listed in Exhibit A of Office of Management and Budget (OMB) Circular A–21 shall submit a Disclosure Statement before award. A Disclosure Statement is not required, however, if the listed entity can demonstrate that the net amount of Federal contract and financial assistance awards received during its immediately preceding cost accounting period was less than $28.5 million.

(ii) Any business unit that is selected to receive a CAS-covered contract or subcontract of $28.5 million or more shall submit a Disclosure Statement before award.

(iii) Any educational institution which, together with its segments, received net awards of negotiated prime contracts and subcontracts subject to CAS totaling $28.5 million or more in its most recent cost accounting period, of which, at least one award exceeded $1 million, must submit a Disclosure Statement before award of its first CAS-covered contract in the immediately following cost accounting period. However, if the first CAS-covered contract is received within 90 days of the start of the cost accounting period, the institution is not required to file until the end of 90 days.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 051110296–5296–01; I.D. 102405A]

RIN 0648–AU02

Protecting Spinner Dolphins in the Main Hawaiian Islands From Human Activities that Cause ''Take,'' as Defined in the Marine Mammal Protection Act and Its Implementing Regulations, or To Otherwise Adversely Affect the Dolphins

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: NMFS is considering whether to propose regulations to protect wild spinner dolphins (*Stenella longirostris*) in the main Hawaiian Islands from ''take,'' as defined in the Marine Mammal Protection Act (MMPA) and its implementing regulations, or to otherwise adversely affect the dolphins. The scope of this advance notice of proposed rulemaking (ANPR) encompasses the activities of any person or conveyance that may result in the unauthorized taking of spinner dolphins and/or that may diminish the value to the dolphins of habitat routinely used by them for resting and/or that may cause detrimental individual-level and population-level impacts. The proposed regulation would apply only to the main Hawaiian Islands and only to spinner dolphins. NMFS requests comments on whether—and if so, what type of—conservation measures, regulations, and, if necessary, other measures would be appropriate to protect spinner dolphins in the main Hawaiian Islands from the effects of these activities.

DATES: Comments must be received at the appropriate address (see **ADDRESSES**) no later than January 11, 2006.

ADDRESSES: You may submit comments by any of the following methods:

- E-mail: *0648–AU02.NOA@noaa.gov.* Include in the subject line the following document identifier: 0648–AU02–NOA.
- Federal e-rulemaking Portal: *http://www.regulations.gov.*
- Mail: Marine Mammal Branch Chief, Protected Resources Division, Pacific Islands Regional Office, National Marine Fisheries Service, 1601 Kapiolani Boulevard, Suite 1110, Honolulu, HI 96814.

FOR FURTHER INFORMATION CONTACT: Chris Yates or Jennifer Sepez, Pacific Islands Regional Office, 808–944–2105; or Trevor Spradlin, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Background

Viewing wild marine mammals in Hawaii is a popular recreational activity for both tourists and residents alike. In the past, most recreational viewing focused on humpback whales (*Megaptera novaeangliae*) during the winter months when the whales migrate from their feeding grounds off the coast of Alaska to Hawaii's warm and protected waters to breed and calve. However, in recent years, recreational activities have increasingly focused on viewing small cetaceans, with a particular emphasis on spinner dolphins (*Stenella longirostris*), which are routinely found close to shore in shallow coves and bays and other areas throughout the main Hawaiian Islands. NMFS is concerned that some of these activities cause unauthorized taking of dolphins, diminish the value to the dolphins of habitat routinely used by them for resting, and cause detrimental individual-level and population-level impacts.

The biology and behavior of Hawaiian spinner dolphins has been well documented in the scientific literature. Hawaiian spinner dolphins are identified as a race of Pacific spinner dolphins found in and around the Hawaiian Islands, including both the main Islands of Hawaii and the Northwestern Hawaiian Islands (Norris *et al.* 1994, page 17). Hawaiian spinner dolphins routinely utilize shallow coves and bays and other areas close to shore during the day to rest, care for their young and avoid predators before traveling to deeper water at night to hunt for food (Würsig *et al.* 1994, Norris 1994). As the dolphins begin or end their resting period, they engage in aerial spinning and leaping behaviors that are noticeable from shore (Würsig *et al.* 1994). However, when they are in a period of deep rest, their behavior consists of synchronous dives and extended periods swimming in quiet formation along the shallow bottom (see: Norris and Dohl 1980, Norris *et al.* 1985, Wells and Norris 1994, Würsig *et al.* 1994).

