



Friends *of the* San Juans

360.378.2319
www.sanjuans.org

P.O. Box 1344
Friday Harbor, WA 98250

October 30, 2020

Washington Department of Fish and Wildlife
PO Box 43200
Olympia, WA 98504-3200

Submitted via the comment portal: <https://www.surveymonkey.com/r/cwwrules>

RE: Commercial Whale Watch Licensing Program draft rules

To the Washington Fish and Wildlife Commission:

Friends of the San Juans appreciates this opportunity to comment on the Commercial Whale Watch Licensing Program draft rules. We are also very appreciative of WDFW staff and the members of the advisory committees and science panel for all their work on this rulemaking process. We were honored to have our own Marine Protection and Policy Director, Lovel Pratt, participate in the process.

Friends of the San Juans represents thousands of members and works with diverse stakeholders, including citizens, committees, tribal and governmental agencies, and other nonprofit organizations in the transboundary region of the Salish Sea to protect and restore the San Juan Islands and the Salish Sea for people and nature—since 1979.

In 2001, Friends of the San Juans was a co-petitioner that led to the federal listing of the Southern Resident Killer Whales as an endangered species under the Endangered Species Act (ESA). The protection and recovery of the Southern Residents continues to be one of our top priorities. To address the lack of prey for Southern Residents, Friends of the San Juans [protects natural shorelines](#) and [restores habitat](#) for the forage fish that feed the salmon that feed these orcas. [Impacts to Southern Residents from large commercial shipping](#) are also being addressed.

The Commercial Whale Watch Licensing Program draft rules, if amended to better reflect the best available science, will provide immediate benefits by reducing the impacts of vessel noise and disturbance which will help the endangered Southern Residents find scarce food, rest, and socialize.

Friends of the San Juans strongly recommends that this rule implement the Southern Resident Orca Task Force Goal 2: Decrease disturbance of and risk to Southern Resident orcas from vessels and noise, and increase their access to prey; Recommendation 28: Suspend viewing of Southern Resident orcas.

[RCW 77.65.620](#) states, “The department must use the best available science in the establishment of the southern resident orca whale watching rules and continue to adaptively manage the program using the most current and best available science.” Recommendation 28 is supported by the Washington State Academy of Sciences’ report, [Summary of Key Research Findings about Underwater Noise and Vessel Disturbance](#):

Given the fragile condition of the SRKW population, however, the committee considers the precautionary approach to management of known stressors to be justified. According to the principle, when an activity threatens harm then measures should be taken—even if certain cause-and-effect relationships are not fully established scientifically. The committee suggests defining every interaction with an SRKW as an opportunity to disturb a whale.¹

Furthermore, and given that RCW 77.65.620 requires the rulemaking to “consider the economic viability of license holders,” Recommendation 28 is also supported by the WDFW-commissioned [Final Analysis of the Economic Viability of Commercial Whale Watching License Holders](#) which states:

Overall, rule elements that specifically and solely limit the viewing of SRKW are not expected to pose a viability concern to the industry. As described previously, SRKW viewing opportunities have decreased substantially over the last decade, due to changes in SRKW presence in the Salish Sea, as well as implementation of regulations on vessel traffic. At the same time, and until 2019, the industry has seen increasing revenues and expansion in number of vessels. Recent evidence from Canada demonstrates that ridership has increased following the PWWA’s a commitment to cease offering tours to view SRKW in Canadian waters.²

Friends of the San Juans supports Option A as filed with the following changes that are needed to better reflect the best available science and the critical status of the Southern Resident population:

1. **Reduce the maximum number of whale-watching vessels with a group of Southern Resident orcas from 3 to 1.** The Washington State Academy of Sciences states:

Given that even a low number of vessels can cause behavioral responses, 3-5 vessels will still potentially disturb SRKW.³

With other recreational vessels present and ideally Soundwatch and enforcement also present to increase compliance by all boaters, the number of commercial whale-watching vessels needs to be below the threshold of three. Furthermore, the best available science states that “[t]here is insufficient evidence for a positive “sentinel” effect of commercial whale watching; this topic needs further study.”⁴

2. **Prohibit the viewing of groups of orcas where there is a known pregnancy.** Both pregnant and lactating whales need less boat noise and disturbance in order to find and consume more salmon to raise healthy calves. See also NOAA’s August 13, 2020 feature story, [Give Pregnant Killer Whales Space to Forage](#). Please amend section 220-460-110 (2) with the underlined additions:

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 pregnant and/or sick and/or vulnerable by emergency rule from the department.

