

information indicating the petitioned action may be warranted with respect to the species throughout its entire range. In accordance with section 4(b)(3)(B) of the ESA and NMFS' implementing regulations (50 CFR 424.14(b)(2)), we will commence a review of the status of the species and make a determination within 12 months of receiving the petition (i.e., April 24, 2010) as to whether the petitioned action is warranted. If warranted, we will publish a proposed rule and solicit public comments before developing and publishing a final rule.

#### Information Solicited

To ensure the status review is based on the best available scientific and commercial data, we are soliciting information on whether largemouth sawfish are endangered or threatened. Specifically, we are soliciting information in the following areas: (1) historical and current distribution and abundance of this species throughout its range; (2) historical and current population trends; (3) information on life history in marine environments, (4) curio, meat, "shark" fin or other trade data; (5) information related to taxonomy of the species and closely related forms (e.g., *P. microdon*); (6) information on any current or planned activities that may adversely impact the species; (7) ongoing efforts to protect and restore the species and its habitat; and (8) information identifying a North American Distinct Population Segment. We request that all information be accompanied by: (1) supporting documentation such as maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, address, and any association, institution, or business that the person represents.

#### Critical Habitat

The petitioner also requested that we designate critical habitat concurrently with listing the species as threatened or endangered. Under our regulations for designating critical habitat, we are only able to designate critical habitat within areas of U.S. jurisdiction (50 CFR 424.12). Critical habitat is defined in the ESA (16 U.S.C. 1531 *et seq.*) as:

"(i) the specific areas within the geographical area currently occupied by the species, at the time it is listed... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the

Secretary that such areas are essential for the conservation of the species."

Our implementing regulations (50 CFR 424.12) describe those essential physical and biological features to include: (1) space for individual and population growth, and normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring; and (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species. We are required to focus on the primary constituent elements (PCEs) which best represent the principal biological or physical features. PCEs may include: spawning sites, feeding sites, water quality and quantity. Our implementing regulations (50 CFR 424.02) define "special management considerations or protection" as "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species."

Section 4(b)(2) of the ESA requires us to designate critical habitat for listed species based on the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any particular area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

To ensure that our review of critical habitat is complete and based on the best available data, we solicit information and comments on whether the petitioned area in U.S. waters including the Exclusive Economic Zone, or some subset thereof, qualifies as critical habitat. Areas that include the physical and biological features essential to the conservation of the species and that may require special management considerations or protection should be identified. Essential features include, but are not limited to, space for individual growth and for normal behavior, food, water, air, light, minerals, or other nutritional or physiological requirements, cover or shelter, sites for reproduction and development of offspring, and habitats that are protected from disturbance or are representative of the historical, geographical, and ecological

distributions of the species (50 CFR 424.12).

#### Peer Review

On July 1, 1994, NMFS, jointly with the U.S. Fish and Wildlife Service, published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270). The intent of the peer review policy is to ensure listings are based on the best scientific and commercial data available. We are soliciting the names of recognized experts in the field who could take part in the peer review process for this status review.

Independent peer reviewers will be selected from the academic and scientific community, tribal and other Native American groups, Federal and state agencies, the private sector, and public interest groups.

**Authority:** 16 U.S.C. 1531 *et seq.*

Dated: July 24, 2009.

**James W. Balsiger,**

*Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 224

[Docket No. 070821475-81493-01]

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.

**ACTION:** Proposed rule; request for comments, and availability of Draft Environmental Assessment on regulations to protect killer whales from vessel effects.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), propose regulations under the Endangered Species Act and Marine Mammal Protection Act to prohibit vessels from approaching killer whales within 200 yards and from parking in the path of whales for vessels in inland waters of Washington State. The proposed regulations would also prohibit vessels from entering a conservation area during a defined season. Certain vessels would

be exempt from the prohibitions. The purpose of this action is to protect killer whales from interference and noise associated with vessels. In the final rule announcing the endangered listing of Southern Resident killer whales we identified disturbance and sound associated with vessels as a potential contributing factor in the recent decline of this population. The Recovery Plan for Southern Resident killer whales calls for evaluating current guidelines and assessing the need for regulations and/or protected areas. We developed this proposed rule after considering comments submitted in response to an Advance Notice of Proposed Rulemaking (ANPR) and preparing a draft environmental assessment (EA). We are requesting comments on the proposed regulations and the draft EA.

**DATES:** Comments must be received at the appropriate address (see **ADDRESSES**) no later than October 27, 2009. Public meetings have been scheduled for September 30, 2009, 7–9 p.m. at the Seattle Aquarium, Seattle, WA and October 5, 2009, 7–9 p.m. in The Grange Hall, Friday Harbor, WA. Requests for additional public meetings must be made in writing by August 28, 2009.

**ADDRESSES:** You may submit comments on the proposed rule, draft EA and any of the supporting documents by any of the following methods:

- *E-mail:* [orca.plan@noaa.gov](mailto:orca.plan@noaa.gov).
- *Federal e-rulemaking Portal:* <http://www.regulations.gov>.
- *Mail:* Assistant Regional

Administrator, Protected Resources Division, Northwest Regional Office, National Marine Fisheries Service, 7600 Sand Point Way, NE., Seattle, WA 98115.

The draft EA and other supporting documents will be available on [Regulations.gov](http://Regulations.gov) and the NMFS Northwest Region Web site at <http://www.nwr.noaa.gov/>.

**FOR FURTHER INFORMATION CONTACT:** Lynne Barre, Northwest Regional Office, 206–526–4745; or Trevor Spradlin, Office of Protected Resources, 301–713–2322.

**SUPPLEMENTARY INFORMATION:**

**Background**

Viewing wild marine mammals is a popular recreational activity for both tourists and local residents. In Washington State, killer whales (*Orcinus orca*) are the principal target species for the commercial whale watch industry (Hoyt 2001). NMFS listed the Southern Resident killer whale distinct population segment (DPS) as endangered under the ESA on November 18, 2005 (70 FR 69903). In

the final rule announcing the listing, NMFS identified vessel effects, including direct interference and sound, as a potential contributing factor in the recent decline of this population. NMFS is concerned that some whale watching activities may harm individual killer whales, potentially reducing their fitness and increasing the population's risk of extinction.

Killer whales in the eastern North Pacific have been classified into three forms, or ecotypes, termed residents, transients, and offshore whales. Resident killer whales live in family groups, eat salmon, and include the Southern Resident and Northern Resident communities. Transient killer whales have a different social structure, are found in smaller groups and eat marine mammals. Offshore killer whales are found in large groups and their diet is largely unknown. The Southern Resident killer whale population contains three pods—J, K, and L pods—and frequents inland waters of the Pacific Northwest. During the spring, summer, and fall, the Southern Residents' range includes the inland waterways of Puget Sound, Strait of Juan de Fuca, and Southern Strait of Georgia. Little is known about the winter movements and range of Southern Residents. Their occurrence in coastal waters extends from the coast of central California to the Queen Charlotte Islands in British Columbia. The home ranges of transients, offshore whales, and Northern Residents also include inland waters of Washington and overlap with the Southern Residents.

There is a growing body of evidence documenting effects from vessels on small cetaceans and other marine mammals. The variety of whale responses include stopping feeding, resting, and social interaction (Baker *et al.* 1983; Bauer and Herman 1986; Hall 1982; Krieger and Wing 1984; Lusseau 2003a; Constantine *et al.* 2004); abandoning feeding, resting, and nursing areas (Jurasz and Jurasz 1979; Dean *et al.* 1985; Glockner-Ferrari and Ferrari 1985, 1990; Lusseau 2005; Norris *et al.* 1985; Salden 1988; Forest 2001; Morton and Symonds 2002; Courbis 2004; Bejder 2006); altering travel patterns to avoid vessels (Constantine 2001; Nowacek *et al.* 2001; Lusseau 2003b, 2006); relocating to other areas (Allen and Read 2000); and changes in acoustic behavior (Van Parijs and Corkeron 2001). In some studies marine mammals display no reaction to vessels (Watkins 1986; Nowacek *et al.* 2003). One study found that marine mammals exposed to human-generated noise released increased amounts of stress hormones that have the potential to

harm their nervous and immune systems (Romano *et al.* 2004).

