

Public comment analysis: Proposed rules for commercial whale watching of Southern Resident Killer Whales

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Julie Watson, Killer Whale Policy Lead, WDFW

Introduction

In spring 2019, the Washington Legislature passed Senate Bill 5577: *a bill concerning the protection of Southern Resident Orca Whales from vessels*, which developed a license for commercial whale watching and directed the Washington Department of Fish and Wildlife (WDFW) to administer the licensing program and develop rules for commercial viewing of Southern Resident Killer Whales (SRKW). WDFW developed proposed rules to both 1) define the licensing process for the commercial whale watching license outlined in RCW 77.65.615, and 2) meet the requirement in RCW 77.65.620 to create rules for commercial viewing of SRKW.

The purpose of creating rules for commercial whale watching of SRKW is to reduce the impacts of vessel noise and disturbance on the whales' ability to forage, rest, and socialize while enabling sustainable whale watching. Draft rule language was developed in a year-long process described in WDFW staff's September 12 and December 4, 2020, presentations to the Fish and Wildlife Commission. There are two options that were put forward for public comment.

- Option A includes a three-month July-September season for motorized commercial whale watching of SRKW with two, two-hour periods per day where viewing SRKW is allowed at closer than one-half nautical mile (limit of 3 motorized commercial whale watching vessels per group of SRKW). In the final stages of drafting the proposed rule, text that would limit viewing to Friday-Monday was inadvertently included in Option A. The public was also invited to comment on the possibility of daily viewing (7 days/week) during those months.¹
- Option B adds a shoulder season of two months on either side (May/June and October/November) of the main season. The shoulder season is Saturday-Sunday viewing only (limit of 1 motorized commercial whale watching vessel per group of SRKW) and the main summer season viewing (July-September) is Friday-Monday (limit of 3 motorized commercial whale watching vessels per group of SRKW). For days that allow viewing of SRKW, there are two, two-hour periods.
- Note: The seasons described in Options A and B only apply to the viewing of SRKW by motorized commercial whale watching vessels and do not restrict the viewing of other whales or marine mammals.
- Both options propose formalizing the 'no-go' zone on the west side of San Juan Island (currently voluntary) for motorized commercial whale watching vessels (100-yard corridor along the shore

¹ WDFW explained via public outreach in late October that that Option A had initially been conceptualized as providing daily viewing (7 days/week) during July-September, but language that limited viewing to 4 days was inadvertently included at the final stages of drafting. In explaining the inadvertent change to Option A prior to publication, WDFW noted that it was interested in public comment on both Option A as published and as originally conceptualized with daily viewing.

for kayaks). The no-go zone is included in both alternatives. It would apply year-round regardless of SRKW presence.

- License application processes, reporting and training requirements, kayak-focused measures, and AIS requirements are present in both options.

The Fish and Wildlife Commission had a briefing and hearing on the proposed rules December 4, 2020, and the comment period closed on December 5. WDFW expects adoption of final rules by January 2021.

Methods:

The public comment period on the proposed rules began on October 21, 2020 and continued through December 5, 2020. Comments were primarily accepted via a Survey Monkey form that collects demographic information (name, affiliation, contact information) and has both a comment box where comments can be typed in directly and an alternative option to upload comments in a PDF or Word Document through the survey collector. Comments mailed or emailed to WDFW Commissioners or staff during the comment period are also being included in the analysis.

Comments collected through 11:59pm on Saturday, November 28, 2020 were included in a preliminary draft analysis for the Fish and Wildlife Commission's briefing and public hearing on December 4, 2020. Comments received during the final week of the comment period (November 29-December 5, 2020), including comments received at the public hearing, were summarized and included in this updated report delivered to the Commission prior to their meeting to deliberate and adopt rules on December 18.

Comments collected via the Survey Monkey were downloaded into an Excel file and reviewed for quality control. Identical comments submitted more than once by the same person (verified by name and IP address) were removed, and multiple comments from the same individual were combined into one field. A few individuals submitted additional comments later in the comment period to clarify or correct their original comments. Comments received outside of the Survey Monkey collector, including at the public hearing, were cross-checked with the collector to ensure they were not counted more than once, as many individuals submitted their comments through the portal and separately sent their comments by email to the Commission.

