

ESSB 5371 - H COMM AMD

By Committee on Appropriations

ADOPTED AS AMENDED 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. In particular, the
9 legislature intends to protect southern resident orcas from those
10 boaters who intentionally harass, chase, and torment the whales.

11 (2) The legislature further finds that the state has a compelling
12 interest in protecting the iconic southern resident orca from
13 extinction by acting to implement recovery activities and adaptively
14 managing the southern resident orca recovery effort using best
15 available science. Studies conducted by the national oceanic and
16 atmospheric administration have indicated that southern resident
17 orcas significantly reduced their foraging behavior when moving
18 vessels were observed within 1,000 yards, and even up to 1,640 yards,
19 of the whale.

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

27 (4) The legislature finds that the threats to orcas are
28 interrelated and they are inexorably linked with salmon recovery.
29 Salmon face a diverse array of threats throughout their life cycle
30 including the threat posed by pinnipeds, such as seals and sea lions,
31 which are protected under federal law, but nevertheless pose a
32 significant threat to salmon and orca recovery through ongoing and

1 excessive predation. Salmon also face fish passage barriers,
2 stormwater runoff, and spills from wastewater treatment plants, among
3 other threats. It is in the best interest of all the people of
4 Washington, including federally recognized tribes and private
5 landowners, to increase the population of salmon and to ensure the
6 survivability of salmon against all threats.

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

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

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

22 (1) Except as provided in subsection (2) of this section, it is
23 unlawful for a person to:

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

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

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

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

37 (e) Cause a vessel or other object to exceed a speed greater than
38 seven knots over ground at any point located within (~~((one-half~~

1 ~~nautical mile (one thousand thirteen yards))~~ 1,000 yards of a
2 southern resident orca (~~whale~~); or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38 (b) Position a vessel to be in the path of a southern resident
39 orca at any point located within 1,000 yards of the whale. This

1 includes intercepting a southern resident orca by positioning a
2 vessel so that the prevailing wind or water current carries the
3 vessel into the path of the whale at any point located within 1,000
4 yards of the whale;

5 (c) Fail to disengage the transmission of a vessel that is within
6 400 yards of a southern resident orca; or

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

10 (2) If an operator of a motorized commercial whale watching
11 vessel enters within 1,000 yards of a group of southern resident
12 orcas, after taking reasonable measures to determine whether the
13 whales were southern resident orcas, and then identifies the whales
14 as southern resident orcas, the operator must:

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

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

23 (c) Accurately log the incident, including measures taken to
24 determine whether the whales were southern resident orcas, and submit
25 the log to the department within 24 hours of the incident.

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

28 If the population of southern resident orcas reaches a threshold
29 of 70 individuals or fewer, the department must provide a report to
30 the legislature within one year of the threshold being met,
31 consistent with RCW 43.01.036, that includes a study of how mandatory
32 1,000-yard setbacks for all vessels has been enforced and identifies
33 gaps and solutions to support any improvements, the use of data
34 science with respect to southern resident orca pod health, and
35 evidence-based plans to address southern resident orca pod health.

36 NEW SECTION. **Sec. 5.** (1) The department of fish and wildlife
37 must convene a diverse work group including, but not limited to,
38 representatives from nongovernmental organizations, recreational

1 boaters, the commercial whale watching industry, commercial fishers,
2 ports and marinas, relevant government entities, tribes, and the
3 southern resident orca research community to inform the development
4 of outreach and education strategies to implement RCW 77.15.740(4). A
5 report summarizing the work of the work group and the department of
6 fish and wildlife's outreach strategies must be included in the 2024
7 adaptive management report identified in RCW 77.65.620(5). The
8 department of fish and wildlife must conduct intensive outreach and
9 education in fiscal year 2024 and the first half of 2025 to implement
10 the work group outreach recommendations.

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

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

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

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

23 (1) A commercial whale watching business license is required for
24 commercial whale watching businesses. The annual fee for a commercial
25 whale watching business license is ~~((two hundred dollars))~~ \$200 in
26 addition to the annual application fee of ~~((seventy-five dollars))~~
27 \$70.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 ~~((+6))~~ (5) No individual may hold more than one commercial whale
28 watching operator license. An individual who holds an operator
29 license may be designated as an operator on an unlimited number of
30 commercial whale watching business licenses.

31 ~~((+7))~~ (6) The annual application fee for a commercial whale
32 watching operator license is ~~((one hundred dollars in addition to an~~
33 ~~annual application fee of seventy-five dollars))~~ \$25.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29 (~~(2)~~) (3) A person is guilty of engaging in commercial whale
30 watching in the first degree if the person commits the act described
31 in subsection (~~(1)~~) (2) of this section and the violation occurs
32 within (~~one year of the date of a prior conviction under this~~
33 ~~section~~) five years of any of the following:

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

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

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

6 ~~((3))~~ (4)(a) Unlawful commercial whale watching in the second
7 degree is a misdemeanor.

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

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

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

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

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

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

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

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

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

39 (b) Unlawful engagement in a paddle tour in the first degree is a
40 gross misdemeanor. In addition to appropriate criminal penalties, the

1 director shall revoke any paddle guide license, business license, or
2 both, and order a suspension of the person's privilege to conduct
3 paddle tours in marine waters for two years."

4 Correct the title.

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

(2) 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.

(3) Specifies that an officer may not issue an infraction to the operator of a vessel that immediately disengages the transmission of the vessel within 400 yards of a southern resident orca and waits for the whale to move away.

(4) 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, report the location of the orca, and submit an accurate log of the incident to the department of fish and wildlife (WDFW).

(5) Requires the WDFW to conduct education and outreach regarding compliance with the mandatory 1,000-yard setbacks in coordination with the work group that is created in the underlying bill.

(6) 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 are being enforced, including an analysis of gaps and solutions to support improvements, 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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