

Concise Explanatory Statement (CES)

Concise Explanatory Statement for Commercial Whale Watching Licensing Program and rules for commercial whale watching of Southern Resident killer whales

Rules amended as part of this rulemaking:

[WAC 220-460 Commercial Whale Watching]

Rules repealed as part of this rulemaking:

[N/A]

Rules created as part of this rulemaking:

[N/A]

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) 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 with many components that informed the rulemaking process:

- A Commercial Whale Watching Licensing Program Advisory Committee (Advisory Committee) was established in October 2019 and met from January to July of 2020. The Advisory Committee had 11 members, including representatives from motorized and nonmotorized commercial whale watching businesses and associations, non-governmental organization representatives, and a retired NOAA manager. The Advisory Committee outlined hopes and values for the program and the variable elements of the rule package for the viewing of SRKW by commercial whale watching license holders. The Advisory Committee discussed key parameters to include in the rule package, including number of vessels and the amount of time commercial vessels spent in the vicinity of SRKWs and potential geographic restrictions.
- An Intergovernmental Coordination Group consisting of state, federal, tribal, local, and Canadian government officials met periodically to advise WDFW about administrative and logistical aspects of the rulemaking.
- A SEPA public engagement and environmental analysis was conducted, resulting in a programmatic Environmental Impact Statement.
- WA State Academy of Sciences was contracted to convene a Science Panel and write a report on best available science
- Two economic analyses were conducted for WDFW: an economic viability analysis and a small business economic impact statement (SBEIS).

The Fish and Wildlife Commission had a briefing and hearing on the proposed rules December 4, 2020, and the comment period closed on December 5. The Commission had a special session on December 15 to facilitate further briefing and discussion of the proposed rules, and the Commission adopted a final rule during their December 18 conference call. This allowed WDFW to meet the goal in Senate Bill 5577 to adopt rules by January 1, 2021.

2. Reasons for adopting the rule:

The main threats to SRKW recovery include prey availability, water contamination, and vessel noise and disturbance. These factors are interrelated. For example, increasing prey by 15% and decreasing vessel noise by 50% is expected to recover the population more effectively than increasing prey by 30% alone (Lacy et al. 2017). SRKW can handle more disturbance/noise when prey is abundant. Complementing the full suite of actions taken in the region to reduce noise and contaminants and to increase prey for 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 considering the economic viability of license holders.

Governor Inslee's Southern Resident Orca Task Force that met in 2018 and 2019 issued 49 recommendations including #28 "Suspend viewing of Southern Resident orcas" to "establish a whale watching regulation that precludes Southern Resident orca viewing by all boats in Puget Sound for the next three to five years." The recommendations also included #18 "Establish a limited-entry whale-watching permit system for commercial whale-watching vessels and commercial kayak groups in the inland waters of Washington state to increase acoustic and physical refuge opportunities for the orcas."

When the legislature passed Senate Bill 5577, they changed the distance and speed rules for all vessels around SRKW, but they did not 1) suspend viewing of SRKW, or 2) establish a limited-entry whale watching permit system. Instead, they created an open licensing system for commercial whale watching, and they directed the Department to "adopt rules for holders of a commercial whale watching license... for the viewing of southern resident orca whales... to reduce the daily and cumulative impacts on southern resident orca whales and consider the economic viability of license holders" and "use the best available science in the establishment of the southern resident orca whale watching rules."

The Department used the best available science compiled by the Washington State Academy of Sciences independent science panel (Science Panel) to develop the rules. The relevant science, as compiled Science Panel, outlined the scientific basis for taking action to reduce vessel noise and disturbance:

1. Close approaches by vessels can cause significant direct effects on foraging (Lusseau et al 2009)¹, and vessel presence, not just sound, can cause changes in orca behavior (Williams et al 2010).
2. Close approaches of boats can cause indirect negative effects including masking (elevated noise levels that interfere with communication and foraging), even with slow-moving vessels (Holt et al 2008).
3. Behavioral responses to noise and disturbance, such as increased surface-active behaviors or changes in vocalizations (Holt et al 2008, 2009, Noren et al 2009), can increase energy expenditure (Noren et al 2009, 2012, 2013, Holt et al 2015, Noren et al 2017).
4. Reduced individual foraging success due to vessels may in turn result in reduced survival and fecundity that may result in population-level effects. Lactating females and calves are likely the

¹ A bibliography including references for citations in this Concise Explanatory Statement is available in the WSAS report on best available science:

Washington State Academy of Sciences. (2020). Summary of Key Research Findings about Underwater Noise and Vessel Disturbance. Seattle, WA: WSAS, 1-25.

most susceptible to the consequences of reduced foraging (SRKW studies ongoing, studied in Sperm Whales by Farmer et al 2018 a, b).