All of the comments received were uploaded to an online qualitative content analysis tool called Dedoose. Each comment was reviewed individually and assigned codes. First, 150 comments were reviewed and assigned preliminary codes, which helped determine the coding scheme that fit the majority of the data. Then, the full dataset was coded from scratch using the codes that were developed. Unusual and unique comments that did not fit the coding scheme were tagged as such for a secondary review. Additionally, comments from intergovernmental partners were flagged for independent review and summary.

Using tools available on the Dedoose platform, descriptive statistics were developed to provide a quantitative picture of the data. However, a qualitative examination of the data provides more nuanced understanding of the perspectives represented in the public comment. Quantitative information is provided below to highlight magnitude of the comments received, and qualitative descriptions paint a fuller picture of public sentiment about the proposed rules.

Results

Between October 21-December 5, **485** unique comments were submitted to WDFW. Of the 485, six were from intergovernmental partners, and five were sets of comments that were repeated:

- One set of comments included 1,489 distinct signed letters with the same text (“WEC letters”).
- One comment was a letter signed by 69 individuals (“naturalist letter”).
- One comment included a petition signed by 1,586 individuals (“petition”).
- One set of comments included 691 letters that varied slightly in text but all included the same central point, thus falling under the same code (“CBD letters”).
- One email with the same text was sent 5 times by unique commenters (“form Letter”).

These sets of comments will be referenced separately (parenthetically) from the other comments submitted by individuals or organizations. Including the repeated comments, there were **4,326** individuals, organizations, or government bodies that commented on the proposed rules during the public comment period.

Comments frequently focused on clusters of themes that reflected (and sometimes directly referenced) the position statements from specific NGOs or coordinated among multiple organizations. At the highest level, these clusters of themes can be divided among comments that *support the rules and/or want WDFW to go further* with the regulation, and comments that *oppose the proposed rules*. Here are the counts of comments in each category:

Comments that *support the proposed rules and/or want them to go further* to protect SRKW: **4,086** (315 individual comments +1,489 WEC letters, +1,586 petition signatories, +691 CBD letters, +5 form letters representing repeated comments). These include **2,417** (191 individual comments +1,489 WEC letters, +691 CBD letters, +5 form letters) comments that support “Option A” or “Option A as filed,” of which **1,583** (94 individual comments +1,489 WEC letters) support a modified version of Option A with several key changes. Most of these comments supporting a modified Option A included the following elements:

- “Reduce the maximum number of whale-watching vessels with a group of Southern Resident orcas from 3 to 1.”
- “Prohibit the viewing of groups of orcas where there is a known pregnancy.”
- “Prohibit the viewing of Southern Residents in low-visibility conditions such as fog.”
- “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.”
- “Require whale-watch operators to provide immediate notifications to WDFW when approaching Southern Residents.”

Some commenters individualized versions of these comments, for example requesting that the number of commercial whale watching boats be limited to 2. Many of these letters also specifically cited aspects of proposed Option A that the commenters support, including:

- “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.”

Nongovernmental organizations who sent comments in this general category include: Friends of the San Juans, Washington Environmental Council, Seattle Aquarium, and Defenders of Wildlife. Other commenters who did not specifically cite this package of recommendations proposed their own modifications to Option A, including limiting the number of days to two per week and increasing the geographic scope of the no-go zone.

A second grouping of comments in the *support and/or go further* category focused on some version of a suspension or moratorium on commercial viewing of SRKW **2,382** (*105 individual comments +1,586 petition signatories, +691 CBD letters*). Many of these comments supported a temporary suspension until the population shows sustainable signs of recovery, and others more broadly wanted to suspend or eliminate whale watching in the Salish Sea. Around **750** (*59 individual comments +691 CBD letters*) commenters said they wanted a suspension, but if limited to the proposed options, preferred Option A. Alternatively, some of these commenters said they preferred Option A, but modified to include a temporary suspension on motorized commercial viewing of SRKW.

