

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 222**

[Docket No. 61096-6196]

Proposed Regulations Governing Approaching Humpback Whales in Hawaiian Waters**AGENCY:** National Marine Fisheries Service (NMFS), NOAA, Commerce.**ACTION:** Proposed rule.

SUMMARY: NMFS proposes this rule for the protection of the humpback whale, an endangered species, when it is in Hawaiian waters. These regulations would not allow vessels or people to approach whales closer than 100 yards or aircraft closer than 1,000 feet of any whale and would replace the current "Notice of Interpretation of Harassment of Humpback Whales in Hawaiian Waters" (44 FR 1113, January 4, 1979) with enforceable regulations. This action is necessary to reduce the level of disturbance experienced by humpback whales from vessel traffic.

DATES: Written comments are being solicited from the general public, user interests, state and local agencies, and other Federal agencies and will be accepted until December 24, 1986. A public hearing is scheduled for December 15, 1986 at a location to be arranged in Lahaina, Maui.

ADDRESS: Send Comments to E.C. Fullerton, Regional Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, CA 90731, Telephone: (213) 514-6201.

FOR FURTHER INFORMATION CONTACT: Doyle E. Gates, Administrator, Western Pacific Program Office, National Marine Fisheries Service, P.O. Box 3830, Honolulu, HI 96812, Telephone: (808) 955-8831;

H.E. Witham, Senior Resident Agent, Enforcement Division, Southwest Region, National Marine Fisheries Service, P.O. Box 50246, Honolulu, HI 96850, Telephone: (808) 546-5670; or James H. Lecky, Wildlife Biologist, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, CA 90731, Telephone: (213) 514-6664.

SUPPLEMENTARY INFORMATION:**Background**

As a result of commercial whaling during the first half of this century, the number of humpback whales (*Megaptera novaeangliae*) in the North

Pacific is seriously reduced from former levels. It is now the second most depleted of all the North Pacific great whales. Population levels have declined from an estimated 15,000 (Rice 1978) in 1905 to a present estimate of 1,200 (Rice and Wolman 1979). Humpback whales received protection in 1966 when the International Whaling Commission placed a prohibition on commercial whaling of this species. In 1970, the humpback whale was designated an endangered species under the Endangered Species and Conservation Act of 1969 (since superseded by the Endangered Species Act of 1973, as amended). The Marine Mammal Protection Act of 1972, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, also provide some measure of protection from direct take (injury and mortality) and from international trade in whale products.

Estimates of the number of humpback whales that winter in Hawaiian waters range from about 650 to 1,000 animals (Rice and Wolman 1979; Darling and Morowitz 1983). It is believed that whales which winter in Hawaii are part of one eastern North Pacific stock which also breeds in Mexican waters and summers throughout Alaskan waters (Darling and McSweeney 1985).

Each year, humpback whales begin arriving in the Hawaiian Islands area in late October. Their numbers usually peak in late February. The whales return each year to the waters inside the 100-fathom isobath surrounding the main Hawaiian Islands to calve, nurse, and breed. Hawaii provides the only habitat under U.S. jurisdiction used by humpback whales for these purposes. The major areas of concentration are around Penguin Bank, the waters bounded by the islands of Molokai, Lanai, Maui, and Kahoolawe, and the northwest coastal waters of the island of Hawaii from Hilo to Keahole Point. The annual northward migration begins in April, and by mid-May, most of the humpback whales have left the Hawaiian Islands area.

Coastal waters of the Hawaiian Islands comprise preferred calving, nursing, and breeding habitat for approximately half of the North Pacific population of humpback whales. Activities that force the humpback whales to abandon these breeding grounds or interrupt breeding and calf-rearing behaviors may result in a lower birth rate. These activities assume greater importance since currently there is no evidence of recovery, or population growth, of humpback whales in the North Pacific (Johnson and Wolman 1984). While in the Hawaiian Islands

area, humpback whales are the subject of whale watching and scientific research. Marine construction, recreational boating, commercial shipping, private and military aircraft flights, and turbidity resulting from agricultural run off also are affecting the behavior and distribution of humpback whales. Glockner-Ferrari and Ferrari (1985) report a decrease in the number of cows and calves seen annually in the nearshore waters of the Lahaina, Maui, area. Results of recent aerial surveys (Forestell, in prep.) bear out earlier observations (Herman *et al.*, 1980) that increased human activity in localized areas is correlated with a decrease in the number of whales using those areas. Whales appear to be continuing to avoid the Lahaina area and, recently, are avoiding the Keawakapu area off Maui, near the site of a recently built and heavily used public boat ramp (Forestell, in prep.).

