

Report and Recommendations to the County Council for NOAA's Proposed Vessel Rule



September 22, 2009

San Juan County Marine Resources Committee



PURPOSE, CREATION AND SCOPE OF THE REPORT

To prepare this report for the County Council on NOAA's proposed vessel rule, the Marine Resources Committee (MRC) convened a subcommittee to analyze the rule, held two discussions with the full committee and heard comments from community members. The make up of the subcommittee reflects some of the diversity in the San Juan community interested in NOAA's proposed vessel rule. The group includes the owner of a local kayak and whale watching business, a sports fisher, scientists, a local builder, and a member of a local environmental organization. The report aligns with the threats and management strategies for marine mammals described in the San Juan Marine Stewardship Area Plan.

The report:

- Provides comments and recommendations for the proposed vessel rule
- Identifies areas of agreement
- Offers a path to guide navigation through those areas where the community appears to be divided.
- Sketches out a proposal that integrates education, regulation and funding that will protect the whales from vessels and which works for the community.

This report is submitted as a draft or work in progress, rather than a completed set of recommendations because our analysis of the rule raised more questions than we could answer. While we support portions of the proposed vessel rule, we recognize that other parts of the plan; such as the establishment of a no-go zone, has triggered division in the community which cannot be resolved quickly. We also recognize that of all the communities in Puget Sound, we are in a unique position to forge a solution to this impasse. In spite of the confusion or disagreement we encountered, we were encouraged that one thing is clear-- many in the community have voiced their commitment to do what is needed to protect the whales.

INTRODUCTION

The southern resident orca population was listed as endangered in 2005, affording it special protection in United States waters. This is the only resident orca population in the contiguous United States and thus represents a rare opportunity for local regulation to have an impact on this species. Although they range widely throughout the year, this population spends much of the summer in a fairly well delimited corridor running from the southern ends of Lopez and San Juan Islands, through Haro Strait, and into the area north of Stuart Island along the southern Canadian Gulf Islands. Because they forage predictably within this defined region, protection is most likely to be effective in that same area. Reduced salmon prey, increased toxic chemicals in tissues, and vessel effects have all been identified as potential sources of orca stress and mortality, leading to population decline. Successful recovery of this population will require addressing all three threats: the number of Chinook salmon they encounter (their favored prey), the level of toxic chemicals in their prey and the effects of boat proximity on these orcas. On July 29, 2009, NOAA, the federal agency charged with implementing the endangered species act for marine mammals, proposed new vessel regulations to address the third threat. While it is

essential to address all these issues, the current issue under discussion is NOAA's proposed rule to reduce vessel impacts.

There is clear evidence that the southern resident orcas have had several periods of fluctuating population over the past four decades, resulting in no significant increase in their population since the 1960s; by comparison, the northern resident pods have increased substantially, almost doubling in that time period (figure 1). We note that orca populations had already been depleted by the time population monitoring began, and thus both northern and southern residents were potentially recovering following the cessation of hunting and collecting for aquaria in the 1970s.

Excellent science supports the geographic and foraging behavior of the southern resident orcas, including many years of mapping their movements. These data show clearly that the west and south sides of San Juan Island are the most regularly visited stretches of coastline for the southern resident orcas, although the entire area from south Lopez to north of Stuart Island is heavily traveled (figure 2). Because this is the prime summer habitat for the only resident orca population in U.S. waters, it is a truly unique and important piece of geography; arguably, it is one of the very most important conservation regions, and opportunities, in the nation.

Several years of monitoring shows that the number of boats and length of time that they follow the whales has increased substantially over the last two decades along the west side of San Juan Island during the peak viewing season. Vessels accompanying the whales have increased from an average of five boats in 1990 to about 20 boats within a half mile of the whales between 1998 and 2006. The maximum number of boats near the whales at any one time has varied from 120 to 69 between 1998 and 2007 (figure 3). Vessels accompany whales for more hours of the day and more days of the year.

Boat traffic has been identified as having a possible negative effect on orcas, through sound disturbance and impacts on foraging, communication, resting and other behavior. Recent studies show that orcas modify their behavior, and their vocalizations, when power boats are present and increasing the general sound level in their habitat.