Finally, in the *support and/or go further* category, **55** commenters focused more generally on the plight of the SRKW, encouraging WDFW to do whatever we can or be as restrictive as possible to benefit the whales (*39 commenters*), referencing a need to prioritize SRKW recovery over profit/economics (*13 commenters*). Among the *support and/or go further* category, many commenters cited the economic viability analysis and the conclusion that the industry is not financially dependent on viewing SRKW. Some commented on the extinction of SRKW being bad for commercial whale watchers, and many voiced that while SRKW may not survive if vessel impacts remain at status quo, the industry will be able adapt to more restrictive (or eliminated) opportunities to view SRKW.

In addition, **14** commenters expressed support specifically for option B. One commenter suggested Option B with a modification to daily viewing July-September. Reasons for supporting option B were vague, ranging from “orcas need to have every opportunity to feed without power boat interference” to “give the endangered animals a bit of peace to live their lives.” A couple comments supporting Option B, however, cited the balance of supporting “both healthy species management + a much steadier economic path than Option A.”

In the other overarching category of comments, **213** (*144 individual comments +69 naturalist letter signatories*) commenters *opposed* both Options A and B. Many of these commenters **146** (*77 individual comments +69 naturalist letter signatories*) laid out several aspects of commercial whale watching that they believe offer positive benefits to SRKW, including:

- The “sentinel role” of commercial whale watching vessels on the water.
 - “Having responsible operators on scene alerts boaters and provides proper examples of etiquette around the whales.”

- “Professional whale watch vessels serve a protective sentinel role on a frequent, daily basis, alerting other vessels to the presence of whales, allowing these other vessels (recreational boaters, ferries, commercial shipping, military) to reduce speed and alter course in order to reduce potential impacts.”
- The ability of commercial whale watch operators to “coordinate with researchers and enforcement to better understand, advocate for, and protect these whales.”
 - “Professional whale watch companies benefit the SRKWs and the Salish Sea ecosystem by contributing to science by sharing sightings data and identification photos, including new calves, with multiple organizations (research, governmental, NGO’s).”
- The educational value of providing opportunities to watch and learn about wildlife:
 - “In connecting people with these whales we create advocates for them and we take great pride and heart in being well-informed, knowledgeable, and fair in what we pass on to those who join us on the water so they can speak with that knowledge.”
 - “Commercial whale watch vessels provide a platform to introduce members of the public to the Salish Sea, educate them about endangered Southern Resident orcas and other species, and inspire them to help with recovery actions.”
- Philanthropic work and donations to salmon recovery from commercial whale watching operators.

Consequently, many of these comments cited both proposed rule options as a “well-intentioned” effort to “make it appear that people care and are trying to do something” but asserted that they would ultimately “increase daily cumulative impacts on SRKW.” Criticisms included that the seasonal, daily, and time restrictions are “untenable,” “arbitrary,” and “overly-complicated.” The two, two-hour time periods for viewing SRKW at closer than one-half nautical mile were the most commonly cited focus of these criticisms, though the commenters in this category often expressed distaste for the full suite of proposed rules.

Some of the *oppose* comments also suggested that the industry has been “scapegoated” and “demonized,” with **38** commenters pointing at salmon recovery or other threats to SRKW (including other vessels issues like ferries and shipping traffic) as a higher priority. Some commenters said that time and funding devoted to developing and enforcing the rules (including the proposed training requirement) should be reallocated to salmon recovery. Others expressed doubts about whether further restrictions on commercial whale watching were necessary, questioning the applicability of the science and whether the 2019 vessel regulations have already done enough for SRKW conservation. Notably, while many commenters in this category cited recreational boaters as a greater risk to SRKW, others opposed the rules because they worry restrictions (such as the proposed geographic restriction) will eventually be applied to recreational boaters as well.

A number of *oppose* comments also noted the dependence of the tourism economy of towns such as Friday Harbor on the commercial whale watching industry, and cited concerns regarding the economic impacts of the proposed rule on the local and regional economy. Commenters also stressed the importance of considering the range of economic impacts of the rule when making this decision.

