



RULE-MAKING ORDER PERMANENT RULE ONLY

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

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STATE OF WASHINGTON
FILED

DATE: November 15, 2021

TIME: 9:40 AM

WSR 21-23-070

Agency: Washington Department of Fish and Wildlife (WDFW)

Effective date of rule:

Permanent Rules

☒ 31 days after filing.

☐ Other (specify) _____ (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: In 2019, state law was adopted (2SSB 5577) creating a commercial whale watching license. In 2020, the Washington Department of Fish and Wildlife (WDFW) completed the rulemaking process directed in the legislation regarding the commercial whale watching license and rules applicable to license-holders, resulting in the creation of a WAC chapter (220-460).

The Washington State legislature amended the statute through bill ESB 5330 in the 2021 legislative session. The bill changed the commercial whale watching license structure: It separated business licenses from operator licenses, eliminated the “designated” and “alternate” operator distinctions, and created a separate license for motorized commercial whale watching operators and non-motorized tour operators (e.g., kayak guides). In addition, the bill exempted Canadian businesses from needing proof of authorization to do business in Washington (i.e., providing a Unified Business Identifier, UBI) and Canadian individuals from the residency requirement in RCW 77.65.040. The bill also modified the fee structure and waived fees for 2021 and 2022.

In May of 2021, WDFW filed WSR 21-11-095 via the expedited rulemaking process. Now, WDFW is entering this order adopting the rule in order to finalize the rulemaking. The intent of the rule is to 1) adopt content explicitly directed in Washington state statute by updating and aligning the definitions and language in WAC 220-460 with the 2021 amendments to RCW 77.65.615, and 2) correct typographical errors and clarify language of the rule without changing its effect.

No written objections to the expedited rule making were filed with the agency within forty-five days after the notice of proposed expedited rulemaking was published. Therefore, the agency is entering an order adopting the rule without further notice or a public hearing.

Citation of rules affected by this order:

New:

Repealed:

Amended: WAC 220-460

Suspended:

Statutory authority for adoption: RCW 77.65.615

Other authority: RCW 77.65.615, RCW 77.65.620

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 21-11-095 on May 19, 2021 (date).

Describe any changes other than editing from proposed to adopted version: None

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	<u>11</u>	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	_____	Amended	_____	Repealed	_____
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	_____	Amended	<u>1</u>	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: 11/15/21

Name: Kelly Susewind

Title: Director

Signature:



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 or guided kayak tour in order to view marine mammals in their natural habitat for a fee.

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

~~"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)) business" means a business that engages in the activity of commercial whale watching.~~

(3) Commercial whale watching operator.

"Commercial whale watching operator" means a person who operates a motorized or sailing vessel engaged in the business of whale watching.

(4) Kayak guide.

"Kayak guide" means a person who conducts guided kayak tours on behalf of a commercial whale watching business. The term kayak guide includes anyone who directs the movement or positioning of any nonmotorized commercial whale watching vessel(s) involved in a tour.

(5) Commercial whale watching license.

"Commercial whale watching license" means a commercial whale watching business license, a commercial whale watching operator license, or a kayak guide license as defined in this section.

(a) "Commercial whale watching business license" means a department-issued license to operate a commercial whale watching business.

(b) "Commercial whale watching operator license" means a department-issued license to operate a commercial motorized or sailing vessel on behalf of a commercial whale watching business.

(c) "Kayak guide license" means a department-issued license to conduct commercial guided kayak tours on behalf of a commercial whale watching business.

(6) Commercial whale watching vessel.

"Commercial whale watching vessel" ((shall be defined as)) means 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.

(a) "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.

(b) "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 definition includes human-powered watercraft such as kayaks and paddleboards. In this chapter, the terms "kayak," "kayak guide," and "kayak tour" encompass any nonmotorized vessels used for whale watching.

~~((+6+))~~ (7) **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+))~~ (8) **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+))~~ (9) **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+))~~ (10) **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+))~~ (11) **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.

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

(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 for a commercial whale watching business license must be authorized to conduct business within the state of Washington. However, the residency and business requirements of RCW 77.65.040 (2) and (3) do not apply to Canadian individuals or corporations applying for and holding Washington commercial whale watching licenses.

(4) The commercial whale watching business 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), and for all associated business owner(s) ~~((,))~~: Full name ~~((s))~~, ~~((physical address, mailing address))~~ association to the business, email address, telephone number, and Social Security number ~~((s of all))~~ if the business owner ~~((s))~~ is a United States citizen or resident.

(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. Canadian commercial whale watching businesses are exempt from this requirement.

(5) The commercial whale watching business license applicant must also designate ~~((an))~~ all commercial whale watching operators ~~((for each))~~ authorized to operate a motorized or sailing vessel ~~((or kayak engaging in whale watching activity.))~~ and all kayak guides authorized to guide a kayak tour on behalf of the business. The applicant must identify the operator's ~~((name of the associated business,))~~ or kayak guide's full name ~~((,))~~ and 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 business license application, the applicant must designate all commercial whale watching vessels to be used while engaging in commercial whale watching.

(a) The applicant must indicate either motorized or sailing vessels or kayaks on the application.

~~((a))~~ (b) 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.) (7) Commercial whale watching operator license applicants and kayak guide license applicants must provide their full name, date of birth, Social Security number (U.S. citizens and residents only), gender, hair, eyes, weight, height, physical address, mailing address, email address, and telephone number.

