

Commercial Whale Watching

220-460

TABLE OF CONTENTS

Summary Sheet.....	1
Option A WAC 220-460 .....	3
Recommended Adjustments.....	24
Summary of Written Comment .....	29
Option B WAC 220-460.....	39
Recommended Adjustments.....	61
CR-102 .....	66



## Fish and Wildlife Commission Presentation Summary Sheet

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**Meeting date:**

12/4/2020

**Agenda item:**

Commercial Whale Watching Briefing, Public Hearing

**Presenter(s):**

Julie Watson, PhD- Killer Whale Policy Lead

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**Background summary:**

In spring 2019, the Washington Legislature passed Senate Bill 5577: *a bill concerning the protection of Southern Resident Orca Whales from vessels*, which developed a license for commercial whale watching and directed the Washington Department of Fish and Wildlife (WDFW) to administer the licensing program and develop rules for commercial viewing of Southern Resident Killer Whales (SRKW). (See RCW 77.65.615 and RCW 77.65.620)

The purpose of creating rules for commercial whale watching of SRKW is to reduce the impacts of vessel noise and disturbance on the whales' ability to forage, rest, and socialize while enabling sustainable whale watching. Draft rule language was developed in a year-long process and is being shared now for public comment and consideration by the Fish and Wildlife Commission. There are two options put forward for public comment.

- Option A includes a three-month July-September season for motorized commercial whale watching of SRKW with two, two-hour periods per day where viewing SRKW is allowed at closer than one-half nautical mile (limit of 3 motorized commercial whale watching vessels per group of SRKW). In the final stages of drafting the proposed rule, text that would limit viewing to Friday-Monday was inadvertently included in Option A. WDFW is seeking comments on Option A as filed. The public is also welcome to comment on the possibility of daily viewing during those months.
- Option B adds a shoulder season of two months on either side (May/June and October/November) of the main season. The shoulder season is Saturday-Sunday viewing only (limit of 1 motorized commercial whale watching vessel per group of SRKW) and the main summer season viewing (July-September) is Friday-Monday (limit of 3 motorized commercial whale watching vessels per group of SRKW). For days that allow viewing of SRKW, there are two, two-hour periods.
- Note: The seasons described in Options A and B only apply to the viewing of SRKW by motorized commercial whale watching vessels and do not restrict the viewing of other whales or marine mammals.
- Both options propose formalizing the 'no-go' zone on the west side of San Juan Island (currently voluntary) for motorized commercial whale watching vessels (100-yard corridor along the shore for kayaks). The no-go zone is included in both alternatives. It would apply year-round regardless of SRKW presence.

- License application processes, reporting and training requirements, kayak-focused measures, and AIS requirements are present in both options.

This presentation will brief Commissioners on the development of and reasoning supporting the two proposed rule options, and it will include a summary of public comments received between October 21 and November 28. The presentation will be followed by a formal public hearing, which is part of the public comment process. The briefing and hearing on the proposed rules precede the close of the comment period on December 5. WDFW expects adoption of final rules by January 2021.

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**Staff recommendation:**

N/A- This is a briefing only.

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**Policy issue(s) and expected outcome:**

This is the formal hearing on the proposed rules. The Commission will deliberate and potentially adopt rules on the December 18, 2020 conference call. This would allow us to meet our mandate in RCW 77.65.620 to adopt rules by January 1, 2021.

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**Fiscal impacts of agency implementation:**

N/A

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**Public involvement process used and what you learned:**

This process has benefited from significant public engagement via the SEPA scoping and draft Environmental Impact Statement public comment processes, science and stakeholder workshops hosted by the Washington State Academy of Sciences, and public comment at advisory committee meetings. Additional public engagement is ongoing via the hearing December 4 and the rulemaking public comment period, which ends December 5.

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**Action requested and/or proposed next steps:**

A preferred alternative will be included in the SEPA Environmental Impact Statement (EIS) based on the feedback received from the Commission at the meeting. The Commission may request revisions/modifications that staff can prepare to support the rule adoption process, which is expected to take place on December 18. The final public comment summary and final EIS will be provided to the Commission prior to the December 18 conference call.

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**Draft motion language:**

N/A

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**Post decision communications plan:**

The Commercial Whale Watching Licensing Program webpage will be updated, a press release will be issued, and the Department will reach out to known watch watching companies and ocean fishing charters to let them know of new commercial whale watching rules. Work will continue into the spring to develop and roll out the training for operators, which will feature an introduction to the new rules.

*Form revised 8-4-20*

OPTION A

Commercial whale watching license and restrictions on commercial  
viewing of southern resident killer whales

**Chapter 220-460 WAC  
COMMERCIAL WHALE WATCHING**

NEW SECTION

**WAC 220-460-010 Definitions.** For the purposes of this chapter,  
the following definitions apply:

**(1) Commercial whale watching.**

"Commercial whale watching" shall be defined as the act of  
taking, or offering to take, passengers aboard a vessel in order to  
view marine mammals in their natural habitat for a fee.

**(2) Commercial whale watching designated primary operator.**

"Commercial whale watching designated primary operator" shall be  
defined as the person identified on the application to operate the  
commercial whale watching vessel on behalf of the whale watching  
business.

**(3) Commercial whale watching alternate operator.**

"Alternate operators" shall be defined as individuals besides the designated primary operator who are designated to operate the vessel on behalf of the whale watching business.

**(4) Commercial whale watching vessel operators.**

"Commercial whale watching vessel operators" shall be defined to include operators of commercial vessels and kayak rentals that are engaged in the business of commercial whale watching. The term "operators" shall be used to identify primary operators and alternate operators who conduct commercial whale watching tours, including operators who direct the movement or positioning of any nonmotorized commercial whale watching vessels involved in a tour.

**(5) Commercial whale watching vessel.**

"Commercial whale watching vessel" shall be defined as any vessel that is being used as a means of transportation for individuals to engage in commercial whale watching.

"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.

"Motorized commercial whale watching vessel" shall be defined as any vessel with an engine being used as a means of transportation for individuals to engage in commercial whale watching, regardless of

whether the engine is in use. This definition includes sailboats with inboard or outboard motors.

"Nonmotorized commercial whale watching vessel" shall be defined as any vessel without an engine being used as a means of transportation for individuals to engage in commercial whale watching. This definition includes human-powered watercraft such as kayaks and paddleboards.

**(6) Group of southern resident killer whales.**

"Group of southern resident killer whales" is defined as a single southern resident killer whale or an assemblage of southern resident killer whales wherein each member is within one nautical mile of at least one other southern resident killer whale. Any individual(s) farther than one nautical mile constitutes a separate group.

**(7) Vicinity.**

"Vicinity" is defined as one-half nautical mile from all southern resident killer whales in the group. References to "vicinity" in this chapter do not permit operators to approach a southern resident killer whale closer than the statutorily defined distances in RCW 77.15.740.

**(8) Vicinity instance.** Each time any commercial whale watching vessel operating under a license enters within one-half nautical mile

of a southern resident killer whale will count as one vicinity instance associated with that license.

(9) **Automatic identification system (AIS)**. AIS refers to a maritime navigation safety communications system standardized by the International Telecommunication Union, adopted by the International Maritime Organization, that:

(a) Provides vessel information, including the vessel's identity, type, position, course, speed, navigational status and other safety-related information automatically to appropriately equipped shore stations, other ships, and aircraft;

(b) Receives automatically such information from similarly fitted ships, monitors and tracks ships; and

(c) Exchanges data with shore-based facilities.

(10) Inland waters of Washington.

"Inland waters of Washington" means Puget Sound and related inland marine waters, including all salt waters of the state of Washington inside the international boundary line between Washington and British Columbia, and lying east of the junction of the Pacific Ocean and the Strait of Juan de Fuca, and the rivers and streams draining to Puget Sound as mapped by water resource inventory areas 1 through 19 in WAC 173-500-040 as it exists on July 1, 2007.

[ ]

NEW SECTION

**WAC 220-460-020 Commercial whale watching licenses—Application process and deadline—Exception.** (1) ~~(Note: This provision will go into effect February 1, 2021.)~~ A commercial whale watching license is required for commercial whale watching motorized vessel, sailboat, and kayak operators.

(2) Applicants must be at least sixteen years of age and possess a driver's license or other government-issued identification number and jurisdiction of issuance.

(3) Applicants must be authorized to conduct business within the state of Washington.

(4) The commercial whale watching license application must include the following information regarding the whale watching business:

(a) The applicant must identify the whale watching business: Business name, type of business (i.e., sole proprietor, partnership, corporation), all associated business owner(s), full name(s), physical



address, mailing address, email address, telephone number, and Social Security numbers of all business owners.

(b) The applicant must identify and confirm the whale watching business is registered to conduct business within the state by providing the unified business identifier (UBI) number.

(5) The commercial whale watching license applicant must also designate an operator for each motorized or sailing vessel or kayak engaging in whale watching activity. The applicant must identify the operator's name of the associated business, full name, date of birth, Social Security number, gender, hair, eyes, weight, height, physical address, mailing address, email address, and telephone number.

(6) On the commercial whale watching license application, the applicant must designate all commercial whale watching vessels to be used while engaging in commercial whale watching. The applicant must indicate either motorized or sailing vessels or kayaks on the application.

(a) If motorized or sailing vessels are selected, then the applicant must select the appropriate option for the passenger capacity on the designated vessel.

(b) If kayak is selected, then the applicant must select the appropriate option for the number of kayaks engaging in whale watching activities.

(7) The applicant may designate alternate operators to be listed on the whale watching license.

(8) An application submitted to the department shall contain the applicant's declaration under penalty of perjury that the information on the application is true and correct.

(9) Applications must be completed and submitted online through the commercial licensing system, or by mailing the application to:

Washington Department of Fish and Wildlife

Attn: Commercial License Sales

P.O. Box 43154

Olympia, WA 98504-3154

(10) If the required fields are blank or omitted from the application, then the department will consider the application to be incomplete, and it will not be processed.

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NEW SECTION

**WAC 220-460-030 Commercial whale watching license cards—**

**Replacements.** (1) Upon lawful application, a commercial whale watching license in the form of a license card will be issued by the department.

(2) The fee to replace a license that has been lost or destroyed is twenty dollars.