The scientific studies to date do not, however, provide all the answers. For example, we don't know exactly how much a given noise level reduces the foraging ability of the whales, nor do we know if it affects the distribution of their prey. We also don't know the source of mortality for most of the orcas which have disappeared from the southern resident population, and thus we cannot allocate an exact effect of lack of prey, toxics, or boat impacts, on mortality. Considering boat traffic, noise from power boats has potential deleterious effects, but it is not clear whether there are measurable effects from kayaks and other human powered craft. It has been suggested that whales already weakened by toxics or poor food supply could be pushed over the edge by having to deal with boat noise as an added stress, further limiting foraging time or success, though this has not been confirmed by data. Climate change as well as increasing population growth throughout the whales' territory may place additional stresses on the whales as we move into the future.

So, in the face of some uncertainty, but with strong evidence that the three identified threats are keeping this population down, by the precautionary principle, we should be doing all we can to

protect this endangered population of orcas and their habitat, and we believe that the San Juan Island community has a significant role to play in this effort. The following sections describe the proposed vessel rule and recommendations from the MRC for specific elements of the rule and its application.

PROPOSED VESSEL RULE

NOAA Fisheries' proposed vessel rule includes three elements.

1. Prohibits vessels from approaching any killer whale from any direction in the inland waters of Washington closer than 200 yards.
2. Requires vessels to keep clear of the whales' forward path within 400 yards of any killer whale throughout the inland waters of Washington State.
3. Prohibits vessels from entering a half-mile no-go zone from Mitchell Point to Eagle Point along the west side of San Juan Island (figure 4) from May 1 through September 30.

Vessels Exempt from All or Portions of the Proposed Rule	
Vessel Type:	Exempt from:
Federal, State or local government vessels operating in the course of official duty.	All regulations: 200 yd limit Path interception No go zone
Vessels participating in the U.S. and Canadian Coast Guards Cooperative Vessel Traffic Service and constrained to shipping lanes.	All regulations: 200 yd limit Path interception No go zone
Vessels engaged in an activity such as scientific research, authorized through a permit issued by the National Marine Fisheries Service or a similar authorization.	All regulations: 200 yd limit Path interception No go zone
Vessels lawfully engaged in treaty Indian fishing that are actively setting, retrieving, or closely tending fishing gear	All regulations: 200 yd limit Path interception No go zone
Non-treaty commercial fishing vessels lawfully engaged in actively setting, retrieving or closely tending fishing gear.	200 yd limit Path interception
Vessel operations necessary to avoid an imminent and serious threat to a person.	All regulations: 200 yd limit Path interception No go zone
Privately owned vessels belonging to privately owned shoreline property located immediately adjacent to the no-go zone.	Can transit the no-go zone by the shortest possible route for the sole purpose of gaining access to their property.

RESPONSE TO PROPOSED RULE

The MRC supports elements 1 and 2 of the proposed rule as important measures to protect whales from vessel-related impacts throughout the inland waters of the state and urge their implementation in 2010 according to NOAA's proposed schedule. However, there is broad agreement that regulations alone will not protect the whales unless they are supported by adequate enforcement and effective education. In addition, we want to stress that changes in vessel behavior alone is not enough to bring about recovery. Therefore, NOAA Fisheries should also immediately put resources towards addressing the other factors of decline such as Chinook salmon recovery and reduction of toxins entering the marine food web. The following sections describe these recommendations in more detail.

Other Impacts: Prey availability and Toxins

The vessel regulations will be to no avail unless the other factors that threaten the whales are addressed. We urge NOAA Fisheries to work with Canadian, federal, state, tribal and local partners to address these threats. Chinook salmon, which come from a wide range of regions of origin, are known to be an important part of their diet in the San Juan Islands. The MRC has previously commented to NOAA that the existing Chinook salmon recovery plans should be made part of the orca recovery plan, and we still think so. In addition, there may be specific actions that would increase Chinook salmon abundance in the San Juan Islands that would help alleviate any shortage of available prey. NOAA should also work with federal, state and municipal partners to reduce toxic inputs into the marine ecosystem from all sources and reduce polluted stormwater runoff into the marine ecosystem throughout the whale's territory. The Puget Sound Partnership is well poised to facilitate this effort, and the MRC suggests that orca recovery should be a major focus of the Partnership's efforts to reduce pollution.

