

WSR 24-09-019
EXPEDITED RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 23-15—Filed April 8, 2024, 3:01 p.m.]

Title of Rule and Other Identifying Information: Chapter 220-460 WAC, Commercial whale watching.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The Washington state legislature adopted ESSB 5371 in the 2023 legislative session. The bill changes the commercial whale watching license structure: It defines a paddle tour business license, separates the licensing of paddle tour businesses and guides from commercial watching businesses (where they were previously lumped), and changes other licensing requirements. The bill also modifies the fee structure, changing some fees and eliminating others. Following the original legislation creating the commercial whale watching licenses in 2019 (2SSB 5577), the Washington department of fish and wildlife (WDFW) initiated the rule-making process directed in the bill, which resulted in the creation of chapter 220-460 WAC on the commercial whale watching license and rules applicable to license holders. This language was updated in 2021 due to passage of ESB 5330. With the passage of ESSB 5371, some language in chapter 220-460 WAC is once again no longer in alignment with RCW 77.65.615. In the drafting of the revisions to chapter 220-460 WAC, WDFW also edited typographical errors and clarified existing rule language.

This rule-making process would: (1) Adopt content explicitly directed in Washington state statute by updating and aligning the definitions and language in chapter 220-460 WAC with the modifications to RCW 77.65.615; and (2) correct typographical errors and clarify language of the rule without changing its effect.

Reasons Supporting Proposal: ESSB 5371 was passed by the Washington legislature in April of 2023 and goes into effect in July 2023. The changes in this bill affect the current license year. This made chapter 220-460 WAC out of alignment with the 2023 revisions in RCW 77.65.615. These revisions have urgent effect on both license holders and WDFW, the entity responsible for providing licenses and enforcing requirements for license holders. This proposal modifies chapter 220-460 WAC to align with the modifications to RCW 77.65.615 while correcting some typographical errors and clarifying language of the rule without changing its effect.

Statutory Authority for Adoption: RCW 77.04.012, 77.04.055, 77.12.047, 77.65.620.

Statute Being Implemented: RCW 77.65.615, 77.65.620.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: WDFW, governmental.

Name of Agency Personnel Responsible for Drafting: Julie Watson, Olympia, Washington, 360-902-2580; Implementation: Peter Vernie, Olympia, Washington, 360-902-2302; and Enforcement: Captain Alan Myers, Mill Creek, Washington, 425-775-1311 ext. 115.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: Expedited rule making is appropriate because ESSB 5371 was passed in April of 2023 and affects the current license year. This made chapter 220-460 WAC out of alignment with the 2023 revisions in RCW 77.65.615. These revisions have urgent effect on both license holders and WDFW, the entity

responsible for providing licenses and enforcing requirements for license holders. This proposal modifies chapter 220-460 WAC to align with the modifications to RCW 77.65.615 while correcting some typographical errors and clarifying language of the rule without changing its effect.

This notice meets the following criteria to use the expedited adoption process for these rules:

- Corrects typographical errors, makes address or name changes, or clarifies language of a rule without changing its effect.
- Content is explicitly and specifically dictated by statute.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Scott Bird, Rules Coordinator, WDFW, P.O. Box 43200, Olympia, WA 98506, phone 360-995-2442, fax 360-902-2155, email rules.coordinator@dfw.wa.gov, AND RECEIVED BY June 17, 2024.

April 8, 2024
Scott Bird
Rules Coordinator

OTS-4836.2

**Chapter 220-460 WAC
COMMERCIAL WHALE WATCHING AND PADDLE TOURS**

AMENDATORY SECTION (Amending WSR 21-23-070, filed 11/15/21, effective 12/16/21)

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 motorized or sailing vessel (~~((or guided kayak tour in order))~~) to view marine mammals in their natural habitat for a fee.

(2) **Commercial whale watching business.**

"Commercial whale watching 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-))~~ **Paddle tour.**

"Paddle tour" means the act of guiding or offering to take people aboard nonmotorized or human-powered vessels, such as kayaks or paddle boards, on a trip, tour, or guided lesson that involves viewing marine mammals in their natural habitat for a fee.