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NEW SECTION

**WAC 220-460-040 Commercial whale watching licensing business**

**organizations—Operator designation.** (1) Any person that holds a commercial whale watching license and is a business organization may designate other persons associated with the business to act on behalf of the license holder to update the business information within the organization's account and/or operate a designated vessel.

(2) In addition to the designated operator, a license holder that is a business organization may designate an unlimited number of alternate operators.

(3) A license holder that is a business organization may substitute the designated operator by surrendering the whale watching

license card, redesignating the operator under the criteria provided ~~for~~ in this section and paying the replacement license fee provided ~~for~~ in RCW 77.65.050.

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NEW SECTION

**WAC 220-460-050 Whale watching vessel designation requirements.**

(1) RCW 77.65.615 requires commercial whale watching operators to designate the vessel(s) to be used for whale watching tours. It is unlawful to engage in commercial whale watching activities unless:

(a) The licensee has designated all commercial whale watching vessels to be used, regardless if using a motorized or sailing vessel, or kayak to guide tours;

(b) The department has issued a commercial license to the licensee showing the vessel so designated;

(c) The vessel operator has the commercial license for the current calendar year in physical possession.

(2) The licensee does not have to own the vessel being designated on the license.

(3) For motorized or sailing vessels, the licensee must provide current ~~Unites~~United States Coast Guard certification inspection documentation which allows the designated vessel to carry more than six passengers.

[]

NEW SECTION

**WAC 220-460-060 Whale watching vessel substitutions—Fees.** The holder of a commercial whale watching license may substitute the vessel designated on the license or designate a vessel if none has previously been designated if the license holder:

(1) Surrenders the previously issued license to the department;

(2) Submits to the department a substitution application and application fee that identifies the currently assigned vessel, and the vessel proposed to be designated;

(3) Submits vessel substitution fees corresponding to the size of the vessel.

[]

NEW SECTION

**WAC 220-460-070 Whale watching alternate operator license**

**requirements.** (1) A person who is not the license holder may operate a motorized or sailing vessel designated on the commercial whale watching license only if:

(a) The person holds a commercial whale watching alternate operator license issued from the department; and

(b) The alternate operator is designated on the underlying license.

(2) Only an individual at least sixteen years of age may hold an alternate operator license.

(3) Commercial whale watching license holders must maintain an accurate record with the department of designated alternate operators. The commercial whale watching license holder must confirm the utilization of a whale watching alternate operator and identify the alternate by entering the alternate's full name and date of birth in the business account through the commercial licensing system.

(4) An individual may hold only one alternate operator license. Holders of an alternate operator license may be designated on an unlimited number of commercial whale watching licenses.

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NEW SECTION

**WAC 220-460-080 Expiration and renewal of licenses.** Commercial whale watching licenses expire at midnight on December 31st of the calendar year for which they are issued. Licenses may be renewed annually upon application and payment of the prescribed license fees.

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NEW SECTION

**WAC 220-460-090 Commercial whale watching of southern resident killer whales- General. ~~Commercial whale watching general provisions.~~**

(1) It is unlawful for an operator of a commercial whale watching vessel to violate any of the restrictions in RCW 77.15.740.

(2) A commercial whale watching license is not an exemption under RCW 77.15.740 (2)(c).

(3) The rules and requirements outlined in this chapter regarding southern resident killer whales apply to commercial whale watching activity in the inland waters of Washington.

[]

NEW SECTION

**WAC 220-460-100 Areas closed to commercial whale watching. (1)**

It is unlawful for operators of motorized commercial whale watching vessels to operate one-quarter mile from shore from Mitchell Point to Cattle Point on the west side of San Juan Island or within one-half mile of Lime Kiln Point State Park. Operators of nonmotorized commercial whale watching vessels must stay within one hundred yards of shore within this zone except when safety conditions preclude it.

(2) Modifications or additions to closed areas may be issued by the department by rule. Violation of such rules shall be unlawful.

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NEW SECTION

**WAC 220-460-110 Limits on number of vessels in the vicinity of southern resident killer whales at once. (1)** It is unlawful for more than three motorized commercial whale watching vessels at a time to be within the vicinity of any group of southern resident killer whales.

(2) It is unlawful for an operator of a motorized commercial whale watching vessel to enter the vicinity of a group of southern resident killer whales that contains a calf of under one year of age



or a whale designated as sick or vulnerable by emergency rule from the department.

[]

NEW SECTION

**WAC 220-460-120 Time limitations on watching southern resident killer whales.** (1) It is unlawful for an operator of a motorized commercial whale watching vessel to approach within one-half nautical mile of a southern resident killer whale between October 1st and June 30th.

(2) It is unlawful for an operator of a motorized commercial whale watching vessel to approach within one-half nautical mile of a southern resident killer whale outside these se time periods ~~hours:~~ ~~of~~ 10:00 a.m. to 12:00 p.m. and 3:00 p.m. to 5:00 p.m. ~~on Fridays,~~ ~~Saturdays, Sundays, and Mondays~~ from July 1st through September 30th.

(3) If any motorized commercial whale watching vessel designated under a commercial whale watching license enters within the vicinity of a southern resident killer whale between 10:00 a.m. and 12:00 p.m., no vessels operating under that license may enter the vicinity of a

southern resident killer whale ~~between 3:00 p.m. and 5~~after 12:00 p.m.  
on the same day.

(4) If an operator enters within one-half mile of a group of killer whales outside of the provisions in this section, after taking reasonable measures to determine whether the killer whales were southern resident killer whales, and then identifies the whales as southern resident killer whales, the operator must:

(a) Immediately safely reposition the vessel to be one-half nautical mile or farther from the southern resident killer whales.

(b) ~~Report~~Immediately report the location of the southern resident killer whale(s) to the whale report alert system (WRAS) or a successor transboundary notification system that is adopted by the international shipping community in the Salish Sea.

(c) Accurately log the incident, including measures taken to determine whether the whales were southern resident killer whales, following the provisions of WAC 220-460-140 and submit the log to the department within twenty-four hours of the incident.

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NEW SECTION

**WAC 220-460-130 Nonmotorized commercial whale watching vessels.**

(1) Tours involving any nonmotorized watercraft used for the purposes of commercial whale watching, such as kayaks, are subject to these requirements. Such watercraft constitute commercial whale watching vessels and are referred to as "vessels" in this chapter.

(2) Operators must prevent all vessels in their tour group from disturbing southern resident killer whales. All vessels in the tour group must adhere to the following requirements:

(a) It is unlawful to launch if southern resident killer whales are within one-half nautical mile of the launch location.

(b) Vessels are prohibited from being paddled, positioned, or waiting in the path of a southern resident killer whale. If a southern resident killer whale is moving towards a vessel, the vessel must immediately be moved out of the path of the whale.

(c) If a vessel or vessels inadvertently encounter a southern resident killer whale, they must immediately be moved as close to shore as possible and secured, or be rafted up close to shore or in a kelp bed, and paddling shall cease until any and all killer whales have moved to at least four hundred yards away from the vessels. Rafting up is defined as manually holding vessels close together, maintaining a tight grouping.

[ ]

NEW SECTION

**WAC 220-460-140 Commercial whale watching compliance and**

**reporting.** (1) ~~(Note: This provision will go into effect January 1, 2022.)~~ An automatic identification system (AIS) must be fitted aboard all motorized commercial whale watching vessels. The AIS must be capable of providing information about the vessel (including the vessel's identity, type, position, course, speed, and navigational status) to state and federal authorities automatically. Operators must maintain the AIS in operation at all times that the vessel is on ~~the~~ water a commercial whale watching tour.

(2) ~~(Note: This provision will go into effect May 1, 2021.)~~ All motorized and nonmotorized commercial whale watching license holders and alternate operators must complete annual training from the department on marine mammals, distances on the water, impacts of whale watching on marine mammals, and southern resident killer whale-related rules and reporting.

(a) At completion of training, license holders must demonstrate adequate understanding of course materials.

(b) It is unlawful for an operator to operate a commercial whale watching vessel without completing the training for the current calendar year.

(c) Naturalists and others who work upon commercial whale watching vessels but are not license holders are encouraged to attend.

(3) ~~{Note: This provision will go into effect May 1, 2021.}~~ All motorized and nonmotorized commercial whale watching license holders shall maintain accurate logs on each instance a vessel operating under a license enters within one-half nautical mile vicinity of southern resident killer whales and submit copies of the logs to the department.

(a) Logs must include license holder name; vessel operator and staff names and roles; vessel name; port(s) of departure; departure time(s); return time(s); number of passengers; location(s) (Lat/Long) of southern resident killer whales encountered; time(s) entering and departing the one-half nautical mile vicinity of southern resident killer whales; time(s) entering and departing within four hundred yards of southern resident killer whales; and qualitative details of southern resident killer whale encounters including whale identification, whale behavior and health, other vessel behavior, and

any operator behavior, including contact with other boaters or government entities, and resulting outcomes.

(b) Information from the logs shall be submitted to the department on the following schedule:

(i) All vicinity instances in July must be reported by August 15th.

(ii) All vicinity instances in August must be reported by September 15th.

(iii) All vicinity instances in September must be reported by October 15th.

(iv) Operators of motorized commercial whale watching vessels must report vicinity ~~Vieinity~~-instances that happen outside of the permitted hours and days described in WAC 220-460-120 ~~must be submitted~~-within twenty-four hours.

(v) Operators of nonmotorized whale watching vessels must report vicinity instances that happen October through June within one week.

(c) It is unlawful to fail to report a vicinity instance or to fraudulently report the details of a vicinity instance.

(d) Logs must be provided for inspection on request of department law enforcement.

(4) All motorized commercial whale watching license holders must log accurate, complete sighting information to the whale report alert system (WRAS) or a successor transboundary notification system that is adopted by the international shipping community in the Salish Sea immediately upon entering within one-half nautical mile of a southern resident killer whale.

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NEW SECTION

**WAC 220-460-150 Penalties.** (1) Commercial operators in violation of WAC 220-460-090 may be issued a notice of infraction punishable under chapter 7.84 RCW that carries a fine of five hundred dollars, not including statutory assessments added pursuant to RCW 3.62.090.

