CERTIFICATION OF ENROLLMENT

**ENGROSSED SUBSTITUTE SENATE BILL 5371**

Chapter 452, Laws of 2023

(partial veto)

68th Legislature

2023 Regular Session

VESSELS—SOUTHERN RESIDENT ORCAS

EFFECTIVE DATE: July 23, 2023—Except for section 2, which takes effect January 1, 2025.

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| Passed by the Senate April 17, 2023  Yeas 30 Nays 18  DENNY HECK  **President of the Senate**  Passed by the House April 11, 2023  Yeas 95 Nays 2  LAURIE JINKINS  **Speaker of the House of Representatives** | CERTIFICATE  I, Sarah Bannister, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5371** as passed by the Senate and the House of Representatives on the dates hereon set forth.  SARAH BANNISTER  Secretary |
| Approved May 15, 2023 1:47 PM with the exception of sections 3 and 4, which are vetoed. | May 16, 2023 |
| JAY INSLEE  **Governor of the State of Washington** | **Secretary of State**  **State of Washington** |

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**ENGROSSED SUBSTITUTE SENATE BILL 5371**

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AS AMENDED BY THE HOUSE

Passed Legislature - 2023 Regular Session

**State of Washington 68th Legislature 2023 Regular Session**

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

AN ACT Relating to protecting southern resident orcas from vessels; amending RCW 77.15.740, 77.65.615, and 77.15.815; adding new sections to chapter 77.12 RCW; creating new sections; prescribing penalties; providing an effective date; and providing an expiration date.

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

NEW SECTION. **Sec.**  (1) It is the intent of the legislature to support the recovery of endangered southern resident orcas by reducing underwater noise and disturbance from vessels, which is one of the three main threats to the population's recovery, along with availability of their preferred prey, Chinook salmon, and contaminants in their food and environment. In particular, the legislature intends to protect southern resident orcas from those boaters who intentionally harass, chase, and torment the whales.

(2) The legislature further finds that the state has a compelling interest in protecting the iconic southern resident orca from extinction by acting to implement recovery activities and adaptively managing the southern resident orca recovery effort using best available science. Studies conducted by the national oceanic and atmospheric administration have indicated that southern resident orcas significantly reduced their foraging behavior when moving vessels were observed within 1,000 yards of the whale, with females being more likely than males to reduce their foraging activities when vessels were within an average of 400 yards.

(3) In 2019, the governor's southern resident orca task force produced 49 recommendations to address the three major threats to the population's recovery. While many investments have been made and implementation is ongoing, increased and sustained efforts are needed to advance salmon recovery, address water quality and contaminants in the environment, and reduce underwater noise and physical disturbance of orcas as they attempt to forage, communicate, and rest.

(4) The legislature finds that the threats to orcas are interrelated and they are inexorably linked with salmon recovery. Salmon face a diverse array of threats throughout their life cycle including the threat posed by pinnipeds, such as seals and sea lions, which are protected under federal law, but nevertheless pose a significant threat to salmon and orca recovery through ongoing and excessive predation. Salmon also face fish passage barriers, stormwater runoff, and spills from wastewater treatment plants, among other threats. It is in the best interest of all the people of Washington, including federally recognized tribes and private landowners, to increase the population of salmon and to ensure the survivability of salmon against all threats.

(5) The legislature directed the department of fish and wildlife to produce a report on the effectiveness of regulations designed to address underwater noise and disturbance from commercial whale watching and recreational vessels. The legislature received the first of three mandated reports in November of 2022, and it contained an assessment of the most recent science demonstrating the negative impact of vessels on southern resident orca foraging behavior and foraging success.

(6) While it takes time to see results from efforts to increase prey availability and reduce contaminants, reducing noise and disturbance from vessels can provide immediate support for the southern resident orcas by increasing their likelihood of successful foraging.

