



## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 231214-0303]

RIN 0648-BF98

### Approach Regulations for Humpback Whales in Waters Surrounding the Hawaiian Islands under the Marine Mammal Protection Act

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

**ACTION:** Final rule

**SUMMARY:** NMFS issues this final rule “Approach Regulations for Humpback Whales in Waters Surrounding the Islands of Hawaii under the Marine Mammal Protection Act” under the Marine Mammal Protection Act (MMPA). This rule prohibits the “take” of humpback whales (*Megaptera novaeangliae*), which means “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal,” within 200 nautical miles (nmi) (370.4 kilometers (km)) of the islands of Hawaii from the detrimental effects resulting from approach by humans.

**DATES:** This rule is effective [insert date *30 days following of date of publication in the FEDERAL REGISTER*].

**ADDRESSES:** Public comments and other supporting materials are available at [www.regulations.gov](http://www.regulations.gov) identified by docket number NOAA-NMFS-2016-0046 or by submitting a request to the Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1845 Wasp Blvd. Bldg. 176, Honolulu, HI 96818, Attn: Humpback Whale Approach Regulations.

**FOR FURTHER INFORMATION CONTACT:** Elena Duke, NMFS, Pacific Islands Regional Office, [elena.duke@noaa.gov](mailto:elena.duke@noaa.gov); 808-725-5085.

**SUPPLEMENTARY INFORMATION:**

**Background**

Protections for humpback whales in Hawaii were initially promulgated under the ESA, after NMFS determined that guidelines published in 1979 as a “Notice of Interpretation of ‘Taking by Harassment’ in Regard to Humpback Whales in the Hawaiian Islands Area” (44 FR 1113; January 4, 1979) proved ineffective in protecting humpback whales in Hawaii from tour vessel operators approaching closer than the recommended viewing guidelines. The ESA rule that protected humpback whales in Hawaii was published on November 23, 1987 as an interim final rule (52 FR 44912), and then was finalized on January 19, 1995 (60 FR 3775). That rule made it unlawful to operate an aircraft within 1,000 feet (ft), approach by any means within 100 yards (yds), cause a vessel or another object to approach within 100 yds, or disrupt the normal behavior or prior activity of a humpback whale by any other act or omission. Regulations regarding the implementation of the ESA were then reorganized on March 23, 1999, with the section containing the approach regulations for humpback whales in Hawaii, changed from 50 CFR 222.31 to 50 CFR 224.103 (64 FR 14052).

NMFS published a final ESA listing rule on September 8, 2016 (81 FR 62259) that revised the species-wide listing and separated humpback whales into 14 DPSs. In that rule, the humpback whales that use the waters surrounding Hawaii as their breeding grounds are identified as the “Hawaii DPS,” which is not listed under the ESA as endangered or threatened and, therefore, is no longer protected under the ESA. Humpback whales in Hawaii would have continued to be protected by approach regulations only within the boundaries of the Hawaiian Islands Humpback Whale

National Marine Sanctuary (HIHWNMS) under the National Marine Sanctuaries Act (15 CFR 922.184 (a)(1) and (2) and (b)).

However, NMFS determined that, although unpermitted take is prohibited by the MMPA for humpback whales or any marine mammals in any location, specific regulations were warranted to address approach and human interactions that result in the take of humpback whales in Hawaii. These specific regulations were warranted because: (1) humpback whales are charismatic and sought out by local community members and tourists; (2) commercial and recreational whale watchers and other tour operators are expected to pursue humpback whales for close encounters absent any protections; (3) increasing numbers of both humpback whales and humans using Hawaiian waters raises the likelihood of human-whale interactions; and (4) approaching whales during the breeding, calving, and nursing season is likely to cause a disturbance that could adversely affect reproduction and development of individuals.

Therefore, an interim final rule was published on September 8, 2016, to ensure that there was no lapse in protection for humpback whales in Hawaii once the final ESA listing rule became effective on October 11, 2016. The interim final rule prohibited operating an aircraft within 1,000 ft (304.8 meters (m)) of a humpback whale, approaching within 100 yds (91.4 m) of a humpback whale by any means, causing a vessel, person or another object to approach within 100 yds (91.4 m) of a humpback whale, or approaching a humpback whale by interception (*i.e.*, placing an aircraft, vessel, person, or another object in the path of a humpback whale so that the whale approaches within a restricted distance). The regulations also prohibited the disruption of normal behavior or prior activity of a humpback whale by any act or omission. Certain vessels and activities were exempted from the prohibition.

