



RULE-MAKING ORDER PERMANENT RULE ONLY

CR-103P (December 2017) (Implements RCW 34.05.360)

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STATE OF WASHINGTON
FILED

DATE: December 23, 2020
TIME: 11:10 AM

WSR 21-01-216

Agency: Washington Department of Fish and Wildlife: Order 20-264

Effective date of rule:

Permanent Rules

- 31 days after filing.
- Other (specify) **Effective January 23, 2021:** WAC 220-460-010; 220-460-030; WAC 220-460-040; WAC 220-460-050; WAC 220-460-060; WAC 220-460-070; WAC 220-460-080; WAC 220-460-090; WAC 220-460-100; 220-460-110; WAC 220-460-120; WAC 220-460-130; WAC 220-460-150; WAC 220-460-160. **Effective March 1, 2021:** WAC 220-460-020; **Effective May 1, 2021:** WAC 220-460-140. **(If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)**

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- Yes No If Yes, explain:

Purpose: The purpose of the rule is to reduce the daily and cumulative impacts of commercial whale watching on southern resident orca whales and consider the economic viability of license holders. This rule creates and populates a new chapter in WAC (220-460) that defines commercial whale watching licensing processes and rules for holders of commercial whale watching licenses.

Citation of rules affected by this order:

New: WAC 220-460-010; WAC 220-460-020; WAC 220-460-030; WAC 220-360-040; WAC 220-360-050; WAC 220-360-060; WAC 220-360-070; WAC 220-360-080; WAC 220-460-090; WAC 220-460-100; WAC 220-360-110; WAC 220-460-120; WAC 220-460-130; WAC 220-460-140; WAC 220-460-150; WAC 220-460-160

Repealed:
Amended:
Suspended:

Statutory authority for adoption:

RCW 77.12.047; RCW 77.65.615; RCW 77.65.620; 77.15.020; RCW 77.15.160; RCW 77.04.012; RCW 77.04.55

Other authority:

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 20-21-111 on October 21, 2020 (date).

Describe any changes other than editing from proposed to adopted version: Two options (A and B) were put forward in the proposed rule. The final rule adopts Option A with the following revisions:

- Change: Added a sub-section (10) to WAC 220-460-010 defining “Inland waters of Washington.”
- Change: Removed “- Exception” from the title of WAC 220-460-020
- Change: Removed from WAC 220-460-020(1): “(Note: This provision will go into effect February 1, 2021)”
- 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.”
- 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.
- Change: Changed “the hours of” to “these time periods:” in WAC 220-460-120(2)
- Change: Removed “on Fridays, Saturdays, Sundays, and Mondays” from WAC 220-460-120(2)
- Change: Changed “between 3:00 p.m. and 5:00 p.m.” to “after 12:00 p.m.” in WAC 220-460-120(3)
- Change: Added “Immediately” to WAC 220-460-120(4)(b)
- Change: Removed “(Note: This provision will go into effect January 1, 2022)” from WAC 220-460-140(1)
- Change: Revised “on the water” to “on a commercial whale watching tour” in WAC 220-460-140(1)
- Change: Removed “(Note: This provision will go into effect May 1, 2021)” from WAC 220-460-140(2)

- Change: Removed “(Note: This provision will go into effect May 1, 2021)” from WAC 220-460-140(3)
- Change: Changed phrasing of WAC 220-460-140(3)(b)(iv) and specified that this sub-section 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.”
- 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.
- Change: Added “immediately” to WAC 220-460-140(4)

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name:
 Address:
 Phone:
 Fax:
 TTY:
 Email:
 Web site:
 Other:

**Note: If any category is left blank, it will be calculated as zero.
 No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
 A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	___	Amended	___	Repealed	___
Federal rules or standards:	New	___	Amended	___	Repealed	___
Recently enacted state statutes:	New	___	Amended	___	Repealed	___

The number of sections adopted at the request of a nongovernmental entity:

New	___	Amended	___	Repealed	___
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The number of sections adopted on the agency’s own initiative:

New	<u>16</u>	Amended	___	Repealed	___
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	___	Amended	___	Repealed	___
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The number of sections adopted using:

Negotiated rule making:	New	___	Amended	___	Repealed	___
Pilot rule making:	New	___	Amended	___	Repealed	___
Other alternative rule making:	New	___	Amended	___	Repealed	___

Date Adopted: December 18, 2020

Signature:

Name: Larry Carpenter



Title: Chair, Washington Department of Fish and Wildlife
Commission

OPTION A
Commercial whale watching license and restrictions on commercial viewing of southern resident killer whales

Chapter 220-460 WAC
COMMERCIAL WHALE WATCHING

NEW SECTION

WAC 220-460-010 Definitions. For the purposes of this chapter, the following definitions apply:

(1) **Commercial whale watching.**

"Commercial whale watching" shall be defined as the act of taking, or offering to take, passengers aboard a vessel in order to view marine mammals in their natural habitat for a fee.

(2) **Commercial whale watching designated primary operator.**

"Commercial whale watching designated primary operator" shall be defined as the person identified on the application to operate the commercial whale watching vessel on behalf of the whale watching business.

(3) **Commercial whale watching alternate operator.**

"Alternate operators" shall be defined as individuals besides the designated primary operator who are designated to operate the vessel on behalf of the whale watching business.

(4) **Commercial whale watching vessel operators.**

"Commercial whale watching vessel operators" shall be defined to include operators of commercial vessels and kayak rentals that are engaged in the business of commercial whale watching. The term "operators" shall be used to identify primary operators and alternate operators who conduct commercial whale watching tours, including operators who direct the movement or positioning of any nonmotorized commercial whale watching vessels involved in a tour.

(5) **Commercial whale watching vessel.**

"Commercial whale watching vessel" shall be defined as any vessel that is being used as a means of transportation for individuals to engage in commercial whale watching.

"Vessel" includes aircraft while on the surface of the water, and every description of watercraft on the water that is used or capable of being used as a means of transportation on the water.

"Motorized commercial whale watching vessel" shall be defined as any vessel with an engine being used as a means of transportation for individuals to engage in commercial whale watching, regardless of whether the engine is in use. This definition includes sailboats with inboard or outboard motors.

"Nonmotorized commercial whale watching vessel" shall be defined as any vessel without an engine being used as a means of transportation for individuals to engage in commercial whale watching. This def-

inition includes human-powered watercraft such as kayaks and paddleboards.

(6) **Group of southern resident killer whales.**

"Group of southern resident killer whales" is defined as a single southern resident killer whale or an assemblage of southern resident killer whales wherein each member is within one nautical mile of at least one other southern resident killer whale. Any individual(s) farther than one nautical mile constitutes a separate group.

(7) **Vicinity.**

"Vicinity" is defined as one-half nautical mile from all southern resident killer whales in the group. References to "vicinity" in this chapter do not permit operators to approach a southern resident killer whale closer than the statutorily defined distances in RCW 77.15.740.

(8) **Vicinity instance.** Each time any commercial whale watching vessel operating under a license enters within one-half nautical mile of a southern resident killer whale will count as one vicinity instance associated with that license.

(9) **Automatic identification system (AIS).** AIS refers to a maritime navigation safety communications system standardized by the International Telecommunication Union, adopted by the International Maritime Organization, that:

(a) Provides vessel information, including the vessel's identity, type, position, course, speed, navigational status and other safety-related information automatically to appropriately equipped shore stations, other ships, and aircraft;

(b) Receives automatically such information from similarly fitted ships, monitors and tracks ships; and

(c) Exchanges data with shore-based facilities.

(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.

NEW SECTION

WAC 220-460-020 Commercial whale watching licenses—Application process and deadline. (1) A commercial whale watching license is required for commercial whale watching motorized vessel, sailboat, and kayak operators.

(2) Applicants must be at least sixteen years of age and possess a driver's license or other government-issued identification number and jurisdiction of issuance.