**Sec.**  RCW 77.15.740 and 2019 c 291 s 1 are each amended to read as follows:

(1) ((~~Except~~)) Beginning January 1, 2025, except as provided in subsection (2) of this section, it is unlawful for a person to:

(a) Cause a vessel or other object to approach, in any manner, within ((~~three hundred~~)) 1,000 yards of a southern resident orca ((~~whale~~));

(b) Position a vessel to be in the path of a southern resident orca ((~~whale~~)) at any point located within ((~~four hundred~~)) 1,000 yards of the whale. This includes intercepting a southern resident orca ((~~whale~~)) by positioning a vessel so that the prevailing wind or water current carries the vessel into the path of the whale at any point located within ((~~four hundred~~)) 1,000 yards of the whale;

(c) Position a vessel behind a southern resident orca ((~~whale~~)) at any point located within ((~~four hundred~~)) 1,000 yards;

(d) Fail to disengage the transmission of a vessel that is within ((~~three hundred~~)) 400 yards of a southern resident orca ((~~whale~~));

(e) Cause a vessel or other object to exceed a speed greater than seven knots over ground at any point located within ((~~one-half nautical mile (one thousand thirteen yards)~~)) 1,000 yards of a southern resident orca ((~~whale~~)); or

(f) Feed a southern resident orca ((~~whale~~)).

(2) A person is exempt from subsection (1) of this section if that person is:

(a) Operating a federal government vessel in the course of official duties, or operating a state, tribal, or local government vessel when engaged in official duties involving law enforcement, search and rescue, or public safety;

(b) Operating a vessel in conjunction with a vessel traffic service as a vessel traffic service user established under 33 C.F.R. and following a traffic separation scheme, or complying with a vessel traffic service or captain of the port measure ((~~of~~)) or direction, or complying with the rules of the road or taking actions to ensure safety. This also includes ((~~support vessels escorting ships in the traffic lanes~~)) vessel transits departing the lanes for safety reasons or to approach or depart a dock or anchorage area, including support vessels escorting or assisting vessels, such as tug boats;

(c) Engaging in an activity, including scientific research or oil spill response, pursuant to the conditions of a permit or other authorization from the national marine fisheries service ((~~and~~)) or the department;

(d) Lawfully engaging in a treaty Indian or commercial fishery that is actively setting, retrieving, or closely tending fishing gear. Commercial fishing vessels in transit are not exempt from subsection (1) of this section;

(e) Conducting vessel operations necessary to avoid an imminent and serious threat to a person, vessel, or the environment, including when necessary for overall safety of navigation and to comply with state and federal navigation requirements; or

(f) Engaging in rescue or clean-up efforts of a beached southern resident orca ((~~whale~~)) overseen, coordinated, or authorized by a volunteer stranding network.

(3) For the purpose of this section, "vessel" includes aircraft while on the surface of the water, and every description of watercraft on the water that is used or capable of being used as a means of transportation on the water. However, "vessel" does not include inner tubes, air mattresses, sailboards, and small rafts, or flotation devices or toys customarily used by swimmers.

(4)(a) A violation of this section is a natural resource infraction punishable under chapter 7.84 RCW and carries a fine of five hundred dollars, not including statutory assessments added pursuant to RCW 3.62.090.

(b) A person who qualifies for an exemption under subsection (2) of this section may offer that exemption as an affirmative defense, which that person must prove by a preponderance of the evidence.

((~~(5) The enforcement actions required of the department from this section are subject to the availability of amounts appropriated for this specific purpose~~)) (c) The department may choose to offer educational materials in lieu of issuing an infraction, at the officer's discretion.

(d) An officer may not issue an infraction to the operator of a vessel that is within 400 yards of a southern resident orca who has immediately disengaged the transmission of the vessel pursuant to subsection (1)(d) of this section and waits for the whale to leave the vicinity.

(5) The department must post signs at public boat launches and marinas that provide information regarding the vessel setbacks and speed limits required by this section. However, the requirements of this section apply whether or not a sign is present and the absence of a sign is not a defense to any violation of this section.

(6) The department shall conduct outreach and education regarding regulations and best practices for recreational boating in waters inhabited by southern resident orcas, including best practices for avoiding or minimizing encounters closer than 1,000 yards from a southern resident orca consistent with the recommendations of the work group established in section 6 of this act. This may include the advancement and proliferation of tools for notifying boaters of southern resident orca presence, identifying orca ecotypes, and estimating distance on the water.

(7) If the operator of a motorized commercial whale watching vessel enters within 1,000 yards of a group of southern resident orcas, after taking reasonable measures to determine whether the whales are southern resident orcas, and then identifies the whales as southern resident orcas, the operator must:

(a) Immediately safely reposition the vessel to be 1,000 yards or farther from the southern resident orcas; and

(b) Immediately after repositioning the vessel, report the location of the southern resident orca or orcas to the WhaleReport application for the whale report alert system, or to a successor transboundary notification system designated by the department that is adopted by the international shipping community in the Salish Sea.

