

Resolution

No. 21-131

URGING THE NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION TO
PROMPTLY ISSUE THE PROPOSED RULE
ENTITLED “ENHANCING PROTECTIONS FOR
HAWAIIAN SPINNER DOLPHINS TO PREVENT
DISTURBANCE”

WHEREAS, on August 24, 2016, National Marine Fisheries Service (“NMFS”) of the National Oceanic and Atmospheric Administration (“NOAA”) published a proposed rule entitled “Enhancing Protections for Hawaiian Spinner Dolphins to Prevent Disturbance” under the Marine Mammal Protection Act (“MMPA”); and

WHEREAS, the proposed rule includes five alternatives focused on proposed actions to enhance protections for Hawaiian Spinner Dolphins and to reduce the impact of human viewing of and interaction with these animals; and

WHEREAS, NMFS’s preferred alternative is Alternative 3(A) (Exhibit “A”), which prohibits swimming with and approaching a Hawaiian Spinner Dolphin within 50 yards for persons, vessels, and objects, including approach by interception; and

WHEREAS, NMFS is also considering implementing “time-area closures” during designated daytime periods in certain bays on the Islands of Hawai‘i and Maui to allow daytime rest for the dolphins, as presented in Alternative 4 (Exhibit “B”); and

WHEREAS, these “time-area closures” would last from 6:00 a.m. to 3:00 p.m., and one of the proposed bays is Maui’s La Perouse Bay (Exhibit “C”); and

WHEREAS, in 2016, NMFS conducted six public hearings on the proposed rule to collect oral testimony, including a hearing in Kihei, Maui, on September 22, 2016, with a public comment period that ended on December 1, 2016; and

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WHEREAS, since the close of the extended comment period, the proposed rule has not been issued; and

WHEREAS, on October 21, 1972, the MMPA was enacted to protect all marine mammals and prohibit, with certain exceptions, the “take” of marine mammals in United States waters and by United States citizens on the high seas; and

WHEREAS, NOAA has stated that some interactions with people in essential daytime habitats may disturb individual dolphins or resting groups, even rising to the level of “take” under the MMPA; and

WHEREAS, in implementing the MMPA, the NMFS is responsible for the protection of dolphins; and

WHEREAS, while final publication of the proposed rule remains pending, Hawaiian Spinner Dolphins continue to endure increasing pressures from wildlife-viewing tours, self-guided tourists, and residents who seek opportunities to interact with and view Hawaiian Spinner Dolphins; and

WHEREAS, scientific evidence reflects concerning changes to the behavioral patterns of Hawaiian Spinner Dolphins—such as an increase in swimming speeds, aerial behavior, and avoidance—occur when they are closely approached by vessels and swimmers; and

WHEREAS, Pacific Whale Foundation research (Stack, 2020) noted the “concern that human activity, such as swimming with and viewing wild dolphins from vessels, is altering their natural behavioral patterns and preventing them from having adequate rest”; and

WHEREAS, on July 30, 2021, NMFS announced the Notice of Availability of the Final Environmental Impact Statement (“FEIS”) and Regulatory Impact Review for “Enhancing Protections for Hawaiian Spinner Dolphins to Prevent Disturbance”; and

WHEREAS, a 30-day public comment period on the FEIS ends on August 30, 2021, with a final decision regarding the proposed action and completion of a Record of Decision to follow by NMFS; and

WHEREAS, according to NMFS, they have no specific timeline for when the Record of Decision will be published, and any delay for issuing the proposed rule will continue to impact the health and safety of the Hawaiian Spinner Dolphins; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

1. That it urges the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration to promptly issue and finalize the publication of Alternative 3(A) in the proposed rule entitled “Enhancing Protections for Hawaiian Spinner Dolphins to Prevent Disturbance”;
2. That it requests the State’s Congressional delegation to also urge NOAA to expedite the issuance of the proposed rule to protect Hawaiian Spinner Dolphins; and
3. That certified copies of the Resolution be transmitted to the Honorable Joseph R. Biden, Jr., President of the United States; the Honorable Kamala Harris, Vice President of the United States; the Honorable Gina M. Raimondo, Secretary of Commerce; Dr. Richard W. Spinrad, Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator; Michael D. Tosatto, NOAA Regional Administrator—Pacific Island Regional Office; Sarah Malloy, NOAA, Deputy Regional Administrator; Martina Sagapolu, NOAA Assistant Director—Pacific Islands Division, Office of Law Enforcement; Ann Garrett, NOAA Assistant Regional Administrator, Protected Species Management Specialist; the Honorable Brian E. Schatz, United States Senator; the Honorable Mazie K. Hirono, United States Senator; the Honorable Kaiiali’i Kahele, United States Representative; the Honorable Ed Case, United States Representative; and the Honorable Michael P. Victorino, Mayor, County of Maui.

