

# Concise Explanatory Statement (CES)

## Concise Explanatory Statement for WAC 220-460 Commercial Whale Watching

### **Rules amended as part of this rulemaking:**

WACs 220-460-010, 220-460-050, 220-460-070, 220-460-090, 220-460-130, 220-460-140, 220-460-150

### **Rules repealed as part of this rulemaking:**

WACs 220-460-110, 220-460-120

### **Rules created as part of this rulemaking:**

WAC 220-460-025

### **1. Background/Summary of Project:**

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, or Department) 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 was to reduce the impacts of vessel noise and disturbance on the whales' ability to forage, rest, and socialize while enabling sustainable whale watching.

The Commission adopted rules for commercial viewing of SRKW (WAC Chapter 220-460) in late 2020, and the licensing program and rules have been in effect since early 2021. In November of 2022, the Department issued the first of three SRKW Vessel Adaptive Management reports required under RCW 77.65.620. In the following 2023 Legislative Session, the Washington Legislature passed Senate Bill 5371, which made changes to the commercial whale watching license fee structure, codified some requirements for commercial whale watching, and instated a 1,000-yard vessel buffer around SRKW which went into effect January 1, 2025.

### **2. Reasons for adopting the rule:**

Per the legislation in 2023 Senate Bill 5371, the Department proposes to update the rules in WAC Chapter 220-460 to clarify requirements for commercial whale watching and paddle tour license holders as authorized under RCW 77.65.620. A summary of the proposed revisions and the rationale behind them is below:

- Removing sections 110 and 120, which define the number of vessels at a time and days and hours when commercial whale watching vessels may approach SRKW closer than one-half nautical mile (1,012.69 yards). With the shift to a uniform 1,000-yard vessel setback from SRKW year-round, these sections are no longer relevant.
- Defining a fee waiver process related to RCW 77.65.615(13) for organizations whose relevant commercial whale watching or marine paddle tour activities are solely for bona fide nonprofit educational purposes.
- Adjusting definitions and reporting requirements to strongly encourage, but not require, logging and reporting SRKW encounters to the Department, and to clarify and add the requirement to report SRKW encounters to the WhaleReport app for the Whale Report Alert System any time a commercial whale watching operator identifies or comes within 1,000 yards of SRKW.
- Making other minor administrative clarifications and refinements within the WAC Chapter.

### **3. Differences between the text of the proposed rule and the rule as adopted:**

No changes beyond the December 2024 [CR-102](#).

### **4. Public comments, response to comments, and consideration of comments:**

The Department held a 41-day public comment period for the rulemaking (from December 4, 2024, to January 13, 2025) and hosted a public hearing during its [January 10, 2025, Fish and Wildlife Commission meeting](#). In total, the Department received 18 comments on the proposed rule changes: nine via public comment form, two via email, and seven via public hearing oral comment. These comments are part of the public record and are subject to disclosure under the Public Records Act. See Appendix A for a list of numbered, summarized comments that correspond with the Department’s responses in Table 1, below.

Comment Highlights:

- No commenters opposed the WAC 220-460 rule changes.
- Fifteen out of eighteen comments, or 83%, explicitly stated support for the rule changes.
- Fifteen out of eighteen, or 83%,<sup>1</sup> of the comments encouraged the Department and/or the Fish and Wildlife Commission to do more to protect orcas and offered several suggestions for the Department to consider. The suggestions are summarized below. They relate to measures that might increase prey availability, vessel restrictions, boater behavior, and increased WDFW Enforcement. Although many of the suggestions are outside the scope of this rulemaking process, the Department will consider them as it continues its adaptive management work to recover Southern Resident orcas. Suggestions included:

---

<sup>1</sup> Although there is overlap, this is not the same 83% of comments that explicitly stated support for the rule changes.