Several scientific studies in the Pacific Northwest have documented disturbance of resident killer whales by vessels engaged in whale watching. Short-term behavioral changes in Northern and Southern Residents have been observed and studied by several researchers (Kruse 1991; Kriete 2002; Williams *et al.* 2002a, 2002b, 2006, In Press; Foote *et al.* 2004; Bain *et al.* 2006, Lusseau *et al.* In Press), although it is not always understood whether it is the presence and activity of the vessel, the sounds the vessel makes, or a combination of these factors that disturbs the animals. Individual animals can react in a variety of ways to nearby vessels, including swimming faster, adopting less predictable travel paths, making shorter or longer dives, moving into open water, and altering normal patterns of behavior (Kruse 1991; Williams *et al.* 2002a, In Press; Bain *et al.* 2006; Noren *et al.* 2007, In Press; Lusseau *et al.* In Press). High frequency sound generated from recreational and commercial vessels moving at high speed in the vicinity of whales may mask echolocation (signals sent by the whales that bounce off objects in the water and provide information to the whales) and other signals the species rely on for foraging (Erbe 2002; Holt 2008), communication (Foote *et al.* 2004), and navigation.

Killer whales may also be injured or killed by collisions with passing ships and powerboats, primarily from being struck by the turning propeller blades (Visser 1999, Ford *et al.* 2000, Visser and Fertl 2000, Baird 2001, Carretta *et al.* 2001, 2004). Some animals with severe injuries eventually make full recoveries, such as a female described by Ford *et al.* (2000) that showed healed wounds extending almost to her backbone. A 2005 collision of a Southern Resident with a commercial whale watch vessel in Haro Strait resulted in a minor injury to the whale, which subsequently healed. From the 1960s to 1990s (Baird 2002) only one resident whale mortality from a vessel collision was reported for Washington and British Columbia. However, additional mortalities since then have been reported. In March of 2006 the lone Southern Resident killer whale, L98, residing in Nootka Sound for several years, was killed by a tug boat. While L98 exhibited unusual behavior and often interacted with vessels, his death demonstrates the risk of vessel accidents. Several mortalities of resident killer whales in British Columbia in recent years have been attributed to

vessel collisions (Gaydos and Raverty 2007).

Vessel effects were identified as a factor in the ESA listing of the Southern Residents (70 FR 69903; November 18, 2005) and are addressed in the recovery plan (73 FR 4176; January 24, 2008) which is available on our Web page at <http://www.nwr.noaa.gov/>.

#### Current MMPA and ESA Prohibitions and NMFS Guidelines and Regulations

The Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*, contains a general prohibition on take of marine mammals. Section 3(13) of the MMPA defines the term take as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” Except with respect to military readiness activities and certain scientific research activities, the MMPA defines the term harassment as “any act of pursuit, torment, or annoyance which—(i) has the potential to injure a marine mammal or marine mammal stock in the wild, [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].”

In addition, NMFS regulations implementing the MMPA further define the term take to include: “the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild” (50 CFR 216.3).

The MMPA provides limited exceptions to the prohibition on take for activities such as scientific research, public display, and incidental take in commercial fisheries. Such activities require a permit or authorization, which may be issued only after agency review.

The ESA prohibits the take of endangered species. The ESA defines take to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Both the ESA and MMPA require wildlife viewing to be conducted in a manner that does not cause take.

NMFS has developed specific regulations for certain species in particular locations. Each rule was based on the biology of the marine mammals, and available information on the nature of the threats. NMFS has regulated close vessel approaches to large whales in Hawaii, Alaska, and the North Atlantic. Buffer zones were also

created to protect Steller sea lions. There are exceptions to each of these rules.

In 1995, NMFS published a final rule to establish a 100 yard (91.4 m) approach limit for endangered humpback whales in Hawaii (60 FR 3775, January 19, 1995). While available scientific information on the effects of vessel traffic and whale watching did not provide precise guidance on proximity limits for approaching whales, NMFS established the 100 yard approach regulation based on its experience enforcing the prohibition of harassment (i.e., activities that were initiated or occurred within 100 yards of a whale had a high probability of causing harassment). In 2001, NMFS published a final rule (66 FR 29502, May 31, 2001) to establish a 100 yard (91.4 m) approach limit for endangered humpback whales in Alaska that included a speed limit for when a vessel is near a whale. Again limited information on vessel impacts was available for humpback whales, however, the risk of harm to the species from a possible delay in detecting a long-term negative response to increased vessel pressure provided the impetus to implement vessel measures in waters off Alaska. NMFS decided to implement a 100 yard distance to maintain consistency with the published guidelines and with the regulations that existed for viewing humpback whales in Hawaii. Some form of speed restrictions was considered to reduce the likelihood of mortality or injury to a whale in the event of a vessel/whale collision. For practical and enforcement reasons, a slow safe speed standard, rather than a strict nautical mile-per-hour standard, was included in the rule.

In 1997, an interim final rule was published to prohibit vessels from approaching endangered North Atlantic right whales closer than 500 yards (457.2 m) (62 FR 6729, February 13, 1997). The purpose of the 500 yard approach regulation was to reduce the current level of disturbance and the potential for vessel interaction and to reduce the risk of collisions. In addition to collision injuries or mortalities, other vessel impacts were identified, including displacing cow/calf pairs from nearshore waters, whales expending increased energy when feeding is disrupted or migratory paths rerouted, and turbulence associated with vessel traffic which may indirectly affect right whales by breaking up the dense surface zooplankton patches in certain whale feeding areas. To further reduce impacts to North Atlantic right whales from collisions with ships, a

final rule was recently published to implement speed restrictions of no more than 10 knots applying to all vessels 65 ft (19.8m) or greater in overall length in certain locations and at certain times of the year along the east coast of the U.S. Atlantic seaboard (73 FR 60173; October 10, 2008).

On November 26, 1990 (55 FR 49204) Steller sea lions were listed as “threatened” under the ESA and the listing included regulations prohibiting vessels from operating within buffer zones 3 nautical miles around the principal Steller sea lion rookeries in the Gulf of Alaska and the Aleutian Islands. Vessels are prohibited from operating within the 3-mile buffer zones, with certain exceptions. Similarly, people are prohibited from approaching on land closer than ½ mile or within sight of a listed Steller sea lion rookery. The buffer zones were created to (1) restrict the opportunities for individuals to shoot at sea lions and facilitate enforcement of this restriction; (2) reduce the likelihood of interactions with sea lions, such as accidents or incidental takings in these areas where concentrations of the animals are expected to be high; (3) minimize disturbances and interference with sea lion behavior, especially at pupping and breeding sites; and, (4) avoid or minimize other related adverse effects.

In addition to these specific regulations, NMFS has provided general guidance for wildlife viewing that does not cause take. This is consistent with the philosophy of responsible wildlife viewing advocated by many Federal and State agencies to unobtrusively observe the natural behavior of wild animals in their habitats without causing disturbance (see <http://www.watchablewildlife.org/> and [http://www.watchablewildlife.org/publications/marine\\_wildlife\\_viewing\\_guidelines.htm](http://www.watchablewildlife.org/publications/marine_wildlife_viewing_guidelines.htm)).

Each of the six NMFS Regions has developed recommended viewing guidelines to educate the public on how to responsibly view marine mammals in the wild and avoid causing a take. These guidelines are available on line at:

[http://www.nmfs.noaa.gov/prot\\_res/MMWatch/MMViewing.html](http://www.nmfs.noaa.gov/prot_res/MMWatch/MMViewing.html). The “Be Whale Wise” guidelines developed for marine mammals by the NMFS Northwest Regional Office and partners are also available at <http://www.nwr.noaa.gov/Marine-Mammals/upload/BeWhaleWise.pdf>.