Exhibit "A"

NMFS recognizes that circumstances may occur where swimmers inadvertently find themselves within 50 yards of a spinner dolphin; an exception is provided for this prohibition provided the swimmer makes no effort to engage or pursue the animals, and takes immediate steps to move away from the animals. Additionally, an exception exists for persons engaged in an activity that is authorized through a permit or authorization issued by the National Marine Fisheries Service to take spinner dolphins, because some research and enhancement activities may require close approach of Hawaiian spinner dolphins (*e.g.*, health assessment work) (see Table 4).

2.4 Alternative 3 –Swim-With and Approach Regulations

Under Alternative 3 NMFS would prohibit swimming with and approaching Hawaiian spinner dolphins within a specified distance; two distance options Alternative 3(A) and Alternative 3(B) are provided for evaluation below.

2.4.1 Alternative 3(A) – Swim-With and 50 Yard Approach Regulations

Under Alternative 3(A), NMFS would prohibit the following activities:

- Approaching or remaining within 50 yards of a Hawaiian spinner dolphin by any means;
- Swimming within 50 yards of a Hawaiian spinner dolphin;
- Causing a vessel, person, or other object to approach or remain within 50 yards of a Hawaiian spinner dolphin; or
- Intercepting or placing a vessel, person, or other object on the path of a spinner dolphin so that the dolphin approaches within 50 yards of the vessel, person, or object.

The prohibitions apply to all forms of swimming-with and approach in water and air. Forms of approaching spinner dolphins include, but are not limited to, swimming, operating a manned or unmanned motorized, non-motorized, self-propelled, human-powered, or submersible vessel; operating an unmanned aircraft system (UAS) or drone; and swimming at the water surface or underwater (*i.e.*, SCUBA or free diving).

This alternative prohibits a range of human activities that occur in close proximity to spinner dolphins including swimming with, touching or attempting to touch, corralling or herding into small areas, and leap frogging (placing a vessel or person in the path of an oncoming spinner dolphin so that the dolphin surfaces within 50 yards of the vessel or person), all of which have the potential to disturb Hawaiian spinner dolphins in the wild.

Similar to the minimum approach rules for humpback whales in Hawai‘i (50 CFR 224.103(a)) and Alaska (50 CFR 224.103(b)) and for right whales in the North Atlantic (50 CFR 224.103(c)), the approach limit accommodates a reasonable level of spinner dolphin viewing while minimizing potential detrimental impacts from close human interactions. This alternative is consistent with Dolphin SMART program criteria and NMFS guidelines, which advise boaters to stay 50 yards away from marine mammals to prevent disturbance. This rule is applicable within 2 nm (3.7 km) of each of the MHI and in designated waters bounded by the islands of Lāna‘i, Maui, and Kaho‘olawe.

NMFS recognizes that circumstances may occur where vessels or swimmers find themselves within 50 yards of a spinner dolphin and we listed a total of eight (8) exceptions to this rule. In the proposed rule, we listed six (6) exceptions to this rule that are included in the final rule:

- (1) Any person who inadvertently comes within 50 yards of a Hawaiian spinner dolphin or is approached by a spinner dolphin, provided the person makes no effort to engage or pursue the animal and takes immediate steps to move away from the animal;
- (2) Any vessel that is underway and is approached by a Hawaiian spinner dolphin, provided the vessel continues normal navigation and makes no effort to engage or pursue the animal. For purposes of this exception, a vessel is defined as a watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water (1 U.S. Code § 3); a vessel is underway if it is not at anchor, made fast to the shore, or aground;
- (3) Any vessel transiting to or from a port, harbor, or in a restricted channel when a 50 yard distance will not allow the vessel to maintain safe navigation;
- (4) Vessel operations necessary to avoid an imminent and serious threat to a person or vessel;
- (5) Activities authorized through a permit or authorization issued by the National Marine Fisheries Service to take Hawaiian spinner dolphins; and
- (6) Federal, State, or local government vessels, aircraft, personnel, and assets when necessary in the course of performing official duties.

