

WSR 24-14-085
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 24-117—Filed June 28, 2024, 1:11 p.m., effective June 28, 2024, 1:11 p.m.]

Effective Date of Rule: Immediately upon filing.

Purpose: The southern resident killer whales (SRKW) are a distinct population segment of North Pacific killer whales. They are an endangered species and require additional protection by way of an emergency rule immediately. The purpose of this emergency rule is to designate J16, J36, J37, J39, J42, J44, J49, J53, L22, L94, L108, L113, L119, L124, J22, and J47 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 miles.

Citation of Rules Affected by this Order: Amending WAC 220-460-110.

Statutory Authority for Adoption: RCW 77.65.620.

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.

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

By way of background, SRKW have a high risk of extinction and are classified as endangered under the Endangered Species Act, and their listing was reaffirmed by National Oceanic and Atmospheric Administration 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. SRKW are comprised of three family groups (pods): J pod, K pod, and L pod. Each individual whale has an alphanumeric 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 2024, the SeaLife Response Rehabilitation and Research (SR3) team contracted by the Washington department of fish and wildlife (WDFW) to monitor SRKW body condition concluded their analysis of SRKW observations collected between June 2023 and June 2024.

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 percent of measurements for their age and sex compared to comparable measurements from 2016-2024. 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 (two to three times higher) probability of subsequent mortality.

The analysis found 14 whales in the BC1 state from J and L pods, including one adult male (M), six adult females (F), three subadult males (SAM), two subadult females (SAF), and two juvenile females (J): J16(F), J36(F), J37(F), J39(M), J42(F), J44(SAM), J49(SAM), J53(J), L22(F), L94(F), L108(SAM), L113(SAF), L119(SAF), L124(J).

This includes five whales that were measured to be in BC1 and designated as vulnerable in 2023 (J16, J39, J44, J49, and J53). Additionally, there were nine whales which were not classified as BC1 in 2023 that have declined into poor condition and are listed as BC1 as of their last measurement (J36, J37, J42, L22, L94, L108, L113, L119, and L124). Of note, L94 and L119 both have young, dependent calves (born in June 2023).

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 percent in the final month of gestation (Kriete 1995). Vessels compound food stress, particularly for females (Holt et al. 2021). SR3 analyzed available data for female SRKW of reproductive age (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 six months of birth, out of an approximately 17-month gestation period).

One whale was determined to fall in this classification when last measured in April of 2024: J22. J22's breadth (and subsequent probability of late-stage pregnancy) increased between February and April 2024. J22 was also measured to be in late-stage pregnancy in April 2023, but she had lost this pregnancy (as per her measured breadth) by June 2023. There are other whales with breadths greater than average that may be in earlier stages of pregnancy when measured, with lower probabilities of support, and some of these may now be in the latter stages of pregnancy. If these whales are encountered and exhibit signs of late-stage pregnancy, an emergency rule at that time will be warranted.

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. Between observations, subadult male J47 (offspring of J37, a female in BC1 with dependent calf), declined three body condition states from a BC5 to BC2, meriting vulnerable designation.

Per WAC 220-460-110, the adoption of the emergency rule 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.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 1, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 28, 2024.

Nate Pamplin
on behalf of Kelly Susewind
Director of External Affairs

NEW SECTION

WAC 220-460-11000F Limits on number of vessels in the vicinity of southern resident killer whales at once. Notwithstanding the provisions of WAC 220-460-110, effective June 28, 2024, until further notice, this rule designates the status of some Southern Resident Killer Whales; other provisions of WAC 220-460-110 not addressed herein remain in effect unless otherwise amended by emergency rule:

In conjunction with WAC 220-460-110(2), the department designates the Southern Resident Killer Whales J16, J36, J37, J39, J42, J44, J49, J53, L22, L94, L108, L113, L119, L124, J22, and J47 as vulnerable individuals.