This final rule serves to clarify the interim final rule by amending regulatory language in paragraphs (a)(5) and (b) of 50 CFR 216.19. The changes to 50 CFR 216.19

include a punctuation correction in paragraph (a)(5), a word change in paragraph (b)(3), and further clarification of exception 1, described in paragraph (b)(1). This final rule also amends the regulatory language in 50 CFR 216.19 (b)(4) to clarify the scope of NMFS-permitted or authorized activities that may fall under that exemption. The exemption under 50 CFR 216.19 (b)(4) in the interim final rule reads “vessels or persons authorized under permit or authorization issued by NMFS to conduct scientific research or response efforts that may result in taking of humpback whales.” However, the exemption as worded in the interim rule leaves out other potentially permitted or authorized activities. The intent of the rule was not to preclude the issuance of permits or authorizations for purposes of scientific research, enhancement, educational or commercial photography, or during emergency response of stranded or entangled marine mammals, or persons authorized to incidentally take humpback whales consistent with the requirements of the MMPA. Therefore, NMFS is amending 50 CFR 216.19(b)(4) to read, “Activities authorized through a permit or authorization issued by the National Marine Fisheries Service to take humpback whales.”

### **Scope and Applicability**

#### *Applications to all Humpback Whales*

Under the MMPA, the regulations apply to all humpback whales found in the action area, as described below.

#### *Geographic Action Area*

The action area for this rule is limited to the waters within 200 nmi (370.4 km) from the shore of the islands of Hawaii. The islands of Hawaii consist of the entire Hawaiian Archipelago, including the main Hawaiian Islands (Hawai‘i, Maui, Kaho‘olawe, Lāna‘i, Moloka‘i, O‘ahu, Kaua‘i, and Ni‘ihau) and the Northwestern Hawaiian Islands.

#### *Applications to all Forms of Approach*

The regulations apply to all forms of approach in water and air. Forms of approaching humpback whales include, but are not limited to, operating a manned or unmanned motorized, non-motorized, self-propelled, human-powered, or submersible vessel; operating a manned aircraft; operating an unmanned aircraft system (UAS) or drone; and swimming at the water surface or underwater (*i.e.*, SCUBA or free diving). UASs are, at minimum, objects, and therefore UASs are not to approach humpback whales within 100 yds (91.4m) without a permit. NMFS may change this determination in the future if scientific information becomes available showing humpback whales react to UASs within or beyond 100 yds.

### **Approach Prohibitions**

The regulations prohibit people from operating aircraft within 1,000 ft (304.8 m) or approaching by any means within 100 yds (91.4 m) of humpback whales within the action area described above (see *Geographic Action Area*). This includes an approach by interception (*i.e.*, placing an aircraft, vessel, person, or another object in the path of a humpback whale so that the whale approaches within the restricted distance), also known as “leapfrogging.” The regulations also prohibit disrupting the normal behavior or prior activity of a humpback whale. Disruption of normal behavior can include, but is not limited to, 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, nursing, or resting 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.

### *Exceptions*

The following specific categories are exempt from the regulations:

(1) Federal, State, or local government vessels, aircraft, personnel, and assets, when necessary, in the course of performing official duties;

(2) Vessel operations necessary to avoid an imminent and serious threat to a person, vessel, or the environment;

(3) Vessels restricted in their ability to maneuver that, because of this restriction, are not able to comply with approach restrictions; or

(4) Activities authorized through a permit or authorization issued by the National Marine Fisheries Service to take humpback whales.

### **Comments and Responses**

NMFS solicited public comments on the interim final rule and received 10 comments. Several comments contained similar recommendations and/or questions and are consolidated. In response to comments, NMFS concurred with comments of support and clarified why NMFS is taking this action specific to humpback whales and not all cetaceans. NMFS provided rationale for not including regulations on speed, approach angle, and engine operating procedures in this rule making. NMFS provided clarification regarding enforcement of this regulation, provided information on the classification of UAS systems, and prohibitions of using UAS within 100 yards of humpback whales. Responses to comments addressing significant issues are summarized below.

*Comment 1:* Four commenters expressed support for the interim final rule, with two of these commenters specifically stating support for making 100 yds (91.4 m) the regulatory approach distance.

*Response:* NMFS concurs.

*Comment 2:* One commenter requested clarification on how NMFS will enforce this approach regulation, how enforcement will contend with efforts by restricted groups to adjust their services/methodologies to conform to the rules of exemption, and how NMFS will manage those situations where an innocent party unwittingly violates the restrictions.

*Response:* Enforcement will be accomplished via all available means, including through land and sea patrols conducted by the NOAA Office of Law Enforcement, the United States Coast Guard, and State partners who work with NMFS on outreach and enforcement under a cooperative joint enforcement agreement (*i.e.*, State of Hawaii's Division of Conservation and Resources Enforcement (DOCARE)), as well as through cases developed through evidence submitted by citizens observing violations.

