

Seattle Sea Kayak Club
c/o Randy Brook, Speaker for the Fleet
13742 41st Ave NE
Seattle, WA 98125

The Seattle Sea Kayak Club (SSKC) is a nonprofit organization of recreational sea kayakers. Among other activities, SSKC has run club trips in the San Juan Islands for more than 20 years. Many of our members have first hand experience paddling the west coast of San Juan Island.

SSKC strongly supports NMFS' efforts to protect the Southern Resident killer whales. We believe in conservation and very much want to see the critically endangered killer whales protected. Admittedly, we also have a self interest in the outcome of this proceeding, like many other commenters. The effects of the new regulations will be greatest on kayakers, who have fewer alternatives than motorized vessels. Nonetheless, we ask for only a very limited change in the proposed regulations.

We have reviewed the entire Environmental Assessment (EA) and all of research papers cited in support of applying the proposed regulations to kayaks. Our view is that NMFS has presented strong, well-based scientific evidence in support of the proposed added protections as applied to motorized vessels, including the No Go Zone. However, we do not believe that NMFS has presented any scientific evidence to support what is effectively a virtual ban on sea kayak travel anywhere on the west coast of San Juan Island.

We believe NMFS should err on the side of protecting the species in case of any doubt. We have listened to or read many of the public comments filed in this proceeding, up through the last round of public hearings. Much of the negative commentary about kayaks is directed toward irresponsible kayakers or kayaking practices. We ourselves have witnessed and been distressed by this behavior and these practices. We therefore believe NMFS has sufficient anecdotal evidence to support the need for some significant limitations on kayaks and similar, nonmotorized vessels.

SSKC agrees in general with Soundwatch's latest proposal regarding the vessel regulation, in particular with respect to kayaks and other hand propelled vessels. We do not have sufficient information, however, to comment on whether Soundwatch's more limited No Go Zone boundaries are appropriate or sufficient. We do not agree with other commenters who argue for only a "go slow" zone for motorized vessels in place of the No Go Zone. There are already nearly as many commercial whale watch boats as there are killer whales, and hundreds more private motor boats. Even if all of them are traveling at under seven knots, this is a daunting flotilla for whales.

In our comments below, we present our views of the available evidence. We give our full support to all of the proposed regulations with one single exception. That is, we believe that kayaks should be allowed to travel within 100 feet of the shore of San Juan Island. Our proposal includes additional limits on kayak behavior within that 100 foot zone. We also offer practical enforcement and education suggestions not found in the current regulation proposal.

Table of Contents

I. History of the proposed regulation from a kayaker’s standpoint. 2

II. The impact of proposed regs on kayakers is much greater than on other vessels. 3

III. NMFS has failed to take into consideration the difference
between kayaks and motorized vessels. 3

IV. Sound is the primary concern and this is not a kayak issue. 4

V. The scientific studies cited by NMFS do not apply to kayaks and killer whales. 5

VI. SSKC proposal for regulating kayaks. 9

VII. The topography of San Juan Island provides a unique opportunity
for enforcement not considered by NMFS. 10

VIII. SSKC disagrees with the argument that the proposed
regulation will limit “educational” opportunities. 11

IX. Conclusion. 12

I. History of the proposed regulation from a kayaker’s standpoint

When NMFS first proposed additional vessel regulations, the stated main reason was because of the noise created by close-by motorized vessels. There was no mention of significant problems caused by kayaks. The kayaking community therefore did not take as active a role in the development of the current proposal as it might otherwise have.

I think it fair to say that, based on the past history of this proposal, the sea kayak community was completely surprised by the broad inclusion of sea kayaks in the current proposed regulation.

Even as stated in the current EA (p. 1-8):

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.

Obviously, kayaks do not create noise or move fast in proximity to the whales.

II. The impact of proposed regs on kayakers is much greater than on other vessels

According to the EA (p. 4-40):

Adoption of a mandatory no-go zone would not affect the opportunity for any type of recreational vessel activity in Puget Sound, compared to the No-action Alternative, because the limited nature of the prohibition would not discourage boating generally.

This statement is not applicable to sea kayaking. Launch and landing sites suitable for, or permitted to, kayaks are quite limited and have grown fewer in recent years, due to site closures, and private development. We cannot simply pick a centralized launch site and motor off quickly to some distant location.