Be Whale Wise is a transboundary effort to develop and revise guidelines for viewing marine wildlife. NMFS has partnered with monitoring groups, commercial operators, whale advocacy groups, U.S. and Canadian government

agencies and enforcement divisions over the past several years to promote safe and responsible wildlife viewing practices through the development of outreach materials, training workshops, on-water education and public service announcements. The 2006 version of the Be Whale Wise guidelines recommends that boaters parallel whales no closer than 100 yards (100 meters), approach animals slowly from the side rather than from the front or rear, and avoid putting the vessel within 400 yards (400 meters) in front of or behind the whales. The Be Whale Wise guidelines are used in U.S. and Canadian waters and use meters and yards interchangeably in the guideline materials. Vessels are also recommended to reduce their speed to less than 7 knots (13 km/h) within 400 meters of the whales, and to remain on the outer side of the whales near shore. In 2008 a State bill with similar language to the current approach and “park in the path” guidelines (HB 2514) was approved to protect Southern Resident killer whales in Washington State waters.

Two voluntary no-boat areas off San Juan Island are recognized by San Juan County, although this is separate from the Be Whale Wise guidelines. The first is a 2 mile (~800 m)—wide zone along a 1.8 mile (3 km) stretch of shore centered on the Lime Kiln lighthouse. The second is a ¼ mile (~400 m)—wide zone along much of the west coast of San Juan Island from Eagle Point to Mitchell Point. These areas, totaling approximately 3.8 square miles, were established to facilitate shore-based viewing and to reduce vessel presence in an area used by the whales for feeding, traveling, and resting.

NMFS supports the Soundwatch boater education program, an on-water stewardship and monitoring group, to help develop and promote the Be Whale Wise guidelines and monitor vessel activities in the vicinity of whales. Soundwatch reports incidents when the guidelines are not followed and there is the potential for disturbance of the whales (Koski 2004, 2006). Incidents are frequently observed involving both recreational and commercial whale watching vessels. Soundwatch also serves as a crucial education component, providing information on the viewing guidelines to boaters that are approaching areas with whales.

Despite the regulations, guidelines and outreach efforts, interactions between vessels and killer whales continue to occur in the waters of Puget Sound and the Georgia Basin. Advertisements on the Internet and in local media in the Pacific Northwest promote activities that appear

inconsistent with what is recommended in the NMFS guidelines. NMFS has received letters from the Marine Mammal Commission, members of the scientific research community, environmental groups, and members of the general public expressing the view that some types of interactions with wild marine mammals have the potential to harass and/or disturb the animals by causing injury or disruption of normal behavior patterns. Soundwatch reports continue to include high numbers of incidents where guidelines to avoid harassment are not being followed (Koski 2004, 2006). Violations of current ESA and MMPA take prohibitions are routinely reported to NOAA’s Office for Law Enforcement; however, the current prohibitions are difficult to enforce. NMFS has also received inquiries from members of the public and commercial tour operators requesting clarification of NMFS’ policy on these matters.

In 2002, NMFS published an ANPR requesting comments from the public on what types of regulations and other measures would be appropriate to prevent harassment of marine mammals in the wild caused by human activities directed at the animals (67 FR 4379, January 30, 2002). The 2002 ANPR was national in scope and covered all species of marine mammals under NMFS’ jurisdiction (whales, dolphins, porpoises, seals and sea lions), and requested comments on ways to address concerns about the public and commercial operators closely approaching, swimming with, touching or otherwise interacting with marine mammals in the wild. Several potential options were presented for consideration and comment, including: (1) Codifying the current NMFS Regional marine mammal viewing guidelines into regulations; (2) codifying the guidelines into regulations with additional improvements; (3) establishing minimum approach regulations similar to the ones for humpback whales in Hawaii and Alaska and North Atlantic right whales; and (4) restricting activities of concern similar to the MMPA regulation prohibiting the public from feeding or attempting to feed wild marine mammals. The 2002 ANPR specifically mentioned the complaints received from researchers and members of the public concerning close vessel approaches to killer whales in the Northwest. Over 500 comments were received on the 2002 ANPR regarding human interactions with wild marine mammals in United States waters and along the nation’s coastlines.

NMFS has determined that existing prohibitions, regulations, and guidelines

described above do not provide sufficient protection of killer whales from vessel impacts. We considered information developed through internal scoping, public and agency comments on the 2002 nation-wide ANPR and a 2007 killer whale-specific ANPR (described below), monitoring reports, and scientific information. Monitoring groups continue to report high numbers of vessels around the whales and increasing numbers of vessel incidents that may disturb or harm the whales. Vessel effects may limit the ability of the endangered Southern Resident killer whales to recover and may impact other killer whales in inland waters of Washington. We therefore deem it necessary and advisable to adopt regulations to protect killer whales from vessel impacts, which will support recovery of Southern Resident killer whales.

#### *Development of Proposed Regulations*

In March 2007, we published an ANPR (72 FR 13464; March 22, 2007) to gather public input on whether and what type of regulation might be necessary to reduce vessel effects on Southern Residents. The ANPR requested comments on a preliminary list of potential regulations including codifying the Be Whale Wise guidelines, establishing a minimum approach rule, prohibiting particular vessel activities of concern, establishing time-area closures, and creating operator permit or certification programs.

We relied on the public comments on the ANPR, the Recovery Plan, Soundwatch data, and other scientific information to develop a range of alternative individual regulations, including the alternative of not adopting regulations. We analyzed the environmental effects of these alternative regulations and considered options for mitigating effects. After a preliminary analysis of individual regulations, we developed an alternative that combined three of the individual regulations into a single package and analyzed the effects of that package. The results of our analysis are contained in a draft EA under the National Environmental Policy Act (NEPA). The EA is available for review and comment in association with this rulemaking (see **ADDRESSES**).

#### **Comments and Responses to Comments on the ANPR**

During the ANPR public comment period, we received a total of 84 comments via letter, e-mail and on the Federal e-rulemaking portal. Comments were submitted by concerned citizens, whale watch operators, research,

conservation and education groups, Federal, State and local government entities, and various industry associations. The majority of comments explicitly stated that regulations were needed to protect killer whales from vessels. Most other comments generally supported protection of the whales. Six comments explicitly stated that no regulations were needed. All comments received during the comment period were posted on the NMFS Northwest Regional Web page <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise-Killer-Whales/ESA-Status/Orca-Vessel-Regs.cfm> and [Regulations.gov](http://www.nwr.noaa.gov/Regulations) (as supporting documents to this proposed rule). The ANPR requested comments on a preliminary list of potential regulations including codifying the Be Whale Wise guidelines, establishing a minimum approach rule, prohibiting particular vessel activities of concern, establishing time-area closures, and creating operator permit or certification programs. There was support for each of the options in the preliminary list of alternatives published in the ANPR, and many comments supported multiple approaches. Some additional alternatives were also suggested. Here we summarize comments and our responses that directly relate to the measures in this proposed rule. Additional information is provided in the Rationale for Regulations section of this notice.

**Mandatory Regulations versus Voluntary Guidelines.** Several commenters supported adoption of mandatory regulations, while other commenters stated that voluntary guidelines are adequate to protect the whales. Monitoring of vessel activity around the whales reveals that many vessels violate the current voluntary guidelines, the number of violations appears to be increasing, and the most serious violation—parking in the path of the whales—is committed primarily by commercial whale watch operators. In the draft EA, we examined the available evidence and concluded that mandatory regulations would reduce the number of incidents of vessels disturbing and potentially harming the whales and that this reduction would improve the whales' chances for recovery. Accordingly, we are proposing mandatory regulations governing vessel activity around the whales.

**Approach regulation.** Some commenters supported an approach limit of 100 yards (current guideline), and others suggested that an approach limit of 200 yards or 200–400 yards would better protect the whales. Commenters noted that an approach

regulation could limit the potential for vessels to disturb or collide with whales and could limit the potential for vessel noise to mask the whale's auditory signals, interfering with their ability to communicate and forage. In the draft EA we fully analyzed the effects of both a 100 and 200 yard approach regulation. Researchers have documented behavioral disturbance and considerable potential for masking from vessels at 100 yards and as far away as 400 yards. Researchers have also modeled the potential for vessel noise to mask the whales' auditory signals and concluded that at 100 yards there is likely to be almost 100 percent masking, while at 400 yards the masking has substantially decreased. The 200 yard approach regulation proposed here is intended to limit the risk of vessel strikes, the degree of behavioral disruption, and the amount of noise that masks echolocation and communication. While an approach regulation at a distance greater than 200 yards would further reduce vessel effects, this could diminish both the experience of whale watching and opportunities to participate in whale watching. We recognize that whale watching educates the public about whales and fosters stewardship. We balanced the benefits to killer whales of a greater approach distance regulation and continued whale watching opportunities to arrive at the 200 yard approach regulation we are proposing.