Regarding exceptions or exemptions to this rule, for exceptions to apply, a person must be a Federal, State, or local government official operating in the course of their official duties; avoiding an imminent and serious threat to a person, vessel, or the environment; authorized under permit or other authorization issued by NMFS; or operating a vessel restricted in its ability to maneuver. Additional details regarding exceptions to these regulations are provided in the final rule below in (b) Exceptions. Any person claiming the benefit of any exemption, exception, or permit has the burden of proving that the exemption or exception is applicable. Enforcement officials will consider and collect, as part of the normal investigative process, all available evidence, including evidence tending to support a party's claim to be exempt from the rule.

Regarding intent, the MMPA is a strict liability statute, meaning the intention of a party violating a regulation issued under the MMPA is not relevant for purposes of liability. Nonetheless, the Agency does consider the individual circumstances of each violation in deciding on an appropriate enforcement response and assessing any penalties. Under the Agency's penalty policy, available to the public at <http://www.gc.noaa.gov/enforce-office3.html>, any penalties assessed for unintentional violations are assessed at a lower level than penalties assessed for intentional violations.

*Comment 3:* NMFS should extend this 100-yd approach regulation to all cetaceans protected by the MMPA.

*Response:* We appreciate your concern for all cetaceans. In general, the MMPA prohibits the take of marine mammals with section 3(13) (16 U.S.C. 1362 (13)) of the MMPA defining the term “take” as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” These approach regulations are specific to humpback whales in Hawaii because of geographic and species-specific factors, including, but not limited to, (1) the fact that humpback whales are sought out for encounters by the local community and tourists; (2) safety concerns for both whales and humans created by a desire of whale watch and other tour operators, as well as individuals, to get as close as possible to the whales; (3) the importance of the habitat around the Hawaiian Islands for breeding, calving, and nurturing young; and (4) the increasing numbers of both humpback whales and humans that use Hawaiian waters. In short, while unpermitted take of marine mammals continues to be prohibited by the MMPA, NMFS believes that specific regulations aimed at approach and human interactions that result in the take of humpback whales in Hawaii are warranted.

*Comment 4:* Several commenters expressed concern regarding how this regulation will affect the collection of up-close photos and video footage if such activities are regulated at distances closer than 100 yds. Specifically, these commenters suggested that UASs or drones could be allowed to collect up-close footage while posing minimal risk to the humpback whales being observed. Two of these commenters noted that the sound of boat engines even at over 100 yds away can produce more vibrations and are far louder than some UASs, which generate noise that is very low and of a frequency that would not penetrate the water to any significant depth.

*Response:* As described in the interim final rule, research suggests that close human interaction poses a significant threat to the health and social structure of humpback whales. These threats can include collisions, noise, visual, and other effects from interactions with vessels, aircraft, persons, or objects. While some UASs create less

noise than vessels, there are situations in which noise and visual effects have the potential to disturb the whales because of the UASs use within 100 yds of humpback whales. Examples of some situations include the use of multiple UASs around a single whale or groups of whales and the use of UASs by inexperienced users. As a result, NMFS has determined that UASs are, at a minimum, “objects” and therefore are not permitted to approach humpback whales within 100 yds in Hawaiian waters (within 200 nmi of the islands of Hawaii).

Specifically, regarding the acquisition of up-close footage of whales, the regulations include exceptions to the 100-yd approach regulations for humpback whales in Hawaii, including an exception for vessels or persons authorized under permit or authorization issued by NMFS to take humpback whales for purposes of scientific research, enhancement educational or commercial photography, or during emergency response of stranded or entangled marine mammals; or persons authorized to incidentally take humpback whales.

*Comment 5:* NMFS should consider a drone or UAS to be an aircraft, rather than an object, therefore prohibiting their use within 1,000 ft of humpback whales.

*Response:* NMFS understands that UASs are considered “aircraft” by Federal agencies, such as the Federal Aviation Administration. UASs, at least in their current form, are relatively small and generate little noise and are therefore unlikely to disturb humpback whales if kept at a distance of 100 yds from the whales. In the context of this rule and, considering available data regarding the effects of UASs on humpback whales and other marine mammals (see the National Environmental Policy Act (NEPA) Environmental Assessment (EA) prepared for the interim final rule), NMFS has determined that UASs are, at a minimum, considered “objects” and therefore are not to approach humpback whales within 100 yds without a permit. NMFS may change this

determination in the future if scientific information becomes available showing whales react to UASs within or beyond 100 yds.

*Comment 6:* The approach regulations for humpback whales should specify vessel operating procedures such as the guidance developed for the HIIHWNMS and whale-watching guidance developed by NMFS for humpback whales in the northeastern United States. The operating procedures should include guidance on vessel speed limits depending on the distance from a humpback whale, the angles at which a vessel can approach and depart from a humpback whale, and engine operating procedures within various distances.

