawa, Hunt, Keiser, Kuderer, Nguyen, Pedersen, Randall, Robinson, Rolfes, Saldaña, Valdez, Wellman and Wilson, C.).

Brief History:

Committee Activity:

Agriculture and Natural Resources: 3/15/23, 3/29/23 [DPA];

Appropriations: 4/3/23, 4/4/23 [DPA(APP w/o AGNR)].

Floor Activity:

Passed House: 4/11/23, 95-2.

Brief Summary of Engrossed Substitute Bill (As Amended by House)

- Establishes a 1,000-yard vessel setback distance from southern resident orcas for most kinds of vessels and provides additional exemptions from the distance restrictions.
- Directs the Department of Fish and Wildlife (WDFW) to develop and conduct various outreach and education efforts on the vessel distance restrictions in coordination with a diverse array of entities and other state agencies.
- Directs the WDFW to develop a transboundary plan to implement the vessel distance restrictions with input from British Columbia and international whale organizations.
- Directs the WDFW to provide a report to the Legislature within one year

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

of the southern resident orca population reaching 70 or fewer animals that includes updates on pod health and enforcement of 1,000 yard distance requirements.

- Modifies the commercial whale watching business license fees by removing fee structures for each vessel based on the number of passengers and eliminating certain other fees.
- Creates paddle tour business and paddle guide licenses with associated fees in place of kayak guide licenses and distinct from commercial whale watching business licenses.
- Modifies enforcement provisions regarding Unlawful Commercial Whale Watching in the first degree.
- Creates enforcement provisions regarding conducting paddle tours.

HOUSE COMMITTEE ON AGRICULTURE AND NATURAL RESOURCES

Majority Report: Do pass as amended. Signed by 9 members: Representatives Chapman, Chair; Morgan, Vice Chair; Reeves, Vice Chair; Dent, Ranking Minority Member; Kloba, Kretz, Lekanoff, Schmick and Springer.

Minority Report: Do not pass. Signed by 2 members: Representatives Chandler, Assistant Ranking Minority Member; Orcutt.

Staff: Rebecca Lewis (786-7339).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Appropriations and without amendment by Committee on Agriculture and Natural Resources. Signed by 20 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Berg, Chopp, Davis, Dye, Fitzgibbon, Hansen, Harris, Lekanoff, Pollet, Riccelli, Rude, Ryu, Senn, Simmons, Stonier and Tharinger.

Minority Report: Do not pass. Signed by 8 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; Chandler, Couture, Sandlin, Schmick and Steele.

Minority Report: Without recommendation. Signed by 1 member: Representative Connors.

Staff: Dan Jones (786-7118).

Background:

Southern Resident Orca.

The federal government listed the southern resident orca as endangered under the Endangered Species Act in November 2005. In January 2008 the federal government released a recovery plan for these orcas. The recovery plan identifies vessel effects as having potential detrimental impacts on the southern resident orca population.

In 2019 the Department of Fish and Wildlife (WDFW) was directed to implement a commercial whale watching license for Puget Sound and related inland marine waters of Washington to protect southern resident orcas. The WDFW was also directed to convene an independent science panel to complete an Adaptive Management Report to review the most current and best available science regarding impacts to orcas by small vessels and commercial whale watching vessels. The WDFW must use the review in both the rulemaking process and adaptive management of the commercial whale watching program. The first report was submitted on November 30, 2022, and future reports are due in 2024 and 2026.

Vessel Approach Distances.

It is unlawful to approach a southern resident orca within 300 yards, position a vessel in the path of a southern resident within 400 yards, or fail to disengage the transmission of a vessel when it is within 300 yards of a southern resident orca. It is unlawful to cause a vessel to exceed a speed of 7 knots within .5 nautical miles of a southern resident orca.

There are some exemptions to these speed and distance restrictions, which include:

- the use of government and tribal vessels in the course of official duties such as law enforcement, search and rescue, and public safety;
- approaching a southern resident orca whale in accordance with certain federal vessel traffic laws;
- conducting scientific research under a permit from the National Marine Fisheries Service and the WDFW; and
- lawfully engaging in a treaty Indian or commercial fishery that is actively setting or tending to gear.

Violating the vessel distance and speed regulations is a natural resources infraction and carries a fine of \$500.

