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**SENATE BILL 5580**

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**State of Washington 66th Legislature 2019 Regular Session**

**By** Senators Rolfes, Palumbo, Frockt, Dhingra, Keiser, Kuderer, and Saldaña; by request of Office of the Governor

AN ACT Relating to implementing recommendations of the southern resident killer whale task force related to increasing habitat and forage fish abundance; amending RCW 77.08.020, 77.32.010, and 43.21B.110; adding new sections to chapter 77.55 RCW; creating a new section; repealing RCW 77.55.141 and 77.55.291; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  (1) The legislature finds that the population of southern resident killer whales has declined in recent years and currently stands at a thirty-year low of seventy-four animals.

(2) The governor convened the southern resident killer whale task force after the 2018 legislative session to study and identify actions that could be taken to help sustain and recover this important species. In the course of its work, the task force found that chinook salmon compose the largest portion of the whales' diet, and are therefore critical to the recovery of the species. Further, several runs of chinook salmon in Washington state are listed under the federal endangered species act, making chinook recovery all the more urgent.

(3) The task force identified four overarching southern resident killer whale recovery goals and adopted several recommendations for specific actions under each goal. Goal one identified by the task force is to increase chinook abundance, and actions under that goal relate to habitat protection, protection of chinook prey, such as forage fish, and reducing impacts of nonnative chinook predators.

(4) To address the need identified by the task force to increase chinook abundance, the legislature intends to take initial, important steps consistent with recommendations made by the governor's southern resident killer whale task force.

**Sec.**  RCW 77.08.020 and 1989 c 218 s 2 are each amended to read as follows:

(1) As used in this title or rules of the commission, "game fish" means those species of the class Osteichthyes that shall not be fished for except as authorized by rule of the commission and includes:

| **Scientific Name** | **Common Name** |
| --- | --- |
| Ambloplites rupestris | rock bass |
| Coregonus clupeaformis | lake white fish |
| Ictalurus furcatus | blue catfish |
| Ictalurus melas | black bullhead |
| Ictalurus natalis | yellow bullhead |
| Ictalurus nebulosus | brown bullhead |
| ((~~Ictalurus punctatus~~ | ~~channel catfish~~)) |
| Lepomis cyanellus | green sunfish |
| Lepomis gibbosus | pumpkinseed |
| Lepomis gulosus | warmouth |
| Lepomis macrochirus | bluegill |
| Lota lota | burbot or freshwater ling |
| ((~~Micropterus dolomieui~~ | ~~smallmouth bass~~ |
| ~~Micropterus salmoides~~ | ~~largemouth bass~~)) |
| Oncorhynchus nerka (in its landlocked form) | kokanee or silver trout |
| Perca flavescens | yellow perch |
| Pomixis annularis | white crappie |
| Pomixis nigromaculatus | black crappie |
| Prosopium williamsoni | mountain white fish |
| Oncorhynchus aquabonita | golden trout |
| Oncorhynchus clarkii | cutthroat trout |
| Oncorhynchus mykiss | rainbow or steelhead trout |
| Salmo salar (in its landlocked form) | Atlantic salmon |
| Salmo trutta | brown trout |
| Salvelinus fontinalis | eastern brook trout |
| Salvelinus malma | Dolly Varden trout |
| Salvelinus namaycush | lake trout |
| ((~~Stizostedion vitreum~~ | ~~Walleye~~)) |
| Thymallus articus | arctic grayling |

(2) Private sector cultured aquatic products as defined in RCW 15.85.020 are not game fish.

**Sec.**  RCW 77.32.010 and 2014 c 48 s 26 are each amended to read as follows:

(1) Except as otherwise provided in this chapter or department rule, a recreational license issued by the director is required to hunt, fish, or take wildlife or seaweed. A recreational fishing or shellfish license is not required for carp((~~, smelt,~~)) and crawfish, and a hunting license is not required for bullfrogs.

(2) A pass or permit issued under RCW 79A.80.020, 79A.80.030, or 79A.80.040 is required to park or operate a motor vehicle on a recreation site or lands, as defined in RCW 79A.80.010.

(3) The commission may, by rule, indicate that a fishing permit issued to a nontribal member by the Colville Tribes shall satisfy the license requirements in subsection (1) of this section on the waters of Lake Rufus Woods and on the north shore of Lake Rufus Woods, and that a Colville Tribes tribal member identification card shall satisfy the license requirements in subsection (1) of this section on all waters of Lake Rufus Woods.