Scientific research studies have documented human disturbance of Hawaiian spinner dolphins during their resting periods along the west coast of the Big Island of Hawaii, most notably in and around Kealakekua Bay. Norris and Dohl (1980) noted that ''cruise boats'' would seek out and run through groups of spinner dolphins during an initial study of the dolphins in 1970, and in follow up research, Norris *et al.* (1985) found that spinner dolphins were particularly sensitive to disturbance during the early stage of their entry into the bay. Forest (2001) compared sightings records of spinner dolphins in Kealakekua Bay from 1979–1980 and 1993–1994, and found that the dolphins were utilizing the bay and engaging in aerial behaviors less frequently than before, and suggested increasing human disturbance as a cause. Courbis (2004) reported high levels of vessel and swimmer traffic in Kealakekua Bay and neighboring Honaunau Bay and Kauhako Bay, and found that spinner dolphins exhibited decreased aerial activity during their entry and exit into Kealakekua Bay when compared to previous studies, as well as increased aerial activity during mid-day when dolphins typically rest. Spinner dolphins in Kealakekua Bay also appeared to have shifted their preferred resting area in response to vessel and swimmer presence. In Kauhako Bay, dolphins were documented avoiding swimmers and leaving the bay in

response to being followed, while in Honaunau Bay, dolphins were documented to spend more time at the mouth of the bay or in deep water at the center of the bay when swimmers were present. Östman-Lind *et al.* (2004) found that human disturbance was highest in mid-morning when spinner dolphins begin their rest period, and that secondary resting areas with less vessel traffic were utilized more than had been previously observed, and suggested the dolphins have been displaced from their primary resting areas. In addition, Ross (2001) found that Hawaiian spinner dolphins around Midway Atoll in the Northwest Hawaiian Islands exhibited short-term behavioral changes in response to vessels at distances of 300 meters and 100 meters.

NMFS is concerned that displacement from primary resting areas has the potential for adverse impacts on the dolphins for a number of reasons, including that these secondary resting areas may not provide for the same quality of rest and protection that primary areas do and that the activities that displaced the dolphins from primary areas are likely to follow them. NMFS scientists are concerned about the potential for individual-level and population-level effects because of anthropogenic activities. NMFS has received an increasing number of complaints from constituents alleging that spinner dolphins in the main Hawaiian Islands are routinely being disturbed by people attempting to closely approach and interact with the dolphins by vessel (motor powered or kayak) or in the water (''swim-with-wild-dolphin'' activities). Concerns have been expressed by officials from the Hawaii Department of Land and Natural Resources and the U.S. Marine Mammal Commission, as well as representatives of the Native Hawaiian community, scientific researchers, wildlife conservation organizations, public display organizations, and some commercial tour operators.

Additionally, there are growing public safety concerns associated with human-dolphin interactions. Although there are no known reports of Hawaiian spinner dolphins injuring humans, people have been seriously injured while trying to interact with various species of marine mammals in the wild, including species of dolphins (Webb 1978, Shane *et al.* 1993, NMFS 1994, Wilson 1994, Orams *et al.* 1996, Seideman 1997, Christie 1998, Santos 1997, Samuels and Bejder 1998, Samuels and Bejder 2004, Samuels *et al.* 2000). In addition, researchers have documented Hawaiian spinner dolphins behaving aggressively towards people in the water by charging and making threat displays (Norris *et al.* 1985, Johnson and Norris 1994). There is also a potential risk of shark attack, since sharks prey upon spinner dolphins and often are seen with them along the coast (Johnson and Norris 1994, Norris 1994). In June 2003, an adult male swimmer was attacked by a shark while trying to swim with spinner dolphins off the coast of Oahu. The man suffered injuries to his leg, which required medical attention (Hoover and Espanol 2003).

NMFS encourages members of the public to view and enjoy spinner dolphins in the main Hawaiian Islands in ways that are consistent with the provisions of the MMPA, and supports responsible wildlife viewing as articulated in agency guidelines (see Web citations below). NMFS is concerned that some activities occurring in Hawaii are not in accordance with these guidelines, and cause unauthorized taking of spinner dolphins, diminish the value to the dolphins of habitat routinely used by them for resting, or cause detrimental individual-level and population-level impacts to these dolphins.

Current MMPA Prohibitions and NMFS Guidelines and Regulations

The Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.,* generally prohibits the ''take'' of marine mammals. Section 3(13) of the MMPA defines the term ''take'' as ''to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.'' Except with respect to military readiness activities and certain scientific research activities, the MMPA defines the term ''harassment'' as ''any act of pursuit, torment, or annoyance which—(i) has the potential to injure a marine mammal or marine mammal stock in the wild, [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

In addition, NMFS regulations implementing the MMPA further describe the term ''take'' to include: ''the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild'' (50 CFR 216.3). The MMPA provides limited exceptions to the prohibition on ''take'' for activities such as scientific research, public display, and incidental take in commercial fisheries. Such activities require a permit or authorization, which may be issued only after a thorough agency review.

