



## Fish and Wildlife Commission Presentation Summary Sheet

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**Meeting date:**

12/9/2022

**Agenda item:**

Protecting Southern Resident Killer Whales from the Effects of Vessels– Briefing

**Presenter(s):**

Julie Watson, PhD, Killer Whale Policy Lead

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**Background summary:**

Governor Inslee established the Southern Resident Orca Task Force in March of 2018 to address the urgent threats to Southern Resident killer whale (SRKW) recovery: prey availability, contaminants, and vessel noise and disturbance. The Task Force was made up of nearly 50 appointed representatives from diverse sectors and Tribes. In its 2019 final report, the Task Force published 49 recommendations including a suite of measures addressing all the major threats, with the addition of recommendations focused on decreasing pressures from climate change and human population growth, leading to four major pieces of legislation in the 2019 State legislative session and significant appropriations to address the threats and implement the Task Force recommendations. Information on the status of Task Force recommendations can be found on the [orca.wa.gov](http://orca.wa.gov) website.

The [2019 Senate Bill 5577](#) modified the State’s requirements for operating a vessel in the vicinity of SRKW by 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. Additionally, the bill directed the Department to adopt a license program for commercial whale watching (CWW), administer the program, and develop rules for commercial viewing of SRKW. WDFW accomplished this in 2020. The final rules were filed on December 23, 2020 and went into effect January 23, 2021.<sup>1</sup>

In spring 2021, the Washington State Legislature passed and the Governor signed [Engrossed Senate Bill 5330](#) to modify the license structure and fees and waive the fees in 2021 and 2022. WDFW modified the commercial whale watching license application to align with the new law and worked with applicants to adjust to the updated application process. WDFW Enforcement began checking for licenses in the field in June of 2021. At present, annual CWW licenses are required for all CWW businesses, vessel operators, and kayak guides, and all rules related to CWW and viewing of SRKW are in effect.

To learn more about the rulemaking process, rules, and licensing program, visit the following links for more information: for the rulemaking process, visit [WDFW’s CWW rulemaking website](#); SRKW approach restrictions

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<sup>1</sup> The exceptions were WAC section 020, which describes the license application process and requires a license to operate, and WAC 220-460-140, which specifies compliance, training, and reporting requirements; these sections went into effect May 1, 2021.

for vessels, visit [RCW 77.15.740](#); for the legislature's direction to WDFW, visit [RCW 77.65.620](#); the CWW license program, visit [RCW 77.65.615](#); and the CWW rules, visit [WAC Chapter 220-460](#).

Beyond the charge to enforce the boating restrictions, administer the licensing program, and to develop and implement rules for commercial viewing of SRKW, the Department was tasked in RCW 77.65.620(5) to analyze and report back on the new laws. WDFW completed this analysis in 2022 through an adaptive management (AM) process, which included the following activities:

- Analyzing the effectiveness of approach distance and CWW restrictions by reviewing studies examining vessel and SRKW behavior, the best available science (BAS) regarding underwater noise, disturbance, and marine mammals, as well as assessing the level of compliance with the restrictions.
- Assessing opportunities for improvement to the CWW licensing program and fee structure with activities such as engaging in discussions with license holders, conducting an analysis of data from the licensing system, and dialogue with WDFW Enforcement.
- Assessing nexuses and opportunities for transboundary alignment by tracking local, state, federal, and Canadian regulatory frameworks, including ongoing and new vessel-related measures related to SRKW recovery.
- Inviting input from industry and the broader community by providing opportunities for interested parties to share their observations, considerations, and opinions.

The Department's AM process involved several concurrent data collection and analysis processes, including a review of recent scientific studies and an assessment of their implications; an analysis of compliance, enforcement, and reporting information; and an analysis of feedback from stakeholders and the public on the vessel restrictions, CWW rules, and CWW licensing program.

