

**Protective Regulations for Killer Whales in the Northwest
Under the Endangered Species Act and Marine Mammal Protection Act
Preliminary Public Comment Summary
February 2010**

Background

On Nov. 18, 2005, NOAA Fisheries listed the Southern Resident killer whale distinct population segment under the Endangered Species Act. The final rule identified several potential factors that may have resulted in the decline or may be limiting recovery of Southern Resident killer whales including: quantity and quality of prey, toxic chemicals which accumulate in top predators, and disturbance from sound and vessel traffic. The rule further identified oil spills as a potential risk factor for the small population of Southern Resident killer whales. In November 2006, NOAA Fisheries published a notice of availability of a *Proposed Recovery Plan for Southern Resident Killer Whales* and finalized the plan in January 2008. The recovery plan identifies management actions to promote recovery of Southern Resident killer whales. One goal of the plan is to minimize disturbance from vessels. To achieve this goal, the recovery program includes the following actions:

- (1) Continue to evaluate and improve voluntary whale-watching guidelines;
- (2) Evaluate the need to establish regulations on vessel activity in the vicinity of killer whales; and
- (3) Evaluate the need to establish areas with restrictions on vessel traffic.

Advance Notice of Proposed Rulemaking

To implement the actions identified in the recovery plan, NOAA Fisheries published an advance notice of proposed rulemaking to gather information on whether regulations were needed to protect Southern Residents from vessel effects, and if so, what type of regulations might be appropriate. The notice invited information from the public on the advisability of regulations, on a preliminary list of options, and on other possible measures that will help the agency decide what type of regulations, if any, would be most appropriate to consider for protecting killer whales in the Pacific Northwest.

In response to the advance notice of proposed rulemaking, a total of 84 comments via letter, e-mail and on the federal e-rulemaking portal were received. Comments were submitted by concerned citizens, whale-watch operators, research, conservation and education groups, federal, state and local government entities, and various industry associations. All comments received during the comment period were posted on the NOAA Fisheries Northwest Regional Website:

<http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Killer-Whales/ESA-Status/Orca-Vessel-Regs.cfm>

The majority of comments (45) explicitly stated that regulations were needed to protect killer whales from vessel effects and most other comments generally supported protection of the whales. Six comments explicitly stated that no regulations were needed.

Proposed Rule

On July 28, 2009, NOAA Fisheries announced proposed vessel regulations to protect killer whales and the availability of a draft environmental assessment for public comment. To develop the proposed regulations, NOAA Fisheries considered information provided during recovery planning and the advance notice of proposed rulemaking comment period, and responded to the notice comments in the proposed rule. The proposed regulations would make it unlawful for vessel operators to:

1. Cause a vessel to approach within 200 yards (182.2m) of any killer whale
2. Enter a no-go zone located along the west side of San Juan Island from May 1-Sept. 30 (6.2 square mile area)
3. Position a vessel in the path of any killer whale at any point located within 400 yards of the whale.

The proposed rule included information on the scope and applicability of the regulations and exceptions.

Three public meetings were held during the public comment period. The public meeting in Anacortes, Wash., was added in response to requests for an additional meeting. At the meetings, NOAA Fisheries staff gave a presentation providing an overview of the information in the proposed rule, accepted written comments, and at the Seattle and Friday Harbor meetings recorded oral statements. More than 160 people recorded oral comments.

Public Meetings	
Sept. 24, 2009	Pier One Main Warehouse, Anacortes, Wash.
Sept. 30, 2009	The Seattle Aquarium, Seattle, Wash.
Oct. 5, 2009	Grange Hall/Friday Harbor High School, Friday Harbor, Wash.

NOAA Fisheries also provided information on the proposed rule and listened to concerns during meetings with specific stakeholder groups, including meetings with the Pacific Whale Watch Association, kayak companies, Harbor Safety Committee, petroleum industry, and recreational fishing groups.

The comment period was originally scheduled to close Oct. 27, 2009, but in response to requests for additional time to comment, the comment period was extended and closed Jan. 15, 2010. Comments were submitted in person at the public meetings, by e-mail to orca.plan@noaa.gov, on-line at the federal e-rulemaking portal, and by mail.

Preliminary Comment Summary

During the public comment period, 704 unique comments were submitted via letter, e-mail and the federal e-rulemaking portal. Comments were submitted by concerned citizens (570 comments); whale watch operators and naturalists (72 comments); research, conservation and education groups (23 comments); federal, state and local government entities (19 comments); and various industry and other associations (20 comments). All written comments received during the comment period are posted on the NOAA Fisheries

Northwest Regional web page: <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Killer-Whales/ESA-Status/Orca-Vessel-Regs.cfm>

In addition to unique comments, more than 2,400 form letters were submitted. There were 15 different form letters with the number of copies for each ranging from four to over 1,500. Many form letters were supportive of maintaining the current 100 yard viewing distance, and some form letters included personal comments in addition to the form letter language. The agency received five petitions that included more than 1,300 names and signatures ranging from 100 to 740 signatures for each. The petitions were split between support for the proposed regulations and opposition to the proposed regulations.

