DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 210901–0174]

RIN 0648–BK04

Establishment of Time-Area Closures for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act

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

ACTION: Proposed rule; request for comment.

SUMMARY: We, NMFS, propose a regulation under the Marine Mammal Protection Act (MMPA) to establish mandatory time-area closures of Hawaiian spinner dolphins' essential daytime habitats at five selected sites in the Main Hawaiian Islands (MHI). These regulatory measures are intended to reduce take of Hawaiian spinner dolphins from occurring in inshore marine areas at essential daytime habitats, and where high levels of disturbance from human activities are most prevalent. During designated times, unless subject to an exception as described in this rule, these regulatory measures would prohibit any person or vessel, on or below the surface, to enter, cause to enter, solicit to enter, or remain within any of the five time-area closures, for the purpose of preventing take of Hawaiian spinner dolphins in areas identified as important essential daytime habitats for spinner dolphins that have high levels of human disturbance. The proposed mandatory time-area closures would occur from 6 a.m. to 3 p.m. daily in areas of Kealakekua Bay, Hōnaunau Bay, Kauhakō Bay (Hoʻokena), and Makako Bay on Hawai'i Island, and La Perouse Bay on Maui.

DATES: Comments on this proposal must be received by December 27, 2021.

ADDRESSES: You may submit comments, identified by the docket number NOAA–NMFS–2021–0091, by either of the following methods:

Electronic Submission: Submit all electronic comments via the Federal eRulemaking Portal. Go to *www.regulations.gov* and enter NOAA–NMFS–2021–0091 in the search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments. Copies of this rule and the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) can be obtained from the website *https://www.fisheries.noaa.gov/action/enhancing-protections-hawaiian-spinner-dolphins.* Written requests for copies of these documents should be addressed to

Mail: 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.

Instructions: You must submit comments by one of the above methods to ensure that we receive, document, and consider them. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Kevin Brindock, NMFS, Pacific Islands Region, Deputy Assistant Regional Administrator, Protected Resources Division, 808–725–5146; or Trevor Spradlin, NMFS, Office of Protected Resources, Deputy Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, 301–427–8402.

SUPPLEMENTARY INFORMATION:

Background

In recent years, viewing of wild marine mammals in Hawai'i has increased, with a particular emphasis on Hawaiian spinner dolphins (*Stenella longirostris longirostris*), which can be predictably found close to shore in shallow waters throughout the MHI. The number of commercial operators engaged in wild dolphin viewing has grown dramatically in Hawai'i (O'Connor 2009, Impact Assessment 2018), putting new pressures on easily accessible groups of resting Hawaiian spinner dolphins. In 2016, when NMFS proposed a swim-with and approach regulation for Hawaiian spinner dolphins (81 FR 57854), 8,934,277 visitors came to Hawaii representing a substantial (18.2 percent) increase from the number of visitors Hawaii received a decade earlier when 7,561,311 visitors arrived in 2006 (*https://www.hawaiitourismauthority.org/media/1146/2006-annual-visitor-research-report.pdf, https://www.hawaiitourismauthority.org/media/3711/2016-annual-visitor-research-report-revised-5-24-18.pdf*). Since 2016, the number of visitors has increased at an even higher rate with 10,386,673 visitors arriving in 2019, representing a 16.3 percent increase over a 3 year period (*https://www.hawaiitourismauthority.org/media/5062/2019-annual-report-final-for-posting.pdf*). The COVID pandemic and associated travel restrictions significantly reduced tourism in 2020, with a 75.2 percent decrease in the number of visitors in December 2020 compared to December 2019. However, tourism has already rebounded in 2021 to date, with the number of visitors in June 2021 approaching pre-pandemic levels, showing only an approximate 16.5 percent decrease compared to June 2019 (*https://www.hawaiitourismauthority.org/media/7582/june-2021-visitor-statistics-press-release.pdf*).

Along the Wai'anae coast of O'ahu and the Kona coast of Hawai'i Island, 752,762 people are estimated to have participated in boat-based commercial dolphin tours annually in 2013, which is 632,762 more than a preliminary estimate conducted statewide in 2008 (Wiener 2016, O'Conner *et al.* 2009). The number of spiritual retreats (*i.e.,* organized retreats centered on dolphin encounters, dolphin-assisted therapy, and dolphin-associated spiritual practices) on Hawai'i Island has increased from 5 in 2007 to 47 in 2017 (Impact Assessment 2018). Similarly, commercial boat tours that facilitate close, in-water dolphin interactions increased on Hawai'i Island from six to 47 over the same period. In addition, a number of residents and visitors venture on their own, independent of commercial operators, to view and interact with spinner dolphins.

Essential daytime habitats refer to preferred daytime habitats of spinner dolphins that provide space with optimal environmental conditions for resting, socializing, and nurturing young. Officials from the Hawai'i Department of Land and Natural Resources (DLNR) and the U.S. Marine Mammal Commission (MMC), as well as various members of the public (including representatives of the native Hawaiian community, scientific researchers, wildlife conservation organizations, public display organizations, and some commercial tour operators), have expressed

concerns over human-dolphin interactions.