(2) Operators out of compliance with WAC 220-460-100, 220-460-110, 220-460-120, 220-460-130, or 220-460-140 may be issued a notice of infraction that carries a fine of up to five hundred dollars, not including statutory assessments added pursuant to RCW 3.62.090.

(3) Nothing in this chapter prohibits the filing of criminal charges for violations of RCW 77.15.815 in lieu of issuance of a notice of infraction.

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NEW SECTION

**WAC 220-460-160 Severability.** If any provision of the chapter or its application to any covered party, person, or circumstance is held invalid, the remainder of the chapter or application of the provision to other covered parties, persons, or circumstances is not affected.

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## RECOMMENDED ADJUSTMENTS

The department recommends the following adjustments since the Code Reviser filed (CR-102). The adjustments are included in your notebooks.

### Page 6

- Change: Added a sub-section (10) to WAC 220-460-010  
(10) Inland waters of Washington.  
"Inland waters of Washington" means Puget Sound and related inland marine waters, including all salt waters of the state of Washington inside the international boundary line between Washington and British Columbia, and lying east of the junction of the Pacific Ocean and the Strait of Juan de Fuca, and the rivers and streams draining to Puget Sound as mapped by water resource inventory areas 1 through 19 in WAC 173-500-040 as it exists on July 1, 2007.

Rationale: This adds a definition for inland waters of Washington to be clearer about where the rules for commercial whale watch operators regarding SRKW apply.

### Page 7

- Change: Removed “- Exception” from the title of WAC 220-460-020

Rationale: Administrative edit for clarity.

- Change: Removed from WAC 220-460-020(1): “(Note: This provision will go into effect February 1, 2021)”

Rationale: In several places in the draft rules, we included notes like this to flag for the public that we intended to delay implementation of the provision via emergency rule. This text was not intended to remain in the final version of the rule.

### Page 11

- Change: Changed two instances of “provided for” to “provided” in WAC 220-460-040(3)

Rationale: Grammatical edit.

### Page 12

- Change: Changed “Unites” to “United” in WAC 220-460-050(3)

Rationale: Typo.

## **Page 14**

- Change: Changed the title of WAC 220-460-090 from Commercial whale watching general provisions” to “Commercial whale watching of southern resident killer whales- General.”

Rationale: This title more accurately reflects the content of the section.

- Change: Changed “whale watch” to “whale watching” in WAC 220-460-090(2).

Rationale: Administrative edit for consistency.

- Change: Added a sub-section (3) to WAC 220-460-090.  
(3) The rules and requirements outlined in this chapter regarding southern resident killer whales apply to commercial whale watching activity in the inland waters of Washington.

Rationale: This additional sub-section provides clarity that the rules for commercial whale watching operators regarding southern resident killer whales apply to operations in the inland waters of Washington.

## **Page 15**

- Change: Changed “whale watch” to “whale watching” in WAC 220-460-100(1).

Rationale: Administrative edit for consistency.

## **Page 16**

- Change: Changed “the hours of” to “these time periods:” in WAC 220-460-120(2)

Rationale: This is a revision for clarity that motorized commercial viewing of Southern Resident killer whales closer than one-half nautical mile would not be permitted at any times or days besides those specified.

- Change: Removed “on Fridays, Saturdays, Sundays, and Mondays” from WAC 220-460-120(2)

Rationale: The proposed rule text as filed for Option A inadvertently included this text limiting viewing of SRKW by motorized commercial whale-watching vessels to the same Friday-Monday viewing window as proposed in Option B. Before developing Option B, staff were considering the option of permitting daily viewing opportunities July-September. When staff created Option B in response to stakeholder feedback, the concept was to remove some days of the week (Tuesday-Thursday) during July-September while allowing

some viewing of SRKW to extend into May-June and October-November. This revision would revert Option A to better resemble the daily viewing July-September conceptualized in the earlier draft of the rules.

## **Page 17**

- Change: Changed “between 3:00 p.m. and 5:00 p.m.” to “after 12:00 p.m.” in WAC 220-460-120(3)

Rationale: This revision achieves the same result with simpler language. The intent is that vessels operating under a single commercial whale watching license may only view SRKW during one of the two available daily periods.

- Change: Added “Immediately” to WAC 220-460-120(4)(b)

Rationale: This clarifies the expectation that “real-time” reporting to the Whale Report Alert System is expected immediately upon encountering SRKW.

## **Page 19**

- Change: Removed “(Note: This provision will go into effect January 1, 2022)” from WAC 220-460-140(1)

Rationale: In several places in the draft rules, we included notes like this to flag for the public that we intended to delay implementation of the provision via emergency rule. This text was not intended to remain in the final version of the rule.

- Change: Revised “on the water” to “on a commercial whale watching tour” in WAC 220-460-140(1)

Rationale: Administrative edit for clarity.

- Change: Removed “(Note: This provision will go into effect May 1, 2021)” from WAC 220-460-140(2)

Rationale: In several places in the draft rules, we included notes like this to flag for the public that we intended to delay implementation of the provision via emergency rule. This text was not intended to remain in the final version of the rule.

## **Page 21**

- Change: Changed “whale watch” to “whale watching” in WAC 220-460-140(2)(b)

Rationale: Administrative edit for consistency.

- Change: Removed “(Note: This provision will go into effect May 1, 2021)” from WAC 220-460-140(3)

Rationale: In several places in the draft rules, we included notes like this to flag for the public that we intended to delay implementation of the provision via emergency rule. This text was not intended to remain in the final version of the rule.

- Change: Changed “whale watch” to “whale watching” in WAC 220-460-140(3)

Rationale: Administrative edit for consistency.

- Change: Changed “enter” to “enters” in WAC 220-460-140(3)

Rationale: Grammatical edit.

## **Page 21**

- Change: Changed phrasing of WAC 220-460-140(3)(b)(iv) and specified that this sub-section applies to motorized commercial whale watching vessels. Change from: “(iv) Vicinity instances that happen outside of the permitted hours and days described in WAC 220-460-120 must be submitted within twenty-four hours.” to “(iv) Operators of motorized commercial whale watching vessels must report vicinity instances that happen outside of the permitted hours and days described in WAC 220-460-120 within twenty-four hours.”

Rationale: Based on concerns about clarity, particularly for the reporting roles of nonmotorized vessel operators, we decided to break this section into two and reword it to be more clear.

- Change: Addition of WAC 220-460-140(3)(b)(v)  
(v) Operators of nonmotorized whale watching vessels must report vicinity instances that happen October through June within one week.

Rationale: The original language in WAC 220-460-140(3)(b)(iv) referred to “permitted hours and days described in WAC 220-460-120,” but those days and hours for SRKW-viewing only apply to motorized commercial whale watching of SRKW. Nonmotorized commercial whale watching of Southern Resident killer whales is not restricted to certain days of the year or hours of the day, and so we wanted to have a clear section outlining the reporting requirements for nonmotorized operators from October-June. This new section sets the reporting requirement to “within one week,” rather than the “within twenty-four hours” requirement for motorized commercial whale watch vessels.

## **Page 22**

- Change: Changed “whale watch” to “whale watching” in WAC 220-460-140(4)

Rationale: Administrative edit for consistency.

- Change: Added “immediately” to WAC 220-460-140(4)

Rationale: This clarifies the expectation that “real-time” reporting to the Whale Report Alert System is expected immediately upon encountering SRKW.

# Public comment analysis: Proposed rules for commercial whale watching of Southern Resident Killer Whales

Partial draft prepared for the Fish and Wildlife Commission December 4 meeting  
Julie Watson, Killer Whale Policy Lead, WDFW

## Introduction

In spring 2019, the Washington Legislature passed Senate Bill 5577: *a bill concerning the protection of Southern Resident Orca Whales from vessels*, which developed a license for commercial whale watching and directed the Washington Department of Fish and Wildlife (WDFW) to administer the licensing program and develop rules for commercial viewing of Southern Resident Killer Whales (SRKW). WDFW developed proposed rules to both 1) define the licensing process for the commercial whale watching license outlined in RCW 77.65.615, and 2) meet the requirement in RCW 77.65.620 to create rules for commercial viewing of SRKW.

The purpose of creating rules for commercial whale watching of SRKW is to reduce the impacts of vessel noise and disturbance on the whales' ability to forage, rest, and socialize while enabling sustainable whale watching. Draft rule language was developed in a year-long process described in WDFW staff's September 12 and December 4, 2020, presentations to the Fish and Wildlife Commission. There are two options that were put forward for public comment.

- Option A includes a three-month July-September season for motorized commercial whale watching of SRKW with two, two-hour periods per day where viewing SRKW is allowed at closer than one-half nautical mile (limit of 3 motorized commercial whale watching vessels per group of SRKW). In the final stages of drafting the proposed rule, text that would limit viewing to Friday-Monday was inadvertently included in Option A. The public was also invited to comment on the possibility of daily viewing (7 days/week) during those months.<sup>1</sup>
- Option B adds a shoulder season of two months on either side (May/June and October/November) of the main season. The shoulder season is Saturday-Sunday viewing only (limit of 1 motorized commercial whale watching vessel per group of SRKW) and the main summer season viewing (July-September) is Friday-Monday (limit of 3 motorized commercial whale watching vessels per group of SRKW). For days that allow viewing of SRKW, there are two, two-hour periods.
- Note: The seasons described in Options A and B only apply to the viewing of SRKW by motorized commercial whale watching vessels and do not restrict the viewing of other whales or marine mammals.
- Both options propose formalizing the 'no-go' zone on the west side of San Juan Island (currently voluntary) for motorized commercial whale watching vessels (100-yard corridor along the shore

<sup>1</sup> WDFW explained via public outreach in late October that that Option A had initially been conceptualized as providing daily viewing (7 days/week) during July-September, but language that limited viewing to 4 days was inadvertently included at the final stages of drafting. In explaining the inadvertent change to Option A prior to publication, WDFW noted that it was interested in public comment on both Option A as published and as originally conceptualized with daily viewing.

for kayaks). The no-go zone is included in both alternatives. It would apply year-round regardless of SRKW presence.

- License application processes, reporting and training requirements, kayak-focused measures, and AIS requirements are present in both options.