- Increase WDFW Enforcement presence on the water and/or assign Orca pod-specific enforcement vessels
- Establish vessel-free “Orca Survival Zones” in the Salish Sea
- Establish dynamic “hot zones” around orca pods that could be tracked with a phone application
- Encourage boaters to use the WhaleAlert phone application
- Further regulate on-the-water commercial activities including fishing
- Increase role of commercial whale watching companies in promoting orca-positive behaviors and policies
- Extend vessel regulations and/or commercial whale watching requirements to airborne aircraft
- Support action on the Lower Snake River Dams
- Consider fishery and/or hatchery changes to support SRKW

*Table 1: WDFW Responses to Comments*

<b>Comment Number(s)</b>	<b>Comment Theme(s)</b>	<b>WDFW Response</b>	<b>Reflected in revised WAC 220-460</b>
1, 4, 5, 6, 10, 13, 14, 15, 16, 17, 18	Supports the proposal and provides additional suggestions to further protect orcas	Thank you for your comment and your support of the draft rule as written in the CR-102. The Department appreciates your suggestions to further protect orcas. Although some suggestions deal with topics and entities other than commercial whale watchers and paddle tours, the Department will consider them as it continues its SRKW adaptive management work.	N/A
1, 2, 7	Suggests going further in restricting commercial whale watching	Thank you for your comment. The Department is changing WAC 220-460 to align with the state legislature’s changes to RCW 77.15.740 via the 2024 Senate Bill 5371.	N/A
10, 14, 16	Suggests investigating and regulating air-based commercial whale watching activity	Thank you for your comment. The current definitions in WAC 220-460-010 include aircraft only while on the surface of the water. This aligns with the definition of vessel in RCW 77.15.740, which was the recently updated statute that prompted the scope of this rulemaking. However, “vessel” is not	N/A

		separately defined in RCW 77.65.615, which establishes the commercial whale watching license. More research needs to be conducted into the scale and impact of aerial commercial and non-commercial whale watching before rules on this topic may be proposed, and the Department will consider further analysis as part of its ongoing adaptive management work.	
3, 7, 12	Supports the proposal and suggests eliminating certain on- water activities	Thank you for your comment and your support of the draft rule as written in the CR-102. The Department appreciates your desire to further protect orcas, however, this protection must be achieved alongside legislatively supported commercial and Tribal activities, including whale watching, fishing, and shipping. Changing regulations related to these activities is outside the scope of this rulemaking process.	N/A
8, 11	Supports the proposal	Thank you for your comment and your support of the draft rule as written in the CR-102.	N/A
9, 16	Suggestions for whale watching operator communications and engagement	Thank you for your comment. The Department appreciates your suggestions to further consider whale watching operators' opportunity to help increase public engagement and/or boater awareness of whale presence and compliance with the rules. Although the Department is not currently considering additional mandatory requirements for whale watching interactions with clients or other boaters, it will consider your suggestions as it continues its SRKW adaptive management work.	N/A

## APPENDIX A

This table below provides more detail about the comments received. Comments are displayed as paraphrased summaries of the written comments provided (comments 1-11) and the oral comments shared during the January 10 Commission meeting (comments 12-18).

Comment Number	Comment themes, by commenter
1	<ul style="list-style-type: none"> <li>• Supports the proposal</li> <li>• Encourages going farther to prevent vessel impacts</li> </ul>
2	<ul style="list-style-type: none"> <li>• Questions the 1,000-yard distance as too similar to the current ½ nautical mile restriction in place for commercial whale watchers most of the year</li> <li>• Suggests that whales need even more space, care, and respect</li> <li>• Suggests that there should be limits on days or seasons when commercial whale watching operators can view SRKW</li> <li>• Says the rulemaking falls short of what the SRKW need</li> </ul>
3	<ul style="list-style-type: none"> <li>• Supports the proposal</li> <li>• Suggests eliminating salmon fishing in Area 7, and suggests that Tribes fish in terminal (“orca-free”) areas</li> </ul>
4	<ul style="list-style-type: none"> <li>• Supports the proposal</li> <li>• Suggests creating vessel-free “Orca Survival Zones” allowing only commercial (not commercial whale watching) and emergency transit</li> </ul>
5	<ul style="list-style-type: none"> <li>• Supports the proposal</li> <li>• Suggests developing mobile “hot zones” around SRKW on an app/mapping software and prohibiting non-commercial motorized vessels and commercial whale watching vessels from these zones.</li> </ul>
6	<ul style="list-style-type: none"> <li>• Supports the proposal</li> <li>• Suggests requiring WDFW Enforcement to dedicate a patrol vessel to each SRKW pod any time SRKW are in the Salish Sea</li> <li>• Suggests a minimum of two Enforcement vessels and four operators stationed in Anacortes and Port Townsend.</li> </ul>
7	<ul style="list-style-type: none"> <li>• Supports the proposal</li> <li>• Suggests shutting down commercial whale watching operations relying on SRKW</li> </ul>
8	<ul style="list-style-type: none"> <li>• Comment from a nonprofit organization</li> <li>• Supports the proposal and the justification supporting the proposal, including the need to align with changes in the statute</li> <li>• “This change reflects the best available science and will help reduce noise and disturbance that interfere with the endangered orcas’ ability to effectively locate and catch prey to feed their families.”</li> </ul>
9	<ul style="list-style-type: none"> <li>• Suggests all boaters (including commercial whale watching operators) should partner to help one another become aware of whale presence and avoid areas of whale activity</li> <li>• Emphasizes that boaters/operators should not withhold information about submerged whales, and discusses when citations should/should not be issued</li> <li>• Discourages “whale shaming” behavior from boaters/operators</li> </ul>

