

HOUSE BILL REPORT

2SHB 1579

As Passed House:

March 7, 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:

Committee Activity:

Rural Development, Agriculture, & Natural Resources: 1/29/19, 2/6/19 [DPS];
Appropriations: 2/20/19, 2/25/19 [DP2S(w/o sub RDAN)].

Floor Activity:

Passed House: 3/7/19, 59-39.

Brief Summary of Second Substitute Bill

- Requires the Department of Fish and Wildlife (Department) to liberalize catch limits for bass, channel catfish, and walleye in anadromous waters of the state.
- Requires a fishing license to fish for saltwater smelt.
- Creates a hydraulic project pre-application which a person may file with the Department to determine whether a project requires a full hydraulic project application.
- Directs the Department to first seek voluntary compliance from a hydraulic project proponent if a violation of the hydraulic code has occurred or is about to occur.
- Authorizes the Department to offer technical assistance to correct violations, issue notices of correction, notices of violation, stop work orders, or notices to comply to hydraulic project proponents in cases of violations of the hydraulic code.

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.

- Authorizes the Department to apply for an administrative inspection warrant to inspect project sites to verify compliance, or if there is probable cause to believe a violation is occurring or has occurred.
- Changes the civil penalty for violations of the hydraulic code from \$100 per day per violation to \$10,000 per violation.
- Authorizes the Department to disapprove applications for up to one year, or until all penalties and notices are paid and complied with, for persons who have failed to comply with either a final stop work order or notice to comply, or failed to pay a civil penalty.
- Removes the requirement that the Department issue a hydraulic project approval (HPA) for single-family residential bulkheads and rock walls.
- Provides that the new hydraulic code enforcement provisions do not apply to projects that have received a forest practices HPA from the Department of Natural Resources.

HOUSE COMMITTEE ON RURAL DEVELOPMENT, AGRICULTURE, & NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Blake, Chair; Shewmake, Vice Chair; Chapman, Fitzgibbon, Lekanoff, Pettigrew, Ramos and Springer.

Minority Report: Do not pass. Signed by 6 members: Representatives Chandler, Ranking Minority Member; Dent, Assistant Ranking Minority Member; Dye, Orcutt, Schmick and Walsh.

Staff: Rebecca Lewis (786-7339).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Rural Development, Agriculture, & Natural Resources. Signed by 19 members: Representatives Ormsby, Chair; Bergquist, 2nd Vice Chair; Robinson, 1st Vice Chair; Cody, Dolan, Fitzgibbon, Hansen, Hudgins, Jinkins, Macri, Pettigrew, Pollet, Ryu, Senn, Springer, Stanford, Sullivan, Tarleton and Tharinger.

Minority Report: Do not pass. Signed by 14 members: Representatives Stokesbary, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Rude, Assistant Ranking Minority Member; Caldier, Chandler, Dye, Hoff, Kraft, Mosbrucker, Schmick, Steele, Sutherland, Volz and Ybarra.

Staff: Dan Jones (786-7118).

Background:

Southern Resident Killer Whale Task Force.

Over the 2018 interim the Governor issued Executive Order 18-02 which, among other things, convened the Southern Resident Killer Whale Task Force (Task Force). Executive Order 18-02 directed the Task Force to identify, prioritize, and support the implementation of a plan to address three threats to southern resident orca whales as identified by the Executive Order: (1) prey availability; (2) contaminants; and (3) disturbance from vessel noise.

Fish Classification and Harvest.

The Department of Fish and Wildlife (Department) is responsible for the management of the state's fish and wildlife resources, and establishes basic rules and regulations governing the time, place, manner, and methods used to harvest or enjoy fish and wildlife. As a part of this responsibility, the Department issues licenses, tags, endorsements, and permits for hunting and fishing in Washington. Categories of fishing licenses include freshwater licenses, saltwater licenses, and combination licenses. There are several endorsements, stamps, permits, or other surcharges required for particular activities in addition to a fishing license. Fee amounts for fishing licenses, stamps, permits, and endorsements are set in statute.

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 commission. Game fish are classified in statute and include several species of fish, including catfish, trout, bass, and walleye.

Hydraulic Project Approval.

Civil Enforcement of the Hydraulic Code.

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. Hydraulic project approvals are issued by the Department to ensure the proper protection of fish life. To receive an HPA, the applicant must provide certain information to the Department. This information includes general plans for the overall project and complete plans for 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. Proceeds of civil penalties are deposited into the General Fund. The Department must provide notice of the imposed penalty in writing to the person incurring the penalty. Any person incurring a penalty may choose to informally appeal the penalty to the Department, 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 imposing the penalty. If an appeal is filed, the penalty is due upon completion of appeal proceedings and issuance of a final order 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.

