

## Establishing the commercial whale watching license and restrictions on commercial viewing of southern resident killer whales in WAC

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These are draft rules shared for initial public feedback prior to the official release of the draft rules on October 21 and the formal comment period, which will run from October 21-November 13, 2020. In addition, comment will be taken at a public hearing during the Fish and Wildlife Commission's meeting on December 4-5, 2020.

If you wish to comment on this early draft of the rules, you may do so at two virtual feedback sessions: October 7, 2020 (1-2:15pm PDT, [register here](#)) or October 8, 2020 (9-10:15am PDT, [register here](#)). Participation in the virtual meetings is preferred, but those who cannot attend may submit comments online by 5pm PDT on October 8, 2020 ([link to comment form here](#)). Please visit WDFW's commercial whale watching [rulemaking webpage](#) for resources about the rulemaking process including information about additional comment opportunities.

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### **New WAC chapter 220-460 Commercial whale watching.**

#### **New WAC section 220-460-010 Definitions**

##### **Definitions – 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.

##### **Definitions – 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.

“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.

##### **Definitions – 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 designated and alternate operators conducting the business of commercial whale watching.

##### **Definitions – 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.

For the purpose of this chapter, "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.

“Non-motorized 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.

**Definitions – Group of southern resident killer whales.**

“Group of southern resident killer whales” is defined as an assemblage of southern resident killer whales wherein each member is within one-half nautical mile of at least one other southern resident killer whale. Any individual(s) farther than one-half nautical mile constitute separate groups.

**Definitions – Vicinity.**

For the purposes of these rules, “vicinity” is defined as one-half nautical mile from any one southern resident killer whale. 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.

**Definitions – 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.

**Definitions – Automatic Identification Systems (AIS).**

AIS refers to a maritime navigation safety communications system standardized by the International Telecommunication Union (ITU), adopted by the International Maritime Organization (IMO), that--

- (1) 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;
- (2) Receives automatically such information from similarly fitted ships, monitors and tracks ships; and
- (3) Exchanges data with shore-based facilities.

**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 16 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:
    - i. 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 vessels or kayaks engaging in whale watching activity.
- a. The applicant must identify the operator's:
    - i. 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.
- a. The applicant must indicate either motorized or sailing vessels or kayaks on the application.
    - i. If motorized or sailing vessels are selected, then the applicant must select the appropriate option for the passenger capacity on the designated vessel.
    - ii. 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:
- a. 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 WAC section WAC 220-460-030 Commercial whale watching license cards - Replacements.**

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

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

**New WAC section 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, re-designating the operator under the criteria provided for in this section and paying the replacement license fee provided for in RCW 77.65.050.

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

- (1) Chapter 77.65 RCW 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 United States coast guard certification inspection documentation which allows the designated vessel to carry more than six passengers.

**New WAC section 220-460-060 Whale watching vessel substitutions - Fees.**

- (1) 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:
  - a. Surrenders the previously issued license to the department;
  - b. Submit to the department a substitution application and application fee that identifies the currently assigned vessel, and the vessel proposed to be designated;
  - c. Submits vessel substitution fees corresponding to the size of the vessel.

**New WAC section 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 16 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 WAC section 220-460-080 Expiration and renewal of licenses.**

- (1) Commercial whale watching licenses expire at midnight on December 31 of the calendar year for which they are issued. Licenses may be renewed annually upon application and payment of the prescribed license fees.

**New WAC section 220-460-090 Commercial whale watching general provisions.**

- (1) No operator of a commercial whale watching vessel may violate any of the restrictions in RCW 77.15.740.
- (2) It is unlawful for an operator of a commercial whale watching vessel to approach, in any manner, within three hundred yards of a southern resident killer whale.
- (3) It is unlawful for an operator to position a commercial whale watching vessel in the path of a southern resident killer whale. This includes intercepting a southern resident killer whale by positioning a vessel so that the prevailing wind or water current carries the vessel into the path of the whale.
- (4) Pursuant to RCW 77.15.815, it is unlawful to engage in commercial whale watching if a person is not in possession of all licenses and permits required, including a valid commercial whale watching license for the current calendar year.