3. **Prohibit the viewing of Southern Residents in low-visibility conditions such as fog.** The viewing of Southern Residents in low visibility conditions would impede compliance with state law distance and speed requirements. Please amend section 220-460-110 with an additional subsection (3):

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 in low visibility conditions (e.g., fog).

4. **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.** WDFW should be prepared to close the opportunity to view Southern Resident Killer Whales in response to emergency near-term situations and/or actions. In addition, we recommend that WDFW develop a protocol for when the viewing of Southern Resident Killer Whales needs to be closed due to violations of the rule.

5. **Require whale-watch operators to provide immediate notifications to WDFW when approaching Southern Residents.** WDFW enforcement is needed on scene to ensure that recreational and commercial vessels alike abide by all state laws. The requirement in 220-460-120 (4)(c) for commercial whale watch license-holders to log an approach and identification of Southern Residents does not require an immediate/real time submittal to WDFW. This could be achieved by providing WDFW access to the commercial whale watch license-holders' reports 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). If WDFW is not provided access to the commercial whale watch license-holders' reports to the WRAS, please amend section 220-460-220 (4)(b) with the underlined additions/strike-out deletion. Note that prefacing this subsection with the additional word, "immediately," ensures that the benefit from real-time reporting to the WRAS is achieved:

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 and to WDFW enforcement.

Friends of the San Juans strongly supports the following sections in Option A as filed:

- 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.

Finally, further actions beyond the scope of this rule are needed to address recreational boaters' adverse impacts to the Southern Residents. At the very least, it is imperative that WDFW enforcement be on scene whenever Southern Residents are in Washington State waters, especially given the increase in recreational boating due to COVID-19. The Washington State Academy of Sciences states:

There are no published data on the behavior of recreational vessels with or without the presence of whale watching boats. However, a 2018 Soundwatch report did find a reduction in regulation incidents with the presence of a law enforcement vessel [Soundwatch 2018].⁵

Thank you for your attention to these comments and for all your work on behalf of Washington State's wildlife.

Sincerely,



R. Brent Lyles, Executive Director

Cc. Larry Carpenter, Chair WDFW Commission
Barbara Baker, Vice Chair, WDFW Commission
James "Jim" Anderson, WDFW Commission
David Graybill, WDFW Commission
Robert "Bob" Kehoe, WDFW Commission
Molly Linville, WDFW Commission
Donald "Don" McIsaac, WDFW Commission
Bradley Smith, Ph.D., WDFW Commission
Kim Thorburn, WDFW Commission
Julie Watson, WDFW Killer Whale Policy Lead

¹ Washington State Academy of Sciences. August 2020. Summary of Key Research Findings about Underwater Noise and Vessel Disturbance. Prepared for the Washington State Department of Fish and Wildlife. Page 4.

² Jen Kassakian and Maura Flight, Industrial Economics, Inc. August 2020. Final Analysis of the Economic Viability of Commercial Whale Watching License Holders. Prepared for the Washington State Department of Fish and Wildlife. Pages 40-41.

³ Washington State Academy of Sciences. 2020. Review of Proposed Rules for Commercial Whale Watching Licensing Program Washington State Academy of Science Committee on Underwater Acoustics and Disturbance. Prepared for the Washington State Department of Fish and Wildlife. Page 7.

⁴ Washington State Academy of Sciences. August 2020. Summary of Key Research Findings about Underwater Noise and Vessel Disturbance. Prepared for the Washington State Department of Fish and Wildlife. Page 1.

⁵ *Ibid.* Page 11.