NEW SECTION. **Sec.**  A new section is added to chapter 77.55 RCW to read as follows:

(1) When the department determines that a violation of this chapter, or of any of the rules that implement this chapter, has occurred or is about to occur, it shall first attempt to achieve voluntary compliance. The department shall offer information and technical assistance to the project proponent, identifying one or more means to accomplish the project proponent's purposes within the framework of the law. The department shall provide a reasonable timeline to achieve voluntary compliance that takes into consideration factors specific to the violation, such as the complexity of the hydraulic project, the actual or potential harm to fish life or fish habitat, and the environmental conditions at the time.

(2) If a person violates this chapter, or any of the rules that implement this chapter, or deviates from a permit, the department may issue a notice of correction in accordance with chapter 43.05 RCW, a notice of violation in accordance with chapter 43.05 RCW, a stop work order, a notice to comply, or a notice of civil penalty as authorized by law and subject to chapter 43.05 RCW and RCW 34.05.110.

(3) For purposes of this section, the term "project proponent" means a person who has applied for a hydraulic project approval, a person identified as an authorized agent on an application for a hydraulic project approval, a person who has obtained a hydraulic project approval, or a person who undertakes a hydraulic project without a hydraulic project approval.

NEW SECTION. **Sec.**  A new section is added to chapter 77.55 RCW to read as follows:

(1) The department may serve upon a project proponent a stop work order, which is a final order of the department, if:

(a) There is any violation of this chapter or of the rules implementing this chapter;

(b) There is a deviation from the hydraulic project approval; or

(c) Immediate action is necessary to prevent continuation of or to avoid more than minor harm to fish life or fish habitat.

(2)(a) The stop work order must set forth:

(i) The specific nature, extent, and time of the violation, deviation, harm, or potential harm;

(ii) The specific course of action needed to correct or prevent a continuing violation, deviation, harm, or potential harm; and

(iii) The right to an appeal.

(b) A stop work order may require that any project proponent stop all work connected with the violation until corrective action is taken.

(3) Within five business days of issuing the stop work order, the department shall mail a copy of the stop work order to the last known address of any project proponent, to the last known address of the owner of the land on which the hydraulic project is located, and to the local jurisdiction in which the hydraulic project is located. Substantial compliance with these mailing requirements is deemed satisfactory compliance with this subsection. For purposes of this subsection, "substantial compliance" means mailing to the last known address of the owner of the land on which the hydraulic project is located, to the local jurisdiction in which the hydraulic project is located, and to the last known address of any project proponent who has applied for a hydraulic project approval, who is identified as an authorized agent on an application for a hydraulic project approval, or who has obtained a hydraulic project approval.

(4) Issuance of a stop work order may be informally appealed by a project proponent who was served with the stop work order or who received a copy of the stop work order from the department, or by the owner of the land on which the hydraulic project is located, to the department within thirty days from the date of receipt of the stop work order. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A stop work order that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the department's decision on the informal appeal.

(5) The project proponent who was served with the stop work order or who received a copy of the stop work order from the department, or the owner of the land on which the hydraulic project is located, may commence an appeal to the board within thirty days from the date of receipt of the stop work order. If such an appeal is commenced, the proceeding is an adjudicative proceeding under the administrative procedure act, chapter 34.05 RCW. The recipient of the stop work order must comply with the order of the department immediately upon being served, but the board may stay, modify, or discontinue the order, upon motion, under such conditions as the board may impose.

(6) For the purposes of this section, "project proponent" has the same meaning as defined in section 4(3) of this act.

NEW SECTION. **Sec.**  A new section is added to chapter 77.55 RCW to read as follows:

(1)(a) If a violation of this chapter or of the rules implementing this chapter, a deviation from the hydraulic project approval, damage to fish life or fish habitat, or potential damage to fish life or fish habitat, has occurred and the department determines that a stop work order is unnecessary, the department may issue and serve upon a project proponent a notice to comply, which must clearly set forth:

(i) The nature, extent, date, and time of the violation;

(ii) Any necessary corrective action; and

(iii) The right to an appeal.

(b) The notice to comply may require that any project proponent take corrective action to prevent, correct, or compensate for adverse impacts to fish life or fish habitat.

(2) Within five business days of issuing the notice to comply, the department shall mail a copy of the notice to comply to the last known address of any project proponent, to the last known address of the owner of the land on which the hydraulic project is located, and to the local jurisdiction in which the hydraulic project is located. Substantial compliance with these mailing requirements is deemed satisfactory compliance with this subsection. For purposes of this subsection, "substantial compliance" means mailing to the last known address of the owner of the land on which the hydraulic project is located, to the local jurisdiction in which the hydraulic project is located, and to the last known address of any project proponent who has applied for a hydraulic project approval, who is identified as an authorized agent on an application for a hydraulic project approval, or who has obtained a hydraulic project approval.