**No-go zone.** We received comments supporting a mandatory no-go zone similar to the current voluntary no-go zones on the west side of San Juan Island, as well as suggestions to create no-go zones that included larger areas, other shoreline areas, and feeding "hot spots". In the draft EA we fully analyzed the effects of a mandatory no-go zone similar to the current voluntary zone, as well as a larger no-go zone on the west side of San Juan Island. A no-go zone provides protection in an area where researchers have observed high levels of foraging. Keeping vessels out of the zone is intended to eliminate the chance of a vessel strike, create foraging opportunities in the absence of vessels, and provide a buffer that limits the potential for acoustic masking. The proposed regulations include a no-go zone out 880 yards from shore, twice the distance of most of the current no-go zone.

**Park in the path.** Some commenters supported codifying the guideline to keep clear of the whales' path. The risk of vessel strikes and masking are both most severe when vessels are directly in front of the whales. The draft EA evaluated an alternative that included a

mandatory prohibition on parking in the whales' path. The proposed regulations include a prohibition on parking in the path because it provides the best management tool for improving compliance and reducing the risk of vessel strikes and masking from vessels directly in front of the whales.

**Other suggested alternatives.** We did not propose some of the regulatory options suggested in the ANPR and in public comments for several reasons, including, difficulties in enforcing them, changes to infrastructure needed to implement them, or a lack of sufficient science to support them. For example, a speed limit within a certain distance of the whales (*i.e.*, less than 7 knots within 400 yards of the whales) would be difficult to implement and enforce without vessel tracking technology. A speed limit of 7 knots within 400 yards of the whales was fully analyzed as an alternative in the draft EA. Several other alternatives were suggested during the ANPR comment period and were addressed in the draft EA as alternatives considered but not analyzed in detail. These included:

(1) A permit or certification program which would require a large infrastructure to implement. There would also be equity issues in determining who is permitted or certified and who is not.

(2) A moratorium on all vessel-based whale watching, or protected areas along all shorelines, which would be challenging to enforce and are not supported by available scientific information.

(3) Regulatory options, such as rerouting shipping lanes or imposing noise level standards, which would unnecessarily restrict some types of vessels rarely in close proximity to the whales.

### Proposed Rule

Current efforts to reduce vessel impacts have not been sufficient to address vessel interactions that have the potential to harass and/or disturb killer whales by causing injury or disruption of normal behavior patterns. The regulatory measures proposed here are designed to protect killer whales from vessel impacts and will support recovery of Southern Resident killer whales. We are proposing these regulations pursuant to our rulemaking authority under MMPA section 112(a) (16 U.S.C. 1382(a)), and ESA 11(f) (16 U.S.C. 1540(f)). These proposed regulations also are consistent with the purpose of the ESA "to provide a program for the conservation of [\* \* \*] endangered species" and "the policy of Congress that all Federal departments

and agencies shall seek to conserve endangered species [\* \* \*] and shall utilize their authorities in furtherance of the purposes of [the ESA].” 16 U.S.C. 1531(b), (c).

### Scope and Applicability

*Application to All Killer Whales:* Under the MMPA and ESA the proposed regulations would apply to all killer whales. Although killer whales are individually identifiable through photo-identification, individual identification requires scientific expertise and resources (*i.e.*, use of a catalog) and cannot always be done immediately at the time of the sighting. It would be difficult for boaters, especially recreational boaters without expertise and experience with killer whales, to identify the individuals in the ESA-listed Southern Resident DPS or even to identify killer whales to ecotype (resident, transient, offshore). Requiring boaters to know which killer whales they are observing is not feasible. In addition, providing protection of all killer whales in inland waters of Washington is appropriate under the MMPA. Section 11(f) of the ESA provides NMFS with broad rulemaking authority to enforce the provisions of the ESA. In addition, section 112(a) of the MMPA provides NMFS with broad authority to prescribe regulations that are necessary to carry out the purposes of the statute.

*Geographic Area:* Regulations would apply to vessels in navigable inland waters of Washington under United States jurisdiction. Inland waters include a core summer area for the whales around the San Juan Islands, as well as a fall foraging area in Puget Sound and transit corridor along the Strait of Juan de Fuca. These three areas make up over 2,500 square miles and were designated as critical habitat for Southern Resident killer whales (71 FR 69054; November 29, 2006). This regulation will apply to an area similar to designated critical habitat including all U.S. marine waters in Jefferson, King, Kitsap, Island, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, Whatcom, and Clallam counties east of a line connecting Cape Flattery, Washington (48°23 10\* N./124°43 32\* W.), Tatoosh Island, Washington (48°23 30\* N./124°44 12\* W.), and Bonilla Point, British Columbia (48°35 30\* N./124°43 00\* W.) and south of the border delineating U.S. and Canadian waters. Marine waters include all waters relative to a contiguous shoreline relative to the mean high water line and cutting across the mouths of all rivers and streams.

*Vessels Subject to Proposed Rule:* Commercial and recreational whale watch vessels include motorized, non-motorized and self-propelled vessels (*i.e.*, motor boats, sail boats and kayaks), all of which can cause disturbance to whales. While kayaks are small and quiet, they have the potential to disturb whales as obstacles on the surface, and they may startle whales by approaching them without being heard (Mathews 2000). Some kayakers may be less likely to follow rules (Jelinski *et al.* 2002) and more likely to approach wildlife closely because they may be more apt to over-estimate distance because of their low aspect on the water, and to assume they are less likely to disturb wildlife than other vessels (Mathews 2000). In studies comparing effects of motorized and non-motorized vessels on dolphins, the type of vessel did not matter as much as the manner in which the boat moved with respect to the dolphins (Lusseau 2003b). Some dolphins' responses to vessels were specific to kayaks or were greater for kayaks than for motorized vessels (Lusseau 2006, Gregory and Rowden 2001, Duran and Valiente 2008). Several studies that have documented changes in behavior of dolphins and killer whales in the presence of vessels include both motorized and non-motorized vessels in their analysis (Lusseau 2003b, Nichols *et al.* 2001, Trites *et al.* 2007, Noren *et al.* 2007, In Press). Based on this information, it is appropriate to protect killer whales from different types of vessels.

*Exceptions:* We considered six specific categories of vessels that should be exempted from the vessel regulations: (1) Government vessels, (2) cargo vessels transiting in the shipping lanes, (3) research vessels, (4) fishing vessels actively engaged in fishing, (5) vessels limited in their ability to maneuver safely, and (6) vessels owned by individuals who own shoreline property located immediately adjacent to the no-go zone when such vessels are transiting to or from the property for personal, non-commercial purposes. These exceptions are based on the likelihood of certain categories of vessels having impacts on the whales and the potential adverse effects involved in regulating certain vessels or activities.

Available data on vessel effects on whales from Soundwatch (Koski 2007) and Bain (2007) indicate that commercial and recreational whale watch vessels have the greatest potential to affect killer whales. This is because operators of whale watching vessels are focused on the whales, track the whales' movements, spend extended time with the whales, and are therefore most often

in close proximity to the whales. Other vessels such as government vessels, commercial and tribal fishing boats, cargo ships, tankers, tug boats, and ferries do not target whales in their normal course of business. Soundwatch (Koski 2007) and Bain (2007) report that these types of vessels combined comprise only 6 percent or less of vessels within ½ mile of the whales. In addition, these vessels generally move slowly and in usually predictable straight paths, which reduces the risk of strikes to whales. While NMFS recognizes that sound from large vessels has the potential to affect whales even at great distances, the primary concern at this time is the sound from small, fast moving vessels moving in close proximity to the whales.