Enforcement

Without enforcement, regulations of any kind will have limited value. Many people who have been tracking whale watching in the San Juan Islands agree that neither the regulations that were established by San Juan County in 2007 nor the state regulations that superseded them in 2008 have been adequately enforced. There is interest in exploring whether effective enforcement of existing rules and protections would achieve the goal of reducing vessel impacts on whales. NOAA should work with State and local governments to develop a collaborative enforcement system that is adequately funded. The responsibility and expense for enforcement of the rule (current, proposed or an alternative) should be coordinated and managed by NOAA Fisheries. NOAA and other government agencies who conduct enforcement should provide training for enforcement agents so that they model responsible vessel operation in the presence of whales. A visible presence on the water coupled with swift response to violations is critical.

Monitoring

NOAA Fisheries should invest in resources to conduct long-term monitoring to measure the effectiveness of the regulations they set in place and their management of those regulations. They should compare vessel activities and compliance under prior regulations and guideline with new regulations. They should periodically review and adjust the regulations as needed to achieve management goals for the whales. The MRC has sponsored a previous vessel traffic study, and could provide expertise, along with Soundwatch, in designing and implementing this monitoring.

Education and Marketing

High concentrations of boats, along with varying levels of expertise and knowledge in boaters make enforcement of vessel regulations very challenging. Regulations and ramped up enforcement will require educating the public in advance about the new rules, consequences for violations and best practices for avoiding whales. Education should extend into Canada and the U.S., since many boaters cross the border and come from other regions.

Orcas are often unpredictable as they travel and keeping clear of their path can be challenging for boaters. NOAA Fisheries should include guidance and best practices for kayakers, recreational fishers and other boaters to help them avoid disturbing the whales and getting fined.

Orcas are a powerful and compelling icon used to promote tourism in this region. This marketing frequently portrays whale watching from boats that are too close to whales and shows other behaviors in disregard of the law and whale safety. We recommend that NOAA Fisheries work with the tourism industry to promote best practices for commercial and recreational whale watchers to foster a culture of stewardship in various sectors—those involved in tourism, visitors, and residents in Washington State and western Canada.

Soundwatch has provided leadership for whale watching guidelines coupled with exemplary outreach in the region. Its Kayak Education Leadership Program (KELP) in partnership with the County Parks educates kayakers about best practices for boating in whale territory. We recommend that NOAA Fisheries continues to support these programs and tap their expertise and experience as they design education strategies.

Speed Limit

We recommend that NOAA Fisheries reconsider speed limits for boats that are in the vicinity of all orcas in the inland waters of the state. Noise from boats varies in intensity depending on vessel size and engine type and underwater sound levels generally increase with speed. Reducing speed limits to 7 knots within 400 yards of the whales would reduce noise levels and the amount of interference with the whale's communication and echolocation, reduce the potential for vessel strikes and allow vessel operators to spot whales and make course adjustments to avoid their path. A 7 knot speed limit aligns with the Be Whale Wise Guidelines and the guidelines developed by the Pacific Whale Watch Association.

NO-GO ZONE

The proposed no-go zone is the element in the proposed rule that most affects San Juan County and consequently creates the most concern on the MRC as well as in the community. In this discussion, we describe these concerns and offer some of the ideas that have emerged from the community as an alternative to the restricted zone outlined in the proposed rule. We also describe what stakeholders in the community are willing to do to forge a workable alternative.

No-go Zone Concerns

The following section represents the types of concerns individual members of the MRC have expressed and includes comments we have heard from citizens.

1) Science for the no-go zone

Given the short time for completing this report, the MRC was not able to do a complete review of the scientific studies NOAA used to support the proposed rule. We did, however, discover disagreement in the community about the studies. Some are concerned that the science is inconclusive and does not warrant the establishment of the no-go zone as described in the proposed rule.

Others think that the endangered status of the southern resident orcas warrants exercise of the precautionary principle which holds that scientific uncertainty does not preclude action if damage would otherwise be serious and irreversible.

Prior to the ESA listing, in 2003, NOAA's Northwest Fisheries Science Center was funded to provide research on the southern resident orcas. While this is valuable information, we recommend that NOAA continue to support additional research on vessel impacts which include long term studies, and studies specific to orcas, kayaks and other vessel impacts.

2) Location of the no-go zone

Some people question the location proposed for the no-go zone. The summer high-use area for the southern resident orcas extends beyond Eagle Point to the south and east and also to the north of the northern terminus of the proposed no-go zone.

