



# RULE-MAKING ORDER EMERGENCY RULE ONLY

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

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER  
STATE OF WASHINGTON  
FILED

DATE: June 29, 2023

TIME: 11:09 AM

WSR 23-14-078

**Agency:** Washington Department of Fish and Wildlife (WDFW) (Order# 23-109)

**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, specifically the Southern Resident population of 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 2023, the SeaLife Response Rehabilitation and Research (SR3) team contracted by WDFW to monitor SRKW body condition concluded their analysis of SRKW observations collected between September 2022 and June 2023.

*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 2016-2023. 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.

The analysis found 10 whales in the BC1 state from J, K, and L pods, including one adult male (M), two adult females (F), two young females (J), and five sub-adult males (S): J16(F), J44(S), J39(M), J49(S), K38(S), L90(F), L110(S), L117(S), J56(J), and J53(J).

This includes six whales that were measured to be in BC1 and designated as vulnerable in 2022 (J44, J49, L90, L110, L117, and J56). Additionally, there were four whales which were not classified as BC1 in 2022 that have declined into poor condition and are now listed as BC1 (J16, J39, K38, and J53). K38 was not imaged in the fall 2022-spring 2023 period, but is on the list because he was measured to be BC1 when last imaged in September 2022. 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 K38’s condition has improved.

*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 late-stage pregnancy (p>0.75 probability of being within 6 months of birth, out of an approximately 17-month gestation period).

Four females were determined to fall in this classification when last measured in November of 2022: K16, K43, L72, and L94. These whales were last measured in November 2022, so we expect these pregnancies may have ended as of late June 2022. Recent online photos show a young calf traveling with L pod, but it appears that neither L72 nor L94 are its mother, so the results of their pregnancies are still unknown. If these whales (K16, K43, L72, and/or L94) are encountered and still exhibit signs of late-stage pregnancy, an emergency rule at that time will be warranted.

Another whale, J22, was determined to be in late-stage pregnancy in April 2023 but no longer showed signs of pregnancy in June 2023. Another whale, J36, was assessed in June 2023 and found to be in late-stage pregnancy. Currently, we expect that only this individual, J36, 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 J16, J36, J39, J44, J49, J53, J56, K38, L110, L117, and L90 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, and it is timely, as there would otherwise be increased commercial viewing of these vulnerable SRKW at closer distances in July-September.

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

New:

Repealed:

Amended: WAC 220-460-110

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	<u>1</u>	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 29, 2023

**Name:** Amy Windrope for Kelly Susewind

**Title:** Deputy Director, WDFW

**Signature:**



NEW SECTION

**WAC 220-460-11000E Limits on number of vessels in the vicinity of southern resident killer whales at once.**

In conjunction with WAC 220-460-110(2), the department designates the Southern Resident Killer Whales J16, J36, J39, J44, J49, J53, J56, K38, L110, L117, and L90 as vulnerable individuals.