(3) Issuance of a notice to comply may be informally appealed by a project proponent who was served with the notice to comply or who received a copy of the notice to comply from the department, or by the owner of the land on which the hydraulic project is located, to the department within thirty days from the date of receipt of the notice to comply. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A notice to comply that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the department's decision on the informal appeal.

(4) The project proponent who was served with the notice to comply, the project proponent who received a copy of the notice to comply from the department, or the owner of the land on which the hydraulic project is located may commence an appeal to the board within thirty days from the date of receipt of the notice to comply. If such an appeal is commenced, the proceeding is an adjudicative proceeding under the administrative procedure act, chapter 34.05 RCW. The recipient of the notice to comply must comply with the notice to comply immediately upon being served, but the board may stay, modify, or discontinue the notice to comply, upon motion, under such conditions as the board may impose.

(5) For the purposes of this section, "project proponent" has the same meaning as defined in section 4(3) of this act.

NEW SECTION. **Sec.**  A new section is added to chapter 77.55 RCW to read as follows:

(1) The department may levy civil penalties of up to ten thousand dollars for every violation of this chapter or of the rules that implement this chapter. Each and every violation is a separate and distinct civil offense.

(2) The penalty provided must be imposed by notice in writing by the department, provided either by certified mail or by personal service, to the person incurring the penalty and to the local jurisdiction in which the hydraulic project is located, describing the violation. The civil penalty notice must set forth:

(a) The basis for the penalty;

(b) The amount of the penalty; and

(c) The right of the person incurring the penalty to appeal the civil penalty.

(3)(a) Except as provided in (b) of this subsection, any person incurring any penalty under this chapter may appeal the penalty to the board pursuant to chapter 34.05 RCW. Appeals must be filed within thirty days from the date of receipt of the notice of civil penalty in accordance with RCW 43.21B.230.

(b) Issuance of a civil penalty may be informally appealed by the person incurring the penalty to the department within thirty days from the date of receipt of the notice of civil penalty. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A civil penalty that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the department's decision on the informal appeal.

(4) The penalty imposed becomes due and payable thirty days after receipt of a notice imposing the penalty unless an appeal is filed. Whenever an appeal of any penalty incurred under this chapter is filed, the penalty becomes due and payable only upon completion of all review proceedings and the issuance of a final order confirming the penalty in whole or in part. When the penalty becomes past due, it is also subject to interest at the rate allowed by RCW 43.17.240 for debts owed to the state.

(5) If the amount of any penalty is not paid within thirty days after it becomes due and payable, the attorney general, upon the request of the director, shall bring an action in the name of the state of Washington in the superior court of Thurston county or of the county in which such a violation occurred, to recover the penalty. In all such actions, the rules of civil procedure~~s~~ and the rules of evidence are the same as in an ordinary civil action. The department is also entitled to recover reasonable attorneys' fees and costs incurred in connection with the penalty recovered under this section. All civil penalties received or recovered by state agency action for violations as prescribed in subsection (1) of this section must be deposited into the state's general fund. The department is authorized to retain any attorneys' fees and costs it may be awarded in connection with an action brought to recover a civil penalty issued pursuant to this section.

(6) The department shall adopt by rule a penalty schedule to be effective by January 1, 2020. The penalty schedule must be developed in consideration of the following:

(a) Previous violation history;

(b) Severity of the impact on fish life and fish habitat;

(c) Whether the violation of this chapter or of its rules was intentional;

(d) Cooperation with the department;

(e) Reparability of any adverse effects resulting from the violation; and

(f) The extent to which a penalty to be imposed on a person for a violation committed by another should be reduced if the person was unaware of the violation and has not received a substantial economic benefit from the violation.

NEW SECTION. **Sec.**  A new section is added to chapter 77.55 RCW to read as follows:

The department may apply for an administrative inspection warrant in either Thurston county superior court or the superior court in the county in which the hydraulic project is located. The court may issue an administrative inspection warrant where:

(1) Department personnel need to inspect the hydraulic project site to ensure compliance with this chapter or with rules adopted to implement this chapter; or

(2) Department personnel have probable cause to believe that a violation of this chapter or of the rules that implement this chapter is occurring or has occurred.

NEW SECTION. **Sec.**  A new section is added to chapter 77.55 RCW to read as follows:

(1) The department may disapprove an application for hydraulic project approval submitted by a person who has failed to comply with a final order issued pursuant to section 5 or 6 of this act or who has failed to pay civil penalties issued pursuant to section 7 of this act. Applications may be disapproved for up to one year from the issuance of a notice of intent to disapprove applications under this section, or until all outstanding civil penalties are paid and all outstanding notices to comply and stop work orders are complied with, whichever is longer.

(2) The department shall provide written notice of its intent to disapprove an application under this section to the applicant and to any authorized agent or landowner identified in the application.