3) Exceptions

The proposed rule identifies vessels that would be exempt from some or all parts of the regulations. The exemptions include cargo vessels, scientific and government research vessels, tribal fishing vessels, and vessels owned by landowners adjacent to a no-go zone (with strict guidelines regarding how property owners can transit the no-go zone). The MRC recommends that NOAA apply the rule as equitably as possible to all U.S., Canadian, international and tribal vessels recognizing that tribal governments are the appropriate authority for adopting rules that apply to tribal vessels. We note that NOAA's "limited exceptions" for property owners adjacent to the no-go zone are ambiguous and recommend that they define who is a property owner, and clarify how their access would be affected by the proposed rule. Considerable concern is being expressed in the community about whether the rule would apply to Canadian vessels and how it would be enforced. We recommend that NOAA work with the Canadian government to ensure that U.S. and Canadian vessels are treated equally under the rule.

4) Entry and exit point congestion

The no-go zone may create congestion at the boundaries and could present hazard by placing boaters in the north bound shipping lanes. These areas are also recognized as important habitat for foraging, resting and travel. The increased congestion of boats that will likely cluster outside the no-go zone could impact other marine wildlife in these areas.

5) Public access

Only two public boat launches are available on San Juan Island. Closing the launch at the County Park would limit access to the water and reduce launch fees which support the operation of County parks.

6) Human powered vessels

People are concerned that human powered vessels are included in the vessels restricted in the no-go zone. Kayaks make little noise and according to Soundwatch monitoring data for 2007 and 2006, were observed to be responsible for only 4% of the violations of the whale watching guidelines (figure 5). Some people feel that the research on kayak impacts is not sufficient to show harm to the whales.

7) Closing areas as a management tool

Some people are worried that the trend of closing areas to boating and fishing is increasingly being used by government as a management tool to achieve conservation goals and endangered species recovery. Sustainable use and enjoyment of marine resources is valued by many in the local community and is a primary tenet of the San Juan Marine Stewardship Plan. As an alternative to a complete closure, citizens are willing to help craft, implement and abide by a recovery program for whales that uses a variety of management tools.

IDEAS/ALTERNATIVES FOR THE NO-GO ZONE

Regulations that are accepted by the public have a much greater likelihood of achieving success. Ownership and acceptance from the San Juan community for a no-go zone is particularly important since the citizens here may bear more of the economic impacts, as well as restricted access, fewer opportunities for recreation and other sacrifices needed to protect the whales. If the San Juan community is allowed to help develop this plan, it is more likely that people will accept it and help make it work.

Integrated vessel plan

The San Juan community is ready to work with NOAA Fisheries to develop and assume ownership and responsibility for an integrated plan which includes education, enforcement, and funding to support regulations. Stakeholders in the community would like to explore alternatives to element 3 of the proposed rule, such as a permit system and limited entry for a whale sanctuary that would protect the whales while not precluding public access. The state is exploring how other regions in the nation are using these innovative management tools and their work could inform and be coordinated with local efforts. We recommend asking NOAA for a time extension of one year and their assistance to develop this plan.

The MRC would be willing to lead this effort and commit 2 or 3 of our members to participating on such a group. Other stakeholders should participate as well. We strongly recommend that the tribes with usual and accustomed fishing rights in the San Juans be invited to participate in this discussion.

Permit system

Establishing a permit system for commercial whale watch outfitters would establish a set of standards for the industry and provide criteria for consumers seeking their services. Trained and permitted operators would be allowed to operate a business as long as they followed regulations. Violators would risk losing their license.

San Juan County Parks does not currently issue launch fees at their boat launches for private boaters and private kayakers. They have recently partnered with Soundwatch to provide education for kayakers through the KELP program and are open to the idea of exploring a training and permit program for private boaters and private kayakers and an expanded permit program for commercial kayakers that use county parks.

Limited entry

Many parks and wilderness areas have established a system of limited entry to protect natural areas from heavy use and this concept has also been successfully used as a conservation tool for hunting and fishing. A limited entry program for a whale sanctuary is an approach which we recommend including in a comment letter to NOAA and should be explored in more detail as part of an integrated recovery program.

CONCLUSION

The MRC supports increased regulatory and voluntary measures to improve protection and recovery of the southern resident orca whales. We support two of the three elements of the proposed rule, specifically for the 200 yard approach limit and the prohibition for intercepting the path of whales and encourage that they take effect according to NOAA's schedule. Our interaction with community members on these two elements suggests to us that most of the community would agree as long as the regulations are coupled with effective enforcement. Further, we recommend that NOAA reconsider a speed limit for vessels in the vicinity of all orcas in the inland waters of the state. However, given the significant concerns and community division over the third element, we do not support the no-go zone as it is written in the proposed rule.