The Fish and Wildlife Commission has a briefing and hearing on the proposed rules December 4, 2020, and the comment period closes on December 5. WDFW expects adoption of final rules by January 2021.

### **Methods:**

The public comment period on the proposed rules began on October 21, 2020 and will continue through December 5, 2020. Comments are primarily accepted via a Survey Monkey form that collects demographic information (name, affiliation, contact information) and has both a comment box where comments can be typed in directly and an alternative option to upload comments in a PDF or Word Document through the survey collector. Comments mailed or emailed to WDFW Commissioners or staff during the comment period are also being included in the analysis.

Comments collected through 11:59pm on Saturday, November 28, 2020 are included in this preliminary (draft) analysis for the Fish and Wildlife Commission's briefing and public hearing on December 4, 2020. Comments received during the final week of the comment period (November 29-December 5, 2020) will be summarized and included in an updated report to the Commission prior to their meeting to deliberate and adopt rules on December 18.

Comments collected via the Survey Monkey were downloaded into an Excel file and reviewed for quality control. Identical comments submitted more than once by the same person (verified by name and IP address) were removed, and multiple comments from the same individual were combined into one field. Comments received outside of the Survey Monkey collector were cross-checked with the collector to ensure they were not counted more than once, as many individuals submitted their comments through the portal and separately sent their comments by email to the Commission.

All of the comments received were uploaded to an online qualitative content analysis tool called Dedoose. Each comment was reviewed individually and assigned codes. First, 150 comments were reviewed and assigned preliminary codes, which helped determine the coding scheme that fit the majority of the data. Then, the full dataset was coded from scratch using the codes that were developed. Unusual and unique comments that did not fit the coding scheme were tagged as such for a secondary review. Additionally, comments from intergovernmental partners were flagged for independent review and summary.

Using tools available on the Dedoose platform, descriptive statistics were developed to provide a quantitative picture of the data. However, a qualitative examination of the data provides more nuanced understanding of the perspectives represented in the public comment. Quantitative information is provided below to highlight magnitude of the comments received, and qualitative descriptions paint a fuller picture of public sentiment about the proposed rules.

### **Results**

In the analysis of comments received October 21-November 28, **399** unique comments were included. Of the 399, five were sets of comments that were repeated:

- One set of comments included 1,485 distinct signed letters with the same text (“WEC letters”).
- One comment was a letter signed by 69 individuals (“naturalist letter”).
- One comment included a petition signed by 1,586 individuals (“petition”).
- One set of comments included 254 letters that varied slightly in text but all included the same central point, thus falling under the same code (“CBD letters”).
- One email with the same text was sent 5 times by unique commenters (“form Letter”).

These sets of comments will be referenced separately (parenthetically) from the other comments submitted by individuals or organizations.

Comments frequently focused on clusters of themes that reflected (and sometimes directly referenced) the position statements from specific NGOs or coordinated among multiple organizations. At the highest level, these clusters of themes can be divided among comments that *support the rules and/or want WDFW to go further* with the regulation, and comments that *oppose the proposed rules*. Here are the counts of comments in each category:

Comments that *support the proposed rules and/or want them to go further* to protect SRKW: **3,582** (252 individual comments +1,485 WEC letters, +1,586 petition signatories, +254 CBD letters, +5 form letters representing repeated comments). These include **1,934** (190 individual comments +1,485 WEC letters, +254 CBD letters, +5 form letters) comments that support “Option A” or “Option A as filed,” of which **1,567** (82 individual comments +1,485 WEC letters) support a modified version of Option A with several key changes. Most of these comments supporting a modified Option A included the following elements:

- “Reduce the maximum number of whale-watching vessels with a group of Southern Resident orcas from 3 to 1.”
- “Prohibit the viewing of groups of orcas where there is a known pregnancy.”
- “Prohibit the viewing of Southern Residents in low-visibility conditions such as fog.”
- “Include a process for WDFW to close the viewing of Southern Residents in response to emergency conditions or if there are repeated violations of the rules.”
- “Require whale-watch operators to provide immediate notifications to WDFW when approaching Southern Residents.”

Some individualized versions of these comments requested that the number of commercial whale watching boats be limited to 2 or 0. Many of these letters also specifically cited aspects of proposed Option A that the commenters support, including:

- “220-460-100 (1) prohibiting commercial whale watching in what is currently a voluntary no-go zone along the west side of San Juan Island.”
- “220-460-100 (2) providing for modifications or additions to closed areas by rule.”
- “220-460-110 (2) prohibiting the viewing of groups of southern resident orcas with young calves or orcas with signs of illness or injury.”
- “220-460-120 (1) prohibiting the viewing of southern resident orcas from October 1 through June 30.”
- “220-460-140 (1) requiring the use of AIS.”



Nongovernmental organizations who sent comments in this general category include: Friends of the San Juans, Washington Environmental Council, Seattle Aquarium, and Defenders of Wildlife.

A second grouping of comments in the *support and/or go further* category focused on some version of a suspension or moratorium on commercial viewing of SRKW **1,920** (*80 individual comments +1,586 petition signatories, +254 CBD letters*). Many of these comments supported a temporary suspension until the population shows sustainable signs of recovery, and others more broadly wanted to suspend or eliminate whale watching in the Salish Sea. Around **303** (*49 individual comments +254 CBD letters*) commenters said they wanted a suspension, but if limited to the proposed options, preferred Option A.

Finally, in the *support and/or go further* category, **44** commenters focused more generally on the plight of the SRKW, encouraging WDFW to do whatever we can or be as restrictive as possible to benefit the whales (*30 commenters*), referencing a need to prioritize SRKW recovery over profit/economics (*7 commenters*).

In addition, **10** commenters expressed support specifically for option B. Reasons for supporting option B were vague, ranging from “orcas need to have every opportunity to feed without power boat interference” to “give the endangered animals a bit of peace to live their lives.” A couple comments supporting Option B, however, cited the balance of supporting “both healthy species management + a much steadier economic path than Option A.”

In the other overarching category of comments, **201** (*132 individual comments +69 naturalist letter signatories*) commenters *opposed* both Options A and B. Many of these commenters **140** (*71 individual comments +69 naturalist letter signatories*) laid out several aspects of commercial whale watching that they believe offer positive benefits to SRKW, including:

- The “sentinel role” of commercial whale watching vessels on the water.
  - “Having responsible operators on scene alerts boaters and provides proper examples of etiquette around the whales.”
  - “Professional whale watch vessels serve a protective sentinel role on a frequent, daily basis, alerting other vessels to the presence of whales, allowing these other vessels (recreational boaters, ferries, commercial shipping, military) to reduce speed and alter course in order to reduce potential impacts.”
- The ability of commercial whale watch operators to “coordinate with researchers and enforcement to better understand, advocate for, and protect these whales.”
  - “Professional whale watch companies benefit the SRKWs and the Salish Sea ecosystem by contributing to science by sharing sightings data and identification photos, including new calves, with multiple organizations (research, governmental, NGO’s).”
- The educational value of providing opportunities to watch and learn about wildlife:
  - “In connecting people with these whales we create advocates for them and we take great pride and heart in being well-informed, knowledgeable, and fair in what we pass on to those who join us on the water so they can speak with that knowledge.”
  - “Commercial whale watch vessels provide a platform to introduce members of the public to the Salish Sea, educate them about endangered Southern Resident orcas and other species, and inspire them to help with recovery actions.”

- Philanthropic work and donations to salmon recovery from commercial whale watching operators.

Consequently, many of these comments cited both proposed rule options as a “well-intentioned” effort to “make it appear that people care and are trying to do something” but asserted that they would ultimately “increase daily cumulative impacts on SRKW.” Criticisms included that the seasonal, daily, and time restrictions are “untenable,” “arbitrary,” and “overly-complicated.” The two, two-hour time periods for viewing SRKW at closer than one-half nautical mile were the most commonly cited focus of these criticisms, though the commenters in this category often expressed distaste for the full suite of proposed rules.

Some of the *oppose* comments also suggested that the industry has been “scapegoated” and “demonized,” with **34** commenters pointing at salmon recovery or other threats to SRKW (including other vessels issues like ferries and shipping traffic) as a higher priority. Some commenters said that time and funding devoted to developing and enforcing the rules (including the proposed training requirement) should be reallocated to salmon recovery. Others expressed doubts about whether further restrictions on commercial whale watching were necessary, questioning the applicability of the science and whether the 2019 vessel regulations have already done enough for SRKW conservation. Notably, while many commenters in this category cited recreational boaters as a greater risk to SRKW, others opposed the rules because they worry restrictions (such as the proposed geographic restriction) will eventually be applied to recreational boaters as well.

Finally, in the *oppose* category, **28** commenters cited a specific package of recommendations as a “counter-proposal” to Options A and B. Most commenters who included this list of recommendations cited affiliations with the Pacific Whale Watch Association (PWWA) as owners, operators, guides, or naturalists working for a whale watching company. The commonly cited features of the counter-proposal include:

- “Limit vessel numbers to no more than five professional CWW near any group of SRKW;”
- “Limit viewing time of SRKW to maximum 45 minutes per vessel;”
- “Commercial vessels must fly whale warning flag in presence of whales;”
- “Codify San Juan Island No-Go Zone (1/4 mile off shore) restriction when SRKW present;”
- “Continue to report the presence of SRKW to WDFW, researchers, commercial traffic, etc.”

Some nongovernmental, nonprofit commenters who opposed Options A and B put forward variant alternatives that differed somewhat from the above recommendations. Their proposals included suggestions such as a 3-5 vessel limit per group of SRKW, no viewing of SRKW for 2 hours in the day (or one-half day per week) to allow research on recreational boater behavior sans commercial whale watching presence, and a full-time closure of the west side of San Juan Island (rather than only when SRKW are present).

Notably, commenters in both the *support/go further* and the *oppose* categories cited several other aspects of SRKW recovery that they wanted WDFW to address. For instance, several of the commenters asked WDFW to do more to “address recreational boaters’ adverse impacts to the Southern Residents.”

