

Subject: Comments on NOAA's Proposed Protective Regulations for Killer Whales
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Comments on NOAA's Proposed Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act

DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
50 CFR Part 224
RIN 0648-AV15
Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act
AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

To Whom It May Concern:

First, thank you very much for this opportunity to comment.

We wish to call attention to
VESSEL TRAFFIC REGULATIONS TO PROTECT KILLER WHALES IN PUGET SOUND
Draft Regulatory Impact Review
<http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Killer-Whales/ESA-Status/upload/Vessel-Prop-Rule-draft-econ-rpt.pdf>
Published October 13, 2008

The particular concern that we wish to raise in this set of Comments is the apparent willingness of National Oceanic and Atmospheric Administration (NOAA) to propose Regulations that are likely to cause significant Negative Economic Impact on this Region, or in some of their choices NOAA is willing to take the chance of imposing these Regulations when they themselves state that they believe the impact will be negative but cannot fully quantify it due to lack of information.

We and in the Pacific Whale Watch Association (PWWA) have always stated, as we have in several other submissions of Comments to date, that Protecting the Health and the Recovery of The Southern Resident Killer Whales are our primary goals. But where there are strong measures that NOAA itself has proposed that can provide substantially the same protection and recovery to the Southern Resident Killer Whales with little or no Economic Dislocation, it is baffling to us why NOAA would gamble the Economic Future of this Region as if it was rolling dice at a casino.

We will address each of NOAA's Proposed Regulations by explaining why we support amendments offered by the Pacific Whale Watch Association (PWWA), amendments that have gained significant support from a wide spectrum of ENGO's, Businesses, Communities and Researchers.

Please remember as you read these "Suggested Amendments" that each of these are more demanding vessels of the Commercial Whale Watch Industry than are the current laws and guidelines; and offer the "Precautionary Buffer" between whales and boats that Scientists, Environmental Non-Governmental Organizations (ENGO's) and many of us in the PWWA see as advisable even if 25 years of research has yet to find it necessary.

Suggested Amendment #1:

"Vessels may not negligently be within 100 meters of Southern Resident Killer Whales in Washington, Oregon, and California, except under special permit issued by NOAA."

While NOAA states in its Scientific Papers and Reports that while turning the Current Guideline Viewing Distance of 100 yards into a Regulation of 100 yards would greatly benefit the Southern Resident Killer Whales by eliminating inappropriate vessel behaviour, NOAA then states on page 2-12 of Draft Regulatory Impact Review, that this change would not affect Commercial Whale Watching:

"This analysis therefore does not anticipate that most commercial whale watching companies operating in the Sound will have to significantly alter their current whale watching practices if NMFS establishes an enforceable 100 yard/meter approach regulation."

Our COMMENT #1A: This would be a "Win,Win" situation as the SRKW's would be further protected but Commercial Whale Watching could remain Economically Healthy.

NOAA then admits on P 2-13 that it does not know the impact of moving to 200 yards as a minimum viewing distance regulation:

"All whale watching vessels not complying with the 100 yard/meter guideline, as well as additional vessels in all categories that are currently complying with the 100 yard/meter approach guideline but not maintaining an approach distance of 200 yards from whales, will likely be affected by an enforceable 200 yard/meter approach regulation. Thus, the number of individuals potentially affected by Scenario 2 is expected to be greater than the number of individuals potentially affected by Scenario 1. Currently, data are not available to determine how many more vessels would be affected by a 200 yard/meter regulation than a 100 yard/meter regulation, or whether the relative proportions of entities/activities affected would remain the same."

Our COMMENT #1B: NOAA admits that it doesn't know how many more vessels would be affected by the extension from a Minimum Viewing Distance of 100 yards to 200 yards. Since 200 yards is the option that NOAA chose, how can you begin to calculate the Economic Impact if you don't know how many boats will be affected?

Suggested Amendment # 2:

"Vessels must avoid the established path of Southern Resident Killer Whales."

Our COMMENT # 2: We do not challenge NOAA's decision to set up a buffer "in the established path of SRKW's": In fact, PWWA had that in our own guidelines long before NOAA decided to print and distribute their Marine Mammal Viewing Guidelines or Regulations.

What we challenge is the choice of making this particular part a "Regulation" instead of keeping it as a "Guideline". Not because we do not want to comply, but because neither NOAA or PWWA has control over the SRKW's and while at times their path may be predictable, there are times when SRKW's can make drastic alterations in course underwater, that we cannot see or predict. For instance, a whale or group of whales could appear to be in a predictable path swimming away from a boat and be well over 400 yards away, then go for a dive where you might expect them to surface 600 yards away... but somewhere between going underwater and resurfacing, one or more of the whales may have changed direction and popped up much less than 400 yards away and now be heading for the boat that you are in.

If a vessel that has approached SRKW's slowly, set up well over 100 yards away, stayed more than 400 yards out of their predicted path and then turned it's engines off to eliminate noise, does it make sense to hold that vessel strictly liable for parking in the Path of Whales because one or some of the SRKW's unexpectedly changed direction?

Suggested Amendment # 3:

"Vessels must obey a 7 knot speed restriction year round from Eagle Point to Mitchell Point, along San Juan Island, out 1/2 mile, except for official law enforcement vessels or vessels engaged in emergency and rescue situations."