(8) The operator of a motorized commercial whale watching vessel may voluntarily log the incident, including measures taken to determine whether the whales were southern resident orcas, and submit the log to the department within 24 hours of the incident.

NEW SECTION. **Sec.**  A new section is added to chapter 77.12 RCW to read as follows:

The department must coordinate with the department of licensing and the parks and recreation commission to mail information regarding the required vessel setbacks and speed limits required by RCW 77.15.740, and whale warning flags, upon issuance or renewal of a vessel registration pursuant to chapter 88.02 RCW.

NEW SECTION. **Sec.**  The department of fish and wildlife must develop a transboundary and statewide plan to implement the vessel distance regulations in RCW 77.15.740, with input from British Columbia and international whale organizations. The department of fish and wildlife must submit a report to the legislature, in accordance with RCW 43.01.036, by January 1, 2025, that includes progress on plan development and a plan for implementation.

NEW SECTION. **Sec.**  A new section is added to chapter 77.12 RCW to read as follows:

If the population of southern resident orcas reaches a threshold of 70 individuals or fewer, the department must provide a report to the legislature within one year of the threshold being met, consistent with RCW 43.01.036, that includes a study of how mandatory 1,000-yard setbacks for all vessels has been enforced and identifies gaps and solutions to support any improvements, the use of data science with respect to southern resident orca pod health, and evidence-based plans to address southern resident orca pod health.

NEW SECTION. **Sec.**  (1) The department of fish and wildlife must convene a diverse work group including, but not limited to, representatives from 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 to implement RCW 77.15.740(4). A report summarizing the work of the work group and the department of fish and wildlife's outreach strategies must be included in the 2024 adaptive management report identified in RCW 77.65.620(5). The department of fish and wildlife must conduct intensive outreach and education in fiscal year 2024 and the first half of 2025 to implement the work group outreach recommendations.

(2) In coordination with the work group established in this section, the department of fish and wildlife must conduct education and outreach regarding compliance with the 1,000-yard setback from southern resident orcas established in RCW 77.15.740.

(3) The department of fish and wildlife must assess and report on the effectiveness of the mandatory 1,000-yard setback and recommendations for any further legislative action needed to protect southern resident orcas from the effects of vessels in the 2024 adaptive management report identified in RCW 77.65.620(5).

(4) This section expires June 30, 2025.

**Sec.**  RCW 77.65.615 and 2021 c 284 s 1 are each amended to read as follows:

(1) A commercial whale watching business license is required for commercial whale watching businesses. The annual fee for a commercial whale watching business license is ((~~two hundred dollars~~)) $200 in addition to the annual application fee of ((~~seventy-five dollars~~)) $70.

(2) The annual ((~~fees~~)) application for a commercial whale watching business license as described in subsection (1) of this section must ((~~include fees for~~)) list each motorized or sailing vessel ((~~or vessels as follows:~~

~~(a) One to twenty-four passengers, three hundred twenty-five dollars;~~

~~(b) Twenty-five to fifty passengers, five hundred twenty-five dollars;~~

~~(c) Fifty-one to one hundred passengers, eight hundred twenty-five dollars;~~

~~(d) One hundred one to one hundred fifty passengers, one thousand eight hundred twenty-five dollars; and~~

~~(e) One hundred fifty-one passengers or greater, two thousand dollars~~)) to be covered under the business license.

(3) The holder of a commercial whale watching business license for motorized or sailing vessels required under subsection (2) of this section may ((~~substitute the vessel designated~~)) designate an additional vessel on the license((~~, or designate a vessel if none has previously been designated,~~)) if the license holder((~~:~~

~~(a) Surrenders the previously issued license to the department;~~

~~(b) Submits~~)) submits to the department an application that identifies the ((~~currently designated vessel, the~~)) vessel proposed to be designated((~~,~~)) and any other information required by the department((~~; and~~

~~(c) Pays to the department a fee of thirty-five dollars and an application fee of one hundred five dollars~~)).