Single-Family Bulkheads.

The Department must approve, within 45 days and with or without additional conditions, applications for bulkhead and rock wall projects that are designed for single-family residences and that meet certain conditions. For example, projects that fall under this exemption 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 that do not meet the conditions in statute must be processed by the Department in the same manner as other HPA permits.

Summary of Second Substitute Bill:

Southern Resident Killer Whale Task Force.

The bill contains an intent section expressing legislative intent to implement recommendations of the Southern Resident Killer Whale Task Force related to chinook abundance.

Fish Classification and Harvest.

The Department of Fish and Wildlife (Department) must liberalize catch limits for bass, channel catfish, and walleye in anadromous waters of the state. A license is required to fish for saltwater smelt.

Hydraulic Projects Approval.

Hydraulic Project Pre-Applications.

A person may file a hydraulic project pre-application with the Department to determine whether a project requires a complete application for a hydraulic project permit. The Department must provide Tribes and local governments a seven-calendar-day review and comment period for pre-applications. If the Department determines that a complete application is required, the applicant would then be required to submit a complete application as defined in statute and the Department would process the permitting decision.

Civil Enforcement of the Hydraulic Code.

The hydraulic code current enforcement provisions are repealed and replaced with new enforcement provisions.

When the Department identifies a violation of the hydraulic code, the Department must first seek voluntary compliance from the project proponent and may offer technical assistance to correct the violation. Subsequently, if the violation is not corrected, the Department 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 hydraulic project approval

(HPA); is identified as an authorized agent on an HPA application; or has undertaken a hydraulic project without an HPA.

The Department may disapprove an HPA application for persons who have failed to comply with either a final stop work order or notice to comply. The Department may disapprove such applications for up to one year, or until all civil penalties are paid and outstanding notices are complied with, whichever is longer. The Department must provide written notice of its intent to disapprove such 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.

The Department 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:

1. to inspect a site to verify compliance with the hydraulic code; or
2. 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.

Stop Work Orders and Notices to Comply.

The Department may issue a stop work order or a notice to comply when there is either a hydraulic code violation or a deviation from an HPA, and immediate action is needed to avoid more than minor harm to fish habitat. 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 the Department in accordance with rules established by the Department, 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 the Department 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 Department personnel, and the Department 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.

Civil penalties are changed from \$100 per violation per day to up to \$10,000 per violation. Proceeds from the civil penalties are deposited into the General Fund; however, the Department is authorized to 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.

Single-Family Bulkheads.

The requirement that the Department 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.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony (Rural Development, Agriculture, & Natural Resources):

(In support) The current orca population is down to about 74 animals. Lack of prey, specifically Chinook salmon, appears to be the biggest factor in the decline of the orca population. Salmon must be recovered in order to recover the orca. With this bill, there should be a quick turnaround in Chinook abundance in Washington waters. There are currently orca calves on the way, and in order to survive they need food. This bill focuses specifically on recommendations of the Governor's Southern Resident Killer Whale Task Force (Task Force) that relate to increasing Chinook abundance, including removing catch limits for nonnative fish, and requiring license to fish for certain forage fish. The most substantive portions of the bill relate to streamlining the enforcement provisions in the hydraulic code. Under the bill, the Department of Fish and Wildlife (Department) will have some of the same civil enforcement tools other agencies have. Civil compliance enforcement tools serve as important backstops. Historically, the Department has used their criminal authority to enforce provisions of the hydraulic code. This works with egregious violations, but the Department would rather use civil authority to correct violations and intends to use voluntary compliance first. The Department has received funds from the Environmental Protection Agency to monitor compliance which have allowed the Department to monitor and remedy noncompliance. The Department does not take the subject of armoring lightly. Repealing the expedited hydraulic project approval (HPA) brings HPA requirements in line with Shoreline Management Act requirements so that an applicant does not receive an approval from the Department, but receives a disapproval from the local government. The Department should have the same tools as other natural resource agencies for civil enforcement of HPA violations, and should not be required to approve HPAs for projects which destroy fish habitat. The state has been working to improve fish habitat for over a decade. The state does not have enough tools to enforce HPA violations. There have been many violations that have gone unreported. The Governor charged the Task Force to put differences aside to come up with bold actions to help recover the orca population. Members of the Task Force represented a very diverse array of interests and did not always agree, but came to agreements in the end. Orcas are starving, and the downward trend is on about the same trend line as lower hatchery production. This bill is one piece in the puzzle to recover orcas, and creates an opportunity to bring people together and honor Tribal Treaty rights. Tribal Treaty harvest rights are threatened by constant habitat degradation, and have not been