(5) Paddle tour business.

"Paddle tour business" means a business that conducts paddle tours.

(6) Paddle guide.

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

(7) Commercial whale watching license.

"Commercial whale watching license" means a commercial whale watching business license (~~(7)~~) or a commercial whale watching operator license (~~(7 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" means any vessel that is being used as a means of transportation for individuals to engage in commercial whale watching.)~~ **(8) Paddle tour license.**

"Paddle tour license" means a paddle tour business license or a paddle guide license as defined in this section.

(a) "Paddle tour business license" means a department-issued license to operate a business that conducts paddle tours.

(b) "Paddle guide license" means a department-issued license to conduct commercial guided paddle tours on behalf of a paddle tour business.

(9) Vessel.

"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) "Commercial whale watching vessel" means any vessel that is being used as a means of transportation for individuals to engage in commercial whale watching.

(b) "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))~~ (c) "Nonmotorized (~~(commercial whale watching)~~) vessel" or "paddle tour 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)~~) a paddle tour. This definition includes human-powered watercraft such as kayaks and paddleboards. (~~(7)~~

~~this chapter, the terms "kayak," "kayak guide," and "kayak tour" encompass any nonmotorized vessels used for whale watching.~~

~~(7))~~ **(10) 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.

~~((8))~~ **(11) 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.

~~((9))~~ **(12) Vicinity instance.** Each time any commercial whale watching vessel or nonmotorized 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.

~~((10))~~ **(13) 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.

~~((11))~~ **(14) 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.

AMENDATORY SECTION (Amending WSR 21-23-070, filed 11/15/21, effective 12/16/21)

WAC 220-460-020 Commercial whale watching and paddle tour licenses—Application process and deadline. (1) License requirements.

(a) A commercial whale watching business license is required for commercial whale watching businesses (~~(, motorized and sailing vessel operators, and kayak guides)~~) as defined in this chapter.

(b) A paddle tour business license is required for paddle tour businesses as defined in this chapter.

(c) A commercial whale watching operator license is required for commercial whale watching operators as defined in this chapter.

(d) A paddle guide license is required for paddle guides as defined in this chapter.

(2) Applicants must be at least ~~((sixteen))~~ 16 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 or paddle tour 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 or paddle tour business license application must include the following information regarding the whale watching or paddle tour business:

(a) The applicant must identify the (~~whale watching~~) business name, type of business (i.e., sole proprietor, partnership, corporation), and for all associated business owner(s): Full name, association to the business, email address, telephone number, and Social Security number if the business owner 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~~) Any business license applicant must also designate, as applicable, all commercial whale watching operators authorized to operate a motorized or sailing vessel (~~and all kayak~~) or all paddle guides authorized to guide a (~~kayak~~) paddle tour on behalf of the business. The applicant must identify (~~the~~) each operator's or (~~kayak~~) paddle guide's full name and date of birth.

(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.

(b) (~~If motorized or sailing vessels are selected, then~~) The applicant must select the appropriate option for the passenger capacity on (~~the~~) each designated vessel.

(7) Commercial whale watching operator license applicants and (~~kayak~~) paddle 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 220-460-030 Commercial whale watching and paddle tour license cards—Replacements. (1) Upon lawful application, a commercial whale watching license or paddle tour license in the form of a license card or certificate will be issued by the department.

(2) The fee to replace a license card that has been lost or destroyed is ~~((twenty dollars))~~ \$20.

AMENDATORY SECTION (Amending WSR 21-23-070, filed 11/15/21, effective 12/16/21)

WAC 220-460-040 Commercial whale watching ~~((licensing business organizations))~~ and paddle tour businesses—Operator or guide designation. (1) Any person that holds a commercial whale watching business license or paddle tour business license 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.

(2) A commercial whale watching business license holder or paddle tour business license holder may designate an unlimited number of operators or ~~((kayak))~~ paddle guides, respectively, so long as each individual obtains the license required under WAC 220-460-070.