Upon review of the comments received during the public comment period, we decided to add two exceptions for:

- (1) Any vessel that is anchored or aground and is approached by a Hawaiian spinner dolphin, provided the vessel makes no effort to engage or pursue the animal; and
- (2) Commercial fishing vessels that incidentally take spinner dolphins during the course of commercial fishing operations, provided such vessels operate in compliance with a valid marine mammal authorization in accordance with MMPA Section 118(c).

2.4.2 Alternative 3(B) – Swim-With and 100 Yard Approach Regulation

Under Alternative 3(B), NMFS would prohibit swimming with and approaching a Hawaiian spinner dolphin within 100 yards (approximately 92 m) by any means. The prohibitions apply to all forms of swimming-with and approach in water and air. Forms of approaching spinner dolphins include, but are not limited to, swimming, operating a manned or unmanned motorized, non-motorized, self-propelled, human-powered, or submersible vessel; operating an unmanned aircraft system (UAS) or drone; and swimming at the water surface or underwater (i.e., SCUBA or free diving). This also includes approach by interception (*e.g.*, leap-frogging, or placing a vessel or person in the path of an oncoming spinner dolphin so that the dolphin surfaces within 100 yards of the vessel or person).

Similar to Alternative 3(A), this Alternative would prohibit the same range of human activities that occur in close proximity to Hawaiian spinner dolphins discussed above. However, the increased distance is expected to provide spinner dolphins more protections from disturbance. The exceptions described above under Alternative 3(A) also apply to this option, when vessels or swimmers are within 100 yards of the dolphins.

Exhibit "B"

2.5 Alternative 4 – Mandatory Time-Area Closures in Five Selected Essential Daytime Habitats and Swim-With and Approach Regulations

Alternative 4 would prohibit people from using five mandatory time-area closures (*i.e.*, closures that are required by law) during specific resting times and prohibit swimming with and approaching Hawaiian spinner dolphins within a minimum prescribed distance. Under Alternative 4, the proposed action would create the following two components within 2 nm (3.7 km) of each of the MHI and in designated waters bounded by the islands of Lāna‘i, Maui, and Kaho‘olawe:

1. **Mandatory time-area closure component:** Implement mandatory time-area closures in five selected essential daytime habitats. NMFS would close a small subset of Hawaiian spinner dolphin essential daytime habitats every day from 6 AM to 3 PM. The areas chosen for mandatory time-area closures are Kealakekua Bay, Hōnaunau Bay, Kauhakō Bay (Ho‘okena), and Makako Bay on the Island of Hawai‘i; and La Perouse Bay on the Island of Maui.
2. **Swim-with and approach regulations component:** Implement swim-with and minimum distance approach regulations. NMFS would prohibit approaching Hawaiian spinner dolphins within a minimum prescribed distance (between 50 and 100 yards). Similar to Alternatives 3(A) and 3(B) swim-with and minimum approach regulations would prevent a range of human activities that occur in close proximity to spinner dolphins that result in take.

NMFS identified the essential daytime habitats chosen for time-area closures through the procedures described in section 2.7 below. At all locations, activities occurring in the intertidal zone, such as shore-based fishing and subsistence gathering, are not prohibited and will be able to continue during any time of day. The exceptions described for Alternative 3(A) in section 2.4.1 would apply to the approach regulations of this Alternative; in addition, because the following activities are temporary and are not expected to result in long-term impacts to the fitness of spinner dolphins, the following exceptions would apply to the time-area closures:

- Vessels participating in organized community-based outrigger canoe races that transit straight through a time-area closure;
- Vessels that transit the time-area closure for the sole purpose of ingress and egress to privately owned shoreline residential property located immediately adjacent to the time-area closure; and
- Outrigger canoes used for traditional subsistence fishing with harvested resources intended for personal, family, or community consumption or traditional use.

