

HOUSE BILL REPORT

ESSB 5371

As Reported by House Committee On:

Agriculture and Natural Resources
Appropriations

Title: An act relating to protecting southern resident orcas from vessels.

Brief Description: Protecting southern resident orcas from vessels.

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

Brief History:

Committee Activity:

Agriculture and Natural Resources: 3/15/23, 3/29/23 [DPA];
Appropriations: 4/3/23, 4/4/23 [DPA(APP w/o AGNR)].

**Brief Summary of Engrossed Substitute Bill
(As Amended By Committee)**

- Establishes a 1,000-yard vessel setback distance from southern resident orcas for most kinds of vessels and provides additional exemptions from the distance restrictions.
- Modifies the commercial whale watching business license fees by removing fee structures for each vessel based on the number of passengers and eliminating certain other fees.
- Creates paddle tour business and paddle guide licenses with associated fees in place of kayak guide licenses and distinct from commercial whale watching business licenses.
- Modifies enforcement provisions regarding Unlawful Commercial Whale Watching in the first degree.
- Creates enforcement provisions regarding conducting paddle tours.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON AGRICULTURE AND NATURAL RESOURCES

Majority Report: Do pass as amended. Signed by 9 members: Representatives Chapman, Chair; Morgan, Vice Chair; Reeves, Vice Chair; Dent, Ranking Minority Member; Kloba, Kretz, Lekanoff, Schmick and Springer.

Minority Report: Do not pass. Signed by 2 members: Representatives Chandler, Assistant Ranking Minority Member; Orcutt.

Staff: Rebecca Lewis (786-7339).

Background:

Southern Resident Orca.

The federal government listed the southern resident orca as endangered under the Endangered Species Act in November 2005. In January 2008 the federal government released a recovery plan for these orcas. The recovery plan identifies vessel effects as having potential detrimental impacts on the southern resident orca population.

In 2019 the Department of Fish and Wildlife (WDFW) was directed to implement a commercial whale watching license for Puget Sound and related inland marine waters of Washington to protect southern resident orcas. The WDFW was also directed to convene an independent science panel to complete an Adaptive Management Report to review the most current and best available science regarding impacts to orcas by small vessels and commercial whale watching vessels. The WDFW must use the review in both the rulemaking process and adaptive management of the commercial whale watching program. The first report was submitted on November 30, 2022, and future reports are due in 2024 and 2026.

Vessel Approach Distances.

It is unlawful to approach a southern resident orca within 300 yards, position a vessel in the path of a southern resident within 400 yards, or fail to disengage the transmission of a vessel when it is within 300 yards of a southern resident orca. There are some exemptions to these distance restrictions, which include:

- the use of government and tribal vessels in the course of official duties such as law enforcement, search and rescue, and public safety;
- approaching a southern resident orca whale in accordance with certain federal vessel traffic laws;
- conducting scientific research under a permit from the National Marine Fisheries Service and the WDFW; and
- lawfully engaging in a treaty Indian or commercial fishery that is actively setting or tending to gear.

Violating the vessel distance and speed regulations is a natural resources infraction and

carries a fine of \$500.

Whale Watching Licenses.

Motorized and Sailing Vessels.

Commercial whale watching businesses must be licensed by the WDFW. The annual fee for a commercial whale watching business license is \$200, with an application fee of \$75. In addition, a commercial whale watching business must pay a fee for each of their motorized or sailing vessels. The per-vessel fees range from \$325 to \$2,000 depending on the passenger capacity of the vessel. For example, the per-vessel fee for each motorized or sailing vessel with a capacity of one to 24 passengers is \$325, and the fee for each motorized or sailing vessel with a capacity of 151 passengers or more is \$2,000, with several price points for vessels with passenger capacity in between those two ranges.

A commercial whale watching business license holder may substitute the vessel designated on the business license by surrendering the previously issued vessel license to the WDFW, submitting an application to the WDFW that identifies both the currently designated vessel and the vessel proposed to be designated, and paying a fee of \$35 with an application fee of \$105. A vessel designation may not be changed more than once per calendar year.

