

# SENATE BILL REPORT

## SB 5580

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As of February 13, 2019

**Title:** An act relating to implementing recommendations of the southern resident killer whale task force related to increasing habitat and forage fish abundance.

**Brief Description:** Implementing recommendations of the southern resident killer whale task force related to increasing habitat and forage fish abundance.

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

**Brief History:**

**Committee Activity:** Agriculture, Water, Natural Resources & Parks: 2/05/19.

**Brief Summary of Bill**

- Authorizes the Department of Fish and Wildlife (DFW) to offer technical assistance to correct violations, issue notices of correction, notices of violation, stop work orders, or notices to comply for violations of hydraulic project approvals.
- Changes the civil penalty for violations of the hydraulic code from \$100 per day per violation to \$10,000 per violation.
- Removes the requirement that DFW issue permits with or without conditions for single-family residential bulkheads and rock walls.

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**SENATE COMMITTEE ON AGRICULTURE, WATER, NATURAL RESOURCES & PARKS**

**Staff:** Jeff Olsen (786-7428)

**Background:** Southern Resident Killer Whale Task Force. 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 three threats to southern resident orca whales identified in the order: (1) prey availability; (2) contaminants; and (3) disturbance from vessel noise.

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*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.*

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. HPAs are issued by DFW to ensure the proper protection of fish life. To receive an HPA, the applicant must provide certain information to DFW including 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. 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.

Single-Family Bulkheads. DFW must approve, within 45 days and with or without additional conditions, applications for bulkhead and rock wall projects designed for single-family residences and that meet certain conditions. For example, projects falling under this exemption must not be located more than six 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.

Fish Classification and Harvest. 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 or enjoy 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 commission. Game fish are classified in statute and include several species, including catfish, trout, bass, and walleye.

**Summary of Bill:** Civil Enforcement of the Hydraulic Code. Current HPA enforcement provisions are repealed and replaced. When DFW identifies a hydraulic code violation, they 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, 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 an HPA; is identified as an authorized agent on an HPA application; or has undertaken a hydraulic project without an HPA.

Administrative Inspection Warrant. DFW may apply for an administrative inspection warrant in Thurston County Superior Court or in 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.

Stop Work Order. DFW may issue a stop work order when there is a hydraulic code violation, a deviation from an HPA, or if immediate action is needed to avoid more than minor harm to fish habitat. A project proponent or a landowner on which the project is located may informally appeal a stop work order by filing with DFW in accordance with rules established by DFW, or by filing a formal appeal with the Pollution Control Hearings Board.

Notice to Comply. A notice to comply must clearly state the nature, extent, date, and time of the violation, any necessary corrective action, and the right to appeal. A project proponent or a landowner on which the project is located may informally appeal a stop work order by filing with DFW in accordance with established rules, or by filing a formal appeal with the Pollution Control Hearings Board.

Civil Penalties. Civil penalties are changed from \$100 per violation per day to up to \$10,000 per violation. Proceeds from civil penalties are deposited into the general fund; however, DFW is authorized to seek and retain, if awarded, attorney fees and any costs awarded if it must litigate to recover civil penalties. The Pollution Control Hearings Board has jurisdiction to hear appeals based on civil penalties.

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 such 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 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. Violations of the hydraulic code or its rules are declared a public nuisance, and remedies in the hydraulic code are not exclusive and do not limit or abrogate any other civil or criminal penalty, remedy, or right.

Single-family Bulkheads. 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.

Fish Classification and Harvest. Bass, channel catfish, and walleye are removed from classification as game fish in statute. A license is required to fish for smelt.

**Appropriation:** None.

**Fiscal Note:** Available.

**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:** PRO: This bill implements some of the recommendations of the Southern Resident Orca Task Force that improve habitat and forage fish populations. DFW needs better tools to protect critical habitat for salmon and orcas. The orca population decrease is alarming, and the status quo is not acceptable. The HPA program is designed to protect fish and fish habitat. The current enforcement mechanism is a \$100 penalty and a gross misdemeanor. This approach includes voluntary compliance, and has enforcement mechanisms that are similar to other natural resource agencies. There was strong agreement in the Task Force for the HPA program changes contained in the bill.

CON: The modifications to the HPA program do not just apply to Puget Sound, they apply statewide. There is the potential for unintended consequences, for example, when applying these changes to agricultural lands. There needs to be side boards that apply to stop work orders, notices to comply, and fines that go up to \$10,000. There is concern about the jurisdiction of the HPA and that it is not applied consistently. Local jurisdictions already cover residential bulkheads.

**Persons Testifying:** PRO: Senator Christine Rolfes, Prime Sponsor; JT Austin, Governor Inslee's Office; Jeff Davis, DFW; Dave Herrera, Northwest Indian Fisheries Commission; Jay Manning, Puget Sound Partnership, Leadership Council; Bruce Wishart, Sound Action; Mindy Roberts, Washington Environmental Council.

CON: Paul Jewell, Washington State Association of Counties; Mike Ennis, Association of Washington Business; Tom Davis, Washington Farm Bureau; Jan Himebaugh, Building Industry Association of Washington; Cindy Alia, Citizens Alliance for Property.

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