The issuance of the proposed rule has motivated people in the community to organize and they are ready to commit to develop an integrated vessel plan for the San Juan Islands that protects the whales, is fair and workable, and achieves community support. We recommend that the County Council ask NOAA to allow the San Juan community a year to develop this plan if the stakeholders who are interested in participating in this effort can lay out a process and provide sufficient resources to see it to completion. The MRC offers its assistance to help this effort.

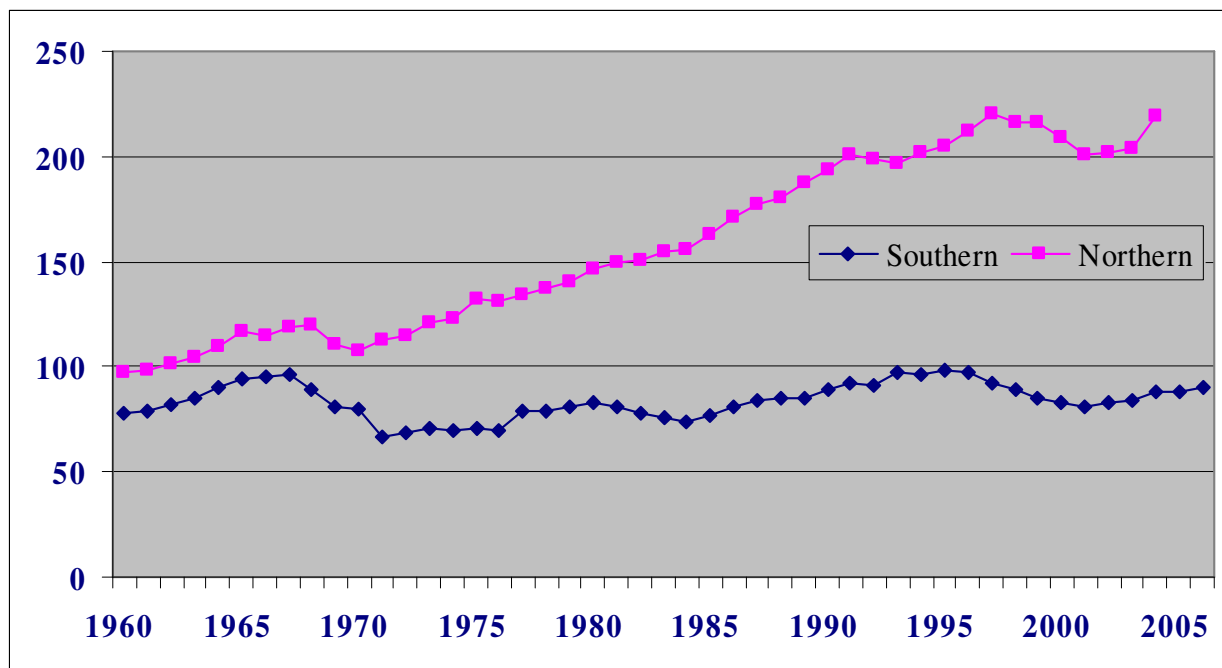


Figure 1: Population trends in southern and northern resident orcas.