Operators of commercial whale watching vessels must also obtain a license from the WDFW, which costs \$100 with an annual application fee of \$75. Operators may only hold one license but may be designated as an operator on an unlimited number of vessels.

Kayak Guides.

A person may conduct guided kayak tours if they both obtain a kayak guide license and are designated as a kayak guide on a commercial whale watching business license. Kayak guide licenses cost \$25 with a \$25 annual application fee. No individual may hold more than one kayak guide license, and kayak guide license holders may be named on an unlimited number of commercial whale watching business licenses.

Commercial Whale Watching Enforcement.

A person is guilty of Unlawful Commercial Whale Watching in the second degree if the person does not have and possess all required licenses or violates any department rule regarding operating a vessel near a southern resident orca. Unlawful Commercial Whale Watching in the second degree is a misdemeanor.

A person is guilty of Unlawful Commercial Whale Watching in the first degree if the person does not have and possess all required licenses or violates any department rule regarding operating a vessel near a southern resident orca, and the violation occurs within one year of a prior conviction. Unlawful Commercial Whale Watching in the first degree is a gross misdemeanor. In addition to criminal penalties, the Director of the WDFW must deny applications for any whale watching licenses for two years from the date of conviction.

Summary of Amended Bill:

Vessel Approach Distances.

Distance Limit Modifications, Exemptions, and Enforcement.

A voluntary 1,000-yard setback distance from southern resident orcas for most vessels except for commercial whale watching vessels is established. Commercial whale watching vessels must maintain 1,000 yards from southern resident orcas. Commercial whale watching vessels that enter within 1,000 yards must immediately reposition the vessel and report the location of the orca to the WhaleReport application for the whale report alert system or a successor transboundary notification system designated by the Department of Fish and Wildlife (WDFW) that is adopted by the international shipping community in the Salish Sea.

The activities that are currently exempt from approach restrictions remain exempted and new exemptions are added for oil spill response vessels, vessels operating as vessel traffic service users, or vessels operating under a captain of the port measure. Language regarding the scientific permit exemption is modified so a permit issued by either the National Marine Fisheries Service or the WDFW is required.

An officer may use their discretion to offer educational materials instead of issuing an infraction. A provision making enforcement of the vessel approach distance requirements subject to appropriation is removed.

If the southern resident orca population drops to 70 or fewer animals, the WDFW must submit a report to the Legislature within a year that includes a study of how a mandatory 1,000-yard setback would be enforced, the use of data science with respect to southern resident pod health, and evidence-based plans to address southern resident pod health.

Outreach and Education.

The WDFW must conduct outreach and education regarding the southern resident orca approach distance regulations and best practices for recreational boating in waters inhabited by southern resident orcas. Outreach and education includes best practices for avoiding or minimizing encounters within 1,000 yards, and advancing and proliferating tools to notify boaters of southern resident orca presence, identifying orca ecotypes, and estimating distance on the water.

The WDFW must convene a diverse workgroup that includes representatives of 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. The workgroup must include a report summarizing its work and the WDFW's outreach strategies in the Adaptive Management Report that is due in 2024. The WDFW must conduct intensive outreach and education in fiscal year 2024 and the first half of 2025 to implement the outreach recommendations from the workgroup. The WDFW

must also coordinate with the workgroup to encourage voluntary adoption of the 1,000-yard setbacks from southern resident orcas, and must assess and report on the effectiveness of the voluntary setbacks with recommendations for further legislative action needed to protect southern resident orcas from vessels. The WDFW must include this report in the 2024 Adaptive Management Report.

The WDFW must post signs at public boat launches and marinas that provide information on the vessel setbacks and speed limits. However, the limits apply whether or not a sign is present, and absence of a sign is not a defense to any violation of the limits.

Whale Watching Licenses.

Motorized and Sailing Vessels.

The application fee for commercial whale watching business licenses is reduced from \$75 to \$70, and the per-vessel fees based on vessel capacity are removed. The annual application for a commercial whale watching business license must list each vessel to be covered under the license. A commercial whale watching business license holder may designate an additional vessel on the license by submitting an application to the WDFW that identifies the vessel proposed to be designated and any other information required by the WDFW. There is no fee to designate an additional vessel.