During the late 1970's, NMFS became concerned that harassment of whales, associated with increasing interest in whale watching could lead to adverse effects on the humpback whales that breed in Hawaii. Much of the problem appeared to be the result of inexperienced boaters who were not familiar with whale behavior or proper conduct for vessel operators in the vicinity of whales. NMFS decided that a public education program would be an effective way to deal with the problem. In 1979, NMFS published a "Notice of Interpretation" (44 FR 1113, January 4, 1979) to inform the public of activities that could be interpreted as harassment of whales. The "Notice of Interpretation" contained guidelines for approaching whales and proper conduct of vessel operators when following or watching whales.

Since 1979, the number of vessels registered in Maui County increased from 835 to 1223. Many of these vessels operate in the same areas used by females to rear calves. A boat ramp constructed at Keawakapu in 1983 improved access to Malaea Bay, an important calving area. Prior to construction of the ramp, vessels were launched at Lahaina or Makena and infrequently used Malaea Bay. Since the ramp opened, an average of 50 vessels are launched in Malaea Bay daily. During peak periods, more than 100 vessels may be launched in a day (Witham pers. comm.). Hawaii's Visitor Bureau estimates that 52% of the State's annual 5 million visitors use the state's ocean resources. Increasing tourist traffic leads to increased water-based recreational services. Jet ski rentals, small boat rentals, and parasail

operations have increased in the last seven years. An accelerated interest in whale watching has supported an increase in the number of commercial whale watching boats from 18 to 65 over the same period.

Observations of NMFS enforcement agents and complaints from the public indicate that vessels and aircraft frequently approach closer than the distances prescribed in the "Notice of Interpretation." This is likely contributing to the increasing levels of disturbance and may be a factor in the redistribution of whales in the vicinity of Lahaina, Maui. In addition, the studies referenced in this rule indicate more restrictive management measures are needed to control human interactions with humpback whales in Hawaii.

Studies of whale behavior conducted in the vicinity of vessels in Hawaii (Bauer and Herman 1985) and Alaska (Johnston 1985) indicate that whales may respond to vessel traffic at distances from one to several kilometers. Responses are manifested by increased dive times, decreased blow intervals, avoidance responses, and increases in aggressive displays. These responses appear to be short in duration, but a cumulative exposure to increasing levels of vessel traffic may deter whales from their preferred habitat.

Whale watching from private platforms and commercial vessels is a major component of the increasing vessel traffic in Hawaii. This activity can be both beneficial and detrimental to the whales. It provides a tool for educating the public about the status of whale populations and encourages public support for management programs to recover depleted whale populations. Also it provides an opportunity to familiarize the public with other marine environmental issues. Whale watching can also be detrimental because it can result in disturbing whales and contribute to an increased cumulative degradation of the whales' breeding habitat from human activities.

NMFS's intent in proposing these regulations is to minimize the detrimental effects of whale encounters without losing the beneficial aspects. There is little information available to provide guidance on what constitutes an acceptable distance for approaching whales. In 1978 and 1979, Jones and Swartz (1984) investigated the effects of whale watching on gray whales in San Ignacio Lagoon, Baja California, Mexico. San Ignacio is one of several lagoons used by gray whales for calving and nursing. Because gray whales calve in shallow confined lagoons, it was

suspected that whale watching might be more detrimental in the lagoons than in the open ocean. However, Jones and Swartz detected no significant difference in whale distribution on days when vessels were present and says when vessels were absent. They also found no significant difference in calf mortality between San Ignacio Lagoon and adjacent lagoons where no whale watching occurred. A preliminary study of the effect of whale watching on humpback whales in the southern Gulf of Maine was done from 1979 to 1983. The study found no change in the whales' calving intervals, or calf survivorship, and concluded that whale watching in the southern Gulf of Maine, up to 1983, did not affect the survival of the species (Chu *et al.*, 1985).