2.6 Alternative 5 – Voluntary Time-Area Closures in Five Selected Essential Daytime Habitats and Swim-With and Approach Regulations

Alternative 5 would create five voluntary time-area closures (*i.e.*, closures that are required by law) and prohibit swimming with and approaching Hawaiian spinner dolphins within a minimum

Exhibit "C"

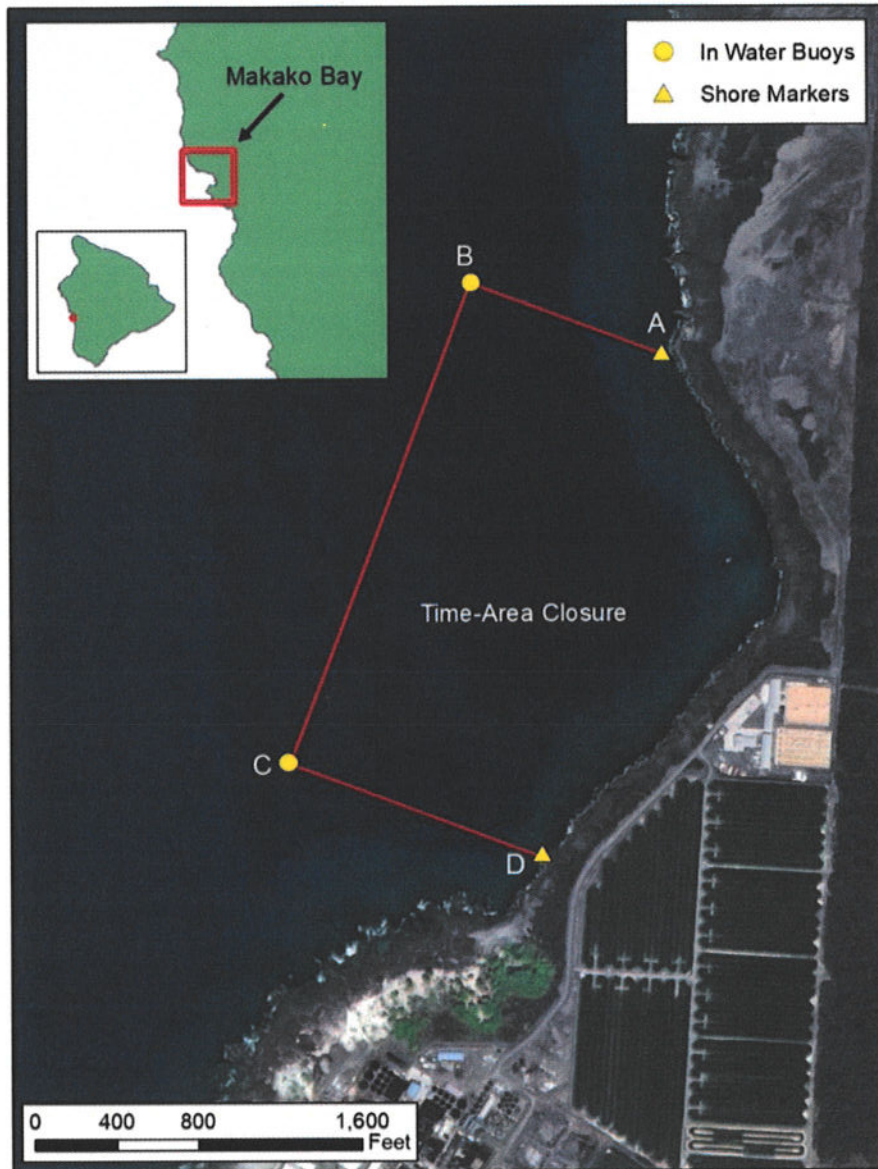


Figure 7: Makako Bay Area Considered for Closure

Approximate Latitude/Longitude Coordinates

- A – 19°44'21"N, 156°3'16"W
- B – 19°44'25"N, 156°3'26"W
- C – 19°44'2"N, 156°3'36"W
- D – 19°43'57"N, 156°3'23"W

2.7.2.5 La Perouse Bay

The red lines between points A and B and C and D in Figure 8 illustrate the marine boundaries for the closure area considered for La Perouse Bay. The approximate segment length of A–B is 1,340 m (0.83 mi), and the segment length of C–D is 1,515 m (0.94 mi). Total area of closure is

0.32 mi². Maui County identifies La Perouse Bay as a public access point for this area. The area inshore of the line between A and B, which includes this access point, would remain open for everyday uses, such as surfing, snorkeling and free diving. NMFS would place in-water marker buoys to delineate the boundary lines at points A, B, C, and D. Two additional in-water marker buoys along the offshore boundary line (line C–D) would delineate the outer closure boundary.