The application fee for a commercial whale watching operator license is reduced from \$75 to \$25, and the \$100 license fee is eliminated.

Paddle Tours.

In order to conduct paddle tours in state waters inhabited by marine mammals, a business must obtain a paddle tour business license. "Paddle tour" is defined as the act of guiding or offering to take people aboard nonmotorized or human-powered vessels, including kayaks, on a trip, tour, or guided lesson in waters inhabited by marine mammals for a fee. The fee for a paddle tour business license is \$200 with a \$70 application fee.

A person may conduct guided paddle tours in waters inhabited by marine mammals only if the person both holds a paddle guide license and is designated as a guide on an underlying paddle tour business license. The annual application fee for paddle guide licenses is \$25. An individual may not hold more than one paddle guide license, but may be designated as a paddle guide on an unlimited number of paddle tour business licenses.

License Fees, Generally.

License and application fees for commercial whale watching and paddle tours may be waived for organizations whose activities are only for bona fide nonprofit educational purposes.

Commercial Whale Watching and Paddle Tour Enforcement.

A person is guilty of Unlawfully Engaging in a Paddle Tour in the second degree if they do not possess required licenses and permits or if they violate WDFW rules regarding

commercial whale watching.

A person is guilty of Unlawfully Engaging in Commercial Whale Watching or Unlawfully Engaging in a Paddle Tour in the first degree if they do not possess required licenses and permits, or violate WDFW rules regarding commercial whale watching, and the violation occurs within five years of the date of a prior conviction, a finding of guilt, or under certain circumstances the disposition of a case originally charged as a violation. In addition to penalties for Unlawful Commercial Whale Watching or Unlawfully Engaging in a Paddle Tour in the first degree, the WDFW shall revoke a license and order a two-year suspension.

Amended Bill Compared to Engrossed Substitute Bill:

As compared to the engrossed substitute bill, the amended bill adds an intent section describing impacts to southern resident orca populations and recovery and makes the following changes to the vessel setback distance requirements:

- 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;
- adds a voluntary 1,000-yard setback distance for all vessels except commercial whale watching vessels, and requires commercial whale watching vessels to maintain a distance of 1,000 yards in any direction from southern resident orcas;
- 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;
- 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;
- 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; and
- 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.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 29, 2023.

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

Staff Summary of Public Testimony:

(In support) The genesis for this bill was legislation passed in 2019 that directed the Department of Fish and Wildlife (WDFW) to study the impacts of vessels on southern resident orcas and create a commercial whale watching licensing program, and is an outcome of the public process that began in the Governor's Southern Resident Killer Whale Task Force (SRKW Task Force). The southern resident orca population is one of the most endangered in the world. The three key threats identified by the SRKW Task Force are toxics, lack of food, and vessel noise. Many people recall when the southern resident orca Tahlequah carried her dead calf for 17 days in mourning. Lots of work has been done to reduce microplastics, enhance the health of kelp beds, and take other actions to help recover these orcas and the salmon that they eat, but it has not been enough. Vessel noise can have a cascading impact on orcas including behavior change. Studies show that vessel noise can impact whales up to 1,600 yards. Whales rely on echolocation to find their food, and many whales hunt on behalf of their young. Decreases in foraging have caused changes in the health and physical condition of many of the southern resident orcas. The desire to see these whales has pushed them to the brink of extinction. The prime sponsor has been working closely with stakeholders, and the bill is not meant to be punitive. The 1,000-yard distance sends a message to leave whales alone. Commercial whale watching vessels are often the first line of defense and recreational boaters will be able to use commercial whale watching vessels as a reference to adhere to the distance restriction. There is a whale wise mobile application under development to help locate and avoid whales. In 1995 there were 98 southern residents and currently there are 73. The population is expected to continue to decline in the next 10 to 12 years. The WDFW has done a great job reviewing the science and meeting with the stakeholders to develop this bill. It is important to think of future constituents when making these decisions. This bill will help future generations turn the southern resident orca population around. The WDFW convened focus groups with various stakeholders to develop the bill, as well as a survey that had a high level of participation. The Senate refined the elements of the bill that dealt with enforcement and education. Of more than 300 enforcement contacts with boaters, WDFW enforcement issued 33 warnings and only 12 citations for the most egregious violations. Enforcement officers currently focus on education over issuing citations and that will continue. The bill will simplify and improve the enforceability of the regulations by making the standards the same for all vessels. There are increased protections in the bill for vessels that deal with the unpredictable movement of southern residents. Southern resident orcas are not around on a daily basis and are in different places in the Salish Sea during different seasons.

