

ORDINANCE NO. 35 - 2007

AN ORDINANCE REGULATING THE OPERATION OF VESSELS IN PROXIMITY TO THE SOUTHERN RESIDENT KILLER WHALE, AN ENDGANGERED SPECIES, AND ESTABLISHING PENALTIES FOR THE VIOLATION THEREOF

BACKGROUND

WHEREAS, San Juan County is an archipelago that includes surrounding marine waters. The territory of San Juan County is described in RCW 36.04.280 as follows:

Commencing in the Gulf of Georgia at the place where the boundary line between the United States and the British possessions deflects from the forty-ninth parallel of north latitude; thence following the boundary line through the Strait of Georgia and Haro Strait to the middle of the Strait de Fuca; thence easterly through the Fuca Straits along the center of the main channel between Blunt's Island and San Juan and Lopez Islands to a point easterly of the western entrance of Deception Pass, until opposite the middle of the entrance to the Rosario Straits; thence northerly through the middle of the Rosario Straits and through the Gulf of Georgia to the place of beginning.

WHEREAS, the southern resident killer whale (*Orcinus orca*) is a wild marine mammal that commonly plies and feeds in the marine waters of the county in Haro Strait and the Strait of Juan de Fuca, south and west of San Juan Island, in Canada and elsewhere;

WHEREAS, on November 18, 2005, the southern resident killer whale population was listed as "endangered" under the Endangered Species Act, 16 USCA §§ 1531 – 1543, by the National Marine Fisheries Service;

WHEREAS, the killer whale has been designated as an "endangered species" by the Washington State Fish and Wildlife Commission;

WHEREAS, it is beneficial to San Juan County residents, Native American tribes, and the people of the State of Washington and visitors to protect and preserve the southern resident killer whale;

WHEREAS, much of the local economy is dependent on the protection and preservation of the County's natural marine environment and the wildlife in the County;

WHEREAS, the San Juan County Council acknowledges the tremendous economic benefit that the presence of killer whales in San Juan County marine waters brings to the County through steady tourism, scientific research opportunities, and enhanced living opportunities;

WHEREAS, on November 29, 2006, the National Marine Fisheries Service released a "Proposed Recovery Plan for southern resident Killer Whales" which plan lays out an adaptive management approach and a conservation strategy. The conservation measures in the plan include:

- **Prey Availability:** Support salmon restoration efforts in the region including habitat, harvest and hatchery management considerations and continued use of existing NMFS authorities under the ESA and Magnuson-Stevens Fishery Conservation and Management Act to ensure an adequate prey base.
- **Pollution/Contamination:** Clean up existing contaminated sites, minimize continuing inputs of contaminants harmful to killer whales, and monitor emerging contaminants.
- **Vessel Effects:** Continue with evaluation and improvement of guidelines for vessel activity near southern resident killer whales and evaluate the need for regulations or protected areas.
- **Oil Spills:** Prevent oil spills and improve response preparation to minimize effects on southern residents and their habitat in the event of a spill.
- **Acoustic Effects:** Continue agency coordination and use of existing MMPA mechanisms to minimize potential impacts from anthropogenic sound.
- **Education and Outreach:** Enhance public awareness, educate the public on actions they can participate in to conserve killer whales and improve reporting of southern resident killer whale sightings and strandings.
- **Respond to Sick, Stranded, Injured Killer Whales:** Improve responses to live and dead killer whales to implement rescues, conduct health assessments, and determine causes of death to learn more about threats and guide overall conservation efforts.
- **Transboundary and Interagency Coordination:** Coordinate monitoring, research, enforcement, and complementary recovery planning with international, federal and state partners.
- **Research and Monitoring:** Conduct research to facilitate and enhance conservation efforts. Continue the annual census to monitor trends in the population, identify individual animals, and track demographic parameters.

WHEREAS, vessel traffic in the proximity of killer whales is presently subject to cooperative guidelines called "Be Whale Wise," which guidelines are designed to allow people to enjoy and view the killer whale yet reduce the risk of disturbing the killer whale;

WHEREAS, the "Be Whale Wise" guidelines are endorsed by numerous organizations, including the National Oceanic and Atmospheric Administration, the United States Coast Guard, Washington Department of Fish and Wildlife, San Juan County, San Juan County Marine Resources Committee, Fisheries and Oceans Canada, BC Parks, the Whale Watch Operators

Association Northwest, the Georgia Straits Alliance, the Whale Museum, the Seattle Aquarium, Soundwatch, and Straitwatch.

