

SENATE BILL REPORT

ESSB 5371

As Amended by House, 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, Water, Natural Resources & Parks: 1/30/23, 2/16/23 [DPS-WM, DNP].

Floor Activity: Passed Senate: 2/28/23, 29-18.
Passed House: 4/11/23, 95-2.

Brief Summary of Engrossed First Substitute Bill

- Increases the distance a vessel must maintain away from a southern resident orca from 400 yards to 1000 yards.
- Modifies commercial whale watching business license fees by removing fee structures for each vessel based on the number of passengers and eliminating certain other fees.
- Adds a paddle tour business license for businesses conducting paddle tours to view marine mammals for a fee.
- Increases penalties for violations of commercial whale watching rules and authorizes the Department of Fish and Wildlife to revoke licenses under certain circumstances.

SENATE COMMITTEE ON AGRICULTURE, WATER, NATURAL RESOURCES & PARKS

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.

Majority Report: That Substitute Senate Bill No. 5371 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Van De Wege, Chair; Salomon, Vice Chair; Rolfes, Shewmake and Stanford.

Minority Report: Do not pass.

Signed by Senators Muzzall, Ranking Member; Short, Wagoner and Warnick.

Staff: Jeff Olsen (786-7428)

Background: Southern Resident Orca. The federal government listed the southern resident killer whale (SRKW) 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 orca population. In 2019, the Department of Fish and Wildlife (DFW) was directed to implement a commercial whale watching license for Puget Sound and related inland marine waters of Washington to protect SRKW.

Vessel Distance Regulations. DFW enforces the approach distance and speed of vessels operating near SRKW. It is unlawful for a person to cause a vessel to approach within 300 yards of a SRKW or to position a vessel in the path of a SRKW within 400 yards. It is also unlawful for a person to cause a vessel to exceed a speed of seven knots at any point located within one-half of a nautical mile of a SRKW. Further, DFW has adopted rules limiting the time and distance an operator of a motorized commercial whale watching vessel must follow when watching a SRKW. A motorized commercial whale watching vessel must not approach within one-half nautical mile of a SRKW, and must reposition their vessel if they enter within one-half nautical mile.

Commercial Whale Watching Licenses and Fees. All businesses that engage in commercial whale watching must acquire an annual commercial whale watching business license, with an additional license fee for each vessel designated under a whale watching license. The application fee is \$75, and the annual license fee is \$200. The additional annual license fees are as follows for motorized or sailing vessels:

- \$325 for one to 24 passengers;
- \$525 for 25 to 50 passengers;
- \$825 for 51 to 100 passengers;
- \$1,825 for 101 to 150 passengers; and
- \$2,000 for 151 or more passengers.

To conduct commercial whale watching via guided kayak tours, a person must obtain a kayak guide license and be designated as a kayak guide on the underlying commercial whale watching business license. The kayak guide license is \$25, with a \$25 application fee. A person who holds a kayak guide license may be designated on an unlimited number of commercial whale watching business licenses, but may hold only one kayak guide

license.

A commercial whale watching license holder may substitute a motorized or sailing vessel designated on their commercial whale watching license for a fee of \$35 instead of the applicable vessel fee to designate an additional vessel. The vessel operator must submit an application to DFW with the \$35 fee and a \$105 application fee. DFW may only change a vessel designation on a commercial whale watching license once per calendar year.

License and application fees were waived in calendar years 2021 and 2022.

Penalties. Commercial whale watching without a permit, or violating DFW rules regarding commercial whale watching, is a misdemeanor, and doing so within one year of the date of a prior conviction is a gross misdemeanor. Upon conviction of a gross misdemeanor, DFW must deny applications for a commercial whale watching license or alternate operator license for up to two years from the conviction. Several exemptions exist, including for government vessels on official duty, permitted scientific research, and for navigational safety.

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

Review and Reporting. In November of 2022, DFW provided the first of three adaptive management reports containing an analysis on the effectiveness and recommendations for changes to the whale watching rules, license fee structures, and approach distance rules.

Summary of Engrossed First Substitute Bill: Vessel Distance Regulations. Effective January 1, 2025, it is unlawful for a person to cause a vessel to approach, position a vessel, or cause a vessel to exceed a speed of seven knots within 1000 yards of a SRKW. It is also unlawful to fail to disengage the transmission of a vessel that is within 400 yards of a SRKW. However, an oil spill response vessel, a vessel operating as a vessel traffic service user or under a caption of the port measure is exempt from the vessel distance regulations.

Commercial Whale Watching Licenses and Fees. A commercial whale watching business license must list each motorized and sailing vessel to be covered under the business license. The requirement for annual fees for a commercial whale watching business license for each vessel with graduated fees based on the number of passengers is eliminated.

A commercial whale watching license holder may designate an additional vessel on the license. Fees of \$35 and an application fee of \$105 for substituting vessels designated under a license are repealed. The restriction that DFW may only change a vessel designation on a commercial whale watching license once per calendar year is repealed. The annual fee and application fee for a commercial whale watching operator license is consolidated and reduced from \$175 to \$25.