(4) ((~~Unless the business license holder owns all vessels identified on the application described in subsection (3)(b) of this section, the department may not change the vessel designation on the license more than once per calendar year.~~

~~(5)~~)) A commercial whale watching operator license is required for commercial whale watching operators. A person may operate a motorized or sailing commercial whale watching vessel designated on a commercial whale watching business license only if:

(a) The person holds a commercial whale watching operator license issued by the director; and

(b) The person is designated as an operator on the underlying commercial whale watching business license.

((~~(6)~~)) (5) No individual may hold more than one commercial whale watching operator license. An individual who holds an operator license may be designated as an operator on an unlimited number of commercial whale watching business licenses.

((~~(7)~~)) (6) The annual application fee for a commercial whale watching operator license is ((~~one hundred dollars in addition to an annual application fee of seventy-five dollars~~)) $25.

(7) A paddle tour business license is required for businesses conducting paddle tours. The annual fee for a paddle tour business license is $200 in addition to the annual application fee of $70.

(8) A person may conduct ((~~commercial whale watching via~~)) guided ((~~kayak~~)) paddle tours only if:

(a) The person holds a ((~~kayak~~)) paddle guide license issued by the director; and

(b) The person is designated as a ((~~kayak~~)) guide on the underlying ((~~commercial whale watching~~)) paddle tour business license.

(9) No individual may hold more than one ((~~kayak~~)) paddle guide license. An individual who holds a ((~~kayak~~)) paddle guide license may be designated on an unlimited number of ((~~commercial whale watching~~)) paddle tour business licenses.

(10) The annual application fee for a ((~~kayak~~)) paddle guide license is $25 ((~~in addition to an annual application fee of $25~~)).

(11) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Commercial whale watching" means the act of taking, or offering to take, passengers aboard a motorized or sailing vessel ((~~or guided kayak tour in order~~)) to view marine mammals in their natural habitat for a fee.

(b) "Commercial whale watching business" means a business that engages in the activity of commercial whale watching.

(c) "Commercial whale watching business license" means a department-issued license to operate a commercial whale watching business.

(d) "Commercial whale watching license" means a commercial whale watching business license((~~,~~)) or a commercial whale watching operator license((~~, or a kayak guide license~~)) as defined in this section.

(e) "Commercial whale watching operator" means a person who operates a motorized or sailing vessel engaged in the business of whale watching.

(f) "Commercial whale watching operator license" means a department-issued license to operate a commercial motorized or sailing vessel on behalf of a commercial whale watching business.

(g) "Commercial whale watching vessel" means any vessel that is being used as a means of transportation for individuals to engage in commercial whale watching.

(h) "((~~Kayak~~)) Paddle guide" means a person who conducts guided ((~~kayak~~)) tours on behalf of a ((~~commercial whale watching~~)) paddle tour business.

(i) "((~~Kayak~~)) Paddle guide license" means a department-issued license to conduct commercial guided ((~~kayak~~)) paddle tours on behalf of a ((~~commercial whale watching~~)) paddle tour business.

(j) "Paddle tour business" means a business that conducts paddle tours.

(k) "Paddle tour" means 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.

(12) The residency and business requirements of RCW 77.65.040 (2) and (3) do not apply to Canadian individuals or corporations applying for and holding Washington commercial whale watching licenses defined in this section.

(13) The license and application fees in this section ((~~are waived for calendar years 2021 and 2022~~)) may be waived for organizations whose relevant commercial whale watching or marine paddle tour activities are solely for bona fide nonprofit educational purposes.

**Sec.**  RCW 77.15.815 and 2019 c 291 s 4 are each amended to read as follows:

(1) This section applies only to persons and activities defined in RCW 77.65.615, including commercial whale watching and paddle tours.

(2) A person is guilty of unlawfully engaging in commercial whale watching in the second degree if the person conducts commercial whale watching activities and:

(a) Does not have and possess all licenses and permits required under this title; or

(b) Violates any department rule regarding ((~~the operation of a~~)) commercial whale watching ((~~vessel near a southern resident orca whale~~)).

((~~(2)~~)) (3) A person is guilty of engaging in commercial whale watching in the first degree if the person commits the act described in subsection ((~~(1)~~)) (2) of this section and the violation occurs within ((~~one year of the date of a prior conviction under this section~~)) five years of any of the following:

(a) The date of a prior conviction under this section;

(b) The date of a finding of guilt or plea of guilty pursuant to an amended information, criminal complaint or citation, or infraction for any violation that was originally charged as a violation of this section, regardless of whether the imposition of the sentence is deferred or the penalty is suspended; or

(c) The date of any disposition of a case arising from an act originally charged as a violation of this section, whereby the offender enters into a disposition that continues or defers the case for dismissal upon the successful completion of specific terms or conditions.