Safe sea kayaking requires travel mostly near the shore and stopping every couple of hours. The launch site at San Juan County Park is ideal, with or without the orcas. It provides access to some of the best coastline for paddling, with good beaches for stopping along the way. It is also an important travel route for more experienced paddlers going through the San Juans. However, even most of these paddlers require places to rest and the safety of the near shore environment.

Human powered craft excluded from approaching the shore would have more than a 12 nautical mile trip before they were able to step ashore. Depending on weather and water conditions this is a significantly dangerous distance, particularly when it has to be a half mile from shore and close to a major shipping lane. An average distance for a middling skilled paddler is closer to 8 nautical miles per day, and this includes taking stops.

The simple fact is that sea kayakers cannot safely paddle the long distance between the southern and northern landing sites outside the No Go Zone at the required distance from shore. This would be too far and too dangerous for all but the strongest and most experienced kayakers. It would put even those kayakers at risk due to the large vessel traffic close by. Indeed, enforcement of the No Go Zone for motorized vessels would put kayakers outside the zone in the middle of even greater vessel traffic. Thus, unlike for motorized vessels, the proposed No Go Zone is the functional equivalent of a total ban on sea kayaking the west coast of San Juan Island.

III. NMFS has failed to take into consideration the difference between kayaks and motorized vessels

As stated in the EA (p. 1-8):

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.

NMFS uses this description to justify applying the regulations to whale watch boats, while giving exceptions for

vessels such as government vessels, commercial and treaty fishing boats, cargo ships, tankers, tug boats, and ferries [who] do not target whales in their normal course of business. . . . In addition, these vessels generally move slowly and in usually predictable straight paths, which reduces the risk of strikes to whales.

These same justifications for exceptions apply to sea kayaks, but NMFS apparently did not give this any consideration.

Kayaks cannot track whale movements or change position quickly in response to radio communications, as whale watch boats do. Nor can we spend extended time with the whales by following them at any distance. For recreational kayakers, seeing the orcas is a wonderful, but only occasional and always brief, magical moment in a day's paddle.

The limits on kayaks closely encountering killer whales may be seen in the Soundwatch *Whale Watching Incidents 2006 Annual Survey* (EA p. 3-16). Out of 1,281 reported incidents, only 49 (3.9%) were attributed to kayaks. There were no reported incidents of kayaks crossing the path of whales, in contrast with 59 incidents by private and commercial boats. The 2009 figures just released by Soundwatch show similar results, with kayaks accounting for only 3.7% of incidents, more than half of which were due to kayaks spreading out or paddling offshore 1/4 mile.

We believe that virtually all kayak incidents could be eliminated with reasonable, additional regulation that would not effectively ban kayaks from the west coast of SJI.

IV. Sound is the primary concern and this is not a kayak issue

NMFS' says its "primary concern at this time is the sound from small, fast moving vessels moving in close proximity to the whales." (EA p. 1-8) As noted above, SSKC believes that NMFS' science fully supports this concern. It just does not apply to kayaks, particularly where the whales themselves are already moving faster than any kayaker can paddle. SSKC would like to offer the testimony of an expert in this field in support of its position:

My name is Burton "Atqaan" Rexford. I was born in 1930 at Pt. Barrow "Nuvuk", Alaska and now reside in Barrow, Alaska. I am a whaling captain and the Chairman of the Alaska Eskimo Whaling Commission (AEWC), which is made up of ten subsistence villages: Gambell, Little Diomedede, Barrow, Nuiqsut and Kaktovik.

This testimony is from my actual experience as a subsistence hunter and a whaling captain. As a whaling captain, I am responsible for feeding my community and for the safety of my crew. For my people, the greatest honor is to be a whaling captain, but it is also the greatest responsibility. You must consider many things to become a whaling captain because once you do, the community will depend on you and you cannot let your family and your community down.