(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 department-provided 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.

AMENDATORY SECTION (Amending WSR 21-01-216, filed 12/23/20, effective 1/23/21)

WAC 220-460-040 Commercial whale watching licensing business organizations—Operator designation. (1) Any person that holds a commercial whale watching business 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 commercial whale watching business license holder ((that is a business organization)) may designate an unlimited number of ((alternate)) operators or kayak guides, so long as each individual obtains the license required under WAC 220-460-070.

(3) A commercial whale watching business 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)) must maintain an accurate record with the department of operators authorized to operate motorized vessels and kayak guides authorized to guide kayak tours on behalf of the business. Commercial whale watching business license holders may add operators and kayak guides to the list associated with the business license by entering the operator's or kayak guide's full name and date of birth in the business account through the commercial licensing system.

AMENDATORY SECTION (Amending WSR 21-01-216, filed 12/23/20, effective 1/23/21)

WAC 220-460-050 Whale watching vessel designation requirements. (1) RCW 77.65.615 requires commercial whale watching (~~((operators))~~) businesses to designate the motorized vessel(s) (~~((to))~~) and indicate if

kayaks will be used for commercial whale watching ((tours)). It is unlawful to engage in commercial whale watching activities unless:

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

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

(c) The person conducting commercial whale watching activities on behalf of the business has the appropriate documentation in physical possession.

(i) The operator of a motorized or sailing vessel ((operator has)) must have both the commercial whale watching business license listing the vessel and their individual operator license for the current calendar year in physical possession.

(ii) The guide of a commercial kayak tour must have their individual kayak guide license in physical possession and must have either the commercial whale watching business license for the current calendar year or a printed or digital scan thereof.

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

(3) For motorized or sailing vessels, the commercial whale watching business licensee must provide applicable documentation numbers such as a hull identification number (HIN), current United States Coast Guard or Transport Canada certification inspection documentation ((which allows the designated vessel to carry more than six passengers)), and/or a vessel registration number.

AMENDATORY SECTION (Amending WSR 21-01-216, filed 12/23/20, effective 1/23/21)

WAC 220-460-060 Whale watching vessel substitutions—Fees. The holder of a commercial whale watching business license may add or substitute ((the)) a vessel designated on the license ((or designate a vessel if none has previously been designated)) within the calendar year 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; and

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

AMENDATORY SECTION (Amending WSR 21-01-216, filed 12/23/20, effective 1/23/21)

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

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

(b) The ~~((alternate))~~ operator is designated on the underlying commercial whale watching business license; and

(c) The person has both the commercial whale watching business license listing the vessel and their individual operator license for the current calendar year in physical possession.

(2) A person may lead a guided kayak tour on behalf of the commercial whale watching business only if:

(a) The person holds a valid kayak guide license issued from the department;

(b) The kayak guide is designated on the underlying commercial whale watching business license; and

(c) The person has their individual kayak guide license in physical possession and must have either the commercial whale watching business license for the current calendar year or a printed or digital scan thereof.

~~((2))~~ (3) Only an individual at least sixteen years of age may hold an ~~((alternate))~~ operator license or kayak guide 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))~~ commercial whale watching operator license. Holders of an ~~((alternate))~~ operator license may be designated on an unlimited number of commercial whale watching business licenses.

(5) An individual may hold only one kayak guide license. Holders of a kayak guide license may be designated on an unlimited number of commercial whale watching business licenses.

AMENDATORY SECTION (Amending WSR 21-01-216, filed 12/23/20, effective 1/23/21)

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))~~ operator or kayak guide 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.

AMENDATORY SECTION (Amending WSR 21-01-216, filed 12/23/20, effective 1/23/21)

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 nautical mile from shore from Mitchell Point to Cattle Point on the west side of San Juan Island or within one-half nautical mile of Lime Kiln Point State Park. (~~Operators of nonmotorized commercial whale watching vessels~~) Kayak guides and all vessels on guided kayak tours 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.

AMENDATORY SECTION (Amending WSR 21-01-216, filed 12/23/20, effective 1/23/21)

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 business 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 business license may enter the vicinity of a southern resident killer whale after 12:00 p.m. on the same day.

(4) If an operator of a motorized commercial whale watching vessel enters within one-half nautical 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 after repositioning the vessel, report the location of the southern resident killer whale(s) to the WhaleReport application for the whale report alert system (WRAS), or to a successor transboundary notification system designated by the department 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.

AMENDATORY SECTION (Amending WSR 21-01-216, filed 12/23/20, effective 1/23/21)

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. Regardless of the type of nonmotorized watercraft involved, the person operating on behalf of the business to conduct the tour is referred to as a "kayak guide" in this chapter.

(2) (~~Operators~~) Kayak guides 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.

AMENDATORY SECTION (Amending WSR 21-01-216, filed 12/23/20, effective 5/1/21)

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~~) conveying passengers for a fee.

(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 or guide a tour of nonmotorized vessels 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~~) participate in the annual training.

(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 business license holder name; vessel operator (~~and~~) or kayak guide name; other 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~~) Kayak guides 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 WhaleReport application for the whale report alert system (WRAS), or to a successor transboundary notification system designated by the department 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.

AMENDATORY SECTION (Amending WSR 21-01-216, filed 12/23/20, effective 1/23/21)

WAC 220-460-150 Penalties. (1) Commercial (~~operators~~) whale watching license holders 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~~) Commercial whale watching license holders 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.