

Written Testimony of
Randall K. Gaylord
San Juan County Prosecuting Attorney
Regarding HB 2514
Protection of the Southern Resident Killer Whale

Last year, the San Juan County Council asked the County Prosecuting Attorney to prepare a local ordinance to protect the killer whale. That ordinance was adopted in September 2007, after first receiving extensive comment from citizens, whale watchers, boat operators, the U.S. Coast Guard, National Marine Fisheries Service, the Washington State Department of Fish and Wildlife and the County Sheriff.

San Juan County's objective in adopting the ordinance was to put teeth into longstanding voluntary guidelines known as the "Be Whale Wise" Guidelines. The Be Whale Wise guidelines establish a 100 yard "no go zone" in every direction around the killer whale. HB 2514 is remarkably similar to the San Juan County Ordinance 35-2007 and shares that same objective.

In preparing the County Ordinance, we relied heavily on regulations that have been used by the National Marine Fisheries Service to protect humpback whales in Hawaii and Alaska.

The San Juan County Ordinance and HB 2514 are limited to the Southern Resident Killer Whale, not all killer whales that may visit Puget Sound. This limitation is required to reduce the risk that the county regulation would be preempted by the Marine Mammal Protection Act. *See*, 16 USC 1879(a). The County (and State's) authority arises from its effort to protect an endangered species, and only the southern resident population has been designated as endangered. We acknowledge that proof that a killer whale is a southern resident presents a challenge to enforcement. But whales have unique dorsal fins, and many people can readily identify individual members of the southern resident population. We believe this challenge is something we can overcome most of the time.

The San Juan County Ordinance and HB 2514 require violations of approaching within 100 yards to be made "knowingly." This knowledge element was included because of two simple facts. First, the water is not marked like a football field and the Coast Guard informed us of the difficulty in enforcing distance requirements on the water.

Second, we wanted to address concerns that a killer whale may toward a vessel and surface within the 100 yard no go zone. We did not want to make the innocent conduct of having a whale moving closer to a vessel create a violation. We recognized that the intent requirement may present a challenge to enforcement, but it should not present a problem in the obvious incidents of a vessel chasing the whales too closely.

There were several exceptions in the San Juan County Ordinance and HB 2514. The County Ordinance clearly requires an offender to bear the burden of proof for each of these exceptions or defenses, and we think HB 2514 should also. To do this, you should include the language that the County Ordinance uses at the beginning of Section 2, part 2 on line 30 of page 2, and assure that the burden of proof rests with the offender.

You will receive testimony from others on how to improve HB 2514. Please remember that this law is intended as an interim measure on a subject that is complicated by federal and state wildlife protection laws, and maritime and boating laws along an international border. We strongly urge you to pass HB 2514 so that the killer whales will have the added benefit of state law enforcement. If we discover unanticipated problems with enforcement, you can expect we will come back to you next year with a clean-up bill.

If you or your staff have any questions regarding the specific language or approach used in the County Ordinance or proposed for HB 2514, please call or e-mail Prosecuting Attorney Randy Gaylord.

Thank you.

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