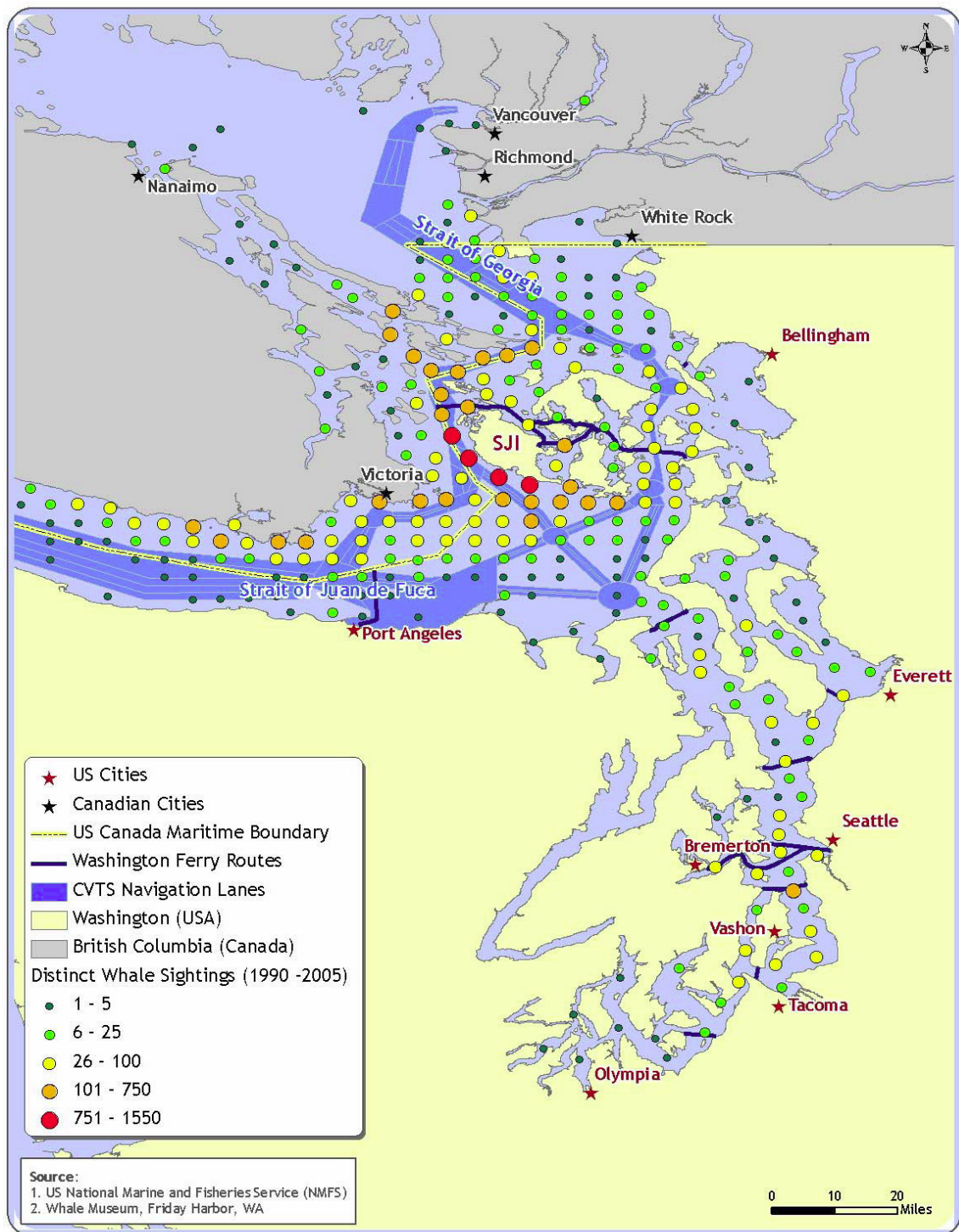


Figure 2: Southern resident orca sitings.

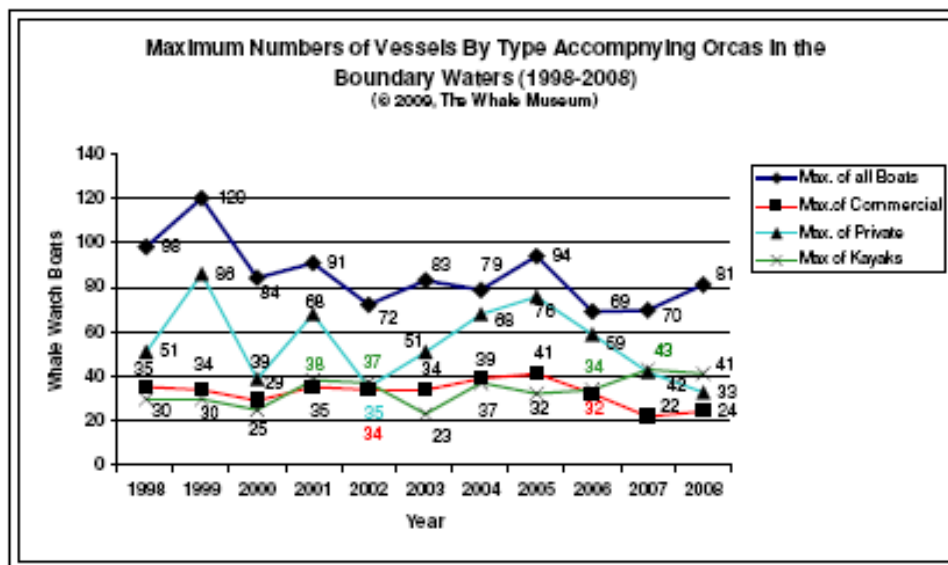


Figure 3: Annual Maximum number of vessels with whales.