(Opposed) Everyone wants the southern resident orcas to be able to forage, but a successful strategy should mitigate impacts. The 1,000-yard distance is not justified by reliable science and is unenforceable and impractical in the field. There are loopholes that allow vessels to be within 400 yards if their transmission is disengaged.

(Other) The intent of this legislation is good and the bill has improved since it was introduced. However there are concerns about the 1,000-yard distance applying to southern

residents only. Transient orca whales are difficult to identify to anyone but those trained to notice the differences. The 1,000-yard distance would effectively close off a 2,000-yard area to boaters. In order to accurately use the mobile application to identify where southern residents are, it would need to be updated by the minute. There is no funding to maintain the application and the developer only works on it in their spare time. Before the bill is passed, there should be more stakeholder work.

Persons Testifying: (In support) Senator Liz Lovelett, prime sponsor; Joseph Gaydos, SeaDoc Society; Timothy Ragen; Donna Sandstrom, The Whale Trail; Tara Galuska, Governor's Salmon Recovery Office; Julie Watson and Alan Myers, Department of Fish and Wildlife; and Nora Nickum, Seattle Aquarium.

(Opposed) Monika Shields, Orca Behavior Institute.

(Other) Bob Wise, Recreational Boating Association of Washington.

Persons Signed In To Testify But Not Testifying: Frances Robertson, San Juan County; Todd Woodard, Samish Indian Nation; Todd Hass, Puget Sound Partnership; Brendan Flynn; and Erin Gless, Pacific Whale Watch Association.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Appropriations and without amendment by Committee on Agriculture and Natural Resources. Signed by 20 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Berg, Chopp, Davis, Dye, Fitzgibbon, Hansen, Harris, Lekanoff, Pollet, Riccelli, Rude, Ryu, Senn, Simmons, Stonier and Tharinger.

Minority Report: Do not pass. Signed by 8 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; Chandler, Couture, Sandlin, Schmick and Steele.

Minority Report: Without recommendation. Signed by 1 member: Representative Connors.

Staff: Dan Jones (786-7118).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Agriculture and Natural Resources:

The Appropriations Committee recommendation makes the following changes:

- the voluntary 1,000-yard setbacks from southern resident orcas are made mandatory for all vessels except for those specifically exempted;
- an officer may not issue an infraction to the operator of a vessel who immediately disengages the transmission of the vessel within 400 yards of a southern resident orca

- and waits for the whale to move away;
- an operator of a commercial whale watching vessel that enters within 1,000 yards of a southern resident orca must submit an accurate log of the incident to the Department of Fish and Wildlife (WDFW) within 24 hours, in addition to immediately repositioning the vessel and reporting the location of the southern resident orca; and
 - the WDFW must include a study of how the 1,000-yard setbacks are being enforced in the report that the WDFW is required to submit within a year of the southern resident orca population reaching 70 animals or fewer.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) None.

(Opposed) None.

(Other) There is support for the intent of the bill, but there are still concerns with the ability of recreational boaters to comply with the standards, since the setbacks would apply only to southern resident orcas. It is difficult to judge how far 1,000 yards is, and to most people it is impossible to distinguish a southern resident orca from a transient orca. The Recreational Boating Association of Washington appreciates the voluntary, bipartisan approach that came from the policy committee and prefers that approach due to the lack of stakeholder process and resources for recreational boaters in putting together the original bill.

Persons Testifying: Bob Wise, President, Recreational Boating Association of Washington.

Persons Signed In To Testify But Not Testifying: None.