P 2-21 "Although 25 commercial whale watching companies in the Puget Sound area caused at least one speeding incident between 2003 and 2006, most of these companies did not repeatedly disregard the speeding guidelines specified in the whale watching guidelines. That is, there does not appear to be a systematic lack of compliance with voluntary vessel speed guidelines. Thus, potential vessel speed regulations are expected to have a minimal effect on commercial whale watching activities in the Puget Sound area."

Our COMMENT # 3A: While likely to "have a minimal effect on commercial whale watching activities" NOAA's scientific reports state clearly that operating at the slow speed of 7 knots or less at 100 yards or more away from any Marine Mammal, including SRKW's, all but eliminates any fear of "Acoustic Masking", thereby guaranteeing that SRKW's will be unaffected as they echolocate to find Salmon. So why move to a 1/2 mile NO GO Zone and 200 yards when it likely adds no additional benefit to the SRKW's, but will likely further damage the Region's Economy and detract from the way of life of the residents of San Juan Island?

P 2-35 "... , this analysis estimates that the following quantities of individuals stand to be affected by the establishment of an enforceable half mile protection area off the west coast of San Juan Island per whale watching season:

- Individuals engaged in a commercial whale watching tour: 6,545
- Individuals engaged in private vessel activities: 154"

Our COMMENT #3B:

Anyone who has walked, cycled, driven or boated along the West Side of San Juan Island will tell you that 154 is more likely the number of vessels that travel within 1/2 mile of the shoreline in a day or week, not the annual number of vessels affected.

This statement also completely misses the point that the imposition of a "NO GO ZONE" will drastically reduce the support that NOAA would otherwise get from San Juan Island residents, kayakers, sport fisherman, etc. without adding any measurable benefit to the SRKW's.

CONCLUSION:

"Existing research does not allow for the quantification of economic impacts of NMFS' alternatives for minimum approach distance, vessel speed, and vessel path regulations or the establishment of enforceable no-go zones, and primary research is beyond the scope of this analysis."

Our COMMENT Conclusion A: NOAA readily admits that it cannot accurately estimate the Economic Impact of its choices

P 3-1

3.1 TYPES OF ECONOMIC IMPACTS ASSOCIATED WITH THE POTENTIAL VESSEL TRAFFIC REGULATIONS

109. A person's ability to get close to whales, including parking directly in the paths of the whales, vessel speeds, or ability to access no-go zones may contribute to an individual's willingness to pay to participate in whale watching activities. As such, potential vessel traffic regulations which limit proximity and access may generate negative social welfare impacts to the individuals forecast to be affected in Chapter 2. Further, to the extent that proximity to whales, vessel speeds, or the ability to access no-go zones contribute to an individual's likelihood to participate in whale watching activities, regional economic impacts to industries providing goods and services to the whale watching industry may occur."

P 3-4 A greater impact to individuals engaged in whale watching activities is therefore expected for Scenario 2 (the Scenario NOAA proposes) than Scenario 1 for two reasons: 1) individuals may be willing to pay less due to the greater minimum approach distance; and 2) impacts are experienced by a greater number of individuals (not only those that are approaching the whales closer than 100 yards/meters, but also individuals approaching whales between 200 and 100 yards/meters).

P 3-5 "The WWOANW (now the "Pacific Whale Watch Association" provided comment on the Advance Notice of Public Rulemaking, expressing support for enforcement of the 100 yard/meter guideline for all vessels operating in the Sound, but cautioning that there is unlikely to be a need for increasing that approach distance.¹⁰³ In fact, the WWOANW anticipates that the industry may not survive the establishment of a 200 yard/meter minimum approach distance as it will limit the educational value of the whale watching trips and decrease participation. Additionally, individual whale watching operators also expressed support for codifying the existing guidelines."

Our COMMENT Conclusion B: NOAA either doesn't believe that the Economic Impact will be as bad as what PWWA foresees; or NOAA doesn't care.

First, let us assure you that there is no real incentive for us to tell you that the Economic Impact will be disastrous if that is not our most accurate assessment. We have not raised this issue until these Regulation Options were presented and we remain hesitant to raise this issue this time because, quite frankly, it is not good for our business to do so. Do you think that we want our bankers, creditors or suppliers, even our customers, to hear us talk about the possibility of severe economic hardship? It is bad for business. It will cost us more to borrow, and we may be required to pay for major purchases prior to delivery. And some Tour Companies and individual passengers may already be deterred from booking with us.

Second, if this is a case where NOAA believes that putting our businesses at risk is justified by some over-arching need that flows from Scientific Research, or from some Policy choice that will lead to a "Greater Good", then we certainly haven't seen it or been told.

We believe we are part of the "New Economy", made up of companies that have a strong Environmental Ethic, work hard to shrink its Environmental Footprint, and help to educate hundreds of thousands of passengers to make better Lifestyle and Consumer Choices.

Our suggested amendments to NOAA's Proposed Viewing Regulations provide excellent protection for the SRKW's, while reducing the Negative Economic Impact on PWWA.

Thank you for this opportunity to comment.

Sincerely,

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