consistently protected by the state. The Tribes have strong connections to orca whales. The whales rely on an ancient ecosystem that is different from the current ecosystem and there needs to be a better balance. It is important that private landowners understand connections to the land. The Suquamish Tribe has been working with neighboring landowners and local governments to coexist on the land. Nonnative fish prey on salmon and forage fish, reducing orca prey, and should not be classified as "game fish." There should be clarification as to how the reclassification of walleye, bass, and catfish will be implemented so that it does not impact other fisheries. Those fish could be classified as "exotic" fish, or bag limits could be increased in anadromous fish habitat. Chinook marine survival is much lower than it was 20 years ago. Salmon rely on herring and other forage fish to survive, and forage fish provide an alternative food source for harbor seals, who also prey on salmon. There has been a dramatic decline in bird species wintering in Washington as a result of declining fish abundance.

(Opposed) While there is agreement with the intent of the bill, there is concern related to the HPA provisions. The business community is working with other stakeholders to find middle ground. Imposing large fines for hydraulic code violations is a concern, and there is opposition to removing the expedited approval for single-family bulkhead projects. The expedited approval is not an exemption from completing an HPA, and was intended to streamline the process and provide people the ability to protect their homes. The Washington Farm Bureau was a part of the Task Force and chose to abstain from the final vote on recommendations because of the broad expansion of HPA authority. The changes to HPA authority would apply statewide, and stop work orders could cause costly delays to farmers who need to complete projects.

(Other) It is hard to imagine a future without orcas. Washington's ports make an important investment in water quality and habitat restoration. There should be more formality with respect to stop work orders. There is a willingness from many to play a constructive role in efforts to improve HPAs and orca survival.

Staff Summary of Public Testimony (Appropriations):

(In support) This is one of three Governor request bills related to orcas. It provides important tools already used by other natural resource agencies and local governments to help ensure compliance with the Hydraulic Project Approval (HPA) program. There are over 70 local elected officials who support this package of bills. Orcas need healthy habitat and a food web. Washington needs a statewide tool to address this holistically. This bill prevents habitat from being destroyed. It is a more efficient tool to engage property owners, stop offenders, and stop work without treating people like criminals. Natural resource agencies need to be adequately funded to ensure the success of this bill. Orcas are at a 35-year low. The loss of habitat has been a key factor in their decline. The state has spent billions of dollars restoring nearshore habitat. This bill ensures that the state's investment is protected.

(Opposed) The Department of Fish and Wildlife's jurisdiction is unclear. This bill provides civil enforcement authority to fine individuals who may not be aware that they should be seeking a permit. There is already a significant shoreline development review in place. This bill applies to all waterways, not just the Puget Sound meaning that any homeowner that wishes to build a bulkhead will now face new development rules. The current HPA program

is not uniformly applied across the state. This makes it difficult for counties to know what the regulations are. Local governments are some of the heaviest users of the program. Issues like stop work orders could have a large fiscal impact on local governments.

Persons Testifying (Rural Development, Agriculture, & Natural Resources): (In support) Representative Fitzgibbon, prime sponsor; JT Austin, Office of the Governor; Jeff Davis, Department of Fish and Wildlife Habitat Division; Leonard Forsman, Suquamish Tribe; Dave Herrera, Northwest Indian Fisheries Commission; Jay Manning, Puget Sound Partnership; Ryley Fee, Puget Sound Anglers and Salmon Recovery Council; Brendan Flynn; Butch Smith, Pacific Salmon Commission; Jacques White, Long Live the Kings; Trina Bayard, Audubon Washington; Amy Carey, Sound Action; Mindy Roberts, Washington Environmental Council; Barbara Lau, Friends of Sammamish Valley; and Rebecca Canright and and Cody Cook, WashPIRG Students, Evergreen State College.

(Opposed) Tom Davis, Washington Farm Bureau; Mike Ennis, Association of Washington Business; Paul Jewell, Washington State Association of Counties; and Jan Himebaugh, Building Industry Association of Washington.

(Other) Chris Bachman, The Lands Council; and Gerry O'Keefe, Washington Public Ports Association.

Persons Testifying (Appropriations): (In support) J. T. Austin, Office of the Governor; Morgan Stinson, Department of Fish and Wildlife; Darcy Nonemacher, Washington Environmental Council; and Bruce Wishart, Sound Action.

(Opposed) Jan Himebaugh, Building Industry Association of Washington; and Paul Jewell, Washington State Association of Counties.

Persons Signed In To Testify But Not Testifying (Rural Development, Agriculture, & Natural Resources): None.

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