(3) The disapproval period runs from thirty days following the date of actual notice of intent or when all administrative and judicial appeals, if any, have been exhausted.

(4) Any person provided the notice may seek review from the board by filing a request for review within thirty days of the date of the notice of intent to disapprove applications.

NEW SECTION. **Sec.**  A new section is added to chapter 77.55 RCW to read as follows:

Any violation of this chapter or of the rules adopted to implement this chapter is declared to be a public nuisance.

NEW SECTION. **Sec.**  A new section is added to chapter 77.55 RCW to read as follows:

The remedies under this chapter are not exclusive and do not limit or abrogate any other civil or criminal penalty, remedy, or right available in law, equity, or statute.

**Sec.**  RCW 43.21B.110 and 2013 c 291 s 34 are each amended to read as follows:

(1) The hearings board shall only have jurisdiction to hear and decide appeals from the following decisions of the department, the director, local conservation districts, the air pollution control boards or authorities as established pursuant to chapter 70.94 RCW, local health departments, the department of natural resources, the department of fish and wildlife, the parks and recreation commission, and authorized public entities described in chapter 79.100 RCW:

(a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431, 70.105.080, 70.107.050, 76.09.170, ((~~77.55.291~~)) section 7 of this act, 78.44.250, 88.46.090, 90.03.600, 90.46.270, 90.48.144, 90.56.310, 90.56.330, and 90.64.102.

(b) Orders issued pursuant to RCW 18.104.043, 18.104.060, 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070, 90.14.130, 90.46.250, 90.48.120, and 90.56.330.

(c) Except as provided in RCW 90.03.210(2), the issuance, modification, or termination of any permit, certificate, or license by the department or any air authority in the exercise of its jurisdiction, including the issuance or termination of a waste disposal permit, the denial of an application for a waste disposal permit, the modification of the conditions or the terms of a waste disposal permit, or a decision to approve or deny an application for a solid waste permit exemption under RCW 70.95.300.

(d) Decisions of local health departments regarding the grant or denial of solid waste permits pursuant to chapter 70.95 RCW.

(e) Decisions of local health departments regarding the issuance and enforcement of permits to use or dispose of biosolids under RCW 70.95J.080.

(f) Decisions of the department regarding waste-derived fertilizer or micronutrient fertilizer under RCW 15.54.820, and decisions of the department regarding waste-derived soil amendments under RCW 70.95.205.

(g) Decisions of local conservation districts related to the denial of approval or denial of certification of a dairy nutrient management plan; conditions contained in a plan; application of any dairy nutrient management practices, standards, methods, and technologies to a particular dairy farm; and failure to adhere to the plan review and approval timelines in RCW 90.64.026.

(h) Any other decision by the department or an air authority which pursuant to law must be decided as an adjudicative proceeding under chapter 34.05 RCW.

(i) Decisions of the department of natural resources, the department of fish and wildlife, and the department that are reviewable under chapter 76.09 RCW, and the department of natural resources' appeals of county, city, or town objections under RCW 76.09.050(7).

(j) Forest health hazard orders issued by the commissioner of public lands under RCW 76.06.180.

(k) Decisions of the department of fish and wildlife to issue, deny, condition, or modify a hydraulic project approval permit under chapter 77.55 RCW, to issue a stop work order, to issue a notice to comply, to issue a civil penalty, or to issue a notice of intent to disapprove applications.

(l) Decisions of the department of natural resources that are reviewable under RCW 78.44.270.

(m) Decisions of an authorized public entity under RCW 79.100.010 to take temporary possession or custody of a vessel or to contest the amount of reimbursement owed that are reviewable by the hearings board under RCW 79.100.120.

(2) The following hearings shall not be conducted by the hearings board:

(a) Hearings required by law to be conducted by the shorelines hearings board pursuant to chapter 90.58 RCW.

(b) Hearings conducted by the department pursuant to RCW 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and 90.44.180.

(c) Appeals of decisions by the department under RCW 90.03.110 and 90.44.220.

(d) Hearings conducted by the department to adopt, modify, or repeal rules.

(3) Review of rules and regulations adopted by the hearings board shall be subject to review in accordance with the provisions of the administrative procedure act, chapter 34.05 RCW.

NEW SECTION. **Sec.**  The following acts or parts of acts are each repealed:

(1)RCW 77.55.141 (Marine beach front protective bulkheads or rockwalls) and 2010 c 210 s 28, 2005 c 146 s 501, & 1991 c 279 s 1; and

(2)RCW 77.55.291 (Civil penalty) and 2010 c 210 s 31, 2005 c 146 s 701, 2000 c 107 s 19, 1993 sp.s. c 2 s 35, 1988 c 36 s 35, & 1986 c 173 s 6.

**--- END ---**