A paddle tour business license is required for a business conducting paddle tours. The annual fee for a paddle tour business license is \$200 plus an annual application fee of \$70. A person may conduct paddle tours in waters inhabited by marine mammals if the person holds a paddle guide license. A paddle tour is defined as the act of guiding or offering to take people aboard nonmotorized or human-powered vessels, such as kayaks or paddle boards, on a trip, tour, or guided lesson that involves viewing marine mammals in their natural habitat for a fee. The kayak guide license is renamed a paddle guide license. A person who holds a paddle guide license may be designated on an unlimited number of paddle tour business licenses.

A commercial whale watching license or application fee may be waived for organizations whose commercial whale watching or marine paddle tour activities are solely for nonprofit educational purposes.

Penalties. 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 DFW 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 engaging in a paddle tour in the first degree, DFW shall revoke a license and order a two-year suspension.

The fine amount for a natural resource infraction for a violation of vessel distance and speed requirements is decreased from \$500 to up to \$250.

Outreach and Education. The DFW may provide educational materials in lieu of issuing a natural resources infraction for a violation of vessel distance and speed requirements to protect SRKW. The DFW must post signs at public boat launches and marinas that provide information regarding the vessel setbacks and speed limit requirements to protect SRKW. The DFW must conduct outreach and education regarding regulations and best practices for recreational boating in waters inhabited by a SRKW including the advancement of tools for notifying boaters of SRKW presence, identifying orca ecotypes, and estimating distance on the water.

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: Section 1 of the act takes effect January 1, 2025, the remaining sections take effect ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Proposed Substitute: *The committee*

recommended a different version of the bill than what was heard. PRO: This bill had broad consensus and is necessary to prevent the SRKW population from going extinct. Protections needs to be fortified to allow the SRKW time and space to find food. The SRKW population is the most endangered mammal in the world. This bill enables the Department of Fish and Wildlife to hold recreational boaters to the same distance standards for SRKW as commercial whale watching boaters. The DFW has two years of lessons learned, and this bill contains improvements based on an analysis of the current system. All boat types will have to maintain the same 1,000 yards of distance, which will keep enforcement consistent and practical. Science has demonstrated impacts to forage behavior. Boats negatively impact orcas' ability to seek food, and by increasing the minimum viewing distance for all boats to 1,000 yards, the SRKW will have more protected space. There are exemptions for certain vessels, including tribal and commercial fishing. In general, any stopped traffic would likely only wait a maximum of 30 minutes before the SRKW are able to pass through the area. There are only about 23 reproductive females, and in the next 13 years there will only be 8. SRKW are acoustic, and they hear more than they see. Noise makes it hard to find the salmon they rely on for survival. The SRKW's survival will be determined by this bill. We must do everything possible to protect them.

OTHER: The 1000 yard distance seems to have been chosen without reason or peer-reviewed scientific research. If the minimum distance was 500 yards, the sentinel effect provided by commercial whale watching vessels would reduce impacts from recreational boaters. Orcas cannot be identified by type at 1000 yards, and this would stop all marine traffic as boats try to determine if the whales they see are SRKW or transients. At 1000 yards it is too far to observe orcas and will eliminate all viewing opportunities, effectively creating a moratorium. At 500 yards, professional, licensed whale watching boaters would be able to provide watching opportunities from a safe distance. Clarifying changes are necessary for the current maritime traffic exemption. Impacts from commercial fishing should be considered.

Persons Testifying: PRO: Senator Liz Lovelett, Prime Sponsor; Julie Watson, WDFW; Tara Galuska, Recreation and Conservation Office - Governor's Salmon Recovery Office; Timothy Ragen; Joseph Gaydos, UC Davis / SeaDoc Society; Donna Sandstrom, The Whale Trail; Brendan Flynn, Washington Reef Net Owners Association; Nora Nickum, Seattle Aquarium; Todd Hass, Puget Sound Partnership.

OTHER: Katrina Watkins; Erin Gless, Pacific Whale Watch Association; Scott Hazlegrove, Pacific Merchant Shipping Association; Whitney Neugebauer, Whale Scout; Monika Wieland Shields, Orca Behavior Institute; Cindy Hansen, Orca Network; Bob Wise, President, Recreational Boating Assoc. of Washington.

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

EFFECT OF HOUSE AMENDMENT(S):

- Adds an intent section to support recovery of SRKW populations by reducing noise and disturbance from vessels.
- Makes it unlawful for a person to position a vessel behind a SRKW at any point within 1000 yards.
- Restores the natural resource infraction fine for approaching within the setback distances from \$250 to \$500.
- Specifies that an officer may not issue an infraction to the operator of a vessel that immediately disengages the transmission of the vessel within 400 yards of a SRKW and waits for the whale to move away.
- Requires commercial whale watching vessels that enter within 1000 yards of a SRKW to safely reposition the vessel so it is outside that distance and report the location of the SRKW.
- Requires WDFW, if the SRKW population reaches 70 individuals or fewer, to submit a report to the Legislature within one year of the threshold being met that includes a study of how mandatory 1000-yard setbacks for all vessels would be enforced, and the use of data and evidence-based plans to address SRKW pod health.
- Requires WDFW to coordinate with the Department of Licensing and the Parks and Recreation Commission to mail information upon issuance or renewal of a vessel including the required vessel setbacks, speed limits, and whale warning flags.
- Requires WDFW to develop a transboundary and statewide plan to implement the vessel distance regulations with input from British Columbia and international whale organizations, with a report to the Legislature due by January 1, 2025.