Finally, in the *oppose* category, **29** commenters cited a specific package of recommendations as a “counter-proposal” to Options A and B. Most commenters who included this list of recommendations cited affiliations with the Pacific Whale Watch Association (PWWA) as owners, operators, guides, or

naturalists working for a whale watching company. The commonly cited features of the counter-proposal include:

- “Limit vessel numbers to no more than five professional CWW near any group of SRKW;”
- “Limit viewing time of SRKW to maximum 45 minutes per vessel;”
- “Commercial vessels must fly whale warning flag in presence of whales;”
- “Codify San Juan Island No-Go Zone (1/4 mile off shore) restriction when SRKW present;”
- “Continue to report the presence of SRKW to WDFW, researchers, commercial traffic, etc.”

Some nongovernmental, nonprofit commenters who opposed Options A and B put forward variant alternatives that differed somewhat from the above recommendations. Their proposals included suggestions such as a 3-5 vessel limit per group of SRKW, no viewing of SRKW for 2 hours in the day (or one-half day per week) to allow research on recreational boater behavior sans commercial whale watching presence, and a full-time closure of the west side of San Juan Island (rather than only when SRKW are present).

Notably, commenters in both the *support/go further* and the *oppose* categories cited several other aspects of SRKW recovery that they wanted WDFW to address. For instance, several of the commenters asked WDFW to do more to “address recreational boaters’ adverse impacts to the Southern Residents.”

Beyond the support/oppose groupings of comments, there were several themes that emerged in one or a handful of comments. Themes from these comments are bulleted below. Some of these comments were outside the scope of the rulemaking, because 1) they are defined separately in state, national, or Canadian law, or 2) they involve regulating entities not covered by WDFW’s rulemaking purview.

- Enforcement
 - Highlighting the importance of enforcement and accountability
 - Recognizing the need for funding
 - Call for the need for clear compliance monitoring plan, including monitoring impacts on other species for shifts due to reduced commercial SRKW viewing
 - Recommendation of secret shopper compliance monitoring
 - Call for higher fines and/or license revocation as penalties for violations
 - Call for language saying WDFW can/will close whale watching opportunities for viewing SRKW if there are violations of the rules
 - Recommendation for citizen call-in reporting of violations
- Canada
 - Support for Canadian sanctuaries and suggestion to broaden the restrictions on the West Side of San Juan Island to more closely mirror Canada’s approach
 - Concern about whale watching by Canadian operators and applicability of the rules to Canadian companies
 - Recommendation that rules apply to all killer whales
- Technology/standards
 - Call for tax incentives to switch to hybrid/electric
 - Suggestion that licensing requirements should restrict how much sound vessels can produce

- Suggestion of collective viewing of live drone footage to replace vessels viewing SRKW at 300 yards
 - Suggestion to include restrictions on the use of echosounders
- Other adjustments to the rules
 - Recommendation that the AIS requirement be implemented sooner- in 2021
 - Suggestion that the restriction on viewing calves should extend for ages 2-5 years
 - Suggestion that viewing time should be set at 1 hour
 - Suggestion that a group of SRKW should be defined as a pod
 - Recommendation to collect SRKW behavior state and changes as part of the reporting requirements
 - Recommendation to expand the no-go zone on the west side of San Juan Island
- Kayaks
 - Disagree with definition of commercial whale watching
 - Suggest a limit on number of kayaks/kayak tours in the vicinity of SRKW at once
 - Suggest nonmotorized vessels as a lower priority, meriting less restrictions than motorized vessels
- Concern about competition/queueing waiting to view SRKW
 - Suggest time limit in the vicinity for queue management
 - Concern about tours all being scheduled for the same times, increasing pressure
- Provisions already included in the proposed rules
 - Recommend at least 2 weekdays with no viewing
 - Recommend quieting the West Side of San Juan Island
 - Support for the Whale Report Alert System reporting requirement, and concern about WDFW getting access to the data
- Other
 - Recommendation to do non-industry sponsored surveys of customers to learn more about their preferences
 - Recommendation to set the distance to 100 yards and speed to 10 knots
 - Recommendation to further address speed limits
 - Discussing fisheries management
 - Recommendation for all-boat time closures on viewing SRKW
 - Recommendation for reduction in research boats near SRKW
 - Suggestions for the licensing process (e.g. limiting the number of alternate operators)
 - Expressing concern about the Navy Northwest Training and Testing incidental take authorization rule recently finalized by NOAA.
 - N/A

One commenter identified as an artist and uploaded images with their comment:



While the comments from intergovernmental partners shared some of the themes from the general body of comments, they generally took novel perspectives that provide additional insight into the proposed rules.

