



# RULE-MAKING ORDER EMERGENCY RULE ONLY

## CR-103E (December 2017) (Implements RCW 34.05.350 and 34.05.360)

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STATE OF WASHINGTON  
FILED

DATE: June 30, 2022

TIME: 8:29 AM

WSR 22-14-068

**Agency:** Washington Department of Fish and Wildlife (WDFW)

**Effective date of rule:**

**Emergency Rules**

- Immediately upon filing.
- Later (specify) \_\_\_\_\_

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

- Yes
- No
- If Yes, explain:

**Purpose:** The Southern Resident killer whales (SRKW) are a distinct population segment of North Pacific killer whales. The SRKW have a high risk of extinction and are classified as endangered under the Endangered Species Act, and their listing was reaffirmed by NOAA in January of 2022. They also are listed as endangered at the State level, and orca are identified as a Species of Greatest Conservation Need under the State Wildlife Action Plan. The SRKW are comprised of three family groups (pods): J pod, K pod, and L pod. Each individual whale has an alpha-numeric identifier that corresponds with its pod and birth order. Because individual whales are identifiable and documented, the health and status of each whale can be measured and tracked over time.

In June of 2022, the SeaLife Response Rehabilitation and Research (SR3) team contracted by WDFW to monitor Southern Resident killer whale (SRKW) body condition concluded their analysis of SRKW observations collected between September 2021 and April 2022.

*Body Condition:* SR3 uses measurements taken from drone photographs and statistical analyses detailed in Stewart et al. (2021) to identify whales in poor condition, which means the orca’s body condition falls in the lowest 20% of measurements for their age and sex compared to comparable measurements from 2016-2022. This lowest body condition state is classified as “BC1.” The best available science suggests that whales measured to be in the “poor condition” state had a significantly increased (2-3 times higher) probability of subsequent mortality.

There were 12 whales in the BC1 state from J and L pods, including one calf (C), one adult male (M), five adult females (F), one juvenile (J) and four sub-adult males (S): J27(M), J36(F), J44(S), J49(J), J56(C), L54(F), L83(F), L90(F), L94(F), L110(S), L116(S), and L117(S).

This includes six whales that were measured to be in BC1 in both September 2021 and fall-spring 2022, plus an additional L pod female (L94) that was not imaged in September. Additionally, there were four whales which have declined into poor condition since September and are now listed as BC1 (J27, J44, J49, L90). L54 was not imaged in the fall-spring 2022 period, but is on the list because she was measured to be BC1 when last imaged in September 2021. Typically, when the Southern Residents return to the Salish Sea in the spring, they are significantly leaner than in the fall (Fearnbach et al. 2019), and thus we have no reason to believe that L54’s condition has improved. No K pod whales were imaged in the fall-spring 2022 period, but none were measured to be in BC1 in September 2021 when all were imaged.

*Late-Stage Pregnancy:* There is a high rate of failed pregnancies in SRKW (Wasser et al. 2017), and failed pregnancy can be lethal (Raverty et al. 2020). Late-stage pregnancy requires more food, as much as 25% in the final month of gestation (Kriete 1995). Vessels compound food stress, particularly for females (Holt et al. 2021). SR3 analyzed all of the female SRKW of reproductive age (33 whales, ages >8 and <50) to identify any whales that may be pregnant, and particularly any in the latter half of pregnancy (p>0.75 probability of being within 9

months of birth, out of an approximately 17-month gestation period). Four females were determined to fall in this classification when last measured: K12, K20, K27, and L72. Recent online videos show a young calf traveling with K pod, and most likely one of K12, K20, or K27 is the mother. These K pod whales were last measured in September 2021, so we expect these pregnancies may have ended as of late June 2022. However, if these whales are encountered and still exhibit signs of late-stage pregnancy, an emergency rule at that time will be warranted. Currently, we expect L72 remains in late-stage pregnancy, meriting vulnerable status. As a reminder, calves and their mothers receive extra protection via WAC 220-460-110, which prohibits motorized commercial whale watching vessels from approaching within one-half nautical mile of a group of SRKW that contains a calf of under one year of age.

*Other Factors:* Beyond the factors described here, WDFW may determine a whale is vulnerable based on other criteria. For example, whales showing signs of illness or injury (emaciated appearance, collapsed dorsal fin, lacerations, entanglement, vessel strike, etc.) would merit extra protection. Additionally, whales that exhibit a dramatic or sudden decline in body condition (for example, dropping two body condition states over a short period of time) or calves that show constrained growth may raise cause for alarm and merit a vulnerable status designation. At this time, no whales beyond those described above are being designated as vulnerable.

Per WAC 220-460-110, the department is adopting an emergency rule to designate J27, J36, J44, J49, J56, L54, L83, L90, L94, L110, L116, L117, and L72 as vulnerable and thereby prevent commercial whale watching operators from approaching these individuals or a group containing any of these individuals within 0.5 nautical mile. This designation and the additional distance is necessary to ensure that the ability of these whales to survive is not hindered by the presence of vessels.

**Citation of rules affected by this order:**

New: WAC 220-460-110D  
 Repealed:  
 Amended:  
 Suspended:

**Statutory authority for adoption:** RCW 77.65.620

**Other authority:**

**EMERGENCY RULE**

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

**Reasons for this finding:** The imminent risk to an endangered species requires additional protection immediately. This emergency action is necessary to protect the public’s interest in the preservation of a vulnerable endangered animal.

**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 \_\_\_\_

**The number of sections adopted on the agency's own initiative:**

New 1 Amended \_\_\_\_ Repealed \_\_\_\_

**The number of sections adopted in order to clarify, streamline, or reform agency procedures:**

New \_\_\_\_ Amended \_\_\_\_ Repealed \_\_\_\_

**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:** June 30, 2022

**Name:** Kelly Susewind

**Title:** Director, WDFW

**Signature:**



NEW SECTION

**WAC 220-460-110D Southern Resident Killer Whales J27, J36, J44, J49, J56, L54, L83, L90, L94, L110, L116, L117, and L72**

In conjunction with WAC 220-460-110(2), the department designates the Southern Resident Killer Whales J27, J36, J44, J49, J56, L54, L83, L90, L94, L110, L116, L117, and L72 as vulnerable individuals.