As a Commissioner to the AEWC and the Chairman of the AEWC, I am responsible for making sure that ten villages are fed and that 150 to 160 crews are able to hunt as safely as possible. This is a very great honor and responsibility. All of our villages look to the AEWC to protect the bowhead and our subsistence hunt. My honor and dignity as a Whaling Captain are of the utmost importance to my peers and colleagues in the Barrow Whaling Captains Association and the Alaska Eskimo Whaling Commission. Without honor and dignity, a whaling captain loses face with the whaling community and loses respect and prestige one attains through many years of involvement as a member of the whaling community.

Like many other Eskimo whaling captains, it is with great care and much thought that I submit my factual findings from actual experiences. Throughout my 53 years of whaling in villages ranging from Pt. Hope, Barrow and Pt. Barrow "Nuvuk", I have personally, like many other whalers, observed the impact of noise interference on bowhead whales. In the spring, when we hunt in the ice leads, we must use the umiaq, made of bearded seal skin.

The umiaq is light to carry when you travel to the ice edge and it is silent in the water. You cannot use an aluminum boat in the ice leads because the sound of the water on the side of the boat will scare the bowhead whale. You must paddle silently in the water because the sound of the paddle in the water will scare the bowhead. You must wear white parkas on the ice because if you don't the whales will see you when they surface. These are only some of the things that a whaler must know. There are many other things, but the most important is to respect the whale and its home.

<http://www.mms.gov/alaska/native/rexford/REXFORD.HTM>

V. The scientific studies cited by NMFS do not apply to kayaks and killer whales

In preparation for filing these comments, we obtained from NMFS copies of all the studies cited by the EA in reference to kayaks. We do not believe these studies support NMFS' conclusions about the need to effectively prohibit all kayaking on the west coast of San Juan Island.

The research appears to fall in three categories. (We offer below a detailed discussion of each cited study). Only three of the eight even focused on orcas. None of the eight studies apply to or support the proposed regulation *as applied to kayaks* without stretching the data and conclusions far beyond what the authors themselves say.

First are the orca studies. Two were conducted in Johnstone Strait. This environment has a significant difference from SJI. In Johnstone Strait, the killer whales actually touch shore at the Robson Bight rubbing beach. Vessels of any kind, including groups of kayaks, can affect orca behavior simply by placing themselves between the orcas and Robson Bight. Along the west coast of San Juan Island, the whales do not touch shore or, at least as far as any of the cited

research shows, approach the very near shore where responsible kayakers paddle. The third orca study concludes that the approach regulation of 100 yards is insufficient. Although this study does not cite any problems attributed to kayaks, we nonetheless support the recommendation of a greater approach limit.

The second group of research articles describes the reaction of small marine mammals, *i.e.*, seals and sea lions, to large and small vessels. These studies would support regulations regarding kayaks approaching small marine mammals. However, there is no basis for saying that they can be extrapolated to killer whales.

Orcas are the premier predators of the oceans. They are many times the size of kayaks, and there is no evidence that they are afraid of kayaks. Indeed, some kayakers, including the author of this comment, have had the magical experience of being approached in open waters by an orca that, without changing direction, simply swam under the kayak and surfaced on the other side.

In contrast, seals and sea lions are prey to larger animals and fear them. Any kayaker who has ever come close to a resting seal or sea lion has seen the immediate reaction. To a smaller marine mammal, it is the kayaker who has the rough shape of an orca and may well appear like an approaching predator. (See the Mathews study described below.) The marine mammals will often leave their resting sites *en masse* and jump into the water. Even larger mammals, like Stellar sea lion males, may initiate aggressive behavior to discourage us from approaching.

The third category of research applies to dolphins. While they may be biologically similar to killer whales, their behavior appears to be very different in reacting to vessels and even to swimmers. Furthermore, there are no recommendations that could be applicable to the killer whales in the San Juans.

1. *Geostatistical analyses of interactions between killer whales (Orcinus orca) and recreational whale-watching boats* D.E. Jelinski, C.C. Krueger, D.A. Duffus

This study focuses on killer whale behavior in Johnstone Strait when tracked by motorized vessels. For example: “All vessel types, except kayaks and small pleasure sail vessels, demonstrated a preferred, deliberate direction of travel in Johnstone Strait, suggesting behaviour characteristic of tracking whales.”

The authors conclude that “slow cruising boats should approach no closer than 50 m to avoid hearing loss and changes in behaviour, and that a cruising speed of about 10 km/h is recommended within a few hundred metres of killer whales. Where possible, motors should be turned off rather than left to idle.