(3) Applicants must be authorized to conduct business within the state of Washington.

(4) The commercial whale watching license application must include the following information regarding the whale watching business:

(a) The applicant must identify the whale watching business: Business name, type of business (i.e., sole proprietor, partnership, corporation), all associated business owner(s), full name(s), physical

address, mailing address, email address, telephone number, and Social Security numbers of all business owners.

(b) The applicant must identify and confirm the whale watching business is registered to conduct business within the state by providing the unified business identifier (UBI) number.

(5) The commercial whale watching license applicant must also designate an operator for each motorized or sailing vessel or kayak engaging in whale watching activity. The applicant must identify the operator's name of the associated business, full name, date of birth, Social Security number, gender, hair, eyes, weight, height, physical address, mailing address, email address, and telephone number.

(6) On the commercial whale watching license application, the applicant must designate all commercial whale watching vessels to be used while engaging in commercial whale watching. The applicant must indicate either motorized or sailing vessels or kayaks on the application.

(a) If motorized or sailing vessels are selected, then the applicant must select the appropriate option for the passenger capacity on the designated vessel.

(b) If kayak is selected, then the applicant must select the appropriate option for the number of kayaks engaging in whale watching activities.

(7) The applicant may designate alternate operators to be listed on the whale watching license.

(8) An application submitted to the department shall contain the applicant's declaration under penalty of perjury that the information on the application is true and correct.

(9) Applications must be completed and submitted online through the commercial licensing system, or by mailing the application to:

Washington Department of Fish and Wildlife
Attn: Commercial License Sales
P.O. Box 43154
Olympia, WA 98504-3154

(10) If the required fields are blank or omitted from the application, then the department will consider the application to be incomplete, and it will not be processed.

NEW SECTION

WAC 220-460-030 Commercial whale watching license cards—Replacements. (1) Upon lawful application, a commercial whale watching license in the form of a license card will be issued by the department.

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

NEW SECTION

WAC 220-460-040 Commercial whale watching licensing business organizations—Operator designation. (1) Any person that holds a commercial whale watching license and is a business organization may designate other persons associated with the business to act on behalf of the license holder to update the business information within the organization's account and/or operate a designated vessel.

(2) In addition to the designated operator, a license holder that is a business organization may designate an unlimited number of alternate operators.

(3) A license holder that is a business organization may substitute the designated operator by surrendering the whale watching license card, redesignating the operator under the criteria provided in this section and paying the replacement license fee provided in RCW 77.65.050.

NEW SECTION

WAC 220-460-050 Whale watching vessel designation requirements.

(1) RCW 77.65.615 requires commercial whale watching operators to designate the vessel(s) to be used for whale watching tours. It is unlawful to engage in commercial whale watching activities unless:

(a) The licensee has designated all commercial whale watching vessels to be used, regardless if using a motorized or sailing vessel, or kayak to guide tours;

(b) The department has issued a commercial license to the licensee showing the vessel so designated;

(c) The vessel operator has the commercial license for the current calendar year in physical possession.

(2) The licensee does not have to own the vessel being designated on the license.

(3) For motorized or sailing vessels, the licensee must provide current United States Coast Guard certification inspection documentation which allows the designated vessel to carry more than six passengers.

NEW SECTION

WAC 220-460-060 Whale watching vessel substitutions—Fees. The holder of a commercial whale watching license may substitute the vessel designated on the license or designate a vessel if none has previously been designated if the license holder:

(1) Surrenders the previously issued license to the department;

(2) Submits to the department a substitution application and application fee that identifies the currently assigned vessel, and the vessel proposed to be designated;

(3) Submits vessel substitution fees corresponding to the size of the vessel.

NEW SECTION

WAC 220-460-070 Whale watching alternate operator license requirements. (1) A person who is not the license holder may operate a motorized or sailing vessel designated on the commercial whale watching license only if:

(a) The person holds a commercial whale watching alternate operator license issued from the department; and

(b) The alternate operator is designated on the underlying license.