10	<ul style="list-style-type: none"> <li>• Comment from an environmental attorney from King County</li> <li>• Supports the proposal</li> <li>• States that much more needs to be done</li> <li>• Suggests that economic viability of industry should “take a back seat to survival of a species”</li> <li>• Discusses personal observations of vessels chasing orcas and expresses a desire for more enforcement/consequences</li> <li>• Shares ideas for stronger monitoring and enforcement around whale-oriented vessel activity (including commercial whale watching) including on-board observers, remote cameras, and drone surveillance</li> <li>• States that the rule fails to address commercial whale watching by airplane, and describes air-based whale watching behaviors</li> <li>• Encourages the commission to “insist the department assess the effects of hatchery production on the ability of the whales to find suitable prey of the right size and age to sustain them” and wishes for more large, wild Chinook in the SRKW feeding grounds</li> </ul>
11	<ul style="list-style-type: none"> <li>• Comment from a nonprofit organization</li> <li>• Support for proposal, naming several components (removing irrelevant sections, addressing reporting requirements, and defining the fee waiver process)</li> <li>• Expresses support for the legislation that established the 1,000-yard vessel setback from SRKW</li> <li>• Expresses and offers support for WDFW’s on-water Enforcement, including increased funding for Enforcement, and discusses the benefits of on-water Enforcement presence</li> </ul>
12	<ul style="list-style-type: none"> <li>• Supports the proposal</li> <li>• Suggests the Department work with the Legislature to consider further regulating commercial fishery activities to increase orca protection from vessels and to provide more prey</li> </ul>
13	<ul style="list-style-type: none"> <li>• Comment from a nonprofit organization</li> <li>• Supports the proposal</li> <li>• Suggests the Department and/or Commission champion lower Snake River dam removal to support salmon recovery and increase prey availability</li> </ul>
14	<ul style="list-style-type: none"> <li>• Suggests the Department consider extending vessel regulations to airborne aircraft to further reduce vessel noise that impacts orcas</li> <li>• Suggests the Department do more to acknowledge the urgency of the SRKW decline, including addressing fishery impacts and removing lower Snake River dams to increase prey availability</li> </ul>
15	<ul style="list-style-type: none"> <li>• Comment from a nonprofit organization</li> <li>• Supports the proposal</li> <li>• Acknowledges urgency of SRKW protection and suggests the Department pursue additional ways to increase prey, including re-examining hatchery production and impacts on wild fish and prey availability</li> <li>• Suggests diverting money from hatchery production to on-water enforcement and supports increased enforcement</li> <li>• Suggests that vessel regulations could have gone farther based on the science, and thus the new law is not enough</li> </ul>

16	<ul style="list-style-type: none"> <li>• Comment from a nonprofit organization</li> <li>• Supports the proposal</li> <li>• Suggests the Department extend vessel regulations to airborne aircraft</li> <li>• Suggests the Department refine its adaptive management work by identifying areas of the Salish Sea where greater vessel setback distances would benefit orcas</li> <li>• Suggests the Department lean on commercial whale watching partners to improve SRKW recovery by training operators to help clients understand ways to mitigate human impacts on SRKW and promote salmon recovery in the policy arena</li> </ul>
17	<ul style="list-style-type: none"> <li>• Comment from a nonprofit organization</li> <li>• Supports the proposal</li> <li>• Supports adoption of many ORCA Group recommendations, including the Ambassador Program and use of WhaleAlert app</li> </ul>
18	<ul style="list-style-type: none"> <li>• Comment from a nonprofit organization</li> <li>• Supports the proposal</li> <li>• Suggests the Department increase Enforcement capacity; promote the use of WhaleAlert app among boaters; and implement the ORCA Group-recommended Ambassador Program as soon as possible</li> </ul>