There is nothing in this study that applies directly to kayaks or suggests changed regulations for kayaks. Indeed, kayakers obeying existing or the proposed new approach regulations would satisfy these authors conclusions.

2. *Boats displace killer whales from a marine protected area* Andrew W. Trites, Wesley M. Hochachka, Sarah K. Carter

The tables in this study show another reason why it is difficult to use Johnstone Strait research in analyzing west coast of SJI behavior. Tables in the study show that commercial fishing vessels account for more than 40 times the boat traffic in the Strait as do kayak groups. Accordingly, the study does not, and could not, draw conclusions about the effect of kayaks on the killer whales, other than the logical conclusion regarding interference with rubbing on the beach at Robson Bight:

Vessels, primarily commercial fishing vessels, were observed entering the Reserve over 12,000 times during the 4-year study. They did not appear to have marked effects on the numbers of whales in the Reserve. However, vessels did appear to affect the movements of the whales in this near-shore habitat. Whales were more likely to move to another area of the Reserve or to leave the Reserve entirely when vessels were present than when they were absent, and were more sensitive to vessels near the rubbing beaches than anywhere else in the Reserve.

3. *Close approaches by vessels elicit surface active behaviors by southern resident killer whales* D. P. Noren, A. H. Johnson, D. Rehder, A. Larson

This study was conducted “to determine if southern resident killer whales perform surface active behaviors (SABs) in response to close approaches by vessels.” Most of the discussion describes motorized vessels:

[B]ecause the commercial and private boats found in the study area were so numerous and diverse, it was not possible to assess whether specific vessel or motor types were more likely to elicit behavioral responses from killer whales. For example, there were 74 and 76 active commercial whale-watch vessels from 39 and 41 companies in 2005 (Koski 2006) and 2006 (Koski 2007), respectively.

...
Unfortunately, due to the high level of traffic and diversity of vessel types in the area, it was not possible to include additional vessel characteristics (e.g. size, motor type, trajectory) in the analysis.

There is no conclusion about any affects of kayaks in causing SABs. The final conclusion of the study is:

These results suggest that close approaches by vessels elicit behavioral responses in southern resident killer whales and that the minimum approach distance of 100 m in whale-watching guidelines may be insufficient in preventing behavioral responses from whales.

The proposed regulation follows this suggestion by proposing a 200 yard distance rather than the current 100 yard distance. As noted in our introductory statement, SSKC supports this proposal.

4. *Reactions of Steller Sea Lions (Eumetopias jubatus) to Vessels at a Haulout in Glacier Bay* Elizabeth A. Mathews

This study directly supports the argument that sea lions react differently than killer whales. The author suggests: “The higher than expected tendency for kayakers to cause disturbance may be due to their ‘stealth-like’ approaches.” Nothing in the EA suggests that killer whales on the west coast of San Juan Island have ever been bothered by, or even experienced, stealth-like approaches by kayakers.

Ms Mathews also states:

The low silhouette of a kayaker may be more similar to that of a killer whale, one of the few predators of sea lions, and this may trigger a stronger response than a large boat that has approached slowly under power.

5. *Hector’s dolphins, boats and people at Akaroa Harbour [New Zealand]* Nichols et al.

This study has no claimed applicability to whales of any kind, and its conclusion is simply to behave appropriately when in the presence of dolphins:

Kayaks were the boat type most often associated with dolphins. Kayaks are also the least intrusive boat-based way to observe dolphins. However, there is the potential for problems when kayakers are not considerate of dolphins, or cluster around them. Once tour participants set off in their separate kayaks, tour guides are not able to monitor all of them all of the time. This highlights how important it is for kayak tour participants to be instructed on appropriate behaviour when they encounter dolphins.

6. *Behaviour patterns of bottlenose dolphins (Tursiops truncatus) relative to tidal state, time-of-day, and boat traffic in Cardigan Bay, West Wales* Paul R. Gregory and Ashley A. Rowden

This study shows the point made above, that kayaks may affect dolphin behavior because of their quiet approach and consequent ability to disturb this relatively small marine mammal.