5. Chinook prey abundance has a greater effect on SRKW population growth rates than vessel noise and disturbance, according to recent population viability analysis models (Lacy et al 2017, Murray et al 2019). However, SRKW reduce foraging behavior in the presence of vessels regardless of prey availability.
6. Strike risk is not zero, and the risk of injury and or mortality increases with vessel speed (Murray et al 2019).
7. Data gaps include an understanding of the chronic effects of whale watching activities on SRKW foraging success under current management, and of the extent that reduced foraging success translates into the growth or decline for the SRKW population.

In addition, this legislation and rulemaking were specifically designed to address commercial whale watching noise and disturbance impacts, which are not negligible, and the best available science supports the need for rules limiting commercial viewing of SRKW:

- Commercial whale watching (CWW) makes up 0.6% of ambient noise in the Salish Sea (MacGillivray et al. 2016), but that isn't the same as what's experienced by the whales.
- Noise levels received by SRKW are correlated with the number of vessels within 1000 meters (Holt et al. 2009). CWW make up more than half (56% in 2019) of boats in the vicinity of orcas (Soundwatch 2019).
- Tollit et al. (2017) found that CWW are responsible for around 1/3 of SRKW's lost foraging time each day.
- Studies report behavioral changes within distances beyond the current (2019) restrictions, suggesting "likely impacts to SRKWs even by the regulation-abiding boats."
- Studies of orcas and other cetaceans find that the effect of vessel presence increases with vessel numbers, particularly for three or more vessels (Williams et al 2002, Williams et al 2009, Williams and Ashe 2007). A lower number of vessels would lead to lower levels of disturbance.

The Science Panel concluded that, "Slowing boats and decreasing time around whales, as well as increasing distance from whales, are considered the primary means to reduce noise levels."

Notably, the Science Panel asserted, "Given the fragile condition of the SRKW population, however, the committee considers the precautionary approach to management of known stressors to be justified. The committee recommends defining every interaction with an SRKW as an opportunity to disturb a whale." The precautionary approach provides scientific justification for significant reduction in days and times where commercial viewing of SRKW could happen at closer than one-half nautical mile.

In addition, some others who opposed WDFW's proposed rule packages pointed to what the industry calls its "Sentinel Role." The Science Panel reviewed the best available evidence of this sentinel (or its opposite, a "magnet role") and found that, "There is insufficient evidence for a positive 'sentinel' effect of commercial whale watching; this topic needs further study." The Science Panel more specifically asserted that WDFW should not justify additional whale watching of SRKW based on the sentinel argument:

"Caution must be used when assuming a sentinel effect exists without sufficient evidence. Scientific evidence of a sentinel effect would support reasoning for a higher number of CWW vessels near whales. As it is currently known that vessel presence has behavioral and physiological effects on whales, and it is not known that there is a sentinel effect due to recreational boater behavior, the precautionary principle would lead us to assume that the sentinel effect is not present until otherwise demonstrated."

The Science Panel did, however, offer that rules could be crafted in such a way to require sentinel activities. With this in mind, the Department included a real-time reporting requirement to the Whale Report Alert System, which will provide important real-time data that can be used to reduce the impacts of ferries and the maritime industry on SRKW.

The science suggests that SRKW spend a small but important portion of their time foraging in the central Salish Sea during the summer months, that SRKW need uninterrupted daylight foraging hours, and that limiting the number of vessels in the vicinity of SRKW is one of the best levers available to reduce acoustic and disturbance impacts. Therefore, the Department aimed to significantly reduce, by around 80-90%, the amount of daylight hours in these core summer months where motorized commercial whale watching vessels could be within ½ nautical mile of SRKW. This is in part because disturbance could be highly variable, depending on SRKW presence and distribution (# of groups, etc.). The final rule is expected to reduce commercial SRKW-viewing hours by 84% during May-September. The overall motorized commercial whale watching vessel disturbance allowed under this rule package would greatly depend on SRKW presence (reduced presence = reduced potential disturbance) and distribution (more dispersed = increased potential disturbance).