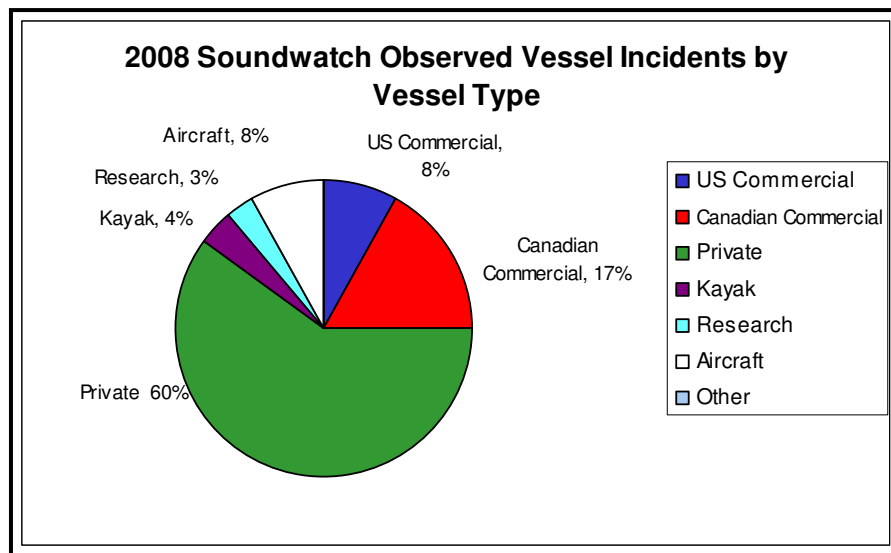


Figure 5: Percentage of incidents (out of compliance with voluntary guidelines) by vessel types.