Commercial whale watching vessels, by rule, may not approach within .5 nautical miles of a southern resident orca during certain seasons and time periods when whales are present. If a commercial whale watching vessel comes within that distance of a group of southern resident orcas, the operator of the vessel must, after taking reasonable measures to determine whether the whales were southern resident orcas, and then identifies the whales as southern resident orcas:

- immediately safely reposition the vessel to be .5 nautical miles or further from the whales;

- report the location of the whales to the WhaleReport application for the whale report alert system, or to a successor transboundary notification system designated by the WDFW that is adopted by the international shipping community in the Salish Sea; and
- accurately log the incident and submit the log to the WDFW within 24 hours of the incident.

Whale Watching Licenses.

Motorized and Sailing Vessels.

Commercial whale watching businesses must be licensed by the WDFW. The annual fee for a commercial whale watching business license is \$200, with an application fee of \$75. In addition, a commercial whale watching business must pay a fee for each of their motorized or sailing vessels. The per-vessel fees range from \$325 to \$2,000 depending on the passenger capacity of the vessel. For example, the per-vessel fee for each motorized or sailing vessel with a capacity of one to 24 passengers is \$325, and the fee for each motorized or sailing vessel with a capacity of 151 passengers or more is \$2,000, with several price points for vessels with passenger capacity in between those two ranges.

A commercial whale watching business license holder may substitute the vessel designated on the business license by surrendering the previously issued vessel license to the WDFW, submitting an application to the WDFW that identifies both the currently designated vessel and the vessel proposed to be designated, and paying a fee of \$35 with an application fee of \$105. A vessel designation may not be changed more than once per calendar year.

Operators of commercial whale watching vessels must also obtain a license from the WDFW, which costs \$100 with an annual application fee of \$75. Operators may only hold one license but may be designated as an operator on an unlimited number of vessels.

Kayak Guides.

A person may conduct guided kayak tours if they both obtain a kayak guide license and are designated as a kayak guide on a commercial whale watching business license. Kayak guide licenses cost \$25 with a \$25 annual application fee. No individual may hold more than one kayak guide license, and kayak guide license holders may be named on an unlimited number of commercial whale watching business licenses.

Commercial Whale Watching Enforcement.

A person is guilty of Unlawful Commercial Whale Watching in the second degree if the person does not have and possess all required licenses or violates any department rule regarding operating a vessel near a southern resident orca. Unlawful Commercial Whale Watching in the second degree is a misdemeanor.

A person is guilty of Unlawful Commercial Whale Watching in the first degree if the person does not have and possess all required licenses or violates any department rule regarding operating a vessel near a southern resident orca, and the violation occurs within one year of

a prior conviction. Unlawful Commercial Whale Watching in the first degree is a gross misdemeanor. In addition to criminal penalties, the Director of the WDFW must deny applications for any whale watching licenses for two years from the date of conviction.

Summary of Amended Bill:

Vessel Approach Distances.

Distance Limit Modifications, Exemptions, and Enforcement.

Beginning January 1, 2025, it is unlawful to approach within 1,000 yards of a southern resident orca. Vessel operators must disengage the transmission of their vessel within 400 yards, rather than 300 yards, of a southern resident orca, and an officer may not issue an infraction to a vessel operator who immediately disengages the transmission of their vessel within that distance and waits for the whale to move away.

Operators of commercial whale watching vessels that enter within 1,000 yards of a southern resident orca must immediately reposition the vessel and report the location of the orca to the WhaleReport application for the whale report alert system or a successor transboundary notification system designated by the Department of Fish and Wildlife (WDFW) that is adopted by the international shipping community in the Salish Sea. The operator may voluntarily provide an incident report to the WDFW.

An officer may use their discretion to offer educational materials instead of issuing an infraction. A provision making enforcement of the vessel approach distance requirements subject to appropriation is removed.

If the southern resident orca population drops to 70 or fewer animals, the WDFW must submit a report to the Legislature within a year that includes a study of how mandatory 1,000-yard setbacks have been enforced, including gaps and solutions to support improvements, the use of data science with respect to southern resident pod health, and evidence-based plans to address southern resident pod health.

Outreach and Education.