A positive response towards tourist boats was observed, with dolphins usually swimming towards these vessels to bow-ride, which has been observed in studies involving bottlenose dolphins (Lockyer, 1978; Wlirsig & Wlirsig, 1979) and other small cetacean species, such as Hector's dolphins (Stone et al., 1995). Dolphins generally showed a negative response towards kayaks, with 57% of observations showing dolphins moving away from this type of vessel. The negative reactions towards kayaks were from the same group of 4-8 individuals, and were repeatedly observed actively moving away to avoid these types of vessel, often traveling up to distances of 200 m away. This reaction could be due to a 'startle response' elicited in the dolphin(s) by this type of vessel, due to their relatively silent approach compared with a motor vessel. Kayaks are able to come within a few

metres of the dolphins when they are foraging before dolphins react.

The authors make no statement regarding kayaks and whales, and even for dolphins simply conclude that “the effect of kayaks requires further investigation.

7. *Male and female bottlenose dolphins Tursiops spp. have different strategies to avoid interactions with tour boats in Doubtful Sound, New Zealand* David Lusseau

This is another study of dolphin behavior with no apparent reference to whales in relation to kayaks or conclusions that might apply here:

It is important to note that the type of vessel interacting with the dolphins did not matter as much as the manner in which this boat moved around the dolphins. A kayak and an 18 m catamaran could trigger a similar avoidance response from dolphins if they were not respecting the Marine Mammal Protection Regulations.

8. *Animal Bioacoustics, Noise, and ECUA: Anthropogenic Noise Effects on Animals I* Duran & Valiente

This is another study of dolphin behavior with no apparent reference to whales in relation to kayaks or conclusions that might apply here:

When only one human activity was present, motorboats and broad-noise increased herd-coordination and number of aerial behaviors; motorboats and both engine-noises reduced number of acoustic behaviors; kayaks and narrow-noise increased herd-coordination, DI and some acoustic behaviors; swimmers reduced herd-coordination and including *Mesoplodon densirostris*.

VI. SSKC proposal for regulating kayaks

SSKC supports enactment of the proposed regulation in its entirety, with the following exception:

There shall be an exception to the No Go Zone for kayaks paddling within 100 feet of shore or within any bay where they are not outside the land points defining the outer reaches of the bay. If whales are approaching, the kayakers should cease paddling or paddle towards shore and cease paddling.

Although we do not make a specific proposal here, we also think it would be reasonable and appropriate for NMFS to include a limit on group size within the 100-foot, near shore zone.

In our experience, and that of various commenters, the main problem caused by sea kayakers is the unknowing or irresponsible behavior of a small number of private kayakers and outfitters. Soundwatch statistics on the few kayak incidents bear out this view. The private kayakers may charge out into the path of the whales. The bad outfitters have excessively large groups that are noisy and spread out to cover a large area, particularly when whales are sighted. They may not even respect the existing 100 yard approach rule. The proposed regulations will prohibit this behavior without the need for completely eliminating kayaks from the west coast of San Juan

Island.

SSKC supports the Responsible Kayaker Code (K.E.L.P.) promulgated by the Friday Harbor Whale Museum and Soundwatch. Responsible kayak outfitters should already be following these guidelines. They include:

I will not intentionally position myself in the path of whales, paddle into groups of whales or chase whales. I will move out of the whales' route and position myself and my group 100 yards/meters from whales, preferably towards the shore or in kelp beds and stop paddling. I will group together with other kayaks to appear as one vessel. Whales can navigate around a cluster of boats more easily than if kayaks are spread out. Outfitters have experiences closer whale encounters when grouped up and not paddling. [emphasis added]

SSKC believes the K.E.L.P. guidelines recommending paddling close to shore and stopping paddling are consistent with its proposal here to allow paddling along the west coast of San Juan Island within 100 feet of shore. Having talked with some of the responsible kayak outfitters, we believe they are already in compliance with the guidelines and could continue to operate successfully under the proposed regulations, so long as the exception proposed by SSKC is accepted by NMFS.

VII. The topography of San Juan Island provides a unique opportunity for enforcement not considered by NMFS

NMFS has rejected an alternative that included any permitting or certification (EA p. 2-8):

A certification program is also not feasible because there is currently no infrastructure to administer, monitor, or enforce a certificate or permit program for whale watching activities. In addition, the MMPA and ESA do not provide exemptions on take for viewing activities. Therefore, permits could not be issued to whale watch operators if viewing activities result in take.