Beyond the support/oppose groupings of comments, there were several themes that emerged in one or a few comments. Many of these comments were outside the scope of the rulemaking, because 1) they

are defined separately in state, national, or Canadian law, or 2) they involve regulating entities not covered by WDFW's rulemaking purview. Those themes include:

- Enforcement
  - Highlighting the importance of enforcement and accountability
  - Recognizing the need for funding
  - Call for the need for clear compliance monitoring plan
  - Recommendation of secret shopper compliance monitoring
  - Call for higher fines and/or license revocation as penalties for violations
- Canada
  - Support for Canadian sanctuaries and suggestion to broaden the restrictions on the West Side of San Juan Island to more closely mirror Canada's approach
  - Concern about whale watching by Canadian operators and applicability of the rules to Canadian companies
  - Recommendation that rules apply to all killer whales
- Technology/standards
  - Call for tax incentives to switch to hybrid/electric
  - Suggestion that licensing requirements should restrict how much sound vessels can produce
  - Suggestion of collective viewing of live drone footage to replace vessels viewing SRKW at 300 yards
- Other adjustments to the rules
  - Recommendation that the AIS requirement be implemented sooner- in 2021
  - Suggestion that the restriction on viewing calves should extend for 2-5 years
  - Suggestion that viewing time should be set at 1 hour
- Kayaks
  - Disagree with definition of commercial whale watching
  - Suggest a limit on number of kayaks/kayak tours in the vicinity of SRKW at once
- Concern about competition/queueing waiting to view SRKW
  - Suggest time limit in the vicinity for queue management
  - Concern about tours all being scheduled for the same times, increasing pressure
- Provisions already included in the rules
  - Recommend at least 2 weekdays with no viewing
  - Recommend quieting the West Side of San Juan Island
- Other
  - Recommendation to set the distance to 100 yards and speed to 10 knots
  - Discussing fisheries management
  - Recommendation for all-boat time closures on viewing SRKW
  - Suggestions for the licensing process (e.g. limiting the number of alternate operators)
  - N/A

While the comments from intergovernmental partners shared some of the themes from the general body of comments, they generally took novel perspectives that provide additional insight into the proposed rules.

- The Northwest Indian Fisheries Commission (NWIFC) advocated for the no-go zone but suggested a flat distance rather than one-quarter mile in most places and one-half mile from the Lime Kiln Lighthouse. NWIFC also asked for the incorporation of language recognizing that the no-go zone does not restrict treaty tribal fishing rights, activities, and access. The NWIFC also promoted establishing a baseline and recommended ways to amplify compliance monitoring and enforcement.
- The Puget Sound Partnership advocated for Option B as a considerable change from the status quo that will “dramatically improve the timing and quality of sightings information that will be available to Washington State Ferries and many other professional mariners in Washington who are using the ‘Whale Report Alert System’ (WRAS).” The Partnership recommended reducing the cap on motorized commercial whale watching vessels with a group of whales from 3 to 1, and suggested that WDFW could offer more viewing opportunities (still limited to two, two-hour periods per day) for companies operating exclusively outside the San Juan Islands.
- San Juan County also submitted comments supporting Option B for its balance of reducing impacts on SRKW while still offering viewing opportunity. The County encouraged WDFW to clarify enforcement and compliance monitoring mechanisms, particularly to ensure that the rules do not have unintended consequences for other species (e.g. transient killer whales, humpbacks).

## Discussion

This section contains responses to the comments, by theme:

The proposed rules were designed to restrict commercial viewing of SRKW in order to reduce the daily and cumulative noise and disturbance of SRKW, per 2SSB 5577 codified as RCW 77.65.620. WDFW used best available science to develop proposed rules for both motorized and nonmotorized commercial whale watching activities, because the science suggests that even nonmotorized vessels impact whale behavior. The Washington State Academy of Sciences recommended a precautionary approach, defining every interaction between a commercial whale watching vessel and SRKW as an opportunity for disturbance of foraging, rest, and socializing activities. Due to the dire state of the SRKW population, WDFW proposed precautionary measures that we expect to reduce daily and cumulative exposure of SRKW to motorized and nonmotorized commercial whale watching vessels. Goals included dedicated stretches of uninterrupted foraging time and reduced boat numbers within ½ nautical mile.

- The bill specifically defined commercial whale watching to include commercial kayak tours that advertise or engage in opportunistic whale watching. Vessels with paying customers who engage in whale watching within Washington waters, whether or not whale watching is central to the business description, are required to have a license. Likewise, Canadian vessels conducting whale watching activity in Washington waters must procure licenses and follow the rules that are adopted for commercial viewing of SRKW.
- WDFW biologists determined that reducing the amount of time when SRKW could potentially experience commercial whale watching by 80% or more would help meet the conservation objective of the bill. This led to a 4-hour per day viewing limit and limited days within the year where viewing at closer than ½ nautical mile would be allowed under the proposed rules.
- This is why a 5 motorized commercial whale watching vessel, year-round, 8+ hour per day viewing opportunity does not meet the conservation objective.

The proposed rules were designed to reduce- not completely eliminate- the daily and cumulative impact of noise and disturbance from commercial whale watching activities. WDFW used best available science synthesized in a report by the Washington State Academy of Sciences to set thresholds that meet our conservation value. Once we were satisfied with the conservation value of the rules, we worked to allow some remaining opportunity for commercial whale watching of SRKW. The legislature directed WDFW to consider the economic viability of license holders in the rulemaking process, and WDFW incorporated economic analysis through an economic viability analysis of rule options and a small business economic impact analysis of the proposed rules. These analyses both concluded that reducing or even eliminating SRKW-viewing opportunities would not affect the viability of the industry, particularly due to the small proportion of tours (<10%) that involve viewing SRKW currently and the plentiful readily available opportunities to view transient killer whales, humpbacks, and other species. However, considering the impacts of the COVID-19 economic recession, WDFW opted to take a regulatorily conservative approach by preserving some viewing opportunity (of SRKW) during these economically uncertain times. Permitting some level of SRKW-viewing opportunity will also allow us to access the benefits of the reporting requirements, including 1) real-time reporting to the Whale Report Alert System, and 2) data for WDFW to analyze the role of commercial whale watch vessels in influencing or mitigating impacts from other boaters.

- This is why we did not suspend viewing of SRKW. We believe we can still allow some viewing while meeting the conservation objective.
- This is why we selected the months, days, and times where viewing SRKW is proposed to be allowed. We attempted to align these opportunities with popular seasons, days, and tour times.
- This is why we set the number of motorized commercial whale watch vessels in the vicinity of a group of SRKW to three and not more or less.
- This is why WDFW proposed delaying the AIS requirement until 2022: to allow the industry time to recover from the economic downturn caused by the COVID-19 pandemic. During a more average year, the cost of AIS (particularly class B) is expected not to be a significant economic burden on license holders.

WDFW needed to develop rules we could administer, enforce, measure, and adaptively manage.

- This is why we did not include pregnant whales specifically. We expect that a pregnant whale could be identified as “vulnerable” via emergency rule once we have reliable data about a confirmed pregnancy.
- This is why we did not include a time limit in the vicinity of SRKW. Staff had concerns about the on-the-water enforcement capacity to monitor multiple boats with stopwatches simultaneously while navigating marine conditions and other on-the-water responsibilities. The two, two-hour periods result in de facto time limits in the vicinity, and we expect that industry would continue to self-manage queuing and turn-taking.
- This is why we did not include a provision about low visibility conditions, as conditions can vary vastly from place to place within the Salish Sea. This would be difficult to know, communicate, and enforce.
- Similarly, restricting the West Side of San Juan Island only when SRKW are present would require WDFW to have constant real-time information on whale presence and an infrastructure to disseminate that information in real-time so operators would be aware when the restriction

was in effect. In addition, we did not want to codify the no-go zone in a way that undermines the intent of the voluntary no-go zone, which, though voluntary, is not contingent upon SRKW presence.

- We did not propose expanding the no-go zone (including expanding it to make a uniform width) because of concerns about altering interactions with vessel traffic and the shipping lanes.
- Enforcement capacity and on-the-water connectivity are also the reasons we did not propose requiring real-time reporting of SRKW locations to WDFW Enforcement Officers. We will collect this information via the proposed log/reporting requirements. Many operators currently share whale locations with WDFW Enforcement officers voluntarily, and we hope this voluntary best-practice will continue.
- WDFW Enforcement officers voiced concerns that a requirement to use the whale warning flag may disincentivize nimble use of the flag, e.g. leaving the flag up to avoid forgetting and receiving a citation. Again, use of the flag is something that is done voluntarily that we expect to continue as a recommended best practice.
- The proposed fine of \$500 for RCW 77.15.740 was set by the legislature. The proposed \$500 fine for the other commercial whale watching SRKW rules fit WDFW's existing infraction authority. Criminal violations of the commercial whale watching rules, per definition by the legislature, are misdemeanors, and two convictions in one calendar year results in the denial of a license for two years, per RCW 77.15.815.
- We did not propose expanding the no-go zone because of concerns about altering interactions with vessel traffic and the shipping lanes.

WDFW prioritizes watchable wildlife as a way for citizens to connect with Washington's species and habitats. WDFW looks forward to building a partnership with the commercial whale watching industry to further shared conservation and watchable wildlife goals. Although commenters have shared many anecdotes of the "sentinel role" of commercial whale watching, the Washington State Academy of Sciences panel specifically concluded that there is insufficient evidence of either a sentinel or magnet role of commercial whale watching, asserting:

"Caution must be used when assuming a sentinel effect exists without sufficient evidence. As vessel presence is currently known to have behavioral and physiological effects on whales, the precautionary principle leads the committee to presume that there is no sentinel effect until otherwise demonstrated."

WDFW was not given authority in 2SSB 5577 to 1) develop restrictions for private recreational vessels, ferries, or shipping vessels, 2) neglect rules for commercial whale watching in order to focus on salmon recovery, 3) change the distance or speed rules (which were set by the legislature in the bill) or their applicability to transient killer whales, 4) change the definition of commercial whale watching and what operations require a license, 5) cap the number of commercial whale watching licenses available, 6) develop tax incentives for quieter technology.

That being said, there is a large body of work focusing on the 49 recommendations from the Governor's Orca Task Force, including salmon recovery work, Be Whale Wise efforts to influence recreational boater behavior, the Whale Report Alert System to reduce impact and risk from shipping and ferries, and Quiet Sound to incentivize development and implementation of quieter technology, such as electrification of

the ferry fleet. The work to develop rules for commercial viewing of SRKW is one insular, defined piece of a much larger SRKW recovery effort happening across the region.