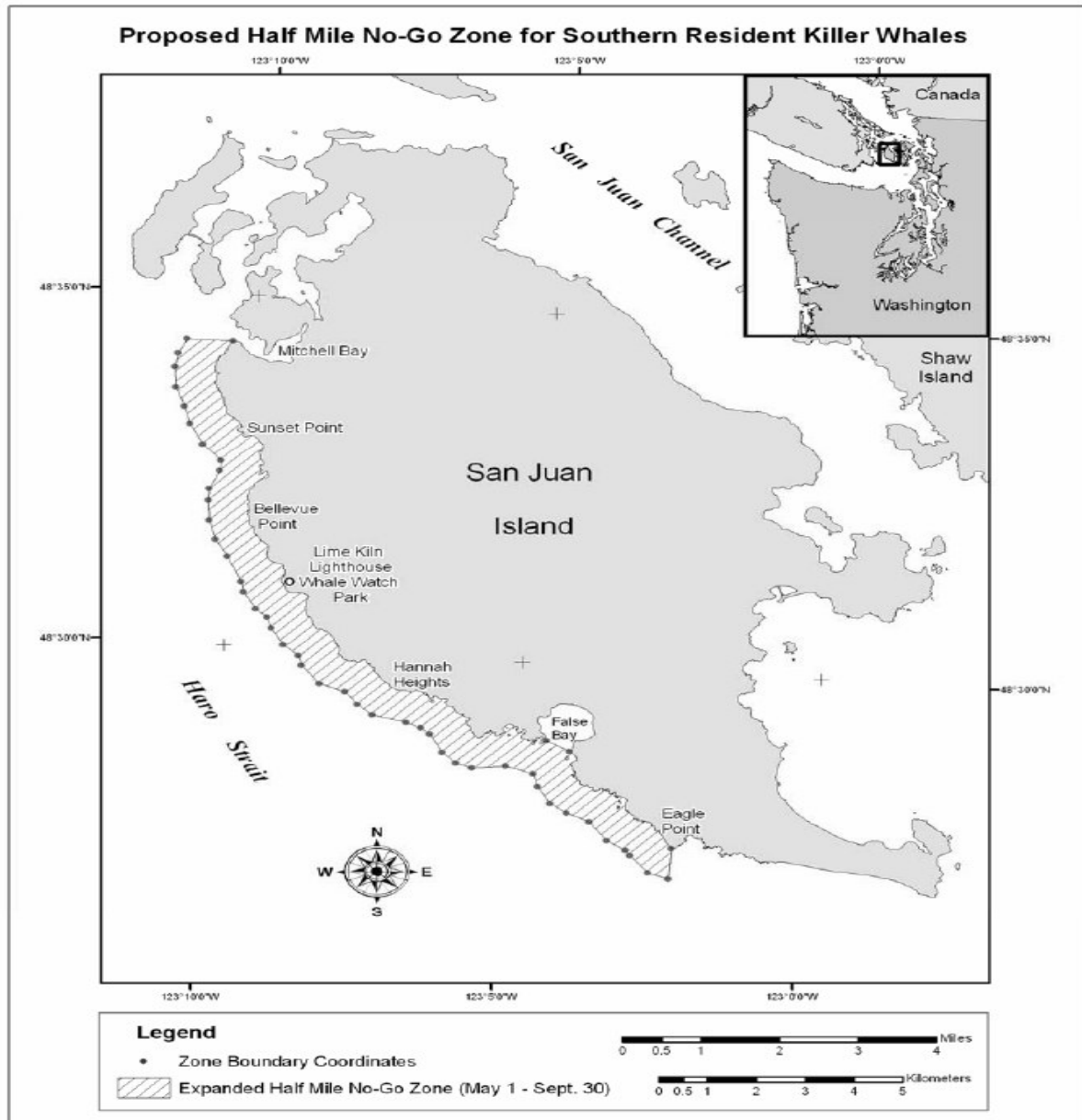


Figure 4:

Public comment received at September 2, 2009 MRC meeting

1. A limited entry program would be preferable to a no-go zone on the west side. There is precedent for this in the Magnuson Act (for commercial and charter fishing vessels). The annual permit fee should all be directed towards salmon enhancement, which would help fishing and the whales.
2. The information on the county web site (probably the MRC news release) is incorrect. In the proposed rule the no-go zone is closed to non-Indian commercial fishermen, not open to them as stated on the site.
3. The current situation does not include enforcement of vessel approach rules.
4. Purse seiners are operating now on the west side, and they make noise.
5. The MRC should accept as fact that the current situation does not adequately protect the whales. The MRC should also accept as fact that there is a need to reduce vessel disturbance. The MRC should give economic considerations a lower priority than protection of the marine ecosystem. The precautionary principle should apply where information is uncertain. All of this leads to support for the proposed rule.
6. The MRC should review the physics of noise propagation in water. What distance is sufficient to reduce noise so that the whales won't be adversely affected.
7. The K.E.L.P. program currently educates private kayakers and commercial kayak guides regarding appropriate behavior around whales. Feedback from kayakers suggests that they question the level of their impact on the SRKW and they would support some kind of a (presumably non-limited-entry) permit system.
8. The population trajectory suggests that the SRKW population is stable, so it may not be endangered.
9. It is difficult for a boat operator to know how far they are from whales on the water, and the whales pop up everywhere, making it very difficult to stay the required distance away.
10. It is true that purse seine skiffs make a lot of noise. Quieter engines are available and are being installed on some boats now. Noise from the purse seine skiffs hasn't bothered the whales for many years.
11. The proposed rule allows property owners to transit the no-go zone only if they head directly from their property offshore to the ½ mile boundary. This makes it impossible

for someone to kayak from their property. Non-motorized vessels should be allowed in the zone.

12. The commercial kayak operators discussed the proposed rule with NOAA in Seattle and there was no mention of kayaks being excluded from the no-go zone. The commercial kayakers would like more time in the offseason to respond to NOAA. Now is still their busy season.
13. Commercial kayakers have discussed more training of guides, a video for customers, and an outreach program in the offseason.
14. The rule as proposed has winners and losers. The MRC needs to take a community neutral standpoint and demand a proposal that doesn't have winners and losers.
15. U. S. rules will not be enforceable on Canadian whale watchers and possibly other Canadian boats. Any enforcement or attempted enforcement on Canadian boats will likely have repercussion on U.S. boats working and traveling in Canada.
16. Most of the problems for the whales are caused on the mainland, not in the islands.
17. The noise effects of aircraft and military vessels should be examined for fairness.
18. No-go zones have been in effect for Stellar's sea lions for many years with little beneficial effect.
19. Create a salmon enhancement program in San Juan County.