Vessels engaged in scientific research do closely approach killer whales to obtain photographs, collect a variety of samples, and observe behavior. NMFS considers ongoing research essential to its efforts to recover the whales. Potential effects of these activities are evaluated under section 7 and takes are authorized under section 10 of the ESA for Southern Resident killer whales. Expertise of researchers, operating procedures, and permit terms and conditions reduce the potential impacts to whales, therefore specific research activities authorized by NMFS would be exempt from the vessel regulations.

Regulating some categories of vessels could cause adverse impacts. Government vessels are often critical to safety missions, such as search and rescue operations, enforcement, and activities critical to national security. Washington State ferries would not be considered government vessels operating in the course of their official duties. U.S. and Canadian regulations require power vessels more than 40 meters in length, tugs that are more than eight meters in length, and vessels carrying 50 or more passengers all participate in the monitoring and reporting system set in place by the Co-operative Vessel Traffic Service which is designed to efficiently and safely manage vessel movements in the shared waters of the two countries (Navigation and Navigable Waters, 33 CFR part 161). These ships generally follow the well-defined navigation lanes called the Traffic Separation Scheme under Rule 10, as amended, of the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS), Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. 8587, adopted by statute at 33 U.S.C. 1602; 57 FR 29218, July 1, 1992. If they were required to make sudden or unpredictable movements to avoid close approaches to whales, it could increase the risk of

collisions and pose safety hazards. If fishing vessels were required to follow regulations while actively engaged in fishing, it could compromise gear or catch. Exempting treaty Indian fishing vessels is consistent with treaty fishing rights and use of Usual and Accustomed fishing areas. NMFS is also proposing to exempt vessels from any regulations if the exemption is required for safe operation of the vessel to avoid adverse effects to public safety. There are private landowners with property adjacent to the no-go zone. NMFS is proposing to exempt the personal use of privately owned vessels for access to their shoreline by landowners adjacent to the no-go zone.

Based on these considerations, NMFS is proposing exceptions to the regulations. The burden would be on the vessel operator to prove the exception applies, and vessel operators would not be exempt from the take prohibitions under the MMPA or ESA. The following exceptions would apply to all regulations:

(1) The regulations would not apply to Federal, State, and local government vessels operating in the course of official duty.

(2) The regulations would not apply to vessels participating in the Vessel Tracking System and operating within the defined Traffic Separation Scheme shipping lanes.

(3) The regulations would not apply to activities, such as scientific research, authorized through a permit issued by the National Marine Fisheries Service under part 222, subpart C, of this chapter (General Permit Procedures) or through a similar authorization.

(4) The regulations would not apply to treaty Indian fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(5) The regulations would not apply to vessel operations necessary for safety to avoid an imminent and serious threat to a person or vessel.

(6) The no-go zone regulation would not apply to personal use of private vessels owned by land owners for access to private property they own located adjacent to the no-go zone.

In addition to these exceptions, the prohibition against approaching within 200 yards and parking in the whales' path would not apply to commercial (non-treaty) fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear. Non-treaty commercial fishing vessels would be prohibited from entering the no-go zone. The regulations would apply to all fishing vessels, including treaty Indian and non-treaty vessels, transiting to or from fishing areas.

## Requirements

**Approach Restrictions:** The proposed regulations would prohibit vessels from approaching any killer whale in the inland waters of Washington closer than 200 yards. This would include approaching by any means, including by interception (*i.e.*, placing a vessel in the oncoming path of a killer whale, so that the whale surfaces within 200 yards of the vessel, or positioning a vessel so that wind or currents carry the vessel to within 200 yards).

**No-go zone:** The proposed regulations would prohibit vessels from entering a no-go zone along the west side of San Juan Island. The area would extend seaward from the mean high water line to a line approximating ½ mile (800 m) offshore, from Eagle Point to Mitchell Point, and include an area totaling approximately 6.2 square miles (Figure 1). With certain exceptions as described above, no vessels would be permitted inside the no-go zone during the period from May 1 through September 30 of each year.

**Prohibition against parking in the whales' path:** The proposed regulations would require vessels to keep clear of the whales' path within 400 yards of the whales. Similar to the approach regulation, parking in the path includes interception (positioning a vessel so that whales surface within 200 yards of the vessel, or so that wind or currents carry the vessel into the path of the whales).

## Rationale for Regulations

The endangered Southern Resident killer whales are a small population with only 85 whales as of the 2008 summer census. Based on ongoing observations to monitor the population, two whales have disappeared since the census count. The Southern Residents underwent an almost 20 percent decline from 1996 to 2001, and while there were several years of population increases following 2001, as of this year the population is once again in decline.

Our listing decision and the Recovery Plan for Southern Resident killer whales identified three major threats to their continued existence, all of which likely act in concert—prey availability, contaminants, and vessel effects and sound. While we and others in the region are working to restore salmon runs and minimize contamination in Puget Sound, these efforts will likely take many years to provide benefits for killer whales. In contrast, the threats posed by vessels can be reduced quickly by regulating vessel activities. The primary objective of promulgating these regulations is to manage the threats to

killer whales from vessels, in support of the recovery of Southern Residents.

Monitoring groups such as Soundwatch have reported that the mean number of vessels following a given group of whales within ½ mile increased from five boats in 1990 to an average of about 20 boats during May through September, for the years 1998 through 2006 (Osborne *et al.* 1999; Baird 2001; Erbe 2002; Marine Mammal Monitoring Project 2002; Koski 2004, 2006). At any one time, the observed numbers of commercial and recreational whale watch boats around killer whales can be much higher. Monitoring groups have collected several years of data on incidents when vessels are not adhering to the guidelines and the whales may be disturbed. In 2006, there were 1,281 incidents of vessels not following the guidelines reported during the time the observers were present (Koski 2007). There was an increasing trend in the number of incidents from 1998 to 2006. Since observers were not present during all days and all hours, it is likely that there were more incidents than those reported. Of the 1,281 incidents in 2006, the majority were committed by private boaters (53 percent), Canadian commercial operators (21 percent), and U.S. commercial operators (9 percent) (Koski 2007). The top incidents also reflect this pattern and are most often committed by private boaters, Canadian commercial whale watch vessels, and U.S. commercial whale watch vessels, respectively. The top four observed incidents were parking in the path, vessels motoring inshore of whales, vessels motoring within 100 yards of whales, and vessels motoring fast within 400 yards of the whales (Koski 2007).

The specific threats from these vessel incidents include (1) risk of strikes, which can result in injury or mortality, (2) behavioral disturbance, which increases energy expenditure and reduces foraging opportunities, and (3) acoustic masking, which interferes with echolocation and foraging, as well as communication. Southern and Northern Resident killer whales have been injured or killed by collisions with vessels. Some whales have sustained injuries from propeller blades and have eventually recovered, one was instantly killed, and several mortalities of stranded animals have been attributed to vessel strikes in recent years (Visser 1999; Ford *et al.* 2000; Visser and Fertl 2000; Baird 2001; Carretta *et al.* 2001, 2004, Gaydos and Raverty 2007).

As described in the background section of this proposed rule and in the EA, it is well documented that killer whales in the Pacific Northwest respond to vessels engaged in whale watching



with short-term behavioral changes. Examples of short-term behavioral responses include increases in direction changes, respiratory intervals, and surface active behaviors, all of which can increase energy expenditure (Bain *et al.* 2006; Noren *et al.* 2007, In Press; Williams *et al.* In Press). Southern Residents also spend less time foraging in the presence of vessels (Bain *et al.* 2006, Lusseau *et al.* In Press). Williams *et al.* (2006) estimated that increased energy expenditure may be less important than the reduced time spent feeding and the resulting likely reduction in prey consumption in the presence of vessels. Vessels in the path of the whales can interfere with important social behaviors such as prey sharing (Ford and Ellis 2006) or with behaviors that generally occur in a forward path as the whales are moving, such as nursing (Kriete 2007).

Vessel sounds may mask or compete with and effectively drown out calls made by killer whales, including echolocation used to locate prey and other signals the whales rely upon for communication and navigation. Masking of echolocation reduces foraging efficiency (Holt 2008), which may be particularly problematic if prey resources are limited. Vessel noise was predicted to significantly reduce the range at which echolocating killer whales could detect salmon in the water column. Holt (2008) reported that the detection range for a killer whale echolocating on a Chinook salmon could be reduced 88 to 100 percent by the presence of a moving vessel within 100 yards of the whale. Masking sound from vessels could affect the ability of whales to coordinate their feeding activities, including searching for prey and prey sharing. Foote *et al.* (2004) attributed increased duration of primary communication calls to increased vessel traffic.