*Response:* The guidelines referenced in this comment contain various measures that are designed to protect humpback whales and other marine mammals. NMFS agrees that all of the guidelines can be useful in protecting humpback whales and other large whale species. However, NMFS did not include in the regulations any provisions regarding speed, approach angle, and engine operating procedures within various distances because the specifics of such provisions vary according to different situations. Therefore, these provisions are more appropriate as guidelines rather than regulations, which must be followed at all times except in limited situations (*i.e.*, the exceptions to the rule). These general guidelines may be used to supplement the minimum approach regulations, but the regulations must be complied with at all times unless an exception applies.

## **Classification**

### *National Environmental Policy Act (NEPA)*

NMFS prepared an EA pursuant to NEPA (42 U.S.C. 4321, *et seq.*) to support the interim final rule published on September 8, 2016. NMFS also provided an opportunity for public comment on the EA; however, no public comments were received. The EA contains an analysis of two no-action alternatives and two action alternatives. Several

elements were common to both of the action alternatives analyzed, including the preferred alternative described in the interim final rule, and several exceptions that would apply to the alternatives. Because the preferred alternative in the interim final rule is the same as in this final rule, an updated NEPA document is unnecessary. The EA with the Finding of No Significant Impact is available for download on the NMFS Pacific Islands Region website <https://www.fisheries.noaa.gov/species/humpback-whale>.

*Executive Order 12866*

This final rule has been determined to be not significant for purposes of Executive Order (E.O.) 12866.

*Paperwork Reduction Act*

The purpose of the Paperwork Reduction Act is to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, and other persons resulting from the collection of information by or for the Federal government. The final rule includes no new collection of information, so further analysis is not required.

*Coastal Zone Management Act*

NMFS determined that the interim final rule would be implemented in a manner consistent, to the maximum extent practicable, with the enforceable policies of the approved coastal zone management program of the State of Hawaii. The State of Hawaii's Coastal Zone Management Program (the responsible State agency under section 307(c)(1) of the Federal Coastal Zone Management Act (CZMA) of 1972) provided a letter, dated May 13, 2016, concurring with NMFS's federal consistency determination. Because the interim final rule is substantively the same as this final rule, no updated CZMA documentation is necessary.

*Executive Order 13132, Federalism*

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific directives for consultation in situations in which a regulation will preempt State law or impose substantial direct compliance costs on State and local governments (unless required by statute). Neither of those circumstances applies to this final rule; therefore, this action does not have federalism implications as that term is defined in E.O. 13132.

*Information Quality Act*

Pursuant to section 515 of Public Law 106-554 (the Information Quality Act), this information product has undergone a pre-dissemination review by NMFS. The signed Pre-dissemination Review and Documentation Form is on file with the NMFS Pacific Islands Regional Office (see **ADDRESSES**).

*Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, whenever an agency publishes a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a Regulatory Flexibility Analysis describing the effects of the rule on small entities, *i.e.*, small businesses, small organizations, and small government jurisdictions. The final regulations are exempt from the requirements of the Regulatory Flexibility Act because NMFS determined that notice and public comment when publishing the interim final rule would have been impracticable and against the public interest.

**List of Subjects in 50 CFR Part 216**

Administrative practice and procedure, Marine mammals.

Dated: December 14, 2023.

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**Samuel D. Rauch, III,**

*Deputy Assistant Administrator for Regulatory Programs,*

*National Marine Fisheries Service.*

For the reasons set out in the preamble, NMFS amends 50 CFR part 216 as follows:

**PART 216- REGULATIONS GOVERNING THE TAKING AND IMPORTING OF  
MARINE MAMMALS**

1. The authority citation for 50 CFR part 216 continues to read as follows:

**Authority:** 16 U.S.C. 1361, *et seq.*, unless otherwise noted.

2. In § 216.19, revise paragraphs (a)(5) and (b) to read as follows:

**§ 216.19 Special restrictions for humpback whales in waters surrounding the islands  
of Hawaii.**

(a) \* \* \*

(5) Disrupt 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, nursing, or resting 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.

(b) *Exceptions.* The prohibitions of paragraph (a) of this section do not apply to:

(1) Federal, State, or local government vessels, personnel, and assets, when necessary, in the course of performing official duties;

(2) Vessel operations necessary to avoid an imminent and serious threat to a person, vessel, or the environment;

(3) Vessels restricted in their ability to maneuver that, because of this restriction, are not able to comply with approach restrictions; or

(4) Activities authorized through a permit or authorization issued by the National Marine Fisheries Service to take humpback whales.

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