WDFW was directed to consider the economic viability of license holders in the creation of the rule, and two analyses informed the final rule package, 1) an economic viability analysis of a full suite of potential rule options, and 2) a small business economic impact statement of the draft rules. These analyses found that nearly all of the measures in the rule package, including the restrictions on viewing SRKW to certain months and times of day, would not affect the viability of the industry, as SRKW-viewing happens currently on less than 10% of tours. The requirement that may result in more than minor/*de minimis* financial impact is the requirement to install, maintain, and use AIS units on each motorized commercial whale watching vessel. However, this primarily raises concerns during a poor business year like 2020, when travel restrictions and the COVID-19 economic downturn have reduced profits. WDFW plans to use enforcement discretion related to this requirement until 2022 in order to provide more time for the industry to recover from the economic down year.

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

There were two options put forward for public comment (A and B). WDFW stressed in presentations to the Commission and the public that 1) the SRKW seasons described in Options A and B only apply to the viewing of SRKW by motorized commercial whale watching vessels and would not restrict the viewing of other whales or marine mammals, and 2) the rules for nonmotorized commercial whale watching do not include seasonal restrictions.

- Option A included 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 invited to comment on the rule as filed as well as the possibility of daily viewing (7 days/week) during those months.

When presented to the Commission, staff included a recommended adjustment to allow for daily viewing.²

- Option B would have added a shoulder season of two months on either side (May/June and October/November) of the main season. The shoulder season would have included Saturday-Sunday viewing only (limit of 1 motorized commercial whale watching vessel per group of SRKW) and the main summer season viewing (July-September) would have been Friday-Monday (limit of 3 motorized commercial whale watching vessels per group of SRKW). As in option A, on days with viewing of SRKW permitted, there would have been two, two-hour periods of allowed viewing at closer than one-half nautical mile
- Both options proposed 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 was 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 were present in both options.

On December 15, the Commission met in a special session to discuss the rules, including Option B and Option A as filed and as conceptualized with daily viewing. The Commission also discussed a version of Option A modified to only allow one motorized commercial whale watching vessel at a time with a group of Southern Resident Killer Whales. In addition, the Commission discussed values and policy perspectives around SRKW recovery and commercial whale watching, and directed staff to begin drafting a Commission Statement summarizing their positions. Based on the guidance from this meeting, staff drafted motion language including:

1. If a commissioner wanted to move to adopt **Option B** with staff’s recommended adjustments:
 - I move to adopt WAC chapter 220-460 that is included in **Option B** with all proposed adjustments presented by staff in the Dec. 4 commission materials.
2. If a commissioner wants to move to adopt **Option A** with 3 motorized commercially whale watch vessels allowed **daily** during July through September.
 - I move to adopt WAC chapter 220-460 that is included in Option A with all proposed adjustments presented by staff in commission materials for the Dec. 4 meeting.
3. If a commissioner wants to move to adopt **Option A** with 3 motorized commercially whale watch vessels allowed from **Friday through Monday** during July through September:
 - I move to adopt WAC chapter 220-460 that is included in Option A with adjustments proposed by staff to sections, except for the proposed adjustment to WAC 220-460-120(2), so that the text “on Fridays, Saturdays, Sundays, and Mondays” will not be removed.
4. If a commissioner wants to move to adopt **Option A** with only **1 motorized commercial whale watch vessel** allowed from **Friday through Monday** during July through September:
 - I move to adopt WAC chapter 220-460 that is included in Option A with adjustments proposed by staff to sections, except for the proposed adjustment to WAC 220-460-120(2), so that the text “on Fridays, Saturdays, Sundays, and Mondays” will not be removed.
 - And I further move to amend the Option A language in WAC 220-460-110(1) to change the language from: “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

² 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.

killer whales.”; To “It is unlawful for more than one motorized commercial whale watching vessel at a time to be within the vicinity of any group of southern resident killer whales.”

On December 18, 2020, after Commission discussion of the proposed rules, a commissioner made the motion to adopt Option A with all proposed staff adjustments (listed as #2 in the list above). Another commissioner made a motion consisting of the amendment to a one-vessel limit (the second amendment listed under option #4 above). The motion to amend did not pass, but the underlying motion did with an 8-supporting, 1-opposed vote. The Commission discussed but did not adopt a Commission Statement but instead decided to continue working on the draft and revisit it in early 2021.

