

WDFW's Implementation of 2SSB 5577: Reporting and Adaptive Management

Prepared in September 2021

Thanks to leadership from the governor, Legislature, and state agencies, several of the Governor's Southern Resident Orca task force recommendations resulted in significant policies and regulatory initiatives to help recover Southern Resident killer whales, representing an encouraging step in Southern Resident recovery. The enacted 2019–21 biennial budgets (operating, capital, and transportation) provided \$1.1 billion to support the recovery of Southern Residents and implement the recommendations of the task force.

In addition, four 2019 bills advanced priority task force recommendations, including Second Substitute Senate Bill 5577: *a bill concerning the protection of Southern Resident Orca Whales from vessels*. This bill modified the state requirements for operating a vessel around Southern Resident killer whales (in RCW 77.15.740), including changing the approach distance from 200 yards to the sides and 400 yards in front of SRKW to 300 yards to each side and 400 yards to the front and back. The bill also established a speed limit of 7 knots within one-half nautical mile of Southern Residents. In addition, the bill added RCW 77.65.615, which developed a license for commercial whale watching, and RCW 77.65.620 which directed the Washington Department of Fish and Wildlife (WDFW) develop rules for commercial viewing of Southern Resident Killer Whales (SRKW). Unlawful commercial whale watching was defined in RCW 77.15.815.

Beyond the charge to enforce the boating regulations, administer the licensing program, and to develop and implement rules for commercial viewing of Southern Residents, WDFW was tasked in RCW 77.65.620(5) to analyze and report back on the new laws:

The department shall complete an analysis and report to the governor and the legislature on the effectiveness of and any recommendations for changes to the whale watching rules, license fee structure, and approach distance rules by November 30, 2022, and every two years thereafter until 2026. This report must be in compliance with RCW **43.01.036**.

This document outlines WDFW's intentions to analyze the effectiveness and develop recommendations for changes in each of these areas. Please note that different processes and analysis may be required (or made possible) based on available funding and data. In addition, each report (2022, 2024, and 2026) may differ based on new developments or science that emerges between reports.

Analyzing the effect of approach distance and commercial whale watching regulations on SRKW

In order to gauge the effect of the rules, WDFW will consider studies examining vessel and SRKW behavior. Some studies will be supported directly with funding from WDFW (see Appendix 1: the year-by-year studies supported by WDFW), but WDFW will also draw insights from studies conducted by NOAA and other partners. To see information about the kind of studies most valuable to assessing vessel and SRKW behavior, please see Appendix 2: guidance for researchers.

In addition to studies directly aimed at understanding the effect of the rules on SRKW, WDFW will examine the best available science regarding underwater noise, disturbance, and marine mammals. The broader body of scientific research is critical to making scientifically based inferences about the effectiveness of the rules in supporting SRKW-recovery outcomes.

Finally, a critical component of understanding the effect of the regulations on SRKW is understanding the level of compliance. The regulations cannot achieve the desired effect if they are not adhered to by boaters or commercial whale watching operators, and so, the level of compliance will be assessed via data from WDFW Enforcement and their joint law enforcement partners.

To learn more about important variables, approaches, and considerations for evaluating management actions intended to reduce noise and disturbance of SRKW, please see the *Adaptive Management of Regulations* recommendations prepared for WDFW by the Washington State Academy of Sciences.

Analyzing the licensing fee structure

In the spring of 2021, the legislature passed ESB 5330: *Regarding commercial whale watching licenses*. This bill restructured the license and fees just as the first year of license sales were beginning. The updates to the license and fees were based on many conversations between industry and WDFW to troubleshoot issues when rolling out the new license. As we approached the launch of license sales, we learned quite a bit about the real-world implications of the license structure, and the legislature was able to address several of the identified issues via the bill. The primary changes included:

- Waiving all commercial whale watching license fees for 2021 and 2022
- Removing the requirement for Canadian businesses to provide a UBI in their application to get the WA commercial whale watching license
- Restructuring the kayak fees to eliminate the fee based on number of kayaks and to provide a lower fee for kayak guides
- Change the structure of the license to:
 - a. Define a commercial whale watching business license separate from the license to operate commercial whale watching vessels or lead kayak tours;
 - b. Define a straightforward operator license that removed the unnecessary distinction between primary, designated, and alternate operators; and
 - c. Define a kayak guide license separate from the operator license.

While we anticipate that these changes resolved many of the identified challenges, WDFW will continue to identify areas where updates to the license fee structure may be needed. The primary means of identifying potential changes will be:

- discussions with licensees
- analysis of data from the licensing system
- internal troubleshooting throughout implementation
- challenges identified by WDFW Enforcement
- alignment opportunities with any Canadian licensing system
- updated economic information or analysis

One area already identified for further discussion is the concept of a differentiation in the licensing requirement for businesses that commit not to engage in viewing of SRKW or operators working on the Washington outer coast. Another is the use of an external decal applied to a licensed commercial whale watching vessel to indicate that the vessel is licensed to conduct commercial whale watching tours.

