

WSR 22-14-068
EMERGENCY RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Filed June 30, 2022, 8:29 a.m., effective June 30, 2022, 8:29 a.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. 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 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 2022, 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 September 2021 and April 2022.

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 2016-2022. 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.

There were 12 whales in the BC1 state from J and L pods, including one calf (C), one adult male (M), five adult females (F), one juvenile (J), and four subadult males (S): J27(M), J36(F), J44(S), J49(J), J56(C), L54(F), L83(F), L90(F), L94(F), L110(S), L116(S), and L117(S).

This includes six whales that were measured to be in BC1 in both September 2021 and fall-spring 2022, plus an additional L pod female (L94) that was not imaged in September. Additionally, there were four whales which have declined into poor condition since September and are now listed as BC1 (J27, J44, J49, L90). L54 was not imaged in the fall-spring 2022 period, but is on the list because she was measured to be BC1 when last imaged in September 2021. 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 L54's condition has improved. No K pod whales were imaged in the fall-spring 2022 period, but none were measured to be in BC1 in September 2021 when all were imaged.

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 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 the latter half of pregnancy ($p > 0.75$ probability of being

within 9 months of birth, out of an approximately 17-month gestation period). Four females were determined to fall in this classification when last measured: K12, K20, K27, and L72. Recent online videos show a young calf traveling with K pod, and most likely one of K12, K20, or K27 is the mother. These K pod whales were last measured in September 2021, so we expect these pregnancies may have ended as of late June 2022. However, if these whales are encountered and still exhibit signs of late-stage pregnancy, an emergency rule at that time will be warranted. Currently, we expect L72 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 J27, J36, J44, J49, J56, L54, L83, L90, L94, L110, L116, L117, and L72 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.

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

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 requires additional protection immediately. This emergency action is necessary to protect the public's interest in the preservation of a vulnerable endangered animal.

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 30, 2022.

Kelly Susewind
Director

NEW SECTION

WAC 220-460-110D Southern Resident Killer Whales J27, J36, J44, J49, J56, L54, L83, L90, L94, L110, L116, L117, and L72 In conjunction with WAC 220-460-110(2), the department designates the Southern Resident Killer Whales J27, J36, J44, J49, J56, L54, L83, L90, L94, L110, L116, L117, and L72 as vulnerable individuals.

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