The WDFW must conduct outreach and education regarding the southern resident orca approach distance regulations and best practices for recreational boating in waters inhabited by southern resident orcas. Outreach and education includes best practices for avoiding or minimizing encounters within 1,000 yards, and advancing and proliferating tools to notify boaters of southern resident orca presence, identifying orca ecotypes, and estimating distance on the water.

The WDFW must convene a diverse workgroup that includes representatives of nongovernmental organizations, recreational boaters, the commercial whale watching industry, commercial fishers, ports and marinas, relevant government entities, tribes, and the southern resident orca research community to inform the development of outreach and education strategies. The workgroup must include a report summarizing its work and the

WDFW's outreach strategies in the Adaptive Management Report that is due in 2024. The WDFW must conduct intensive outreach and education in fiscal year 2024 and the first half of 2025 to implement the outreach recommendations from the workgroup. The WDFW must also coordinate with the workgroup to assess compliance with and effectiveness of the 1,000-yard setbacks from southern resident orcas with recommendations for further legislative action needed to protect southern resident orcas from vessels. The WDFW must include this report in the 2024 Adaptive Management Report.

The WDFW must post signs at public boat launches and marinas that provide information on the vessel setbacks and speed limits. However, the limits apply whether or not a sign is present, and absence of a sign is not a defense to any violation of the limits.

The WDFW must coordinate with the Department of Licensing and the Parks and Recreation Commission to mail information regarding vessel setbacks and speed limits, and whale warning flags, upon issuance or renewal of a vessel registration.

The WDFW must also develop a transboundary and statewide plan to implement the vessel distance regulations with input from British Columbia and international whale organizations. The WDFW must report to the Legislature by January 1, 2025, on progress of plan development and a plan for implementation.

Whale Watching Licenses.

Motorized and Sailing Vessels.

The application fee for commercial whale watching business licenses is reduced from \$75 to \$70, and the per-vessel fees based on vessel capacity are removed. The annual application for a commercial whale watching business license must list each vessel to be covered under the license. A commercial whale watching business license holder may designate an additional vessel on the license by submitting an application to the WDFW that identifies the vessel proposed to be designated and any other information required by the WDFW. There is no fee to designate an additional vessel.

The application fee for a commercial whale watching operator license is reduced from \$75 to \$25, and the \$100 license fee is eliminated.

Paddle Tours.

In order to conduct paddle tours in state waters inhabited by marine mammals, a business must obtain a paddle tour business license. "Paddle tour" is defined as the act of guiding or offering to take people aboard nonmotorized or human-powered vessels, including kayaks, on a trip, tour, or guided lesson in waters inhabited by marine mammals for a fee. The fee for a paddle tour business license is \$200 with a \$70 application fee.

A person may conduct guided paddle tours in waters inhabited by marine mammals only if the person both holds a paddle guide license and is designated as a guide on an underlying paddle tour business license. The annual application fee for paddle guide licenses is \$25.

An individual may not hold more than one paddle guide license, but may be designated as a paddle guide on an unlimited number of paddle tour business licenses.

License Fees, Generally.

License and application fees for commercial whale watching and paddle tours may be waived for organizations whose activities are only for bona fide nonprofit educational purposes.

Commercial Whale Watching and Paddle Tour Enforcement.

A person is guilty of Unlawfully Engaging in a Paddle Tour in the second degree if they do not possess required licenses and permits or if they violate WDFW rules regarding commercial whale watching.

A person is guilty of Unlawfully Engaging in Commercial Whale Watching or Unlawfully Engaging in a Paddle Tour in the first degree if they do not possess required licenses and permits, or violate WDFW rules regarding commercial whale watching, and the violation occurs within five years of the date of a prior conviction, a finding of guilt, or under certain circumstances the disposition of a case originally charged as a violation. In addition to penalties for Unlawful Commercial Whale Watching or Unlawfully Engaging in a Paddle Tour in the first degree, the WDFW shall revoke a license and order a two-year suspension.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on April 11, 2023.

Effective Date: The bill contains multiple effective dates. Please see the bill.