Assessing updates to science and regulations

Keeping pace with the broader regulatory and scientific landscape will inform recommendations to the governor and legislature. Particularly, WDFW will track state, federal, and Canadian changes to regulations concerning SRKW to identify nexuses and opportunities for alignment. In 2019, NOAA initiated a comment period to consider updates to the federal SRKW-related regulations for vessels. This process may proceed and result in changes to the regulatory framework at the federal level within the next several years. In addition, the Canadian SRKW-related vessel regulations have been set annually on an interim basis, but eventually, we expect that Transport Canada and the Department of Fisheries and Oceans may adopt permanent regulations. The potential for alignment across jurisdictions may present opportunities to increase understanding and compliance with rules, and it may support synergistic efforts that facilitate SRKW recovery. Therefore, WDFW will be tracking and coordinating with our counterparts to the extent possible.

At the state level, WDFW will be tracking any legislation and policies that affect SRKW, including anything that may affect underwater noise and disturbance. For example, the Quiet Sound program received funding in 2021. Science, ideas, and recommendations coming from the Quiet Sound program (as well as the Canada-based ECHO program) will provide important collaboration opportunities and best practices to reduce vessel noise and disturbance.

In addition, WDFW will assess updates to the best available science. Relevant science published between reports to the governor and legislature will be summarized and cited as appropriate. More comprehensively, WDFW envisions a retrospective on the evolution of best available science to be included in the 2026 report. This could entail working with the Washington State Academy of Sciences to produce an addendum to the 2020 *Summary of Key Research Findings about Underwater Noise and Vessel Disturbance*. The Academy's report highlights several areas where additional data or specific studies are needed, and an update could assess if developments in the science address any of the uncertainties identified.

Assessing input from industry and the broader community

There is broad interest in regulations and other management actions that support the recovery of SRKW, from former Southern Resident Orca task force members as well as non-profits, government partners, affected industries, and the general public. WDFW intends to provide opportunities for all of these interested parties to share their observations, considerations, and opinions.

Communication with the whale watching industry will provide important feedback about the on-the-water, day-to-day implementation of the rules for commercial whale watching. Post-season debriefs will give us the opportunity to hear from businesses, operators, and kayak guides about what it was like to adhere to the new rules: what was challenging or confusing, what worked well, and what they noticed. This will also help improve WDFW Enforcement's ability to communicate with industry and provide clarification. The whale watching industry is also well positioned to provide feedback about their experiences with the approach distance and speed regulations.

Assessing the impact of the rules and the licensing system on the commercial whale watching industry may also include an economic analysis. Two economic analyses informed the creation of the rules for commercial viewing of SRKW: an economic viability analysis and an economic impact analysis. WDFW may conduct another analysis after a few years of implementation to reassess the rules' impact on the industry. In addition, this analysis could look at the actual cost of the licenses to determine the economic impact of purchasing annual licenses. Tentatively, this type of analysis may be included in the 2024 report.

Finally, WDFW envisions some type of public engagement opportunity or opportunities prior to presenting a report to the governor and legislature. This could include a listening session or other opportunity to share thoughts with WDFW before developing recommendations, and/or it may include an opportunity to review WDFW's draft recommendations and provide feedback. Public engagement also provides a chance for people to bring forward other studies or data for WDFW to consider. Likely, these public engagement opportunities would happen during the summer or early fall of 2022, 2024, and 2026.

Conclusion

In our highly dynamic social, political, economic, and ecological environment, it is quite difficult to imagine exactly what will happen over the next six years. Moreover, it is difficult to isolate the impacts of specific rules in such a dynamic system with a multitude of other variables, including efforts to increase prey availability, decrease contamination, and reduce noise and disturbance from other types of on-the-water activity besides recreational boating and commercial whale watching. On top of that, the Washington State Academy of Sciences warned that six years is likely too short a time to see a noticeable signal in the SRKW population.

That being said, WDFW can still assess progress, learn from experience, and continue to build in the best available science as we adaptively manage over the next several years. While many of the concepts outlined herein are contingent upon funding and staff capacity, WDFW will share and update an annual list of the monitoring efforts that are conducted or funded by the Department (see Appendix 1).

If you or others in your community wish to contribute research or data to WDFW's monitoring and adaptive management efforts, please reference Appendix 2, which describes guidance for researchers and the qualities of studies that are most useful to inform adaptive management. Please also reference the reports from the Washington State Academy of Sciences, both *the Summary of Key Research Findings about Underwater Noise and Vessel Disturbance* and the *Adaptive Management of Regulations* documents, which were prepared specifically to inform the regulatory and adaptive management processes.

Please reach out to Julie Watson, WDFW's Killer Whale Policy Lead, with any questions or comments about this document.