- The Northwest Indian Fisheries Commission (NWIFC) advocated for the no-go zone but suggested a flat distance rather than one-quarter mile in most places and one-half mile from the Lime Kiln Lighthouse. NWIFC also asked for the incorporation of language recognizing that the no-go zone does not restrict treaty tribal fishing rights, activities, and access. The NWIFC also promoted establishing a baseline and recommended ways to amplify compliance monitoring and enforcement.
- The Puget Sound Partnership advocated for Option B as a considerable change from the status quo that will “dramatically improve the timing and quality of sightings information that will be available to Washington State Ferries and many other professional mariners in Washington who are using the ‘Whale Report Alert System’ (WRAS).” The Partnership recommended reducing the cap on motorized commercial whale watching vessels with a group of whales from 3 to 1, and suggested that WDFW could offer more viewing opportunities (still limited to two, two-hour periods per day) for companies operating exclusively outside the San Juan Islands.
- San Juan County also submitted comments supporting Option B for its balance of reducing impacts on SRKW while still offering viewing opportunity. The County encouraged WDFW to clarify enforcement and compliance monitoring mechanisms, particularly to ensure that the rules do not have unintended consequences for other species (e.g. transient killer whales, humpbacks).
- The Port of Friday Harbor supported limiting the number and size of vessels allowed to offer whale watching of SRKW. The Port also emphasized a positive role of commercial whale watching, recommended that the geographic closure on the west side of San Juan Island be based on whale presence, suggested WDFW incentivize safer and quieter whale watch vessels, and emphasized the need to do more about recreational boating near SRKW.
- Letters from the Samish Indian Nation and Mayor of Shoreline Will Hall promoted the modified Option A discussed above.

At the public hearing held December 4, 2020, 38 individuals were each given 2 minutes to speak. The majority of these commenters also submitted written comments, and so their verbal comments were appended and coded as part of their overall comment in order to avoid duplication. Twenty five of the 38 comments at the Commission hearing were from individuals who also submitted comments either as individuals or on behalf of their organizations, and 5 were from staff of an organization that submitted a letter. Eight commenters were unique, meaning they did not submit separate written comments. Public comment at the hearing included 11 individuals affiliated with the Governor's Southern Resident Orca Task Force and/or its working groups, and 7 of 11 members of WDFW's Commercial Whale Watching Licensing Program Advisory Committee. While 19 of the commenters expressed support for the proposed rules and/or stricter rules, 15 commenters at the hearing opposed the rules and/or proposed less restrictive rules. A few of the commenters at the hearing spoke more generally about the need for regulation of commercial whale watching as part of the broader SRKW-conservation effort, and 5 commenters emphasized the need for more salmon to increase prey availability for SRKW.

Discussion

This section contains responses to the comments, by theme:

The proposed rules were designed to restrict commercial viewing of SRKW in order to reduce the daily and cumulative noise and disturbance of SRKW, per 2SSB 5577 codified as RCW 77.65.620. WDFW used best available science to develop proposed rules for both motorized and nonmotorized commercial whale watching activities, because the science suggests that even nonmotorized vessels impact whale behavior. The Washington State Academy of Sciences recommended a precautionary approach, defining every interaction between a commercial whale watching vessel and SRKW as an opportunity for disturbance of foraging, rest, and socializing activities. Due to the dire state of the SRKW population, WDFW proposed precautionary measures that we expect to reduce daily and cumulative exposure of SRKW to motorized and nonmotorized commercial whale watching vessels. Goals included dedicated stretches of uninterrupted foraging time and reduced boat numbers within $\frac{1}{2}$ nautical mile.