WHEREAS, federal law prohibits persons from “taking” or “harassing” marine mammals and state law makes it unlawful when a person “maliciously harasses” endangered wildlife;

WHEREAS, the federal standard of “harass” and the state standard of “maliciously harasses” present difficulties for state and federal enforcement when vessels move in close proximity to the southern resident killer whales;

WHEREAS, notwithstanding the adoption and promotion of the “Be Whale Wise Guidelines,” members of Soundwatch and others have seen citizens carelessly and inappropriately operate vessels in close proximity to the southern resident killer whale;

WHEREAS, more clear, understandable and enforceable standards are desired to regulate vessel operation in proximity to the southern resident killer whale;

WHEREAS, San Juan County has been informed that the National Marine Fisheries Service has issued an Advance Notice of Proposed Rulemaking regarding possible conservation measures to protect whales from the effects of vessel traffic (See Federal Register, Vol. 72, No. 55 at 13464, March 22, 2007) and it is likely to take some time to complete the rulemaking process;

WHEREAS, San Juan County has been informed that the Washington State Fish and Wildlife Commission intends to propose or adopt regulations regarding the operation of vessels in proximity of vessels near killer whales;

WHEREAS, the San Juan County Council desires to make portions of the “Be Whale Wise Guidelines” as a regulation for which there is a penalty for the violation thereof until such time as the National Marine Fisheries Service or the State of Washington or the Washington State Fish and Wildlife Commission adopt regulations;

WHEREAS, after due notice, the San Juan County Council held a public hearing on this ordinance on September 11, 2007, and considered public testimony, written statements and reports of the public and the officials from the following government agencies:

- National Marine Fisheries Service;
- National Oceanic and Atmospheric Administration
- United States Coast Guard;
- Washington State Department of Fish and Wildlife;
- San Juan County Marine Resources Committee
- San Juan County Sheriff; and
- San Juan County Prosecuting Attorney.

NOW, THEREFORE, THE SAN JUAN COUNTY COUNCIL HEREBY ORDAINS AS FOLLOWS:

Section 1. Legislative Intent.

A. The public health, safety and welfare are substantially benefited by the protection and conservation of the southern resident killer whale.

B. This ordinance is adopted pursuant to the police power authority granted to San Juan County in Article XI, Section 11, of the Washington Constitution, and the authority granted to states to adopt more restrictive provisions with respect to the taking of endangered species pursuant to 16 USCA 1535(f) (the Endangered Species Act).

C. This ordinance is intended to be local and apply only to the operation of vessels in San Juan County during the time that the southern resident killer whale is present in the marine waters of San Juan County.

D. This ordinance shall not be enforced if the State of Washington or any department thereof, or the United States or any department thereof, establishes laws or regulations regarding the operation of vessels in proximity to the southern resident killer whale;

E. Because the southern resident killer whale may surface in unpredictable locations, all vessel operators must maintain a vigilant lookout for killer whales and to keep their distance away from visible whales. Moreover, because whales may surface closer to a vessel than the specified distance, it is not appropriate to make the violation of a distance requirement between a vessel and a killer whale in subsections 3(A)(1), (2), and (3) a strict liability or status offense and instead only make unlawful the knowing violations.

F. Subsections 3(A)(5), (6), and (7) are appropriate as strict liability offenses.

Section 2. General Guidance and Objectives, and Definitions.

A. General Guidance and Objectives. The master and operator of every vessel in San Juan County has a duty to maintain a lookout for southern resident killer whales while operating in the marine waters of San Juan County and to determine the direction of travel of the whales and to safely operate the vessel to avoid violating this ordinance. Vessel operators should move out of the way of approaching whales to maintain an open way in front of and behind the killer whale and 100 yards to each side of the killer whale. The fundamental concept of these rules is that vessels should not approach within 100 yards of the killer whale and maintain an open way with a minimum of 100 yards on each side of the pod of whales. When the killer whales are close to shore, the master of the vessel should keep the vessel on the seaward side of the whales. All masters of vessels must reduce speed in proximity to whales to avoid interfering with other nearby vessels and to protect whales from unnecessary noise and interference.

B. Definitions.

“Vessel” means every description of water craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water;

“Public vessel” means a vessel that is (a) owned or demise chartered, and operated by the United States Government, the Government of the State of Washington or any department thereof, San Juan County or any elected official or department thereof, or a government of a foreign country; and (b) is not engaged in commercial service.

Section 3. Unlawful activity in proximity to the southern resident killer whale.