Thus, on December 18, 2020, the Commission adopted Option A with all staff recommended changes, including the recommended adjustment removing the language that would limit viewing of SRKW at closer than one-half nautical mile by motorized commercial whale watching to Friday-Monday. In other words, Option A was adopted to include daily SRKW-viewing during two, two-hour periods from July through September. Here are the other, substantive recommended adjustments adopted by the Commission into the final rule:

- **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.
- **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)””; Removed “(Note: This provision will go into effect January 1, 2022)” from WAC 220-460-140(1); Removed “(Note: This provision will go into effect May 1, 2021)” from WAC 220-460-140(2) and WAC 220-460-140(3)
Rationale: In several places in the draft rules, staff included notes like this to flag for the public that WDFW 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 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:** 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.

- 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.
- 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.
- Change:** Changed phrasing of WAC 220-460-140(3)(b)(iv) 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, staff decided to break this section into two and reword it to be clearer.
- 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 WDFW 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.
- 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.

4. Public comments, response to comments, and consideration of comments

WDFW solicited public comment through a variety of public hearings, open public comment at meetings, and written comment periods at various stages throughout the rulemaking process. Thus, the public had many opportunities to provide comment, including during:

- the Advisory Committee meetings
- the Washington State Academy of Sciences science workshop April 27 and stakeholder workshop May 6
- the SEPA scoping period May 18-June 8 and public meeting May 28
- the draft SEPA Environmental Impact Statement public comment period Sept. 23- Oct. 23 and public meeting Oct. 19
- a short Oct. 1-8 comment period on pre-filed draft rules, with public comment meetings Oct. 7 and 8
- the official public comment period on the proposed rules October 21-December 5
- the Fish and Wildlife Commission public hearing on the proposed rules December 4

In addition, WDFW staff met several times with industry representatives in small groups to solicit industry feedback on elements of the proposed rules as they developed.

Particularly, WDFW shared a pre-filed draft of the proposed rules and had a comment period from October 1-8 including two public meetings and a small-group meeting with industry. The pre-draft rules were an early draft concept of Option A, including daily viewing July-September during two, two-hour periods daily. WDFW heard feedback that the industry and others who wanted the rules to be less restrictive wanted to see a larger part of the year when commercial boats could view SRKW. This led to the development of Option B, which had a comparable amount of allowed viewing days and hours but spread them out to include 7 months where some viewing of SRKW at closer than one-half nautical mile would be allowed. Public feedback also led to the refinement of Option A to better align the two, two-hour periods with existing tour times.

The proposed rule options filed with the Office of Code Revisor on October 21, 2020 reflected the totality of feedback received throughout the rulemaking process to date. The below section describes methods used to collect and analyze comments, describes comments received during the formal public comment period after publication of the proposed rule options in the Washington State Register, and provides agency responses to the major themes of the comments.

Methods

The public comment period on the proposed rules began on October 21, 2020 and continued through December 5, 2020. Comments were 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 the Fish and Wildlife Commission office or staff during the comment period were also included in the analysis.

Comments collected through 11:59pm on Saturday, November 28, 2020 were included in a 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), including comments received at the public hearing, were summarized and included in

the updated report delivered 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. A few individuals submitted additional comments later in the comment period to clarify or correct their original comments. Comments received outside of the Survey Monkey collector, including at the public hearing, 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

Between October 21-December 5, **485** unique comments were submitted to WDFW. Of the 485, six were from intergovernmental partners, and five were sets of comments that were repeated:

- One set of comments included 1,489 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 691 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. Including the repeated comments, there were **4,326** individuals, organizations, or government bodies that commented on the proposed rules during the public comment period.

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: **4,086** (315 individual comments +1,489 WEC letters, +1,586 petition signatories, +691 CBD letters, +5 form letters representing repeated comments). These include **2,417** (191 individual comments +1,489 WEC letters, +691 CBD letters, +5 form letters) comments that support “Option A” or “Option A as filed,” of which **1,583** (94 individual comments +1,489 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 commenters individualized versions of these comments, for example requesting that the number of commercial whale watching boats be limited to 2. 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. Other commenters who did not specifically cite this package of recommendations proposed their own modifications to Option A, including limiting the number of days to two per week and increasing the geographic scope of the no-go zone.