(2) Only an individual at least sixteen years of age may hold an alternate operator license.

(3) Commercial whale watching license holders must maintain an accurate record with the department of designated alternate operators. The commercial whale watching license holder must confirm the utilization of a whale watching alternate operator and identify the alternate by entering the alternate's full name and date of birth in the business account through the commercial licensing system.

(4) An individual may hold only one alternate operator license. Holders of an alternate operator license may be designated on an unlimited number of commercial whale watching licenses.

NEW SECTION

WAC 220-460-080 Expiration and renewal of licenses. Commercial whale watching licenses expire at midnight on December 31st of the calendar year for which they are issued. Licenses may be renewed annually upon application and payment of the prescribed license fees.

NEW SECTION

WAC 220-460-090 Commercial whale watching of southern resident killer whales—General. (1) It is unlawful for an operator of a commercial whale watching vessel to violate any of the restrictions in RCW 77.15.740.

(2) A commercial whale watching license is not an exemption under RCW 77.15.740 (2) (c).

(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.

NEW SECTION

WAC 220-460-100 Areas closed to commercial whale watching. (1) It is unlawful for operators of motorized commercial whale watching vessels to operate one-quarter mile from shore from Mitchell Point to

Cattle Point on the west side of San Juan Island or within one-half mile of Lime Kiln Point State Park. Operators of nonmotorized commercial whale watching vessels must stay within one hundred yards of shore within this zone except when safety conditions preclude it.

(2) Modifications or additions to closed areas may be issued by the department by rule. Violation of such rules shall be unlawful.

NEW SECTION

WAC 220-460-110 Limits on number of vessels in the vicinity of southern resident killer whales at once. (1) It is unlawful for more than three motorized commercial whale watching vessels at a time to be within the vicinity of any group of southern resident killer whales.

(2) It is unlawful for an operator of a motorized commercial whale watching vessel to enter the vicinity of a group of southern resident killer whales that contains a calf of under one year of age or a whale designated as sick or vulnerable by emergency rule from the department.

NEW SECTION

WAC 220-460-120 Time limitations on watching southern resident killer whales. (1) It is unlawful for an operator of a motorized commercial whale watching vessel to approach within one-half nautical mile of a southern resident killer whale between October 1st and June 30th.

(2) It is unlawful for an operator of a motorized commercial whale watching vessel to approach within one-half nautical mile of a southern resident killer whale outside these time periods: 10:00 a.m. to 12:00 p.m. and 3:00 p.m. to 5:00 p.m. from July 1st through September 30th.

(3) If any motorized commercial whale watching vessel designated under a commercial whale watching license enters within the vicinity of a southern resident killer whale between 10:00 a.m. and 12:00 p.m., no vessels operating under that license may enter the vicinity of a southern resident killer whale after 12:00 p.m. on the same day.

(4) If an operator enters within one-half mile of a group of killer whales outside of the provisions in this section, after taking reasonable measures to determine whether the killer whales were southern resident killer whales, and then identifies the whales as southern resident killer whales, the operator must:

(a) Immediately safely reposition the vessel to be one-half nautical mile or farther from the southern resident killer whales.

(b) Immediately report the location of the southern resident killer whale(s) to the whale report alert system (WRAS) or a successor transboundary notification system that is adopted by the international shipping community in the Salish Sea.

(c) Accurately log the incident, including measures taken to determine whether the whales were southern resident killer whales, following the provisions of WAC 220-460-140 and submit the log to the department within twenty-four hours of the incident.

NEW SECTION

WAC 220-460-130 Nonmotorized commercial whale watching vessels.

(1) Tours involving any nonmotorized watercraft used for the purposes of commercial whale watching, such as kayaks, are subject to these requirements. Such watercraft constitute commercial whale watching vessels and are referred to as "vessels" in this chapter.

(2) Operators must prevent all vessels in their tour group from disturbing southern resident killer whales. All vessels in the tour group must adhere to the following requirements:

(a) It is unlawful to launch if southern resident killer whales are within one-half nautical mile of the launch location.