Energetic costs from increased behavioral disturbance and reduced foraging can decrease the fitness of individuals (Lusseau and Bejder 2007). Energy expenditure or disruption of foraging could result in poor nutrition. Poor nutrition could lead to reproductive or immune effects, or, if severe enough, to mortality. Interference with foraging can affect growth and development, which in turn can affect the age at which animals reach reproductive maturity, fecundity, and annual or lifetime reproductive success. Interference with essential behaviors, including prey sharing and communication, could also reduce social cohesion and foraging efficiency for Southern Resident killer whales, and, therefore, the growth,

reproduction, and fitness of individuals. Injuries from vessel strikes could also affect the health and fitness of individuals. Any injury to or reduction in fitness of a single member of the Southern Resident killer whale population is serious because of the small population size.

To reduce the risk of vessel strikes, behavioral disturbance, and acoustic masking, and to manage effectively the threat from vessels, regulations must reduce the current number of harmful vessel incidents. Monitoring demonstrates that there are numerous incidents in which the current voluntary guidelines are not observed. Research suggests that vessel operators are more likely to comply with mandatory regulations than with voluntary guidelines (May 2005). In addition, level of compliance is likely to depend on how easy the regulations are to understand, follow and enforce. We therefore expect that clear mandatory regulations will reduce the number of incidents, compared to the current voluntary guidelines.

After analyzing a range of alternative regulations, we concluded that the most appropriate measures to protect the whales are a combination of an approach regulation, a no-go zone, and a prohibition on parking in the path. We recognize that adopting regulations that are different from the current voluntary guidelines and State regulation may present some challenges. The current infrastructure, however, includes enforcement, monitoring, and stewardship groups, who will be available to assist with an education campaign to inform boaters about the new regulations and the scientific information on which they are based. The combination of three measures as part of the regulation package provides multiple tools for enforcement that are measurable, easy for the public to understand, and based on the best available science regarding vessel impacts. The draft EA contains a full analysis of a No-action alternative, six individual alternatives, and the combined approach we are proposing, described below.

**200 yard approach regulation.** A regulation prohibiting approaches closer than 200 yards would be clear to whale watch operators. These operators would likely know about such a regulation and be able to accurately judge the distance of their vessels from whales, as indicated by their current high levels of compliance with the current 100 yard guideline. Recreational boaters would be less likely to know about such a regulation, though over time it is reasonable to expect that familiarity

with the regulation would increase, particularly with education and publicity about any prosecutions. Some recreational boaters may also follow the example of commercial operators to determine the proper viewing distance.

The 200 yard approach regulation is intended to reduce the risk of vessel strikes, the degree of behavioral disruption, and the amount of noise that masks echolocation and communication. Current research results have documented behavioral disturbance and considerable potential for masking from vessels at 100 yards. These effects are reduced at 200 yards and greater distances. Some effects are observed up to 400 yards from the whales. While an approach regulation at a distance greater than 200 yards would further reduce vessel effects, this could diminish both the experience of whale watching and opportunities to participate in whale watching. We recognize that whale watching educates the public about whales and fosters stewardship. We balanced the benefits to killer whales of a greater approach distance regulation and continued whale watching opportunities, and we arrived at the 200 yard approach regulation we are proposing.

**No-go zone.** A no-go zone is clear and could be readily avoided by both commercial and recreational boaters. The area would be identified using latitude and longitude coordinates and landmarks on maps and charts, making the regulation widely identifiable and compliance and enforcement straightforward. The no-go zone provides special protection in an area where researchers have observed high levels of foraging. Keeping vessels out of the zone is intended to eliminate the chance of a vessel strike, allow for increased foraging opportunities in the absence of vessels, and provide a buffer that greatly reduces the potential for acoustic masking. The potential for masking declines as vessels are kept further away from the whales. Holt (2008) concluded that some fast moving vessels within 200 yards of the whales can decrease the distance at which whales can detect salmon by 75 to 95 percent, while those same vessels at 400 yards reduce the distance at which they can detect salmon by 38 to 90 percent. The expanded no-go zone creates a maximum buffer of over 880 yards from vessels, twice that of the current no-go zone. This large buffer is particularly important for reducing the masking effects on echolocation signals and impacts to foraging from vessel sound.

**Parking in the path prohibition.** As described above, this is the most common violation of the current



guidelines by commercial whale watch operators. It also carries one of the greatest risks, since it increases the chance of vessel strike. This regulation is consistent with the current guidelines and is therefore already understood by commercial whale watch operators. A prohibition on parking in the path complements the approach regulation, which prohibits approaching within 200 yards of the whales, including by interception. The path regulation provides the best management tool for improving compliance and reducing the risk of vessel strikes and masking from vessels directly in front of the whales. The risk of vessel strikes and masking are both most severe when vessels are directly in front of the whales. By instituting a mandatory regulation in place of a voluntary guideline, we expect increased compliance, particularly by the commercial operators who are most often in the path of the whales.

The proposed regulations for killer whales differ from protective regulations promulgated to protect other marine mammal species in other locations. In each case the development of regulations was based on the biology of the marine mammal species and available information on the nature of the threats. For the Southern Resident killer whales, we have detailed information on killer whale biology, vessel activities around the whales, and vessel effects on the whales' behavior and acoustic foraging activities that informed the selection of the proposed rule.

We did not propose some of the regulatory options suggested in the ANPR and in public comments for several reasons, including, difficulties in enforcing them, changes to infrastructure needed to implement them, or a lack of sufficient science to support them. For example, a speed limit within a certain distance of the whales (*i.e.*, less than 7 knots within 400 yards of the whales) would be difficult to implement and enforce without vessel tracking technology. A permit or certification program would require a large infrastructure to implement. There would also be equity issues in determining who is permitted or certified and who is not. A moratorium on all vessel-based whale watching, or protected areas along all shorelines, would be challenging to enforce and is not supported by available scientific information. Some comments suggested regulatory options such as rerouting shipping lanes or imposing noise level standards, which would unnecessarily restrict some types of vessels rarely in close proximity to the whales.

We considered both benefits and costs in selecting the proposed regulation. The reduction in threats for each element of the regulation package as described above provides a benefit to the whales, as well as to the public who value the whales. Reducing threats to the whales also supports the long-term sustainability of the whale watching industry. The regulations also provide benefits to land-based viewing and may provide benefits to other marine species. In addition to the benefits, we also considered the potential costs of the proposed regulations. To limit some potential costs to vessels or industries rarely in close proximity to the whales, we have proposed several exemptions to the regulations (*i.e.*, ships in shipping lanes, fishing vessels). The exemptions also prevent other potential costs by protecting public safety, allowing for critical government and permitted activities to continue, allowing us to fulfill our treaty trust responsibilities, and avoiding infringement on the use of private land.

The costs of implementing vessel regulations to protect the whales will be borne primarily by the commercial whale watch industry and recreational whale watchers. One cost of the proposed regulations is to increase viewing distance, which may affect the quality of whale watching experiences. An increased viewing distance affects the experience of the whale watch participants and not necessarily the revenue of the industry or companies. While some commercial whale watch operators have suggested that increased viewing distance will affect their revenue, there is information indicating that proximity to the whales is not the most important aspect of whale watching, and that participants value viewing in a manner that respects the whales. We do not anticipate any loss of business or reduction in the number of opportunities for participating in whale watching activities. Another cost is that some commercial and recreational kayakers may need to relocate to alternate launch sites where they are farther from core whale areas. Other impacts to boaters are expected to be minor and include slight deviations of a vessel's path, or relocating to a nearby fishing area in order to comply with proposed regulations.