Staff Summary of Public Testimony (Agriculture and Natural Resources):

(In support) The genesis for this bill was legislation passed in 2019 that directed the Department of Fish and Wildlife (WDFW) to study the impacts of vessels on southern resident orcas and create a commercial whale watching licensing program, and is an outcome of the public process that began in the Governor's Southern Resident Killer Whale Task Force (SRKW Task Force). The southern resident orca population is one of the most endangered in the world. The three key threats identified by the SRKW Task Force are toxics, lack of food, and vessel noise. Many people recall when the southern resident orca Tahlequah carried her dead calf for 17 days in mourning. Lots of work has been done to reduce microplastics, enhance the health of kelp beds, and take other actions to help recover these orcas and the salmon that they eat, but it has not been enough. Vessel noise can have a cascading impact on orcas including behavior change. Studies show that vessel noise can impact whales up to 1,600 yards. Whales rely on echolocation to find their food, and many whales hunt on behalf of their young. Decreases in foraging have caused changes in the health and physical condition of many of the southern resident orcas. The desire to see these whales has pushed them to the brink of extinction. The prime sponsor has been

working closely with stakeholders, and the bill is not meant to be punitive. The 1,000-yard distance sends a message to leave whales alone. Commercial whale watching vessels are often the first line of defense and recreational boaters will be able to use commercial whale watching vessels as a reference to adhere to the distance restriction. There is a whale wise mobile application under development to help locate and avoid whales. In 1995 there were 98 southern residents and currently there are 73. The population is expected to continue to decline in the next 10 to 12 years. The WDFW has done a great job reviewing the science and meeting with the stakeholders to develop this bill. It is important to think of future constituents when making these decisions. This bill will help future generations turn the southern resident orca population around. The WDFW convened focus groups with various stakeholders to develop the bill, as well as a survey that had a high level of participation. The Senate refined the elements of the bill that dealt with enforcement and education. Of more than 300 enforcement contacts with boaters, WDFW enforcement issued 33 warnings and only 12 citations for the most egregious violations. Enforcement officers currently focus on education over issuing citations and that will continue. The bill will simplify and improve the enforceability of the regulations by making the standards the same for all vessels. There are increased protections in the bill for vessels that deal with the unpredictable movement of southern residents. Southern resident orcas are not around on a daily basis and are in different places in the Salish Sea during different seasons.

(Opposed) Everyone wants the southern resident orcas to be able to forage, but a successful strategy should mitigate impacts. The 1,000-yard distance is not justified by reliable science and is unenforceable and impractical in the field. There are loopholes that allow vessels to be within 400 yards if their transmission is disengaged.

(Other) The intent of this legislation is good and the bill has improved since it was introduced. However there are concerns about the 1,000-yard distance applying to southern residents only. Transient orca whales are difficult to identify to anyone but those trained to notice the differences. The 1,000-yard distance would effectively close off a 2,000-yard area to boaters. In order to accurately use the mobile application to identify where southern residents are, it would need to be updated by the minute. There is no funding to maintain the application and the developer only works on it in their spare time. Before the bill is passed, there should be more stakeholder work.

Staff Summary of Public Testimony (Appropriations):

(In support) None.

(Opposed) None.

(Other) There is support for the intent of the bill, but there are still concerns with the ability of recreational boaters to comply with the standards, since the setbacks would apply only to southern resident orcas. It is difficult to judge how far 1,000 yards is, and to most people it is impossible to distinguish a southern resident orca from a transient orca. The Recreational

Boating Association of Washington appreciates the voluntary, bipartisan approach that came from the policy committee and prefers that approach due to the lack of stakeholder process and resources for recreational boaters in putting together the original bill.

Persons Testifying (Agriculture and Natural Resources): (In support) Senator Liz Lovelett, prime sponsor; Joseph Gaydos, SeaDoc Society; Timothy Ragen; Donna Sandstrom, The Whale Trail; Tara Galuska, Governor's Salmon Recovery Office; Julie Watson and Alan Myers, Department of Fish and Wildlife; and Nora Nickum, Seattle Aquarium.

(Opposed) Monika Shields, Orca Behavior Institute.

(Other) Bob Wise, Recreational Boating Association of Washington.

Persons Testifying (Appropriations): Bob Wise, President, Recreational Boating Association of Washington.

Persons Signed In To Testify But Not Testifying (Agriculture and Natural Resources): Frances Robertson, San Juan County; Todd Woodard, Samish Indian Nation; Todd Hass, Puget Sound Partnership; Brendan Flynn; and Erin Gless, Pacific Whale Watch Association.

Persons Signed In To Testify But Not Testifying (Appropriations): None.