### **Conclusion**

This is a partial draft of the full summary and response to public comments that has been prepared for the initial briefing of the Fish and Wildlife Commission on December 4. Public comments received during the final week of the public comment period (November 29 – December 5, 2020) will be assembled and added to this analysis, and the draft will be updated to reflect the full body of public comments received. The updated draft, along with the final SEPA Environmental Impact Statement including the full comment analysis and response, will be shared with the Commission prior to the December 18 deliberation on the proposed commercial whale watching rule package.

OPTION B

Commercial whale watching license and restrictions on commercial  
viewing of southern resident killer whales

**Chapter 220-460 WAC  
COMMERCIAL WHALE WATCHING**

NEW SECTION

**WAC 220-460-010 Definitions.** For the purposes of this chapter,  
the following definitions apply:

**(1) Commercial whale watching.**

"Commercial whale watching" shall be defined as the act of  
taking, or offering to take, passengers aboard a vessel in order to  
view marine mammals in their natural habitat for a fee.

**(2) Commercial whale watching designated primary operator.**

"Commercial whale watching designated primary operator" shall be  
defined as the person identified on the application to operate the  
commercial whale watching vessel on behalf of the whale watching  
business.

**(3) Commercial whale watching alternate operator.**



"Alternate operators" shall be defined as individuals besides the designated primary operator who are designated to operate the vessel on behalf of the whale watching business.

**(4) Commercial whale watching vessel operators.**

"Commercial whale watching vessel operators" shall be defined to include operators of commercial vessels and kayak rentals that are engaged in the business of commercial whale watching. The term "operators" shall be used to identify primary operators and alternate operators who conduct commercial whale watching tours, including operators who direct the movement or positioning of any nonmotorized commercial whale watching vessels involved in a tour.

**(5) Commercial whale watching vessel.**

"Commercial whale watching vessel" shall be defined as any vessel that is being used as a means of transportation for individuals to engage in commercial whale watching.

"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.

"Motorized commercial whale watching vessel" shall be defined as any vessel with an engine being used as a means of transportation for individuals to engage in commercial whale watching, regardless of

whether the engine is in use. This definition includes sailboats with inboard or outboard motors.

"Nonmotorized commercial whale watching vessel" shall be defined as any vessel without an engine being used as a means of transportation for individuals to engage in commercial whale watching. This definition includes human-powered watercraft such as kayaks and paddleboards.

(6) **Group of southern resident killer whales.**

"Group of southern resident killer whales" is defined as a single southern resident killer whale or an assemblage of southern resident killer whales wherein each member is within one nautical mile of at least one other southern resident killer whale. Any individual(s) farther than one nautical mile constitutes a separate group.

(7) **Vicinity.** For the purposes of these rules, "vicinity" is defined as one-half nautical mile from all southern resident killer whales in the group. References to "vicinity" in this chapter do not permit operators to approach a southern resident killer whale closer than the statutorily defined distances in RCW 77.15.740.

(8) **Vicinity instance.** Each time any commercial whale watching vessel operating under a license enters within one-half nautical mile

of a southern resident killer whale will count as one vicinity instance associated with that license.

(9) **Automatic identification system (AIS)**. AIS refers to a maritime navigation safety communications system standardized by the International Telecommunication Union, adopted by the International Maritime Organization, that:

(a) Provides vessel information, including the vessel's identity, type, position, course, speed, navigational status and other safety-related information automatically to appropriately equipped shore stations, other ships, and aircraft;

(b) Receives automatically such information from similarly fitted ships, monitors and tracks ships; and

(c) Exchanges data with shore-based facilities.

(10) Inland waters of Washington.

"Inland waters of Washington" means Puget Sound and related inland marine waters, including all salt waters of the state of Washington inside the international boundary line between Washington and British Columbia, and lying east of the junction of the Pacific Ocean and the Strait of Juan de Fuca, and the rivers and streams draining to Puget Sound as mapped by water resource inventory areas 1 through 19 in WAC 173-500-040 as it exists on July 1, 2007.

[ ]

NEW SECTION

WAC 220-460-020 Commercial whale watching licenses—Application process and deadline—Exception. (1) ~~(Note: This provision will go into effect February 1, 2021.)~~ A commercial whale watching license is required for commercial whale watching motorized vessel, sailboat, and kayak operators.

(2) Applicants must be at least sixteen years of age and possess a driver's license or other government-issued identification number and jurisdiction of issuance.

(3) Applicants must be authorized to conduct business within the state of Washington.

(4) The commercial whale watching license application must include the following information regarding the whale watching business:

(a) The applicant must identify the whale watching business: Business name, type of business (i.e., sole proprietor, partnership, corporation), all associated business owner(s), full name(s), physical

address, mailing address, email address, telephone number, and Social Security numbers of all business owners.

(b) The applicant must identify and confirm the whale watching business is registered to conduct business within the state by providing the unified business identifier (UBI) number.

(5) The commercial whale watching license applicant must also designate an operator for each motorized or sailing vessel or kayak engaging in whale watching activity. The applicant must identify the operator's name of the associated business, full name, date of birth, Social Security number, gender, hair, eyes, weight, height, physical address, mailing address, email address, and telephone number.

(6) On the commercial whale watching license application, the applicant must designate all commercial whale watching vessels to be used while engaging in commercial whale watching. The applicant must indicate either motorized or sailing vessels or kayaks on the application.

(a) If motorized or sailing vessels are selected, then the applicant must select the appropriate option for the passenger capacity on the designated vessel.

(b) If kayak is selected, then the applicant must select the appropriate option for the number of kayaks engaging in whale watching activities.

(7) The applicant may designate alternate operators to be listed on the whale watching license.

(8) An application submitted to the department shall contain the applicant's declaration under penalty of perjury that the information on the application is true and correct.

(9) Applications must be completed and submitted online through the commercial licensing system, or by mailing the application to:

Washington Department of Fish and Wildlife

Attn: Commercial License Sales

P.O. Box 43154

Olympia, WA 98504-3154

(10) If the required fields are blank or omitted from the application, then the department will consider the application to be incomplete, and it will not be processed.

[]

NEW SECTION

**WAC 220-460-030 Commercial whale watching license cards—**

**Replacements.** (1) Upon lawful application, a commercial whale watching license in the form of a license card will be issued by the department.

(2) The fee to replace a license that has been lost or destroyed is twenty dollars.

[]

NEW SECTION

**WAC 220-460-040 Commercial whale watching licensing business**

**organizations—Operator designation.** (1) Any person that holds a commercial whale watching license and is a business organization may designate other persons associated with the business to act on behalf of the license holder to update the business information within the organization's account and/or operate a designated vessel.

(2) In addition to the designated operator, a license holder that is a business organization may designate an unlimited number of alternate operators.

(3) A license holder that is a business organization may substitute the designated operator by surrendering the whale watching

license card, redesignating the operator under the criteria provided ~~for~~ in this section and paying the replacement license fee provided ~~for~~ in RCW 77.65.050.

[]

NEW SECTION

**WAC 220-460-050 Whale watching vessel designation requirements.**

(1) RCW 77.65.615 requires commercial whale watching operators to designate the vessel(s) to be used for whale watching tours. It is unlawful to engage in commercial whale watching activities unless:

(a) The licensee has designated all commercial whale watching vessels to be used, regardless if using a motorized or sailing vessel, or kayak to guide tours;

(b) The department has issued a commercial license to the licensee showing the vessel so designated;

(c) The vessel operator has the commercial license for the current calendar year in physical possession.

(2) The licensee does not have to own the vessel being designated on the license.



(3) For motorized or sailing vessels, the licensee must provide current ~~Unites~~United States Coast Guard certification inspection documentation which allows the designated vessel to carry more than six passengers.

[]

NEW SECTION

**WAC 220-460-060 Whale watching vessel substitutions—Fees.** The holder of a commercial whale watching license may substitute the vessel designated on the license or designate a vessel if none has previously been designated if the license holder:

(1) Surrenders the previously issued license to the department;

(2) Submits to the department a substitution application and application fee that identifies the currently assigned vessel, and the vessel proposed to be designated;

(3) Submits vessel substitution fees corresponding to the size of the vessel.

[]

NEW SECTION

**WAC 220-460-070 Whale watching alternate operator license**

**requirements.** (1) A person who is not the license holder may operate a motorized or sailing vessel designated on the commercial whale watching license only if:

(a) The person holds a commercial whale watching alternate operator license issued from the department; and

(b) The alternate operator is designated on the underlying license.

(2) Only an individual at least sixteen years of age may hold an alternate operator license.

(3) Commercial whale watching license holders must maintain an accurate record with the department of designated alternate operators. The commercial whale watching license holder must confirm the utilization of a whale watching alternate operator and identify the alternate by entering the alternate's full name and date of birth in the business account through the commercial licensing system.

(4) An individual may hold only one alternate operator license. Holders of an alternate operator license may be designated on an unlimited number of commercial whale watching licenses.

[]

NEW SECTION

**WAC 220-460-080 Expiration and renewal of licenses.** Commercial whale watching licenses expire at midnight on December 31st of the calendar year for which they are issued. Licenses may be renewed annually upon application and payment of the prescribed license fees.

[]

NEW SECTION

**WAC 220-460-090 Commercial whale watching of southern resident killer whales- General. ~~Commercial whale watching general provisions.~~**

(1) It is unlawful for an operator of a commercial whale watching vessel to violate any of the restrictions in RCW 77.15.740.

(2) A commercial whale watching license is not an exemption under RCW 77.15.740 (2)(c).

(3) The rules and requirements outlined in this chapter regarding southern resident killer whales apply to commercial whale watching activity in the inland waters of Washington.

[]

NEW SECTION

**WAC 220-460-100 Areas closed to commercial whale watching. (1)**

It is unlawful for operators of motorized commercial whale watching vessels to operate one-quarter mile from shore from Mitchell Point to Cattle Point on the west side of San Juan Island or within one-half mile of Lime Kiln Point State Park. Operators of nonmotorized commercial whale watching vessels must stay within one hundred yards of shore within this zone except when safety conditions preclude it.