In developing these regulations, we have determined that current regulations and guidelines are not sufficient to protect endangered Southern Resident killer whales and that additional regulations are necessary to reduce the risk of extinction. While we cannot quantify the reduction in risk of extinction, the perilous status of the

Southern Residents compels us to take all reasonable actions to improve their chances of survival and recovery. We proposed the most appropriate regulations to reduce threats posed by vessels, limit costs, and maintain opportunities for the public to participate in whale watching. Of the alternatives considered, we chose a combination of the three with the greatest benefits. All of the options have relatively low socioeconomic and recreation costs. In contrast, the cost of extinction of Southern Residents is incalculable. The proposed regulations maximize net benefits to the whales and the public who value the whales.

#### **Evaluation of the Effectiveness of the Measures**

The success of this program is vital to the recovery of the species. Therefore, NMFS will monitor the effectiveness of the final regulations and consider altering the measures or implementing additional measures if appropriate.

#### **References Cited**

A complete list of all references cited in this proposed rule can be found on our Web site at <http://www.nwr.noaa.gov/> and is available upon request from the NMFS office in Seattle, Washington (see **ADDRESSES**).

#### **National Environmental Policy Act (NEPA), Regulatory Flexibility Act, and Regulatory Impact Review**

NMFS has prepared a draft EA/RIR, pursuant to NEPA (42 U.S.C. 4321 *et seq.*), Executive Order 12866, and an Initial Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), to support this proposed rule. NMFS was the lead agency for the analysis and the U.S. Coast Guard, Washington Department of Fish and Wildlife, and the Department of Fisheries and Oceans, Canada were cooperating agencies. The draft EA/RIR and IRFA contain a full analysis of a No-action alternative, six individual alternatives, and the combined approach we are proposing. There are a number of elements that were common to all of the alternatives analyzed, including the action proposed in this notice. NMFS identified the geographic location, application of regulations and exemptions, as described in the Proposed Rule section of this notice. The elements common to all alternatives are as follows. All regulations would apply to activities in the inland waters of Washington State. The specific protected areas within inland waters are identified. The regulations would apply to all killer whales, not just endangered Southern Residents. The regulations

would not exempt any vessel operators from the harassment or take prohibitions under the MMPA or ESA. The regulations would apply to motorized and non-motorized vessels.

The following exceptions would apply to all regulations:

(1) The regulations would not apply to Federal, State, and local government vessels operating in the course of official duty.

(2) The regulations would not apply to vessels participating in the Vessel Tracking System and operating within the defined Traffic Separation Scheme shipping lanes.

(3) The regulations would not apply to activities, such as scientific research, authorized through a permit issued by the National Marine Fisheries Service or through a similar authorization.

(4) The regulations would not apply to treaty Indian fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(5) The regulations would not apply to vessel operations necessary for safety to avoid an imminent and serious threat to a person or vessel.

(6) The no-go zone regulation would not apply to personal use of private vessels owned by land owners for access to private property they own located adjacent to the no-go zone.

Additional exceptions considered for individual alternatives are presented under each alternative below.

(1) *Alternative 1: No Action.* The MMPA prohibits take of all marine mammals, including killer whales, and the ESA prohibits the take of listed marine mammals, including endangered Southern Resident killer whales. NMFS promotes responsible viewing through a "Be Whale Wise" education campaign that includes a set of voluntary guidelines designed to help boaters avoid harassment. Under the No-action Alternative, NMFS would not promulgate any new regulations but would continue the education and outreach program with all of the partners involved in Be Whale Wise. The elements common to all alternatives above are specific to regulations and would not apply to the No-action Alternative.

(2) *Alternative 2: 100 Yard Approach Regulation.* Under this alternative, NMFS would promulgate a regulation prohibiting vessels from approaching any killer whale closer than 100 yards. This would include approaching by any means, including by interception (*i.e.*, placing a vessel in the oncoming path of a killer whale, so that the whale surfaces within 100 yards of the vessel, or positioning a vessel so that wind or currents carries the vessel to within 100

yards). In addition to the exceptions listed above, this regulation would not apply to commercial fishing vessels (non-treaty) lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(3) *Alternative 3: 200 Yard Approach Regulation.* This alternative is the same as Alternative 2, but the rule would prohibit vessel approaches within 200 yards of all killer whales.

(4) *Alternative 4: Protected Area—Current Voluntary No-go Zone.* Under this alternative, NMFS would formalize the current voluntary no-go zone along the west side of San Juan Island. This includes a ½ mile (800 meter)-wide zone centered on the Lime Kiln lighthouse and a ¼ mile (400 meter)-wide zone from Eagle Point to Mitchell Point. No vessels would be permitted inside the protected area from May 1 through September 30. This area would not overlap with shipping lanes or ferry routes and would not be directly adjacent to the Canadian border.

(5) *Alternative 5: Protected Area—Expanded No-go Zone.* Under this alternative, NMFS would formalize a no-go zone along the west side of San Juan Island. The area would extend ½ mile (800 meter) offshore from Eagle Point to Mitchell Point. This is a larger, but simplified area compared to the no-go zone described under Alternative 4. No vessels would be permitted inside the protected area from May 1 through September 30. This area would not overlap with shipping lanes or ferry routes and would not be directly adjacent to the Canadian border.

(6) *Alternative 6: Speed Limit of 7 Knots Within 400 Yards of Killer Whales.* Under this alternative, NMFS would promulgate a regulation prohibiting vessels from operating at speeds over 7 knots when within 400 yards of killer whales. In addition to the exceptions listed above, this regulation would not apply to commercial fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(7) *Alternative 7: Keep Clear of the Whales' Path.* Under this alternative, NMFS would promulgate a regulation requiring vessels to keep clear of the whales' path. Violations of this regulation would include intercepting or placing a vessel in the oncoming path of a killer whale or positioning a vessel so that wind or currents carry the vessel into the path of the whales. In addition to the exceptions listed above, this regulation would not apply to commercial fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(8) *Proposed Action.* Under this alternative, NMFS would promulgate a package of regulations incorporating Alternatives 3, 5, and 7 as described in the Proposed Rule section of this notice.

The Draft EA/RIR addresses impacts to the eight resources that could be affected by the proposed action or alternatives: Marine Mammals, Listed and Non-listed Salmonids, Socioeconomics, Recreation, Environmental Justice, Noise, Aesthetics, and Transportation. Impacts to some resources were avoided or reduced by exempting certain classes of vessels or activities under all of the alternatives.

The draft EA/RIR/IRFA, and supporting documents are available for review and comment and can be found on the NMFS Northwest Region Web site at <http://www.nwr.noaa.gov/>.

#### Clarity of This Proposed Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by any of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible.

#### Public Comments

You may submit information and comments concerning this Proposed Rule, the draft EA, or any of the supporting documents by any one of several methods (see **ADDRESSES**). Materials related to this notice can be found on the NMFS Northwest Region Web site at <http://www.nwr.noaa.gov/>. We will consider all comments and information received during the comment period in preparing a final rule.

#### Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment

to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

### Public Hearings

Based on the level of interest in killer whales and whale watching, public meetings have been scheduled for September 30, 2009, 7–9 p.m. at the Seattle Aquarium, Seattle, WA and October 5, 2009, 7–9 p.m. in The Grange Hall, Friday Harbor, WA. Requests for additional public hearings must be made in writing (see **ADDRESSES**) by August 28, 2009.

### Required Determinations

#### *Paperwork Reduction Act*

This proposed rule will not impose any new requirements for collection of information that requires approval by the OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) This proposed rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations.

#### *Executive Order (E.O.) 12866 Regulatory Planning and Review*

This Proposed Rule was determined to be significant for purposes of E.O. 12866. It was reviewed by the Office of Management and Budget and other interested Federal agencies.

#### *E.O. 12988 Civil Justice Reform*

We have determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of E.O. 12988. We issue protective regulations pursuant to provisions in the ESA and MMPA using an existing approach that improves the clarity of the regulations and minimizes the regulatory burden of managing ESA listings while retaining necessary and advisable protections to provide for the conservation of threatened and endangered species.

#### *E.O. 13175 Consultation and Coordination With Indian Tribal Governments*

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and co-management agreements. These differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and

the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175 outlines the responsibilities of the Federal Government in matters affecting tribal interests. During our scoping process we provided the opportunity for all interested tribes to comment on the need for regulations and discuss any concerns they may have. We will continue to coordinate with the tribes on management and conservation actions related to this species.