Although Hawaiian spinner dolphins are not a listed species under the Endangered Species Act (ESA), there are specific regulations for some ESA-listed marine mammals which address interactions with humans in the wild. These regulations prohibit approaches within 3 nautical miles (5.5 km) of particular Steller sea lion rookeries in the Aleutian Islands and Gulf of Alaska (50 CFR 223.202), approaches closer than 100 yards (91.4 m) to humpback whales in Hawaii, approaches closer than 100 yards (91.4 m) to humpback whales in Alaska, and approaches closer than 500 yards (460 m) to right whales in the North Atlantic (50 CFR 224.103). Documentation for these latter two regulations (66 FR 29502, May 31, 2001, and 62 FR 6729, February 13, 1997) cites rulemaking authority under both the ESA and the MMPA.

For both ESA-listed species and for MMPA-protected species, wildlife viewing must be conducted in a manner that does not cause ''take.'' This is consistent with the philosophy of responsible wildlife viewing advocated by many federal agencies to unobtrusively observe the natural behavior of wild animals in their habitats without causing disturbance (see *http://www.watchablewildlife.org/* and *http://www.watchablewildlife.org/publications/marine_wildlife_viewing_guidelines.htm*).

Each of the six NMFS Regions has developed recommended viewing guidelines to educate the general public on how to responsibly view marine mammals in the wild and avoid causing a ''take.'' These guidelines are available on line at: *http://www.nmfs.noaa.gov/prot_res/MMWatch/MMViewing.html.* The guidelines developed by the NMFS Pacific Islands Regional Office for marine mammals in Hawaii are also available at: *http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm.* The Regional Office viewing guidelines for Hawaii recommend that people view wild dolphins from a safe distance of at least 50 yards (45 m) and refrain from trying to chase, closely approach, surround, swim with, or touch the animals. To support the guidelines in Hawaii, NMFS has partnered with the State of Hawaii and the Hawaiian Islands Humpback Whale National Marine Sanctuary over the past several years to promote safe and responsible wildlife viewing practices through the development of outreach materials, training workshops and public service

announcements. NMFS' education and outreach efforts have also been supported by a partnership with the Watchable Wildlife program, a consortium of Federal and State wildlife agencies and wildlife interest groups that encourages passive viewing of wildlife from a distance for the safety and well-being of both animals and people (Duda 1995, Oberbillig 2000).

However, despite the regulations, guidelines and outreach efforts, interactions through swim-with-dolphins programs continue to occur and are increasing in Hawaii. Advertisements on the Internet and in local media in Hawaii promote activities that contradict the NMFS guidelines. NMFS has received letters from the Marine Mammal Commission (MMC), members of the scientific research community, environmental groups, the public display community, and members of the general public expressing the view that swimming with and other types of interactions with wild marine mammals have the potential to harass and/or disturb the animals by causing injury or disruption of normal behavior patterns. NMFS has also received inquiries from members of the public and commercial tour operators requesting clarification on NMFS' policy on these matters.

The MMC sponsored a literature review by Samuels *et al.* (2000) to compile information regarding human interactions with wild dolphins. Upon review of the report, the MMC stated:

> The information and analyses in the report provide compelling evidence that any efforts to interact intentionally with dolphins in the wild are likely to result in at least Level B harassment and, in some cases, could result in the death or injury of both people and marine mammals.

The MMC subsequently recommended that NMFS ''promulgate regulations specifying that any activity intended to enable in-water interactions between humans and dolphins in the wild constitutes a taking and is prohibited'' (Letter from MMC to NMFS dated May 23, 2000).

In 2002, NMFS published an ANPR requesting comments from the public on what types of regulations and other measures would be appropriate to prevent harassment of marine mammals in the wild caused by human activities directed at the animals (67 FR 4379, January 30, 2002). The 2002 ANPR was national in scope and covered all species of marine mammals under NMFS' jurisdiction (whales, dolphins, porpoises, seals and sea lions), and requested comments on ways to address concerns about the public and commercial operators closely approaching, swimming with, touching or otherwise interacting with marine mammals in the wild. Several potential options were proposed for consideration and comment, including: (1) Codifying the current NMFS Regional marine mammal viewing guidelines into regulations; (2) codifying the guidelines into regulations with additional improvements; (3) establishing minimum approach rules similar to the ones under the ESA regulations for humpback whales in Hawaii and Alaska and North Atlantic right whales; and (4) restricting activities of concern similar to the MMPA regulation prohibiting the public from feeding or attempting to feed wild marine mammals. The 2002 ANPR specifically mentioned the concerns about Hawaiian spinner dolphins and increasing human interactions. Over 500 comments were received on the 2002 ANPR regarding human interactions with wild marine mammals in United States waters and along the nation's coastlines. A portion of the comments specifically addressed Hawaii concerns and recommended a wide spectrum of measures from no action to restricting swim with activities through regulations or time-area closures.