((~~(3)~~)) (4)(a) Unlawful commercial whale watching in the second degree is a misdemeanor.

(b) Unlawful commercial whale watching in the first degree is a gross misdemeanor. ((~~Upon conviction~~)) In addition to the appropriate criminal penalties, the director shall ((~~deny applications submitted by the person for a commercial whale watching license or alternate operator license for two years from the date of conviction~~)) revoke any operator license, business license, or both, and order a suspension of the person's privilege to engage in commercial whale watching for two years.

(5) A person is guilty of unlawfully engaging in a paddle tour in the second degree if the person conducts paddle tour activities and:

(a) Does not have and possess all licenses and permits required under this title; or

(b) Violates any department rule regarding the operation of paddle tours in marine waters.

(6) A person is guilty of unlawfully engaging in a paddle tour in the first degree if the person commits an act described in subsection (5) of this section and the violation occurs within five years of the date of any of the following:

(a) The date of a prior conviction under this section;

(b) The date of a finding of guilt or plea of guilty pursuant to an amended information, criminal complaint or citation, or infraction for any violation that was originally charged as a violation of this section, regardless of whether the imposition of sentence is deferred or the penalty is suspended; or

(c) The date of any disposition of a case arising from an act originally charged as a violation of this section, whereby the offender enters into a disposition that continues or defers the case for dismissal upon the successful completion of specific terms and conditions.

(7)(a) Unlawful engagement in a paddle tour in the second degree is a misdemeanor.

(b) Unlawful engagement in a paddle tour in the first degree is a gross misdemeanor. In addition to appropriate criminal penalties, the director shall revoke any paddle guide license, business license, or both, and order a suspension of the person's privilege to conduct paddle tours in marine waters for two years.

NEW SECTION. **Sec.**  Section 2 of this act takes effect January 1, 2025.

**--- END ---**

Passed by the Senate April 17, 2023.

Passed by the House April 11, 2023.

Approved by the Governor May 15, 2023, with the exception of certain items that were vetoed.

Filed in Office of Secretary of State May 16, 2023.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to Sections 3 and 4, Engrossed Substitute Senate Bill No. 5371 entitled:

"AN ACT Relating to protecting southern resident orcas from vessels."

This important bill protects Southern Resident orcas by addressing vessel impacts on their ability to forage, communicate and rest by expanding the vessel buffer (or approach distance) around Southern Resident orcas to 1,000 yards. It also reduces and simplifies the commercial whale watching licensing fees and improves the supporting education and enforcement efforts around these changes.

Section 3 of the bill requires a mailing to every registered vessel owner in the state regarding the orca protection vessel setbacks, speed limits, and whale warning flags. This mailing would entail a significant cost to the identified agencies, but funding was not provided for this work in the final budget. For this reason, I am vetoing Section 3. However, the updated vessel distance laws do not come in effect until 2025, so it is my hope that the workgroup tasked with developing outreach and education strategies under Section 6 of the bill will be able to provide recommendations and cost estimates to be considered in the 2024 supplemental budget.

Section 4 of the bill requires the Department of Fish and Wildlife to develop a transboundary and statewide plan to implement vessel distance regulations. The department is a coordinating partner in the Be Whale Wise partnership, which coordinates orca recovery efforts, including a transboundary plan for vessel guidelines across the state, federal, and international jurisdictions. Updating the transboundary plan is already prescribed in RCW 77.65.620, and the existing Southern Resident orca conservation and management framework also includes biennial adaptive management reporting requirements. The plan required in Section 4 would largely duplicate this ongoing effort and would not likely produce meaningfully different results. In addition, no funding was provided for the requirements in Section 4. For these reasons, I am vetoing Section 4. However, I am directing the department to coordinate with the Department of Fisheries and Oceans and with Transport Canada, who have jurisdiction in Canadian waters and manage vessel restrictions in Canada, in support of the updated Southern Resident orca recovery efforts.

For these reasons I have vetoed Sections 3 and 4 of Engrossed Substitute Senate Bill No. 5371.

With the exception of Sections 3 and 4, Engrossed Substitute Senate Bill No. 5371 is approved."