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 **2,382** (*105 individual comments +1,586 petition signatories, +691 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 **750** (*59 individual comments +691 CBD letters*) commenters said they wanted a suspension, but if limited to the proposed options, preferred Option A. Alternatively, some of these commenters said they preferred Option A, but modified to include a temporary suspension on motorized commercial viewing of SRKW.

Finally, in the *support and/or go further* category, **55** commenters focused more generally on the plight of the SRKW, encouraging WDFW to be as restrictive as possible to benefit the whales (*39 commenters*), referencing a need to prioritize SRKW recovery over profit/economics (*13 commenters*). Among the *support and/or go further* category, many commenters cited the economic viability analysis and the conclusion that the industry is not financially dependent on viewing SRKW. Some commented on the extinction of SRKW being bad for commercial whale watchers, and many voiced that while SRKW may not survive if vessel impacts remain at status quo, the industry will be able adapt to more restrictive (or eliminated) opportunities to view SRKW.

In addition, **14** commenters expressed support specifically for option B. One commenter suggested Option B with a modification to daily viewing July-September. 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, **213** (*144 individual comments +69 naturalist letter signatories*) commenters *opposed* both Options A and B. Many of these commenters **146** (*77 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.”
 - 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 **38** 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.

A number of *oppose* comments also noted the dependence of the tourism economy of towns such as Friday Harbor on the commercial whale watching industry, and cited concerns regarding the economic impacts of the proposed rule on the local and regional economy. Commenters also stressed the importance of considering the range of economic impacts of the rule when making this decision.

Finally, in the *oppose* category, **29** 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 handful of comments. Themes from these comments are bulleted below. Some 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.

- Enforcement
 - Highlighting the importance of enforcement and accountability
 - Recognizing the need for funding
 - Call for the need for clear compliance monitoring plan, including monitoring impacts on other species for shifts due to reduced commercial SRKW viewing
 - Recommendation of secret shopper compliance monitoring
 - Call for higher fines and/or license revocation as penalties for violations
 - Call for language saying WDFW can/will close whale watching opportunities for viewing SRKW if there are violations of the rules
 - Recommendation for citizen call-in reporting of 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
 - Suggestion to include restrictions on the use of echosounders
- 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 ages 2-5 years
 - Suggestion that viewing time should be set at 1 hour
 - Suggestion that a group of SRKW should be defined as a pod
 - Recommendation to collect SRKW behavior state and changes as part of the reporting requirements
 - Recommendation to expand the no-go zone on the west side of San Juan Island
- Kayaks
 - Disagree with definition of commercial whale watching
 - Suggest a limit on number of kayaks/kayak tours in the vicinity of SRKW at once
 - Suggest nonmotorized vessels as a lower priority, meriting less restrictions than motorized vessels
 - 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 proposed rules
 - Recommend at least 2 weekdays with no viewing
 - Recommend quieting the West Side of San Juan Island
 - Support for the Whale Report Alert System reporting requirement, and concern about WDFW getting access to the data
- Other
 - Recommendation to do non-industry sponsored surveys of customers to learn more about their preferences
 - Recommendation to set the distance to 100 yards and speed to 10 knots
 - Recommendation to further address speed limits
 - Discussing fisheries management
 - Recommendation for all-boat time closures on viewing SRKW
 - Recommendation for reduction in research boats near SRKW
 - Suggestions for the licensing process (e.g. limiting the number of alternate operators)
 - Expressing concern about the Navy Northwest Training and Testing incidental take authorization rule recently finalized by NOAA.
- N/A

One commenter identified as an artist and uploaded images with their comment:



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).
- The Port of Friday Harbor supported limiting the number and size of vessels allowed to offer whale watching of SRKW. The Port also emphasized a positive role of commercial whale watching, recommended that the geographic closure on the west side of San Juan Island be based on whale presence, suggested WDFW incentivize safer and quieter whale watch vessels, and emphasized the need to do more about recreational boating near SRKW.
- Letters from the Samish Indian Nation and Mayor of Shoreline Will Hall promoted the modified Option A discussed above.
- Senator Van De Wege echoed many of the comments in the “oppose” category, discussing the value of commercial whale watching and expressing concern about the economic impacts of the rules on top of the COVID-19 economic downturn. He said that the rules “are, in effect, a moratorium” and expressed that “nearly every area of consideration authorized by the legislature is proposed to be highly regulated.” Senator Van De Wege also expressed concerns about the potential burden of the AIS and training requirements.