Request for Comments

NMFS is requesting comments on whether —and if so, what type of— conservation measures, regulations, and, if necessary, other measures would be appropriate to protect spinner dolphins in the main Hawaiian Islands from human activities that result in the unauthorized taking of spinner dolphins and/or that may diminish the value to the dolphins of habitat routinely used by them for resting and/or that may cause detrimental individual-level and population-level impacts. If a rule were proposed, the agency could further delineate the definition of ''take'' in the Code of Federal Regulations for situations involving Hawaiian spinner dolphins, focusing on the take of individual dolphins. The agency could also design regulations to address possible adverse effects at the population level, where repeated intrusions into resting areas cumulatively have the potential to disrupt the behavioral patterns within the population of dolphins and/or have the potential to injure the stock as a whole through displacement of animals from their preferred habitat. The agency could also act to protect essential habitats, including mating grounds and areas of similar significance to the dolphins.

NMFS offers several possible options for consideration and comment:

Codify the current NMFS Pacific Islands Regional Office's marine mammal viewing guidelines—Codifying the guidelines as regulations would make them requirements rather than recommendations, and would provide for enforcement of these provisions and penalties for violations.

Codify the current NMFS Pacific Islands Regional Office's marine mammal viewing guidelines with improvements—The current guidelines could be revised to more clearly address specific activities of concern, such as those discussed below, and then codified as enforceable regulations.

Establish minimum approach rule—Similar to the minimum approach rules for humpback whales in Hawaii and Alaska, and right whales in the North Atlantic (50 CFR 224.103; 66 FR 29502, May 31, 2001), a limit could be established by regulation to accommodate a reasonable level of dolphin viewing opportunities while minimizing the potential detrimental impacts from humans. If establishing a minimum approach rule is appropriate, then NMFS would have to consider whether the current guideline of 50 yards is appropriate for this regulation. NMFS would consider exceptions for situations in which marine mammals approach vessels or humans as well as other situations in which approach is not reasonably avoidable.

Restrict individual activities of concern—Similar to the prohibition on feeding wild marine mammals (50 CFR 216.3), a regulation further delineating the definition of ''take'' for the case of Hawaiian spinner dolphins could clarify which specific activities are prohibited. Such activities could include actions engaged in by individuals, *e.g.,* swimming with, touching (either directly or with an object), or otherwise acting on or with a Hawaiian spinner dolphin in the wild. It could also include operating a vessel or providing other platforms from which such interactions are conducted or supported.

Restrict vessel activities of concern—Activities of concern engaged in by vessels could also be prohibited through a regulation further delineating the definition of ''take'' for the case of Hawaiian spinner dolphins. These activities of concern could include actions engaged in by vessels, *e.g.,* the use of vessels to herd dolphins, surround dolphins, or otherwise prevent a reasonable means of escape, to ''leapfrog'' dolphins by positioning in their predictable paths, separate calves from attending adults, approach at or above specified speeds, or to ''run through'' a group of dolphins in order to elicit bow-wake riding.

Establish time-area closures in resting bays—Similar to the prohibitions used to protect fish stocks or habitat, a regulation restricting human access to specific areas could be established. These restrictions could be for full-time, or limited to certain times of the day when dolphins have the most potential to be present. They could: restrict all human entry to the area; restrict only specified types of activities; restrict human access to an entire area or a particular zone within an area; or a closure could be any combination of the above parameters.

NMFS also recognizes that the most appropriate regulations may be some combination of the above measures, or that additional possibilities may exist.

The geographic scope of these regulations, if proposed, would be the near shore habitats off the main Hawaiian Islands, including the Big Island of Hawaii, Maui, Kohoolawe, Lanai, Molokai, Oahu, Kauai, and Niihau, and their nearby land or land-like masses (*e.g.,* Molokini, Kaohiakipu, etc.). These are the locations where activities of concern are concentrated. The Northwestern Hawaiian Islands (NWHI) do not currently have a significant level of activities of concern, and NMFS feels the remoteness of these islands makes it unlikely that they will develop at significant levels in the future. In addition, a marine sanctuary is contemplated which would encompass the NWHI. NMFS requests comments on the geographic scope of this ANPR, including whether the agency should be considering a larger or smaller overall geographic scope to protect Hawaiian spinner dolphins.

NMFS invites comment on the above options and other possible measures that will help the agency decide what type of regulations, if any, would be most appropriate to consider for protecting spinner dolphins in the main Hawaiian Islands from human activities that cause unauthorized taking of spinner dolphins, diminish the value to the dolphins of habitat routinely used by them for resting, or cause detrimental individual-level and population-level impacts to these dolphins.

Classification

This advance notice of proposed rulemaking was determined to be significant for purposes of E.O. 12866.

Dated: December 6, 2005.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

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