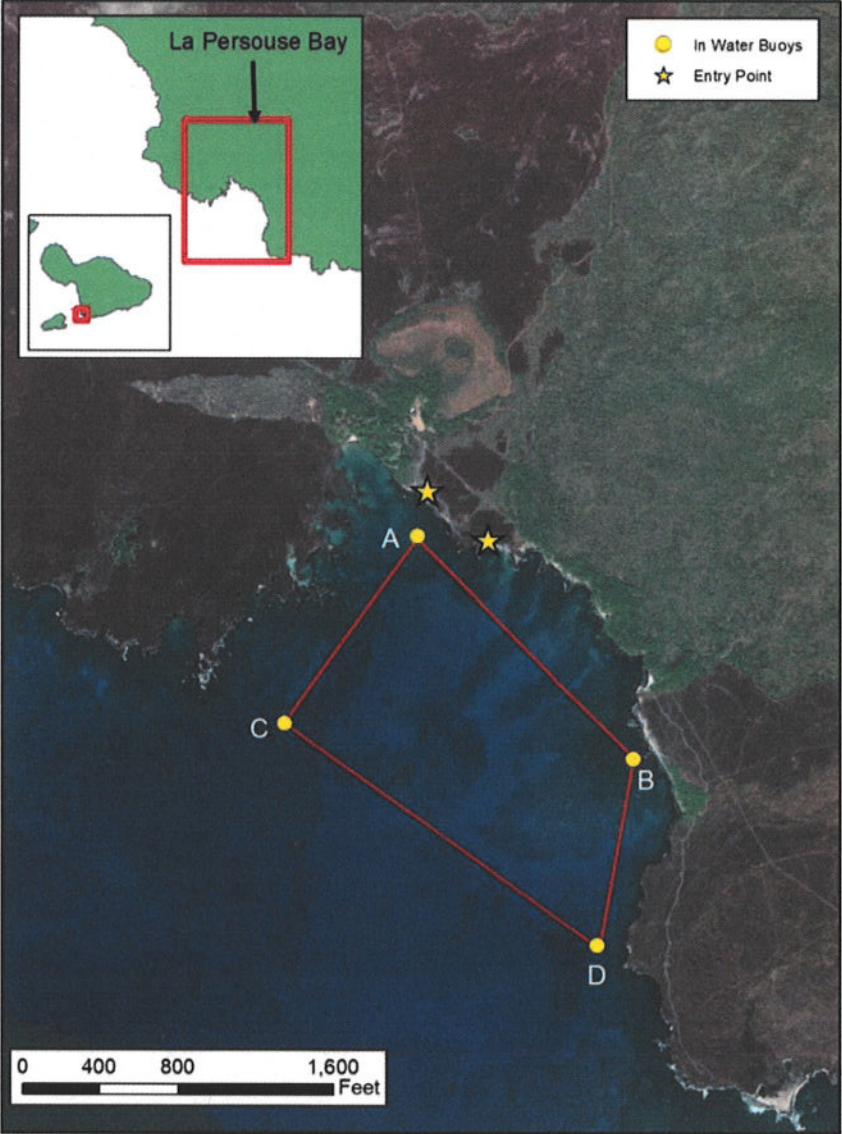


Figure 8: La Perouse Bay Area Considered for Closure

Approximate Latitude/Longitude Coordinates

- A – 20°35’53”N, 156°25’12”W
- B – 20°35’31”N, 156°24’50”W
- C – 20°35’35”N, 156°25’26”W
- D – 20°35’13”N, 156°24’54”W

COUNCIL OF THE COUNTY OF MAUI

WAILUKU, HAWAII 96793

CERTIFICATION OF ADOPTION

It is HEREBY CERTIFIED that RESOLUTION NO. 21-131, was adopted by the Council of the County of Maui, State of Hawaii, on the 24th day of August, 2021, by the following vote:

MEMBERS	Alice L. LEE Chair	Keani N. W. RAWLINS-FERNANDEZ Vice-Chair	Gabriel JOHNSON	Natalie A. KAMA	Kelly T. KING	Michael J. MOLINA	Tamara A. M. PALTIN	Shane M. SINENCI	Yuki Lei K. SUGIMURA
ROLL CALL	Aye	Aye	Aye	Excused	Aye	Aye	Aye	Aye	Aye



COUNTY CLERK