Many of the oral and written comments from individual members of the public were short general statements that: 1) supported the proposed regulations and killer whale conservation, 2) disagreed with the proposed regulations, or 3) disagreed with only the proposed no-go zone. About 50 of the individual written public comments included substantive information, such as specific suggestions to alter the proposed regulations, new information, or additional alternatives to consider. Eighty-six of the individual written comments focused entirely on issues relating to how kayaks are considered in the proposed regulations.

NOAA Fisheries received a range of comments from the commercial whale-watching industry including owners, operators and naturalists. The commercial whale-watching community expressed a number of concerns about impacts to their businesses, from increasing the viewing distance from the current 100-yard guideline to a 200-yard regulation. The whale-watching community provided support for a “go slow zone” in lieu of the no-go zone. The most common form letters were signed by commercial whale-watch participants and supported the position of the Pacific Whale Watch Association in maintaining the current 100-yard viewing distance. Additional industry associations and groups representing fishing, boating, transportation, and petroleum interests provided detailed information on potential impacts to their groups from the proposed regulations, and suggestions for revised language in the rule and for modifications to the exceptions.

Research, education, and conservation groups generally supported the proposed regulations, and in some cases identified additional measures that could be taken to further protect the whales. Researchers provided references to scientific information, data and peer reviewed scientific papers regarding vessel impacts to whales.

The government entities commenting included federal, state, county, tribes and other local organizations. The government comments generally supported regulations to protect killer whales, including the 200 yard approach rule, and offered a number of suggestions to adjust the proposed regulations, particularly the no-go zone. The comments suggested modifications to boundaries of the zone, additional exceptions to the zone, and sources for additional information on impacts of the zone to user groups. Comments from tribes suggested wording changes to the exception for treaty Indian fishing vessels. The

government comments also suggested consideration of speed restrictions, permit systems, and coordination with Canada on comparable regulations in Canadian waters.

Issues and Concerns

Similar to the initial comments submitted on the advance notice of proposed rulemaking, there was support for a range of options. The oral comments provided at the public meetings and written comments addressed many similar issues. Some specific comments on the three elements of the proposed rule were:

200 yard approach rule - Comments supported the current 100-yard guideline, a 100 yard approach regulation, a 150-yard approach regulation, the proposed 200-yard rule, and approach rules at greater distances (400 yards to miles from the whales).

Proposed no-go zone - A large number of comments addressed only the no-go zone and did not refer to the other parts of the proposed regulations (i.e., 200-yard approach or park in the path regulations). The majority of comments pertaining only to the no-go zone were opposed to the zone. NOAA Fisheries also received comments that supported the proposed no-go zone on the west side of San Juan Island, smaller no-go zones, and larger no-go zones that include other shoreline areas.

Park in the path - There were fewer comments on the proposed prohibition on parking in the path of the whales. A common comment identified the challenges of boaters identifying the whale's path and difficulties in enforcing this regulation.

NOAA Fisheries received a number of comments supporting inclusion of the speed restriction analyzed in the draft environmental assessment. There were also comments that suggested alternatives that were previously considered, but not fully analyzed in our draft, such as permits or certification programs, days off for the whales (i.e., no whale-watching Wednesdays), and noise level standards for vessels.

Some common themes throughout the oral and written comments were:

- A need for increased enforcement to protect whales and questions about how new regulations would be enforced
- The importance of strong education programs to raise awareness about any new regulations
- Questions about the science relating to vessel impacts on the whales used to support the regulations, particularly impacts from kayaks
- Deficiency in our analysis of impacts on particular stakeholder groups such as the recreational fishing community now using the proposed no-go zone, and
- Many comments encouraged NOAA Fisheries to focus recovery efforts on other threats such as prey availability, contaminants, and sonar, rather than using resources to address vessel effects.

Conclusion

NOAA Fisheries appreciates the thoughtful and detailed comments submitted during the public comment period and will consider these comments in moving forward with final

regulations. The comments will also be available for public review. Because of the large number of oral and detailed written comments, NOAA Fisheries will need considerable time to thoroughly review all of the comments, follow up on offers to provide additional information, incorporate new information and comments into the environmental assessment, and continue to meet with stakeholder groups in developing a final rule. NOAA Fisheries will consider how to address the contradictory and often opposite comments submitted by groups and individuals with different perspectives. Final regulations will include responses to the comments, and the final National Environmental Policy Act document will also incorporate and respond to substantive comments. In addition to final regulations, NOAA Fisheries will develop an implementation plan that will include enforcement, education and methods for evaluating effectiveness.