(2) Modifications or additions to closed areas may be issued by the department by rule. Violation of such rules shall be unlawful.

[]

NEW SECTION

**WAC 220-460-110 Limits on number of vessels in the vicinity of southern resident killer whales at once. (1)** It is unlawful for more than:

(a) Three motorized commercial whale watching vessels at a time to be within the vicinity of any group of southern resident killer whales from July 1st to September 30th.

(b) One motorized commercial whale watching vessel at a time to be within the vicinity of any group of southern resident killer whales from May 1st to June 30th and October 1st to November 30th.

(2) It is unlawful for an operator of a motorized commercial whale watching vessel to enter the vicinity of a group of southern resident killer whales that contains a calf of under one year of age or a whale designated as sick or vulnerable by emergency rule from the department.

[]

NEW SECTION

**WAC 220-460-120 Time limitations on watching southern resident killer whales.** (1) It is unlawful for an operator of a motorized commercial whale watching vessel to approach within one-half nautical mile of a southern resident killer whale between December 1st and April 30th.

(2) It is unlawful for an operator of a motorized commercial whale watching vessel to approach within one-half nautical mile of a southern resident killer whale outside ~~the hours of~~ these time periods:

(a) 10:00 a.m. to 12:00 p.m. and 3:00 p.m. to 5:00 p.m. on Fridays, Saturdays, Sundays, and Mondays from July 1st through September 30th.

(b) 10:00 a.m. to 12:00 p.m. and 3:00 p.m. to 5:00 p.m. on Saturdays and Sundays from May 1st through June 30th.

(c) 10:00 a.m. to 12:00 p.m. and 2:00 p.m. to 4:00 p.m. on Saturdays and Sundays from October 1st through November 30th.

(3) If any motorized commercial whale watching vessel designated under a commercial whale watching license enters within the vicinity of a southern resident killer whale between 10:00 a.m. and 12:00 p.m., no vessels operating under that license may enter the vicinity of a southern resident killer whale ~~between 3:00 p.m. to 5~~ after 12:00 p.m. on the same day.

(4) If an operator enters within one-half mile of a group of killer whales outside of the provisions in this section, after taking reasonable measures to determine whether the killer whales were southern resident killer whales, and then identifies the whales as southern resident killer whales, the operator must:

(a) Immediately safely reposition the vessel to be one-half nautical mile or farther from the southern resident killer whales.

(b) ~~Report~~ Immediately report the location of the southern resident killer whale(s) to the whale report alert system (WRAS) or a successor transboundary notification system that is adopted by the international shipping community in the Salish Sea.

(c) Accurately log the incident, including measures taken to determine whether the whales were southern resident killer whales, following the provisions of WAC 220-460-140 and submit a copy of the log to the department within twenty-four hours of the incident.

[]

#### NEW SECTION

##### **WAC 220-460-130 Nonmotorized commercial whale watching vessels.**

(1) Tours involving any nonmotorized watercraft used for the purposes of commercial whale watching, such as kayaks, are subject to these requirements. Such watercraft constitute commercial whale watching vessels and are referred to as "vessels" in this chapter.

(2) Operators must prevent all vessels in their tour group from disturbing southern resident killer whales. All vessels in the tour group must adhere to the following requirements:

(a) It is unlawful to launch if southern resident killer whales are within one-half nautical mile of the launch location.

(b) Vessels are prohibited from being paddled, positioned, or waiting in the path of a southern resident killer whale. If a southern resident killer whale is moving towards a vessel, the vessel must immediately be moved out of the path of the whale.

(c) If a vessel or vessels inadvertently encounter a southern resident killer whale, they must immediately be moved as close to shore as possible and secured, or be rafted up close to shore or in a kelp bed, and paddling shall cease until any and all killer whales have moved to at least four hundred yards away from the vessels. Rafting up is defined as manually holding vessels close together, maintaining a tight grouping.

[]

NEW SECTION

**WAC 220-460-140 Commercial whale watching compliance and reporting.** (1) ~~(Note: This provision will go into effect January 1, 2022.)~~ An automatic identification system (AIS) must be fitted aboard all motorized commercial whale watching vessels. The AIS must be



capable of providing information about the vessel (including the vessel's identity, type, position, course, speed, and navigational status) to state and federal authorities automatically. Operators must maintain the AIS in operation at all times that the vessel is on a commercial whale watching tour~~the water~~.

(2) ~~{Note: This provision will go into effect May 1, 2021.}~~ All motorized and nonmotorized commercial whale watching license holders and alternate operators must complete annual training from the department on marine mammals, distances on the water, impacts of whale watching on marine mammals, and southern resident killer whale-related rules and reporting.

(a) At completion of training, license holders must demonstrate adequate understanding of course materials.

(b) It is unlawful for an operator to operate a commercial whale watching vessel without completing the training for the current calendar year.

(c) Naturalists and others who work upon commercial whale watching vessels but are not license holders are encouraged to attend.

(3) ~~{Note: This provision will go into effect May 1, 2021.}~~ All motorized and nonmotorized commercial whale watching license holders shall maintain accurate logs on each instance a vessel operating under

a license enters within one-half nautical mile vicinity of southern resident killer whales and submit copies of the logs to the department.

(a) Logs must include license holder name; vessel operator and staff names and roles; vessel name; port(s) of departure; departure time(s); return time(s); number of passengers; location(s) (Lat/Long) of southern resident killer whales encountered; time(s) entering and departing the one-half nautical mile vicinity of southern resident killer whales; time(s) entering and departing within four hundred yards of southern resident killer whales; and qualitative details of southern resident killer whale encounters including whale identification, whale behavior and health, other vessel behavior, and any operator behavior, including contact with other boaters or government entities, and resulting outcomes.

(b) Information from the logs shall be submitted to the department on the following schedule:

(i) All vicinity instances in May must be reported by June 15th.

(ii) All vicinity instances in June must be reported by July 15th.

(iii) All vicinity instances in July must be reported by August 15th.

(iv) All vicinity instances in August must be reported by September 15th.

(v) All vicinity instances in September must be reported by October 15th.

(vi) All vicinity instances in October must be reported by November 15th.

(vii) All vicinity instances in November must be reported by December 15th.

(viii) Operators of motorized commercial whale watching vessels must report Vicinity-vicinity instances that happen outside of the permitted hours and days described in WAC 220-460-120 ~~must be submitted~~ within twenty-four hours.

(ix) Operators of nonmotorized whale watching vessels must report vicinity instances that happen December through April within one week.

(c) It is unlawful to fail to report a vicinity instance or to fraudulently report the details of a vicinity instance.

(d) Logs must be provided for inspection on request of department law enforcement.

(4) All motorized commercial whale watching license holders must log accurate, complete sighting information to the whale report alert system (WRAS) or a successor transboundary notification system that is

adopted by the international shipping community in the Salish Sea  
immediately upon entering within one-half nautical mile of a southern  
resident killer whale.

[]

NEW SECTION

**WAC 220-460-150 Penalties.** (1) Commercial operators in violation of WAC 220-460-090 may be issued a notice of infraction punishable under chapter 7.84 RCW that carries a fine of five hundred dollars, not including statutory assessments added pursuant to RCW 3.62.090.

(2) Operators out of compliance with WAC 220-460-100, 220-460-110, 220-460-120, 220-460-130, or 220-460-140 may be issued a notice of infraction that carries a fine of up to five hundred dollars, not including statutory assessments added pursuant to RCW 3.62.090.

(3) Nothing in this chapter prohibits the filing of criminal charges for violations of RCW 77.15.815 in lieu of issuance of a notice of infraction.

[]

NEW SECTION

**WAC 220-460-160 Severability.** If any provision of the chapter or its application to any covered party, person, or circumstance is held invalid, the remainder of the chapter or application of the provision to other covered parties, persons, or circumstances is not affected.

[]

## WAC 220-460 COMMERCIAL WHALE WATCHING.

### Page 42

- Change: Added a sub-section (10) to WAC 220-460-010 (10) Inland waters of Washington. "Inland waters of Washington" means Puget Sound and related inland marine waters, including all salt waters of the state of Washington inside the international boundary line between Washington and British Columbia, and lying east of the junction of the Pacific Ocean and the Strait of Juan de Fuca, and the rivers and streams draining to Puget Sound as mapped by water resource inventory areas 1 through 19 in WAC 173-500-040 as it exists on July 1, 2007.

Rationale: This adds a definition for inland waters of Washington to be clearer about where the rules for commercial whale watch operators regarding SRKW apply.

### Page 43

- Change: Removed “- Exception” from the title of WAC 220-460-020

Rationale: Administrative edit for clarity.

- Change: Removed from WAC 220-460-020(1): “(Note: This provision will go into effect February 1, 2021)”

Rationale: In several places in the draft rules, we included notes like this to flag for the public that we intended to delay implementation of the provision via emergency rule. This text was not intended to remain in the final version of the rule.

### Page 47

- Change: Changed two instances of “provided for” to “provided” in WAC 220-460-040(3)

Rationale: Grammatical edit.

### Page 48

- Change: Changed “Unites” to “United” in WAC 220-460-050(3)

Rationale: Typo.

### Page 50

- Change: Changed the title of WAC 220-460-090 from Commercial whale watching general provisions” to “Commercial whale watching of southern resident killer whales- General.”

Rationale: This title more accurately reflects the content of the section.

- Change: Changed “whale watch” to “whale watching” in WAC 220-460-090(2).

Rationale: Administrative edit for consistency.

- Change: Added a sub-section (3) to WAC 220-460-090.  
(3) The rules and requirements outlined in this chapter regarding southern resident killer whales apply to commercial whale watching activity in the inland waters of Washington.

Rationale: This additional sub-section provides clarity that the rules for commercial whale watching operators regarding southern resident killer whales apply to operations in the inland waters of Washington.

## **Page 51**

- Change: Changed “whale watch” to “whale watching” in WAC 220-460-100(1).

Rationale: Administrative edit for consistency.

## **Page 52**

- Change: Changed “the hours of” to “these time periods” in WAC 220-460-120(2)

Rationale: This is a revision for clarity that motorized commercial viewing of Southern Resident killer whales closer than one-half nautical mile would not be permitted at any times or days besides those specified.