- The bill specifically defined commercial whale watching to include commercial kayak tours that advertise or engage in opportunistic whale watching. Vessels with paying customers who engage in whale watching within Washington waters, whether or not whale watching is central to the business description, are required to have a license. Likewise, Canadian vessels conducting whale watching activity in Washington waters must procure licenses and follow the rules that are adopted for commercial viewing of SRKW.
- WDFW biologists determined that reducing the amount of time when SRKW could potentially experience commercial whale watchers by 80% or more would help meet the conservation objective of the bill. This led to a 4-hour per day viewing limit and limited days within the year where viewing at closer than $\frac{1}{2}$ nautical mile would be allowed under the proposed rules.
- This is why a 5 motorized commercial whale watching vessel, year-round, 8+ hour per day viewing opportunity does not meet the conservation objective.

The proposed rules were designed to reduce- not completely eliminate- the daily and cumulative impact of noise and disturbance from commercial whale watching activities. WDFW used best available science synthesized in a report by the Washington State Academy of Sciences to set thresholds that meet our conservation value. Once we were satisfied with the conservation value of the rules, we worked to allow

some remaining opportunity for commercial whale watching of SRKW. The legislature directed WDFW to consider the economic viability of license holders in the rulemaking process, and WDFW incorporated economic analysis through an economic viability analysis of rule options and a small business economic impact analysis of the proposed rules. The economic viability analysis concluded that reducing or even eliminating SRKW-viewing opportunities would not affect the viability of the industry, particularly due to the small proportion of tours (<10%) that involve viewing SRKW currently and the plentiful readily available opportunities to view transient killer whales, humpbacks, and other species. The CWW industry does provide an important economic contribution to the local and regional economies, and the viability analysis concludes that the rule elements specifically limiting viewing of SRKW would not result in the elimination of the industry and its local and regional economic benefits. These rule elements may still result in some costs to individual businesses and to the regional economy; however, a cost benefit analysis was not conducted for this rule.

Considering the impacts of the COVID-19 economic recession, WDFW opted to take a regulatorily conservative approach by preserving some viewing opportunity (of SRKW) during these economically uncertain times. Permitting some level of SRKW-viewing opportunity will also allow us to access the benefits of the reporting requirements, including 1) real-time reporting to the Whale Report Alert System, and 2) data for WDFW to analyze the role of commercial whale watch vessels in influencing or mitigating impacts from other boaters.

- This is why we did not suspend viewing of SRKW. We believe we can still allow some viewing while meeting the conservation objective.
- This is why we selected the months, days, and times where viewing SRKW is proposed to be allowed. We attempted to align these opportunities with popular seasons, days, and tour times.
- This is why we set the number of motorized commercial whale watch vessels in the vicinity of a group of SRKW to three and not more or less.
- This is why WDFW proposed delaying the AIS requirement until 2022: to allow the industry time to recover from the economic downturn caused by the COVID-19 pandemic. During a more average year, the cost of AIS (particularly class B) is expected not to be a significant economic burden on license holders.

WDFW needed to develop rules we could administer, enforce, measure, and adaptively manage.

- This is why we did not include pregnant whales specifically. We expect that a pregnant whale could be identified as “vulnerable” via emergency rule once we have reliable data about a confirmed pregnancy.
- This is why we did not include a time limit in the vicinity of SRKW. Staff had concerns about the on-the-water enforcement capacity to monitor multiple boats with stopwatches simultaneously while navigating marine conditions and other on-the-water responsibilities. The two, two-hour periods result in de facto time limits in the vicinity, and we expect that industry would continue to self-manage queuing and turn-taking.
- This is why we did not include a provision about low visibility conditions, as conditions can vary vastly from place to place within the Salish Sea. This would be difficult to know, communicate, and enforce.
- Similarly, restricting the West Side of San Juan Island only when SRKW are present would require WDFW to have constant real-time information on whale presence and an infrastructure

to disseminate that information in real-time so operators would be aware when the restriction was in effect. In addition, we did not want to codify the no-go zone in a way that undermines the intent of the voluntary no-go zone, which, though voluntary, is not contingent upon SRKW presence.