(b) Vessels are prohibited from being paddled, positioned, or waiting in the path of a southern resident killer whale. If a southern resident killer whale is moving towards a vessel, the vessel must immediately be moved out of the path of the whale.

(c) If a vessel or vessels inadvertently encounter a southern resident killer whale, they must immediately be moved as close to shore as possible and secured, or be rafted up close to shore or in a kelp bed, and paddling shall cease until any and all killer whales have moved to at least four hundred yards away from the vessels. Rafting up is defined as manually holding vessels close together, maintaining a tight grouping.

NEW SECTION

WAC 220-460-140 Commercial whale watching compliance and reporting.

(1) An automatic identification system (AIS) must be fitted aboard all motorized commercial whale watching vessels. The AIS must be capable of providing information about the vessel (including the vessel's identity, type, position, course, speed, and navigational status) to state and federal authorities automatically. Operators must maintain the AIS in operation at all times that the vessel is on a commercial whale watching tour.

(2) All motorized and nonmotorized commercial whale watching license holders and alternate operators must complete annual training from the department on marine mammals, distances on the water, impacts of whale watching on marine mammals, and southern resident killer whale-related rules and reporting.

(a) At completion of training, license holders must demonstrate adequate understanding of course materials.

(b) It is unlawful for an operator to operate a commercial whale watching vessel without completing the training for the current calendar year.

(c) Naturalists and others who work upon commercial whale watching vessels but are not license holders are encouraged to attend.

(3) All motorized and nonmotorized commercial whale watching license holders shall maintain accurate logs on each instance a vessel operating under a license enters within one-half nautical mile vicinity of southern resident killer whales and submit copies of the logs to the department.

(a) Logs must include license holder name; vessel operator and staff names and roles; vessel name; port(s) of departure; departure

time(s); return time(s); number of passengers; location(s) (Lat/Long) of southern resident killer whales encountered; time(s) entering and departing the one-half nautical mile vicinity of southern resident killer whales; time(s) entering and departing within four hundred yards of southern resident killer whales; and qualitative details of southern resident killer whale encounters including whale identification, whale behavior and health, other vessel behavior, and any operator behavior, including contact with other boaters or government entities, and resulting outcomes.

(b) Information from the logs shall be submitted to the department on the following schedule:

(i) All vicinity instances in July must be reported by August 15th.

(ii) All vicinity instances in August must be reported by September 15th.

(iii) All vicinity instances in September must be reported by October 15th.

(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.

(v) Operators of nonmotorized whale watching vessels must report vicinity instances that happen October through June within one week.

(c) It is unlawful to fail to report a vicinity instance or to fraudulently report the details of a vicinity instance.

(d) Logs must be provided for inspection on request of department law enforcement.

(4) All motorized commercial whale watching license holders must log accurate, complete sighting information to the whale report alert system (WRAS) or a successor transboundary notification system that is adopted by the international shipping community in the Salish Sea immediately upon entering within one-half nautical mile of a southern resident killer whale.

NEW SECTION

WAC 220-460-150 Penalties. (1) Commercial operators in violation of WAC 220-460-090 may be issued a notice of infraction punishable under chapter 7.84 RCW that carries a fine of five hundred dollars, not including statutory assessments added pursuant to RCW 3.62.090.

(2) Operators out of compliance with WAC 220-460-100, 220-460-110, 220-460-120, 220-460-130, or 220-460-140 may be issued a notice of infraction that carries a fine of up to five hundred dollars, not including statutory assessments added pursuant to RCW 3.62.090.

(3) Nothing in this chapter prohibits the filing of criminal charges for violations of RCW 77.15.815 in lieu of issuance of a notice of infraction.

NEW SECTION

WAC 220-460-160 Severability. If any provision of the chapter or its application to any covered party, person, or circumstance is held invalid, the remainder of the chapter or application of the provision to other covered parties, persons, or circumstances is not affected.