The resulting report ([link](#)), which summarizes the findings from these activities and outlines the Department's recommended changes, was delivered to the legislature on November 30, 2022. This legislative report fulfills the Department's requirement to analyze the effectiveness of and any recommendations for changes to the state's commercial whale watching rules, license fee structure, and approach distance rules (as outlined in RCW 77.65.620, subsection 5); it is prepared by WDFW for the Washington State Governor and legislature.

### ***WDFW Recommendations***

In addition to our broader work on increasing prey availability, increasing foraging success remains critical. The most recent advancements in science suggest that our statutes, if modified to provide increased protections of SRKW from vessel impacts, could afford increased foraging and foraging success at a critical juncture in the population's recovery trajectory. As such, the Department recommends that the legislature increase the vessel buffer around SRKW to 1000 yards (approximately one-half nm) for all vessels, unless exempted for safety or other specified reasons.

#### **General restrictions for vessels operating around SRKW (RCW 77.15.740)**

- 1000-yard buffer around SRKW
- *See Appendix A for specific modifications to RCW 77.15.740*

#### **Commercial Whale Watching License (RCW 77.65.615 and RCW 77.15.815)**

- Distinguishing sea paddle tour licensing from motorized CWW licensing
- Simplification & general reduction of fees
- Improvements to the enforcement mechanisms

- See Appendix B for specific modifications to RCW 77.65.615 and Appendix C for specific modifications to RCW 77.15.815
- Note: If the legislature pursues changes to the CWWLP, determining the phasing and/or effective date will be important to enable the Department to make the required adjustments.

### **Commercial Whale Watching Rules (WAC 220-460)**

- The Department proposes simplifying the rules and requirements in WAC 220-460 to align with changes to the RCW via a Department rulemaking process. These changes could include:
  - Modifying the reporting structure and process to simplify where possible and increase effectiveness, efficiency, and compliance
  - Simplifying or removing several sections that would not be applicable, including approach distance windows and limits on number of boats within one-half nm of SRKW, if all vessels are held to a 1000-yard vessel approach distance

Please note that the Department is not recommending a 1000-yard buffer around all killer whales. This 1000-yard restriction would apply only around the Southern Resident killer whale population. For other killer whales encountered in the inland waters of Washington, such as Bigg's transient killer whales, boaters and commercial whale watching operators would continue to follow current federal law specifying vessels must remain at least 200 yards away.

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### **Staff recommendation:**

While there is no decision in front of the Commission today, staff request the Commission's support and endorsement of the Department's recommendations in the report.

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

The legislature tasked the Department with completing "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..." and specified that, "The Department must... continue to adaptively manage the program using the most current and best available science."

Of the recommendations described above, most require legislative action to update RCW 77.15.740, RCW 77.65.615, and RCW 77.15.815. If the legislature passes a bill in the 2023 legislative session, this will precipitate rulemaking by the Department to update WAC chapter 220-460. WDFW anticipates proposing additional updates to WAC chapter 220-460 which would likely be done in concert with updates based on legislation.

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### **Fiscal impacts of agency implementation:**

If the legislature takes action on the Department's recommendations, there may be some costs incurred to 1) complete rulemaking to update WAC chapter 220-460, 2) update the WILD licensing system to reflect changes in the license structure and fees, and 3) conduct outreach, education, and enforcement of the revised statutes.

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

WDFW collected public and stakeholder feedback through a combination of an online survey and a series of focus group meetings.