While the available scientific information on the effects of vessel traffic and whale watching does not provide precise guidance on proximity limit for approaching whales, NMFS is establishing 100 yards as an approach limit in Hawaiian waters based on its experience in enforcing the prohibition of harassment. Activities that are initiated or occur within 100 yards of a whale have a high probability of causing harassment. NMFS's experience with the commercial whale watching industry indicates that whales can be followed at a distance of 100 yards or more without disturbing them.

The calving and breeding areas designated in the "Notice of Interpretation" are not being included in the proposed rule because more recent studies on the distribution of whales (Forestell 1985) indicate that persistent and distinct calving areas probably do not exist. The 100-yard minimum does not eliminate the prohibition of harassment outside that limit. Any actions occurring beyond 100 yards that result in harassment are still prohibited by the Endangered Species Act and the Marine Mammal Protection Act.

NMFS will continue to monitor the effects of all activities occurring in proximity to whales in order to determine if additional measures are necessary to protect humpback whales. NMFS will also continue to consult with Federal agencies (e.g., the Army Corps of Engineers and the Maritime Administration) as required by section 7 of the Endangered Species Act.

CLASSIFICATION: Applicability to other Laws, Regulations and Requirements.

NMFS has prepared an environmental assessment in which it determined that approval and implementation of the proposed rule and the alternatives would not significantly affect the quality

of the human environment, and preparation of an environmental statement would not be required under section 102(2) of the National Environmental Policy Act or its implementing regulations.

The National Marine Fisheries Service has made a preliminary determination under Executive Order 12291 that proposed action will not result in a significant annual effect on the economy of \$100 million or more; (2) major increase in cost or prices for consumers, industries, Federal, State or local government agencies, or geographic regions; and (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete in domestic or export markets.

This rule does not contain a significant information requirements for purposes of the Paperwork Reduction Act.

NMFS has determined that the proposed action will not have a significant impact on a substantial number of small businesses, and will not be a difference in degradation of impact due to varying sizes of businesses affected.

List of Subjects in 50 CFR Part

Endangered and Threatened

Dated: November 18, 1986.

James E. Douglas, Jr.,

Acting Deputy Assistant Administrator,
Fisheries.

For the reasons set forth in the preamble, it is proposed to amend 50 CFR Part 222 by adding a new section to read as follows:

PART 222—[AMENDED]

1. The authority citation for this part continues to read as follows:

Authority: 16 U.S.C. 1531–1543.

2. A new Subpart D consisting of § 222.31 is added, to read as follows:

Subpart D—Special Prohibitions

Sec.

222.31 Approaching humpback whale in Hawaiian waters.

Subpart D—Special Prohibitions

§ 222.31 Approaching humpback whale in Hawaiian waters.

Except as provided in §§ 222.31 and 222.32 (Scientific permits) it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, within 100 nautical miles of the Islands of Hawaii, any of the following acts with

humpback whales (*Megaptera
novaehangliae*):

(a) To operate any aircraft within
1,000 feet of any humpback whale or;

(b) Approaching, by any means,
within 100 yards of any humpback
whale;

(c) Causing a vessel or other object to
approach within 100 yards of any
humpback whale; or

(d) Disrupting the normal behavior or
prior activity of a whale by any other
act or omission. A disruption of normal
behavior may be manifested by, among
other actions on the part of the whale, a
rapid change in direction or speed;
escape tactics such as prolonged diving,
underwater course changes, underwater
exhalation or evasive swimming
patterns; interruptions of breeding or
nursing activities; attempts by a whale
to shield a calf from a vessel or human
observer by tail swishing or by other
protective movements; or the
abandonment of a previously frequented
area.

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