At the public hearing held December 4, 2020, 38 individuals were each provided 2 minutes to speak. The majority of these commenters also submitted written comments, and so their verbal comments were appended and coded as part of their overall comment in order to avoid duplication. Twenty five of the 38 comments at the Commission hearing were from individuals who also submitted comments either as individuals or on behalf of their organizations, and 5 were from staff of an organization that submitted a letter. Eight commenters were unique, meaning they did not submit separate written comments. Public comment at the hearing included 11 individuals affiliated with the Governor’s Southern Resident Orca Task Force and/or its working groups, and 7 of 11 members of WDFW’s Commercial Whale Watching Licensing Program Advisory Committee. While 19 of the commenters expressed support for the proposed rules and/or stricter rules, 15 commenters at the hearing opposed the rules and/or proposed less restrictive rules. A few of the commenters at the hearing spoke more generally about the need for regulation of commercial whale watching as part of the broader SRKW-conservation effort, and 5 commenters emphasized the need for more salmon to increase prey availability for SRKW.

This section contains responses to the comments, by the me :

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 it expects 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 motorized commercial 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 satisfied with the conservation value of the rules, WDFW worked to allow some remaining opportunity for commercial whale watching of SRKW and ensure the limited opportunity for commercial whale watching of SRKW was practically implementable and enforceable. 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. The economic viability analysis 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. A 2019 Earth Economics report³ concludes that the ability to view whales provides an important economic contribution to the local and regional economies, and the viability analysis concludes that the rule elements specifically limiting viewing of SRKW would not result in the elimination of the industry and its local and regional economic benefits. These rule elements may still result in some costs to individual businesses; however, a cost benefit analysis was not conducted for this rule.

WDFW opted to take a regulatorily conservative approach to ensure conservation benefit for SRKW while recognizing the uncertainties described in the WSAS science report which pointed out that differential benefits of less than three vessels in the vicinity of SRKW have not been teased out in the science. Once WDFW was satisfied that the proposed rule was expected to achieve conservation benefit, the Department proposed allowing commercial viewing of SRKW at 3 or less vessels during limited months and limited hours of the day. Permitting some level of SRKW-viewing opportunity during core summer months will also allow the Department 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 WDFW did not suspend viewing of SRKW. WDFW believes it can still allow some commercial viewing while meeting the conservation objective.
- This is why WDFW selected the months, days, and times where viewing SRKW is proposed to be allowed. WDFW attempted to align these opportunities with popular seasons, days, and tour times.
- This is why WDFW 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.

³ Van Deren, M., Mojica, J., Martin, J., Armistead, C., Koefod, C. 2019. The Whales in Our Waters: The Economic Benefits of Whale Watching in San Juan County. Earth Economics. Tacoma, WA.

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

- This is why WDFW did not include pregnant whales specifically. WDFW expects that a pregnant whale could be identified as “vulnerable” via emergency rule once we have reliable data about a confirmed pregnancy.
- This is why WDFW 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 WDFW expects that industry would continue to self-manage queuing and turn-taking.
- This is why WDFW 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, WDFW 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.
- WDFW did not propose expanding the no-go zone (including expanding it) because of concerns about altering interactions with vessel traffic and the shipping lanes.
- Enforcement capacity and on-the-water connectivity are also the reasons WDFW did not propose requiring real-time reporting of SRKW locations to WDFW Enforcement Officers. WDFW will collect this information via the proposed log/reporting requirements. Many operators currently share whale locations with WDFW Enforcement officers voluntarily, and WDFW hopes this voluntary best-practice will continue.
- WDFW was concerned 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 WDFW expects 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.
- WDFW did not include provisions indicating thresholds to stop commercial viewing of SRKW based on number of violations because WDFW sees this as something it may potentially do through emergency rulemaking if needed, under existing authority.
- WDFW did not propose defining a group of whales as a pod because of concerns about enforceability.

The legislation directed WDFW to “continue to adaptively manage the program using the most current and best available science,” and it says “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.” WDFW has requested funding to support this work and will be developing and implementing a monitoring plan using the guidance from the Washington State Academy of Sciences.

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, shipping vessels, or the Navy, 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.