



Animal Welfare Institute

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Mr. Kevin Brindock
Deputy Assistant Regional Administrator
Protected Resources Division
National Marine Fisheries Service
Pacific Islands Regional Office
1845 Wasp Blvd., Bldg. 176
Honolulu, HI 96818
Sent via regulations.gov

Attn: Establishment of Time-Area Closures for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act, *86 FR 53844*, NOAA–NMFS–2021–0091

Dear Mr. Brindock:

On behalf of the Animal Welfare Institute (AWI) and the undersigned non-governmental organizations (NGOs), with members and constituents who live or vacation in Hawaii, I am submitting comments on the proposed rule, as published in *86 FR 53844*, to establish time-area closures for Hawaiian spinner dolphins, *Stenella longirostris longirostris*, in five bays of the Main Hawaiian Islands under the Marine Mammal Protection Act (MMPA). We attach and incorporate comments submitted by AWI, dated October 18, 2016, during the comment period for the proposed rule on swim-with and approach regulations, as published in *81 FR 57854*, herein by reference.

We strongly support the promulgation of regulations to protect spinner dolphins in the Main Hawaiian Islands, whose essential daytime habitats have been under pressure from increasing human activity, particularly targeted swim-with encounters by commercial tourism operators, for decades. We are especially pleased that the National Marine Fisheries Service (NMFS) has decided to issue this proposed rule to establish time-area closures, after merely “considering” such closures five years ago, when it published *81 FR 57854*. While we fully support both swim-with and approach regulations (which NMFS has finalized in *86 FR 53818*) and time-area closures, we find both the final rule, establishing a 50-yd mandatory minimum approach distance, and this proposed rule, establishing five mandatory time-area closures, to be insufficient to provide the dolphins the protection they need to enter into and experience a proper resting state of adequate duration. In our opinion, this is a case of “better than nothing, but not quite enough.”

As an example with the final rule, AWI’s 2016 comments noted that 50 yds was essentially an arbitrary distance for a minimum approach limit. As the 2016 and current proposed rules note, the data actually support a 150-yd minimum approach distance (see, e.g., p. 53846, *86 FR 53844*, which notes that Symons [2013] found that “spinner dolphins are less likely to rest when swimmers are present within 150 m”). **We strongly urge NMFS to collect data on the efficacy of a 50-yd minimum approach limit with regard to disrupting spinner dolphin rest in the five affected bays.** If these data show, within the next 3–5 years, that the 50-yd limit has little or

no positive effect on the resting behavior of spinner dolphins in these bays, then the agency must consider expanding this limit to 100 or 150 yds, both more robustly supported by currently available data than 50 yds. While we understand the need to evaluate the economic impact of these final and proposed regulations on the local tourism industry, such impacts cannot and must not supersede the biological and ecological impacts of tourism on these dolphins. These populations need *effective* protection, not just the minimum protection compatible with business.

We also strongly urge that NMFS devote sufficient resources to enforcement of the regulations. Given we believe 50 yds will be difficult for the public to “eyeball,” a point AWI noted in its 2016 comments, enforcement of this regulation becomes even more important. If the public learns that enforcement will be reliable and consistent, they may generally stand off farther than 50 yds (to a more data-driven distance with regard to disrupting spinner dolphin rest and more easily assessed by swimmers) to minimize the chance of violating the law. **The agency must also conduct adequate outreach, including with the placement of signs to alert the public about appropriate behavior around the dolphins (especially in the areas not covered by the time-area closure regulations being proposed here).** It is understood that enforcement officers cannot be everywhere all the time; signage and other outreach (e.g., brochures for tourists, public service announcements, tabling at local events) will help NMFS address the information gap with the public.

Regarding the current proposed rule on time-area closures, while we fully support the proposal to create such closures, we are disappointed that only five of 23 essential daytime habitats (see Table 1, p. 50, Final Environmental Impact Statement, 2021) have been selected. The proposed rule states that these five bays and the areas within them chosen for closures are “the smallest area compatible with the purpose of this regulation to reduce take of Hawaiian spinner dolphins” (p. 53851, 86 FR 53844). We know of no legal requirement for the chosen time-area closure areas to be “the smallest compatible” with reducing take. The proposed rule also notes that closures in these bays are “logically feasible” (p. 53852, 86 FR 53844), but this too is not a requirement or standard found anywhere in the MMPA.

Indeed, the “smallest compatible” rationale does not even make sense; if the goal were merely to reduce take (by an unspecified amount), creating *one* time-area closure might suffice. We know of only one overarching goal found in the MMPA for this type of proposed regulatory action, which is to allow target species to remain a “significant functioning element of [their] ecosystem” (16 U.S.C. 1361 § 2(2)). If the failure to establish time-area closures in the other 18 bays that have been identified as essential daytime habitat leads to spinner dolphins ceasing, or significantly reducing, use of those bays to rest, then this proposed rule would fail in achieving this fundamental MMPA goal. **The proposed rule contains no discussion of how choosing these five bays and the areas within them is compatible with this actual statutory goal; the final rule must address this.** In addition, the risk of negative impacts from tourism activity in the 18 other bays is also increased by limiting this rule to only five bays, as tourism operators may displace their disruptive activities from these five bays to some or all of the 18 other essential daytime habitats around the Main Hawaiian Islands.

In addition, we are concerned that making the proposed time-area closures the minimum size, as has been proposed (especially for Kauhako and La Perouse Bays, whose closure areas are

smaller than described in the 2016 proposed rule), does not take into account any “edge effects” that might arise. Such effects might lead to vessel and swimmer approaches along the boundaries of the closure areas becoming concentrated as these parties seek to get as close as possible (keeping in mind the 50-yd limit) to dolphins without actually entering the closure area. This could mean that any dolphins resting in these bays, but not fortunate enough to find themselves well inside the closure area boundaries, might paradoxically be disturbed even more than before the areas were established. **If the closure areas were inclusive of a “buffer zone,” rather than minimum, then any edge effects might be mitigated.**

Again, AWI and the undersigned NGOs appreciate NMFS finalizing a swim-with and approach regulation and proposing a time-area closure regulation for spinner dolphins in the Main Hawaiian Islands. Such action is long overdue. However, we do have concerns that the final rule (86 FR 53818) and this proposed rule (86 FR 53844), while they may indeed reduce take, will prove inadequate to the task of providing protection to these dolphins that is sufficient to allow them to remain significant functional elements of their ecosystem. Spinner dolphins require these essential daytime habitats to rest and recover from taxing nighttime foraging activities. These bays are uniquely suited to allow large groups of dolphins to be protected while they rest. Non-directed human activity is difficult enough for the dolphins to accommodate, when their need is, literally, for peace and quiet, but directed activity, especially viewing trips and swim-with encounters, is simply too much to expect them to bear. **We urge NMFS to strengthen this proposed rule by expanding the number of bays with time-area closures and the size of the closure area within each bay. We also urge strong enforcement of the final regulations and monitoring of the 50-yd approach distance’s efficacy with regard to spinner dolphin rest. If 50 yds proves inadequate for protecting resting dolphins from disturbance, the agency must increase this limit to 100 or 150 yds.**

Thank you for your consideration of our comments.

Sincerely,



Naomi A. Rose, Ph.D.
Marine mammal scientist

On behalf of:

Cetacean Society International
Defenders of Wildlife
International Marine Mammal Project of Earth Island Institute
Natural Resources Defense Council
NY4WHALES

CC: Peter Thomas, Ph.D., Executive Director, Marine Mammal Commission