We think there is an enforcement alternative applicable to private and commercial kayakers that is both feasible and legal. This is because of the unusual nature of the west coast of San Juan Island. The same reason that the proposed No Go Zone is effectively a ban on all kayaking also makes the regulations susceptible to a different method of enforcement.

For all practical purposes, there is a single launch site for all whale watching by kayak. That is the San Juan County Park. An educational and permitting kiosk at this location would reach virtually every kayaker visiting the area. All permitting could be handled by San Juan County Parks. This would eliminate NMFS legal constraints regarding exemptions on take, and its lack of infrastructure to administer the program. This would not change NMFS' presumed duty to enforce regulations.

San Juan County has a significant vested interest in running a permitting program if it allows kayaking from the park to continue. San Juan County Park alone provides the county park system with its single largest source of user-based income, much of which comes from kayakers paying

camping or parking fees. The proposed No Go Zone would wipe out much of that income, as well as all income received annually from commercial kayak outfitters using the launch site.

The park could add to the parking fee a launch fee that requires kayakers read a list of regulations and sign an agreement to follow them. SSKC thinks that no one would object to a launch fee to cover the cost of this operation. Indeed, if the fee was explained as supporting orca conservation efforts, and compliance with the regulations as supporting keeping the west coast open to kayaking, we believe that kayakers would react very positively.

The EA does not give consistent estimates of the number of kayak launches each season. There are estimates of 5,000 recreational kayakers ((EA p. 4-41), 5,000 customers of commercial outfitters (EA p. 4-31), and “26,000 camper nights. Both campers and local residents likely use the boat launch.” (EA p. 3-34) If one conservatively assumes 10,000 kayak launches per season, even a modest fee of \$5/person would provide San Juan County Parks with an income of \$50,000. This could easily fund the cost of an educational permitting system, including a summer park ranger to provide in person educational opportunities to kayakers.

SSKC firmly believes that educating all kayakers regarding the regulations and why they are necessary will eliminate most violations and thus reduce NMFS’ enforcement costs.

NMFS could also expect San Juan County to assist in enforcing compliance by commercial outfitters. They rely on the same launch site as private kayakers. Their comments on the proposed regulations demonstrate how essential this is to their business. San Juan County Parks could condition access to the launch site on the outfitter’s record of compliance with NMFS’ regulations, in addition to payment of launch fees.

This is a small community. Locals know all the outfitters. Any violations would be quickly noticed and reported. An outfitter would be less likely to violate the regulation if it could result in effectively losing its business. An outfitter denied access to the launch site for violations could not simply dissolve the business and reopen under a different name.

VIII. SSKC disagrees with the argument that the proposed regulation will limit “educational” opportunities

In written and oral comments, a number of commercial whale watch boat operators, particularly from Canada, have argued against the new regulations on supposed “educational” grounds. The often repeated view is that the closer you let people get to the whales, the more they will understand and love them. That supposedly will lead these people to join in conservation efforts.

The problem with this tired old argument about getting as close as possible is that there is no real basis for it. To the contrary, we think this promotes a disrespect for conservation and the regulations designed to protect the whales. It suggests that the whales are there for entertainment and that close approaches are not problematic.

Many of us, the author of this comment included, have been on responsible commercial whale watch boats. The operator or naturalists on these boats take time to explain why they do not approach the whales more closely. Even those customers who had expected closer encounters are

usually satisfied with this explanation. We believe these customers leave their experience with a better understanding of the whales and the need for conservation than those on the boats that charged closer to the whales. For this reason, SSKC disagrees with arguments against the 200 yard approach rule and other attempts to weaken the proposed regulation by commercial operators based on “educational” grounds.

IX. Conclusion

Increased protection of the Southern Resident killer whales in Puget Sound is urgently needed. NMFS’ proposal, while only directed towards one aspect of a multifaceted problem, is an important step. The Seattle Sea Kayak Club supports NMFS’ efforts to protect these whales.

Respectfully submitted,

Randy Brook
Speaker for the Fleet

December 31, 2009