## **Page 53**

- Change: Changed “between 11:00 a.m. and 1:00 p.m.” to “between 10:00 a.m. and 12:00 p.m.” in WAC 220-460-120(3)

Rationale: This revision corrects an administrative error in the times specified.

- Change: Changed “between 3:00 p.m. and 5:00 p.m.” to “after 12:00 p.m.” in WAC 220-460-120(3)

Rationale: This revision achieves the same result with simpler language. The intent is that vessels operating under a single commercial whale watching license may only view SRKW during one of the two available daily periods.

## **Page 54**

- Change: Added “Immediately” to WAC 220-460-120(4)(b)

Rationale: This clarifies the expectation that “real-time” reporting to the Whale Report Alert System is expected immediately upon encountering SRKW.

## **Page 55**

- Change: Removed “(Note: This provision will go into effect January 1, 2022)” from WAC 220-460-140(1)

Rationale: In several places in the draft rules, we included notes like this to flag for the public that we intended to delay implementation of the provision via emergency rule. This text was not intended to remain in the final version of the rule.

- Change: Changed “whale watch” to “whale watching” in WAC 220-460-140(1)

Rationale: Administrative edit for consistency.

## **Page56**

- Change: Revised “on the water” to “on a commercial whale watching tour” in WAC 220-460-140(1)

Rationale: Administrative edit for clarity.

- Change: Removed “(Note: This provision will go into effect May 1, 2021)” from WAC 220-460-140(2)

Rationale: In several places in the draft rules, we included notes like this to flag for the public that we intended to delay implementation of the provision via emergency rule. This text was not intended to remain in the final version of the rule.

- Change: Changed “whale watch” to “whale watching” in WAC 220-460-140(2)(b)

Rationale: Administrative edit for consistency.

- Change: Removed “(Note: This provision will go into effect May 1, 2021)” from WAC 220-460-140(3)

Rationale: In several places in the draft rules, we included notes like this to flag for the public that we intended to delay implementation of the provision via emergency rule. This text was not intended to remain in the final version of the rule.



- Change: Changed “whale watch” to “whale watching” in WAC 220-460-140(3)

Rationale: Administrative edit for consistency.

## **Page 57**

- Change: Changed “enter” to “enters” in WAC 220-460-140(3)

Rationale: Grammatical edit.

## **Page 58**

- Change: Changed phrasing of WAC 220-460-140(3)(b)(viii) and specified that this subsection applies to motorized commercial whale watching vessels. Change from: “(iv) Vicinity instances that happen outside of the permitted hours and days described in WAC 220-460-120 must be submitted within twenty-four hours.” to “(iv) Operators of motorized commercial whale watching vessels must report vicinity instances that happen outside of the permitted hours and days described in WAC 220-460-120 within twenty-four hours.”

Rationale: Based on concerns about clarity, particularly for the reporting roles of nonmotorized vessel operators, we decided to break this section into two and reword it to be clearer.

- Change: Addition of WAC 220-460-140(3)(b)(ix)  
(ix) Operators of nonmotorized whale watching vessels must report vicinity instances that happen December through April within one week.

Rationale: The original language in WAC 220-460-140(3)(b)(iv) referred to “permitted hours and days described in WAC 220-460-120,” but those days and hours for SRKW-viewing only apply to motorized commercial whale watching of SRKW. Nonmotorized commercial whale watching of Southern Resident killer whales is not restricted to certain days of the year or hours of the day, and so we wanted to have a clear section outlining the reporting requirements for nonmotorized operators from December-April. This new section sets the reporting requirement to “within one week,” rather than the “within twenty-four hours” requirement for motorized commercial whale watch vessels.

- Change: Changed “whale watch” to “whale watching” in WAC 220-460-140(4)

Rationale: Administrative edit for consistency.

## **Page 59**

- Change: Added “immediately” to WAC 220-460-140(4)

Rationale: This clarifies the expectation that “real-time” reporting to the Whale Report Alert System is expected immediately upon encountering SRKW.



# PROPOSED RULE MAKING

## CR-102 (December 2017) (Implements RCW 34.05.320)

Do NOT use for expedited rule making

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER  
STATE OF WASHINGTON  
FILED

DATE: October 21, 2020

TIME: 11:44 AM

WSR 20-21-111

**Agency:** Washington Department of Fish and Wildlife

**Original Notice**

**Supplemental Notice to WSR** \_\_\_\_\_

**Continuance of WSR** \_\_\_\_\_

**Preproposal Statement of Inquiry was filed as WSR 20-07-093 ; or**

**Expedited Rule Making--Proposed notice was filed as WSR** \_\_\_\_\_; or

**Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or**

**Proposal is exempt under RCW** \_\_\_\_\_.

**Title of rule and other identifying information:** (describe subject) Commercial whale watching license and restrictions on commercial viewing of southern resident killer whales

**Hearing location(s):**

Date:	Time:	Location: (be specific)	Comment:
December 4-5, 2020	8:00am	Webinar and/or conference call	The meeting will take place by webinar. The public may participate in the meeting. Visit our website at <a href="http://wdfw.wa.gov/about/commission/meetings">http://wdfw.wa.gov/about/commission/meetings</a> or contact the Commission office at 360-902-2267 or <a href="mailto:commission@dfw.wa.gov">commission@dfw.wa.gov</a> for instructions on how to join the meeting.

**Date of intended adoption:** December 18, 2020 (Note: This is **NOT** the **effective** date)

**Submit written comments to:**

Name: Julie Watson

Address: PO Box 43200  
Olympia, WA 98504-3200

Email: See electronic submission instructions below under 'other.'

Fax:

Other: To submit written comments electronically, go to: <https://www.surveymonkey.com/r/cwwrules>. Comments received by November 13 will be summarized and presented to the Commission during the December 4-5 hearing, however WDFW will continue to accept and consider written comments received through December 5, 2020.

The period for SEPA public comment associated with this rule making process closes on October 23, 2020 at 5pm PDT, and SEPA comments can be submitted at: <https://www.surveymonkey.com/r/V736PTB>

By (date) December 5, 2020

**Assistance for persons with disabilities:**

Contact Dolores Noyes

Phone: 360-902-2346

Fax:

TTY: 360-902-2207

Email: [dolores.noyes@dfw.wa.gov](mailto:dolores.noyes@dfw.wa.gov)

Other:

By (date) December 5, 2020

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** The purpose of the proposed rule is to reduce the daily and cumulative impacts of commercial whale watching on southern resident orca whales and consider the economic viability of license holders. This proposal would create and populate a new chapter in WAC (220-460) that defines commercial whale watching licensing processes and rules for holders of commercial whale watching licenses.

**Reasons supporting proposal:** The proposal was developed over the course of a year with input from a Commercial Whale Watching Licensing Program Advisory Committee, an independent science panel managed by the Washington State Academy of Sciences, an intergovernmental coordination group, economic viability and small business economic impacts analyses, and multiple staff work groups and public comment opportunities, including two public comment meetings on the pre-proposed draft proposal. The proposal defines important administrative aspects of the commercial whale watching licensing program created in RCW 77.65.615. In addition, per the mandate in RCW 77.65.620, the proposal is designed using best available science to reduce the daily and cumulative impacts of commercial whale watching on southern resident orca whales and also considers the economic viability of license holders.

**Statutory authority for adoption:** RCW 77.12.047; RCW 77.65.615; RCW 77.65.620; 77.15.020; RCW 77.15.160; RCW 77.04.012; RCW 77.04.55

**Statute being implemented:** RCW 77.65.615; RCW 77.65.620

**Is rule necessary because of a:**

- Federal Law?  Yes  No  
Federal Court Decision?  Yes  No  
State Court Decision?  Yes  No

If yes, CITATION:

**Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:** WDFW is proposing two alternative proposed rules (Option A and Option B). WDFW is soliciting comment on both options..

**Name of proponent:** (person or organization) Washington Department of Fish and Wildlife  Private  
 Public  
 Governmental

**Name of agency personnel responsible for:**

	Name	Office Location	Phone
Drafting:	Julie Watson	1111 Washington St. SE Olympia, WA. 98501	360-790-4528
Implementation:	Julie Watson	1111 Washington St. SE Olympia, WA. 98501	360-790-4528
Enforcement:	Steve Bear	1111 Washington St. SE Olympia, WA. 98501	360-338-2895

**Is a school district fiscal impact statement required under RCW 28A.305.135?**  Yes  No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

- Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

**Is a cost-benefit analysis required under RCW 34.05.328?**

Yes: A preliminary cost-benefit analysis may be obtained by contacting:

- Name:  
Address:

Phone:  
Fax:  
TTY:  
Email:  
Other:

No: Please explain: A cost-benefit analysis is not required for this rulemaking under RCW 34.05.328.

**Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement:**

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3). Check all that apply:

RCW 34.05.310 (4)(b)  
(Internal government operations)

RCW 34.05.310 (4)(e)  
(Dictated by statute)

RCW 34.05.310 (4)(c)  
(Incorporation by reference)

RCW 34.05.310 (4)(f)  
(Set or adjust fees)

RCW 34.05.310 (4)(d)  
(Correct or clarify language)

RCW 34.05.310 (4)(g)  
((i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit)

This rule proposal, or portions of the proposal, is exempt under RCW \_\_\_\_\_.

Explanation of exemptions, if necessary:

**COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES**

If the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?


No Briefly summarize the agency's analysis showing how costs were calculated. \_\_\_\_\_

Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses, and a small business economic impact statement is required. Insert statement here:

The effected industry consists of small businesses, and our analysis concluded that the rule may impose more-than-minor costs. An economic impact statement has been completed and is available online at: <https://wdfw.wa.gov/species-habitats/at-risk/species-recovery/orca/rule-making>

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name: Julie Watson  
Address: PO Box 43200  
Olympia, WA 98504-3200  
Phone: 360-790-4528  
Fax:  
TTY:  
Email: killerwhales@dfw.wa.gov  
Other:

<b>Date:</b> October 21, 2020	<b>Signature:</b> 
<b>Name:</b> Benjamin J. Power	
<b>Title:</b> Interim Agency Rules Coordinator	