A. Except as provided in Section 3(B) of this ordinance, it is unlawful for any person subject to the jurisdiction of the State of Washington to commit, attempt to commit or cause to be committed the following acts within the marine waters of San Juan County with respect to the southern resident killer whale (*Orcinus orcas*):

- 1) Knowingly approach, by any means, within 100 yards in any direction of any killer whale; or
- 2) Knowingly allow a vessel or other object to remain in the apparent path of an oncoming killer whale thereby resulting in a killer whale surfacing within 100 yards in any direction of the vessel or object; or
- 3) Knowingly place a vessel or other object within 100 yards in any direction of the killer whale; or
- 4) Fail to yield to a killer whale; or
- 5) Fail to disengage the transmission of a vessel that is within 100 yards in any direction of any killer whale; or
- 6) Operate a vessel in excess of a slow, safe speed when such vessel is within 400 yards of any killer whale. “Safe speed” has the same meaning as the term is defined in 33 USC 2006 and the international regulations for preventing collisions at sea 1972, *See* 33 USC Section 1602.
- 7) Feed a killer whale.

B. The following exceptions apply to the conduct described in Section 3(A) of this ordinance, but any person who claims the applicability of an exception has the burden of proving the exception applies:

- 1) The vessel is required to use the Vessel Traffic Services (VTS) in the waters of or adjacent to San Juan County; or

2) The person is operating a vessel pursuant to and in a manner consistent with a permit issued by the National Marine Fisheries Service, or similar authorization; or

3) The master or operator reasonably determines that compliance with the distance requirement of this ordinance will threaten the safety of the vessel, the vessel's crew or passengers, or is not feasible due to vessel design limitations, or because the vessel is restricted in its ability to maneuver due to wind, current, tide, or weather.

4) The person operating the vessel is lawfully engaged in actively setting, retrieving or closely tending commercial fishing gear. For purposes of this subsection, "commercial fishing" means taking or harvesting fish or fishery resources to sell, barter or trade. "Commercial fishing" does not include commercial sport fishing boats used for charter operations or sport fishing; or

5) The person was operating a public vessel in the course of official duty for local, state, or the federal government; or

6) The person was operating a vessel in a manner consistent with a treaty with Native Americans or foreign nations.

Section 4. Presumption.

In any infraction involving a violation of this ordinance in the presence of a law enforcement officer in a marked vessel, proof that the particular vessel described in the notice of infraction was in violation of Section 3, together with proof that the person named in the notice of infraction was at the time of the violation the registered owner of the vessel, constitutes in evidence a prima facie presumption that the registered owner of the vehicle was the person in control of the vehicle at the point where and for the time during which, the violation occurred. This presumption may be overcome only if the registered owner states under oath, in a written statement or testimony to the court that the vessel was, at the time, stolen, or in the care, custody, or control of some person other than the registered owner.

Section 5. Penalty.

A violation of Section 3(A) of this ordinance is a civil infraction enforceable as provided in Chapter 7.80 RCW. The maximum penalty is seven hundred fifty dollars (\$750.00).

Section 6. Codification.

Section 1 through 5 of this ordinance shall be codified in Chapter 10.28 until such time as the ordinance expires by its terms.

Section 7. Expiration.

This ordinance shall expire when either the National Marine Fisheries Service or the Washington State Department of Fish and Wildlife establishes laws or regulations regarding the operation of vessels in proximity to the southern resident killer whale.

Section 8. Invalidity.

In the event any part of this ordinance is declared invalid, the remaining portions shall be unaffected.

Section 9. Wide notice of adoption.

As provided in the County Charter, notice of adoption of this ordinance shall occur promptly. In addition, these regulations, the “Be Whale Wise” guidelines, and other responsible wildlife viewing messages should be widely disseminated to private boaters and the general public through the distribution or posting of brochures, billboards, advertisements, and other information sources in coastal communities, marinas, and fishing and boating literature, at boating shows, boat dealers, and bareboat charters, during boating safety training courses, and in conjunction with vessel registration or licensing.

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ADOPTED this ____ day of September 2007.

**COUNTY COUNCIL
SAN JUAN COUNTY, WASHINGTON**

ATTEST: Clerk of the Council

Bob Myhr, Chair
District 6, Lopez/Shaw

By: _____
Laura Tuttle - Clerk
Date:

Howard Rosenfeld, Vice-Chair
District 3, Friday Harbor

REVIEWED BY COUNTY
ADMINISTRATOR

Kevin M. M. Ranker, Member
District 1, San Juan South

Pete Rose Date:

APPROVED AS TO FORM ONLY
RANDALL K. GAYLORD

Rich Peterson, Member
District 2, San Juan North

By: _____
Date

Alan Lichter, Member
District 4, Orcas West

Gene Knapp, Member
District 5, Orcas East