- WDFW hosted an online survey to collect feedback on different aspects of the CWW license program and rules, as well as the general vessel restrictions. The survey was open from September 1 – 30, 2022 and included both closed- and open-ended questions, meaning sometimes participants were asked to select specific answer choices and sometimes they had the opportunity to provide short answers/comments. Although the survey was open to the public, the reader should note that the feedback themes presented in this report do not represent the full spectrum of public opinion, as most survey respondents were likely closely invested in issues related to SRKW and tracking them closely. Overall, 852 individuals responded to the survey. Of the 751 respondents who provided their affiliation, 333 identified as a recreational boater, 15 identified as a motorized CWW owner/operator, and 8 identified as a sea kayak/ paddle tour owner/guide.
- Five 90-minute stakeholder focus group meetings were conducted in October 2022 to collect more in-depth and targeted feedback on the license program, CWW rules, and general vessel restrictions. Focus group participants were determined by the Department based upon the participants’ interest and involvement with previous WDFW CWW rulemaking efforts; the groups themselves loosely grouped participants based on their interests and affiliations (so participants in a group generally had somewhat similar viewpoints). The meetings had 3-8 participants each and were facilitated in a semi-structured format to prompt the participants on specific topics. The stakeholder groups were:
  - Motorized CWW business and operator license holders
  - Nonmotorized CWW business and sea kayak guide license holders
  - NGO representatives (two focus groups)
  - Recreational boater representatives
- WDFW also met with government partners, including the Inter-governmental Coordination Group, which includes representatives from Washington State agencies, county, federal, and tribal government partners, and Canadian government entities, to share program updates and consider opportunities to better align processes.
- WDFW hosted an online science survey that was designed to allow people to submit studies and science for it to consider during its AM process. The survey was open to the public from September 1–20, 2022. Eight individuals submitted science and/or comment for consideration. Three peer-reviewed journal articles, three unpublished reports, and unanalyzed data were submitted.

The data and findings from WDFW’s reviews in these areas are summarized in Chapter 2 of the report, and Appendices D and F provide greater detail.

***Key findings include:***

- The current statutory restrictions on vessel operation when in the vicinity of SRKW are seen as confusing.
- CWW license holders and some NGO focus group participants identified a need for the CWW license program to accommodate CWW companies or entities that do not seek SRKW or take clients to view them within one-half nm (e.g., provide reduced fee options).
- Focus group and survey participants universally value SRKW protection and overwhelmingly indicated that the current CWW viewing rules do not support SRKW recovery as much as they could. Furthermore, participants generally agree that the SRKW viewing rules for CWW vessels should not be more restrictive than rules for other types of vessels.
- CWW license holders and some NGO focus group participants believe that a system in which average boaters have more SRKW-viewing privilege than licensed vessel operators and sea kayak guides is “backwards.”
- Focus group and survey participants generally agree that all SRKW should be considered “vulnerable;” that identifying a vulnerable SRKW from one-half nm is challenging; and that WDFW’s vulnerable whale emergency rule and designation process could be refined.

Ultimately, WDFW’s recommendation for adaptive management of the statute stems from the most current and best available science, but it also addresses many key challenges and opportunities discussed in the survey and focus group conversations, including:

- Addressing the complexity of the current approach distance statutory restriction as well as the complexity of the rules for commercial viewing of SRKW. This would drastically simplify both and provide a much simpler message to communicate, which we anticipate would enable better understanding of and compliance with the statute and regulations, particularly among recreational boaters.
- Addressing the critique that for most of the time, general recreational boaters are legally permitted to approach SRKW closer than licensed commercial whale watchers, and it is the CWW operators who are generally better at identifying killer whale ecotypes and assessing distance on the water.
- Leaning into the potential benefits of a “sentinel” effect of motorized CWW by enabling these operators to set a positive example for other boaters to align with their behavior.
- Avoiding the potential downside of a “magnet” effect of motorized CWW by keeping any boats drawn to the scene of orcas at a distance that will not decrease foraging behavior or success.
- Enabling improved enforcement of the regulations by reducing requirements that officers can identify specific individual whales and by simplifying the variables they must track on-scene during their patrols.
- Removing the need for a “vulnerable whales” process that attempted to parse out the most vulnerable among the critically endangered population.
- Underscoring feedback that opportunities to commercially and recreationally view marine mammals in Washington waters remain high, and feedback from members of the CWW industry that viewing Southern Residents even at greater distances can provide CWW customers with opportunities to fall in love with the iconic SRKW population.

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

N/A – briefing only. Staff will return to present rulemaking decision points, as appropriate, in 2023.

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**Draft motion language:**

N/A

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**Post decision communications plan:**

N/A