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

AMENDATORY SECTION (Amending WSR 21-23-070, filed 11/15/21, effective 12/16/21)

WAC 220-460-050 Whale watching vessel designation requirements and required operator and paddle guide documentation. (1) RCW 77.65.615 requires commercial whale watching businesses to designate the motorized vessel(s) ~~((and indicate if kayaks))~~ that will be used for commercial whale watching. 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 ~~((, and has designated if kayaks 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 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, and/or a vessel registration number.

(4) It is unlawful to engage in paddle tour activities unless the person conducting paddle tour activities on behalf of the business has the appropriate documentation in physical possession.

The guide of a commercial paddle tour must have their individual paddle 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.

AMENDATORY SECTION (Amending WSR 21-23-070, filed 11/15/21, effective 12/16/21)

WAC 220-460-060 Whale watching vessel (~~(substitutions—Fees)~~) changes. The holder of a commercial whale watching business license may ~~((add or substitute a vessel designated on))~~ designate an additional vessel on the license within the calendar year if the license holder ~~((:~~

- ~~(1) Surrenders the previously issued license to the department;~~
- ~~(2))~~ submits to the department ((a substitution)) an 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))~~ and any other information required by the department.

AMENDATORY SECTION (Amending WSR 21-23-070, filed 11/15/21, effective 12/16/21)

WAC 220-460-070 Whale watching operator and ((kayak)) paddle guide license requirements. (1) A person 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 operator license issued from the department;
- (b) The 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))~~ paddle tour on behalf of the commercial whale watching business only if:

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

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

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

(3) Only an individual at least ((sixteen)) 16 years of age may hold an operator license or ((kayak)) paddle guide license.

(4) An individual may hold only one commercial whale watching operator license. Holders of an operator license may be designated on an unlimited number of commercial whale watching business licenses.

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

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

WAC 220-460-080 Expiration and renewal of licenses. Commercial whale watching and paddle tour licenses expire at midnight on December 31st of the calendar year for which they are issued. Licenses may be renewed annually upon application and payment of the prescribed license fees.

AMENDATORY SECTION (Amending WSR 21-23-070, filed 11/15/21, effective 12/16/21)

WAC 220-460-090 Commercial whale watching of southern resident killer whales and paddle tours operating near southern resident killer whales—General. (1) It is unlawful for a commercial whale watching operator or ((kayak)) paddle guide to violate any of the restrictions in RCW 77.15.740.

(2) ((A commercial whale watching license is)) Licenses issued by the department under this chapter are 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 and paddle tour activity in the inland waters of Washington.

AMENDATORY SECTION (Amending WSR 21-23-070, filed 11/15/21, effective 12/16/21)

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. ((Kayak)) Paddle

guides and all vessels on guided ((~~kayak~~)) paddle tours must stay within ((~~one hundred~~)) 100 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 21-23-070, filed 11/15/21, effective 12/16/21)

**WAC 220-460-130 Nonmotorized ((~~commercial whale watching~~)) pad-
dle tour vessels.** (1) Tours involving any nonmotorized watercraft used for the purposes of ((~~commercial whale watching~~)) paddle tours, such as kayaks, are subject to these requirements. Such watercraft constitute ((~~commercial whale watching~~)) paddle tour 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~~)) paddle guide" in this chapter.

(2) ((~~Kayak~~)) Paddle 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~~)) 400 yards away from the vessels. Rafting up is defined as manually holding vessels close together, maintaining a tight grouping.

AMENDATORY SECTION (Amending WSR 21-23-070, filed 11/15/21, effective 12/16/21)

WAC 220-460-140 Commercial whale watching and paddle tour 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 conveying passengers for a fee.

(2) All commercial whale watching and paddle tour license holders 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 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 participate in the annual training.

(3) All commercial whale watching and paddle tour 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 or (~~kayak~~) paddle 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~~) 400 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~~) 24 hours.

(v) (~~Kayak~~) Paddle 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 21-23-070, filed 11/15/21, effective 12/16/21)

WAC 220-460-150 Penalties. (1) Commercial whale watching or paddle tour 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~~) \$500, not including statutory assessments added pursuant to RCW 3.62.090.

(2) Commercial whale watching or paddle tour 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~~) \$500, 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.