#### *E.O. 13132 Federalism*

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt State law, or impose substantial direct compliance costs on State and local governments (unless required by statute). The Washington Department of Fish and Wildlife was a cooperating agency on the NEPA analysis to support development of proposed regulations. A Federal regulation under the MMPA and ESA prohibiting approach within 200 yards of killer whales is more protective than the State regulation HB 2514 prohibiting approach within 100 yards of Southern Resident killer whales and therefore may preempt the State regulation. Inclusion of the Washington Department of Fish and Wildlife as a cooperating agency satisfies the consultation requirements of E.O. 13132.

#### *E.O. 13211 Energy Supply, Distribution, or Use*

E.O. 13211 requires agencies to prepare a statement of energy effects when undertaking certain actions. According to E.O. 13211, “significant energy action” means any action by an agency that is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under E.O. 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. We have determined that the energy effects of this final rule are unlikely to exceed the energy impact thresholds identified in E.O. 13211 and that this rulemaking is, therefore, not a significant energy action. No statement of energy effects is required.

#### List of Subjects in 50 CFR Part 224

Endangered marine and anadromous species.

Dated: July 21, 2009.

**James W. Balsiger,**

*Acting Assistant Administrator for Fisheries,  
National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 224 is proposed to be amended as follows:

### **PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES**

1. The authority citation for 50 CFR part 224 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543 and 16 U.S.C 1361 *et seq.*

2. A new § 224.103(e) is added to read as follows:

#### **§ 224.103 Special prohibitions for endangered marine mammals.**

\* \* \* \* \*

(e) *Protective regulations for killer whales in Washington—(1) Prohibitions.* The following restrictions apply to all motorized, non-motorized, and self-propelled vessels, regardless of size, transiting the navigable waters of Washington State and subject to the jurisdiction of the United States, which includes all U.S. marine waters in Clallam, Jefferson, King, Kitsap, Island, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom counties east of a line connecting Cape Flattery, Washington (48°23 10\* N./124°43 32\* W.), Tatoosh Island, Washington (48°23 30\* N./124°44 12\* W.), and Bonilla Point, British Columbia (48°35 30\* N./124°43 00\* W.) and south of the U.S. Canadian border. Marine waters include all waters relative to a contiguous shoreline relative to the mean high water line and cutting across the mouths of all rivers and streams. Except as noted in paragraph (e)(2) of this section it is unlawful to:

(i) Cause a vessel to approach within 200 yards (182.8 m) of any killer whale. This includes approaching a killer whale by any means, including by interception (i.e., by placing a vessel in the path of an oncoming killer whale, so that the whale surfaces within 200 yards (182.8 m) of the vessel, or by positioning a vessel so that the prevailing wind or currents carries the vessel to within 200 yards (182.8 m), or being towed by another vessel).

(ii) Enter the no-go zone located along the west side of San Juan Island extending ½ mile (805 m) offshore from Mitchell Point south to Eagle Point (Figure 1) at any time during the period May 1 through September 30 each year. The boundary of the no-go zone consists of straight lines connecting all of the following points in the order stated: Beginning at 123°10'120.19" W, 48°34'20.67" N;

123°11'6.71" W, 48°34'20.67" N;  
 123°11'13.99" W, 48°34'8.12" N;  
 123°11'15.83" W, 48°33'56.15" N;  
 123°11'13.14" W, 48°33'38.80" N;  
 123°11'2.91" W, 48°33'22.97" N;  
 123°10'55.44" W, 48°33'7.97" N;  
 123°10'40.63" W, 48°32'51.10" N;  
 123°10'21.06" W, 48°32'37.62" N;  
 123°10'21.38" W, 48°32'28.70" N;  
 123°10'30.04" W, 48°32'12.73" N;  
 123°10'29.69" W, 48°32'2.48" N;  
 123°10'26.63" W, 48°31'45.92" N;  
 123°10'18.54" W, 48°31'29.48" N;  
 123°10'5.34" W, 48°31'16.07" N;  
 123°09'48.51" W, 48°30'55.15" N;  
 123°09'45.22" W, 48°30'46.38" N;  
 123°09'31.91" W, 48°30'32.53" N;  
 123°09'19.56" W, 48°30'20.03" N;  
 123°09'13.97" W, 48°30'16.86" N;  
 123°09'0.19" W, 48°30'3.30" N;  
 123°08'44.56" W, 48°29'55.15" N;  
 123°08'40.54" W, 48°29'46.62" N;  
 123°08'20.43" W, 48°29'31.99" N;  
 123°07'54.54" W, 48°29'26.65" N;  
 123°07'40.69" W, 48°29'16.29" N;  
 123°07'24.74" W, 48°29'8.36" N;  
 123°06'50.12" W, 48°29'3.18" N;  
 123°06'34.81" W, 48°28'59.48" N;  
 123°06'25.50" W, 48°28'54.57" N;  
 123°06'11.47" W, 48°28'39.55" N;  
 123°05'56.57" W, 48°28'31.18" N;  
 123°05'39.99" W, 48°28'27.84" N;  
 123°05'6.86" W, 48°28'31.27" N;  
 123°04'38.40" W, 48°28'25.94" N;  
 123°04'32.58" W, 48°28'15.11" N;  
 123°04'18.39" W, 48°28'1.25" N;  
 123°04'1.07" W, 48°27'54.14" N;  
 123°03'37.56" W, 48°27'47.83" N;  
 123°03'18.18" W, 48°27'32.24" N;  
 123°02'58.60" W, 48°27'25.48" N;  
 123°02'53.75" W, 48°27'21.01" N;  
 123°02'34.37" W, 48°27'7.24" N;  
 123°05'13.06" W, 48°27'3.05" N;

and connecting back to 123°10'120.19" W, 48°34'20.67" N along the shoreline of San Juan Island, following the mean high water line, with the exception of the opening to False Bay, where the shoreward boundary is defined by a straight line connecting 123°04'28.33" W, 48°28'54.84" N and 123°04'4.01" W, 48°28'46.89" N.

(iii) Position a vessel in the path of any killer whale at any point located within 400 yards of the whale. This includes intercepting a killer whale by positioning a vessel so that the prevailing wind or currents carry the vessel into the path of the whale.

(2) *Exceptions.* The following exceptions apply to this section:

(i) The prohibitions of paragraph (e)(1) of this section do not apply to:

(A) Federal, State, or local government vessels operating in the course of official duty;

(B) Vessels participating in the U.S. Coast Guard and Canadian Coast Guard Co-operative Vessel Traffic Service and constrained to Traffic Separation Scheme shipping lanes;

(C) Vessels engaged in an activity, such as scientific research, authorized through a permit issued by the National Marine Fisheries Service under part 222, subpart C, of this chapter (General Permit Procedures) or through a similar authorization;

(D) Vessels lawfully engaged in treaty Indian fishing that are actively setting, retrieving, or closely tending fishing gear; or

(E) Vessel operations necessary to avoid an imminent and serious threat to a person.

(ii) The prohibition of paragraph (e)(1)(ii) of this section does not apply to privately owned vessels that transit the no-go zone for the sole purpose of gaining access to privately owned shoreline property located immediately adjacent to the no-go zone. For purposes of this section, "transit" means that a vessel crosses the no-go zone by the shortest possible safe route, on a straight line course as consistent with International Regulations for Preventing Collisions at Sea, 1972 (COLREGS), while making way by means of a source of power at all times, other than drifting by means of the prevailing water current or weather conditions.

(iii) The prohibitions of paragraphs (e)(1)(i) and (e)(1)(iii) of this section do not apply to non-treaty commercial fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(3) *Affirmative defense.* In connection with any action alleging a violation of the prohibitions of paragraph (e)(1) of this section, any person claiming the benefit of any exception listed in paragraph (e)(2) of this section shall have a defense where the person can demonstrate that the exception is applicable and was in force, and that the person fully complied with the exception at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent.

3. In Part 224, Figure 1 is added to read as follows.

**BILLING CODE 3510-22-P**

Figure 1 of Part 224 -- Proposed No-go Zone.