**New WAC section 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 non-motorized commercial whale watch 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.

**New WAC section 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 (as defined in this chapter) of any one 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 showing signs of illness or injury.

**New WAC section 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 1 and June 30.

- (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 11am to 1pm and 3pm-5pm from July 1 through September 30.
- (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 11am and 1pm, no vessels operating under that license may enter the vicinity of southern resident killer whale between 3pm-5pm 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 the location of the southern resident killer whale(s) to the Whale Report Alert System.
  - c. Accurately log the incident, including measures taken to determine whether the whales were southern resident killer whales, following the provisions of WAC 220-460-150 and submit the log to WDFW within 24 hours of the incident.

#### **New WAC section 220-460-130 Non-motorized commercial whale watching vessels.**

- (1) Tours involving any other non-motorized watercraft used for the purposes of commercial whale watching, such as kayaks, are subject to these requirements.
- (2) Licensed tour 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 paddling, positioning, or waiting in the path of a southern resident killer whale. If a southern resident killer whale is moving towards the vessels, the vessels must immediately move out of the path of the whale.
  - c) If vessels inadvertently encounter a southern resident killer whale, they must immediately move all vessels to as close to shore as possible and secure themselves, or raft up close to shore or in a kelp bed and stop paddling until any and all killer whales have moved to at least 400 yards away from the vessels. Rafting up is defined as manually holding vessels close together, maintaining a tight grouping.

#### **New WAC section 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 watch 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.
- (2) **(Note: This provision will go into effect May 1, 2021.)** All motorized and non-motorized commercial whale watching license holders and alternate operators must complete annual

WDFW training 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 watch 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 non-motorized commercial whale watch license-holders shall maintain accurate logs on each instance a vessel operating under a license enter within one-half nautical mile vicinity of southern resident killer whales and submit copies of the logs to WDFW.
- 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 WDFW on the following schedule:
    - i. All vicinity instances in July must be reported by August 15.
    - ii. All vicinity instances in August must be reported by September 15.
    - iii. All vicinity instances in September must be reported by October 15.
    - iv. Vicinity instances that happen outside of the permitted hours and days described in WAC 220-460-120 must be submitted within 24 hours.
  - c. Accurate logs must be submitted for every vicinity instance, even if the vicinity instance falls outside of the rules defined in this chapter.
  - d. Logs must be provided for inspection on request of WDFW law enforcement.
- (4) All motorized commercial whale watch license-holders must log accurate, complete sighting information to the Whale Report Alert System (WRAS) upon entering within one-half nautical mile of a southern resident killer whale.

#### **New WAC section 220-460-150 Penalties**

- (1) Commercial operators in violation of WAC 220-460-090 will be issued a fine of \$500.
- (2) Operators out of compliance with WAC 220-460-100, WAC 220-460-110, WAC 220-460-120, WAC 220-460-130, or WAC 220-460-140 will be issued a fine of \$100 pursuant to RCW 77.15.160. Violations of these WAC may alternatively be pursued criminally under RCW 740
- (3) No commercial whale watching vessels will be allowed in the vicinity of southern resident killer whales for the remainder of the month if the total number of civil or criminal citations or referrals issued for violations of the provisions in this chapter reaches or exceeds three during that month.

- (4) An operator will not be permitted within one-half nautical mile of a southern resident killer whale for the remainder of the year if the total number of civil or criminal citations or referrals issued to that operator for violations of the provisions in this chapter reaches or exceeds two during the year.
- (5) Any commercial whale watching license associated with five or more civil or criminal citations or referrals in one calendar year of any of the provisions in this chapter will not be permitted within one-half nautical mile of a southern resident killer whale for the remainder of the year and the following year.
- (6) If any commercial whale watching operator does not log a vicinity instance or fraudulently reports the details of a vicinity instance:
  - a. No vessel associated with the license will be permitted within one-half nautical mile of a southern resident killer whale for the remainder of the year.
  - b. The operator will not be permitted within one-half nautical mile of a southern resident killer whale for the remainder of the year and the following year.

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