

ESSB 5371 - H COMM AMD

By Committee on Agriculture and Natural Resources

NOT ADOPTED 04/11/2023

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** (1) It is the intent of the legislature
4 to support the recovery of endangered southern resident orcas by
5 reducing underwater noise and disturbance from vessels, which is one
6 of the three main threats to the population's recovery, along with
7 availability of their preferred prey, Chinook salmon, and
8 contaminants in their food and environment.

9 (2) The state has a compelling interest in protecting the iconic
10 southern resident orca from extinction by acting to implement
11 recovery activities and adaptively managing the southern resident
12 orca recovery effort using best available science.

13 (3) Governor Inslee's southern resident orca task force produced
14 49 recommendations to address the three major threats to the
15 population's recovery. While many investments have been made and
16 implementation is ongoing, increased and sustained efforts are needed
17 to advance salmon recovery, address water quality and contaminants in
18 the environment, and reduce underwater noise and physical disturbance
19 of orcas as they attempt to forage, communicate, and rest.

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

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

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

14 **Sec. 2.** RCW 77.15.740 and 2019 c 291 s 1 are each amended to
15 read as follows:

16 (1) Except as provided in subsection (~~((2))~~) (3) of this section,
17 it is unlawful for a person to:

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

20 (b) Position a vessel to be in the path of a southern resident
21 orca (~~(whale)~~) at any point located within (~~(four hundred)~~) 400 yards
22 of the whale. This includes intercepting a southern resident orca
23 (~~(whale)~~) by positioning a vessel so that the prevailing wind or
24 water current carries the vessel into the path of the whale at any
25 point located within four hundred yards of the whale;

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

28 (d) Fail to disengage the transmission of a vessel that is within
29 (~~(three hundred)~~) 300 yards of a southern resident orca (~~(whale)~~);

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

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

35 (2) Except as provided in section 3 of this act, a voluntary
36 1,000-yard approach distance around southern resident orcas is
37 established. This is also referred to as a 1,000-yard setback or
38 1,000-yard avoidance distance, as the intent is to discourage boaters

1 from pursuing on-water viewing or approaching of southern resident
2 orcas.

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

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

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

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

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

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

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

33 ~~((3))~~ (4) For the purpose of this section, "vessel" includes
34 aircraft while on the surface of the water, and every description of
35 watercraft on the water that is used or capable of being used as a
36 means of transportation on the water. However, "vessel" does not
37 include inner tubes, air mattresses, sailboards, and small rafts, or
38 flotation devices or toys customarily used by swimmers.

39 ~~((4))~~ (5)(a) A violation of this section is a natural resource
40 infraction punishable under chapter 7.84 RCW and carries a fine of

1 five hundred dollars, not including statutory assessments added
2 pursuant to RCW 3.62.090.

3 (b) A person who qualifies for an exemption under subsection
4 (~~((2))~~) (3) of this section may offer that exemption as an
5 affirmative defense, which that person must prove by a preponderance
6 of the evidence.

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

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

17 (7) The department shall conduct outreach and education regarding
18 regulations and best practices for recreational boating in waters
19 inhabited by southern resident orcas, including best practices for
20 avoiding or minimizing encounters closer than 1,000 yards from a
21 southern resident orca consistent with the recommendations of the
22 work group established in section 5 of this act. This may include the
23 advancement and proliferation of tools for notifying boaters of
24 southern resident orca presence, identifying orca ecotypes, and
25 estimating distance on the water.

26 NEW SECTION. Sec. 3. A new section is added to chapter 77.15
27 RCW to read as follows:

28 (1) It is unlawful for an operator of a motorized commercial
29 whale watching vessel licensed under RCW 77.65.615 to:

30 (a) Approach, in any manner, within 1,000 yards of a southern
31 resident orca;

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

38 (c) Fail to disengage the transmission of a vessel that is within
39 400 yards of a southern resident orca; or

1 (d) Cause a vessel or other object to exceed a speed greater than
2 seven knots over ground at any point located within 1,000 yards of a
3 southern resident orca.

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

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

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

16 NEW SECTION. **Sec. 4.** A new section is added to chapter 77.12
17 RCW to read as follows:

18 If the population of southern resident orcas reaches a threshold
19 of 70 individuals or fewer, the department must provide a report to
20 the legislature within one year of the threshold being met,
21 consistent with RCW 43.01.036, that includes a study of how
22 enforcement of implementing mandatory 1,000-yard setbacks for all
23 vessels would be applied, the use of data science with respect to
24 southern resident orca pod health, and evidence-based plans to
25 address southern resident orca pod health.