- We did not propose expanding the no-go zone (including expanding it) because of concerns about altering interactions with vessel traffic and the shipping lanes.
- Enforcement capacity and on-the-water connectivity are also the reasons we did not propose requiring real-time reporting of SRKW locations to WDFW Enforcement Officers. We will collect this information via the proposed log/reporting requirements. Many operators currently share whale locations with WDFW Enforcement officers voluntarily, and we hope this voluntary best-practice will continue.
- WDFW Enforcement officers voiced concerns that a requirement to use the whale warning flag may disincentivize nimble use of the flag, e.g. leaving the flag up to avoid forgetting and receiving a citation. Again, use of the flag is something that is done voluntarily that we expect to continue as a recommended best practice.
- The proposed fine of \$500 for RCW 77.15.740 was set by the legislature. The proposed \$500 fine for the other commercial whale watching SRKW rules fit WDFW's existing infraction authority. Criminal violations of the commercial whale watching rules, per definition by the legislature, are misdemeanors, and two convictions in one calendar year results in the denial of a license for two years, per RCW 77.15.815.
- We did not include provisions indicating thresholds to stop commercial viewing of SRKW based on number of violations because WDFW sees this as something we may potentially do through emergency rulemaking if needed, under existing authority.
- We did not propose defining a group of whales as a pod because of concerns about enforceability.

The legislation directed WDFW to “continue to adaptively manage the program using the most current and best available science,” and it says “the department shall complete an analysis and report to the governor and the legislature on the effectiveness of and any recommendations for changes to the whale watching rules, license fee structure, and approach distance rules by November 30, 2022, and every two years thereafter until 2026.” WDFW has requested funding to support this work and will be developing and implementing a monitoring plan using the guidance from the Washington State Academy of Sciences.

WDFW prioritizes watchable wildlife as a way for citizens to connect with Washington's species and habitats. WDFW looks forward to building a partnership with the commercial whale watching industry to further shared conservation and watchable wildlife goals. Although commenters have shared many anecdotes of the “sentinel role” of commercial whale watching, the Washington State Academy of Sciences panel specifically concluded that there is insufficient evidence of either a sentinel or magnet role of commercial whale watching, asserting:

“Caution must be used when assuming a sentinel effect exists without sufficient evidence. As vessel presence is currently known to have behavioral and physiological effects on whales, the precautionary principle leads the committee to presume that there is no sentinel effect until otherwise demonstrated.”

WDFW was not given authority in 2SSB 5577 to 1) develop restrictions for private recreational vessels, ferries, shipping vessels, or the Navy, 2) neglect rules for commercial whale watching in order to focus on salmon recovery, 3) change the distance or speed rules (which were set by the legislature in the bill) or their applicability to transient killer whales, 4) change the definition of commercial whale watching and what operations require a license, 5) cap the number of commercial whale watching licenses available, 6) develop tax incentives for quieter technology.

That being said, there is a large body of work focusing on the 49 recommendations from the Governor's Orca Task Force, including salmon recovery work, Be Whale Wise efforts to influence recreational boater behavior, the Whale Report Alert System to reduce impact and risk from shipping and ferries, and Quiet Sound to incentivize development and implementation of quieter technology, such as electrification of the ferry fleet. The work to develop rules for commercial viewing of SRKW is one insular, defined piece of a much larger SRKW recovery effort happening across the region.

Conclusion

This report was prepared for the Fish and Wildlife Commission, in order to summarize the public comments received during the rulemaking process, so that this feedback can be considered as the Commission deliberates and adopts final rules. The document summarizes public comments received between October 21 and December 5, 2020, and it presents responses to the major themes of comments. A partial draft of this report summarizing comments received October 21-November 28 was prepared for the initial briefing of the Fish and Wildlife Commission on December 4. Following the briefing, Comments received during the public hearing and the final week of the public comment period (November 29 – December 5, 2020) were assembled and added to the analysis. This document is the updated report that reflects the full body of public comments received. This comment summary and response, along with the final SEPA Environmental Impact Statement including the full SEPA comment analysis and response, will be shared with the Commission prior to the December 15 and December 18 deliberations on the proposed commercial whale watching rule package.