26 NEW SECTION. **Sec. 5.** (1) The department of fish and wildlife
27 must convene a diverse work group including, but not limited to,
28 representatives from nongovernmental organizations, recreational
29 boaters, the commercial whale watching industry, commercial fishers,
30 ports and marinas, relevant government entities, tribes, and the
31 southern resident orca research community to inform the development
32 of outreach and education strategies to implement RCW 77.15.740(5). A
33 report summarizing the work of the work group and the department of
34 fish and wildlife's outreach strategies must be included in the 2024
35 adaptive management report identified in RCW 77.65.620(5). The
36 department of fish and wildlife must conduct intensive outreach and
37 education in fiscal year 2024 and the first half of 2025 to implement
38 the work group outreach recommendations.

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

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

10 (4) This section expires June 30, 2025.

11 **Sec. 6.** RCW 77.65.615 and 2021 c 284 s 1 are each amended to
12 read as follows:

13 (1) A commercial whale watching business license is required for
14 commercial whale watching businesses. The annual fee for a commercial
15 whale watching business license is ~~((two hundred dollars))~~ \$200 in
16 addition to the annual application fee of ~~((seventy-five dollars))~~
17 \$70.

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

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

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

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

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

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

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

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

38 ~~(b) Submits))~~ submits to the department an application that
39 identifies the ~~((currently designated vessel, the))~~ vessel proposed

1 to be designated(~~(7)~~) and any other information required by the
2 department(~~(7)~~ and

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

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

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

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

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

17 ~~((6))~~ (5) No individual may hold more than one commercial whale
18 watching operator license. An individual who holds an operator
19 license may be designated as an operator on an unlimited number of
20 commercial whale watching business licenses.

21 ~~((7))~~ (6) The annual application fee for a commercial whale
22 watching operator license is ~~((one hundred dollars in addition to an~~
23 ~~annual application fee of seventy-five dollars))~~ \$25.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33 (k) "Paddle tour" means the act of guiding or offering to take
34 people aboard nonmotorized or human-powered vessels, such as kayaks
35 or paddle boards, on a trip, tour, or guided lesson that involves
36 viewing marine mammals in their natural habitat for a fee.

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

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

6 **Sec. 7.** RCW 77.15.815 and 2019 c 291 s 4 are each amended to
7 read as follows:

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

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

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

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

19 (~~(2)~~) (3) A person is guilty of engaging in commercial whale
20 watching in the first degree if the person commits the act described
21 in subsection (~~(1)~~) (2) of this section and the violation occurs
22 within (~~one year of the date of a prior conviction under this~~
23 ~~section~~) five years of any of the following:

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

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

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

35 (~~(3)~~) (4)(a) Unlawful commercial whale watching in the second
36 degree is a misdemeanor.

37 (b) Unlawful commercial whale watching in the first degree is a
38 gross misdemeanor. (~~Upon conviction~~) In addition to the appropriate
39 criminal penalties, the director shall (~~deny applications submitted~~

1 ~~by the person for a commercial whale watching license or alternate~~
2 ~~operator license for two years from the date of conviction)) revoke~~
3 ~~any operator license, business license, or both, and order a~~
4 ~~suspension of the person's privilege to engage in commercial whale~~
5 ~~watching for two years.~~

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

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

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

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

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

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

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

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

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

34 Correct the title.

EFFECT: (1) Adds an intent section describing impacts to southern resident orca populations and recovery.

(2) Restores the distances that vessels, except for commercial whale watching vessels, must maintain from southern resident orcas to 300 yards to the side of an orca, and 400 yards in front and behind an orca.

(3) Restores the natural resource infraction fine for approaching within the setback distances to \$500 and maintains the provision that educational materials may be offered instead of an infraction at the officer's discretion. Adds a voluntary 1,000-yard setback distance for all vessels except commercial whale watching vessels.

(4) Requires commercial whale watching vessels to maintain a distance of 1,000 yards in any direction from southern resident orcas.

(5) Requires commercial whale watching vessels that enter within 1,000 yards of a southern resident orca to safely reposition the vessel so it is outside that distance and report the location of the orca.

(6) Requires the department of fish and wildlife (WDFW) to conduct education and outreach regarding the voluntary 1,000-yard setbacks in coordination with the work group that is created in the underlying bill.

(7) Requires the WDFW, if the southern resident orca 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 1,000-yard setbacks for all vessels would be enforced, the use of data science with respect to southern resident orca pod health, and evidence-based plans to address pod health.

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