In April 2000, the MMC released a literature review of scientific publications that evaluated the impacts of swimming with wild dolphins worldwide (Samuels *et al.* 2000). The authors of this review noted the prevalence of disturbances by tourist activities in areas critical to the animals' well-being, and recommended that precautions be taken to protect the dolphins (Samuels *et al.* 2000). The concerns about disturbance to spinner dolphins by boaters and swimmers prompted NMFS to raise the topic of enhancing protections for these animals in an ANPR (70 FR 73426, December 12, 2005). Public comments received in 2005 reiterated and reinforced the concerns expressed by the MMC. In the years since the 2000 Samuels *et al.* review, additional scientific evidence has documented disturbances or disruptions to spinner dolphins by boaters or swimmers (Forest 2001; Courbis 2004, 2007; Danil *et al.* 2005; Timmel 2005; Courbis and Timmel 2009; Ostman-Lind 2009; Symons 2013; Heenehan *et al.* 2014; Tyne *et al.* 2015). This problem is pronounced in spinner dolphin essential daytime habitats that are targeted for dolphin-directed activities, and animals that use these areas are exposed to intense activity on a daily basis. For example, a recent study found that human activities took place within 100 meters (m) of spinner dolphins over 82 percent of the time that the animals were using four spinner dolphin resting bays on Hawai'i Island: Kealakekua Bay, Makako Bay, Hōnaunau Bay, and Kauhakō Bay (Tyne *et al.* 2018).

Certain biological and life history characteristics make Hawaiian spinner dolphins uniquely vulnerable to disturbance from human activity. In 2010, we recognized five island-associated stocks and one pelagic stock of Hawaiian spinner dolphins in our annual Stock Assessment Report, identifying genetic distinctions and site fidelity differences as reasons to separately manage stocks found in waters surrounding the Hawaiian Islands (Andrews 2009; Andrews *et al.* 2010; Carretta *et al.* 2011; Hill *et al.* 2010). Three of the 5 island-associated stocks (the Kaua'i/Ni'ihau stock, O'ahu/4-Islands stock, and Hawai'i Island stock) are found near the MHI and are considered resident stocks. These 3 stocks reside in waters surrounding their namesake islands out to approximately 10 nautical miles (nmi) (18.5 kilometers (km)) (Hill *et al.* 2010), and population estimates for each stock are relatively small. The Hawai'i Island stock, which is thought to be the largest stock, has an estimated 617 individuals (Coefficient of Variation (CV)=0.09), the Kaua'i/Ni'ihau estimated to be around 601 (CV=0.20), and O'ahu/4-Islands stocks is estimated to be 355 (CV=0.09) individuals, (Tyne *et al.* 2014, Carretta *et al.* 2019).

These smaller, island-associated spinner dolphin populations may be at a higher risk compared to a larger population that may interbreed widely throughout the region. Dolphin populations that are resident, closed, or isolated (local populations with barriers to gene flow) can become more susceptible to threats than larger, genetically-diverse populations because the impacts to multiple individuals' health and fitness have quicker and more disproportionate effects population-wide (Bejder 2005). Thus, the small island-associated spinner dolphin populations of the MHI may be more vulnerable to negative impacts from threats, including human disturbance.

MHI spinner dolphins have complex social structures and behavioral patterns linked to specific habitats that support their high energetic demands. The rigid, cyclical, and patterned behavior of a Hawaiian spinner dolphin's day is well documented from decades of scientific research on spinner dolphins off the Kona coast on Hawai'i Island (Norris and Dohl 1980, Norris *et al.* 1994). The daily pattern of Hawaiian spinner dolphins involves accomplishing the energetically demanding task of foraging at night when spinner dolphins move offshore in large groups to feed on fish, shrimp, and squid found in the mesopelagic boundary community, part of the pelagic zone that extends from a depth of 200 to 1,000 m (~660 to 3,300 feet) below the ocean surface. During the day, spinner dolphins return in smaller groups to areas closer to shore to socialize, nurture their young, and rest in preparation for nightly foraging (Norris *et al.* 1994, Tyne *et al.,* 2017). These smaller groups visit specific habitats that are located along the coastlines of the MHI. These essential daytime habitats of spinner dolphins are areas that provide space with optimal environmental conditions for resting, socializing, and nurturing young. Spinner dolphins' essential daytime habitats are located close to offshore feeding areas, which minimize the energetic cost of nightly travel to and from these areas and have environmental characteristics that support the dolphins' ability to detect predators (Norris and Dohl 1980, Norris *et al.* 1994, Thorne *et al.* 2012).

Throughout the day, spinner dolphins take advantage of the physical characteristics of essential daytime habitats to engage in specific patterned resting behaviors to recuperate between foraging bouts. The physical characteristics of these essential daytime habitats, combined with specific patterned resting behaviors, play an important role in supporting the dolphins' activity and energetic budgets. Additionally, the physical characteristics of essential daytime habitats increase the dolphins' ability to visually (instead of acoustically) detect predators while resting, and thus minimize the energetic costs of vigilance (Norris *et al.* 1994). Tyne *et al.* (2017) observed socializing behavior in the early mornings and late afternoons in essential resting habitats and found that spinner dolphins were never observed foraging during the daytime, when resting was the predominant activity. As a result, the authors propose that the constrained nature of spinner dolphin behaviors suggests that they are less resilient to human disturbance than other cetaceans.

Thorne *et al.* (2012) used dolphin surveys and predictive habitat modeling to test a suite of these environmental factors that may make spinner dolphins favor these areas. The study found that proximity to deep-water foraging areas, depth, the proportion of bays with shallow depths, and low rugosity (indicating low substrate roughness, *i.e.,* sand) were important predictors of spinner dolphin habitat. The strongest predictors of spinner dolphin resting habitat were distance to the 100 m depth contour (foraging habitat) and depth of the resting areas, with spinner dolphin resting habitat generally occurring in the shallow depths (<50 m) within a bay that was close to the 100 m depth contour and thus, their offshore foraging grounds (Thorne *et al.* 2012). In tests of these characteristics across the MHI, the bays that were predicted by the model to be optimal resting habitats were consistent with spinner dolphin resting habitats that are recognized as preferred from various observations.

Tyne *et al.* (2015) further examined key ecological characteristics and spinner dolphin behavior to see which characteristics support resting behavior. The most important factor contributing to the likelihood of rest was the dolphins' presence within a bay, meaning that they were most likely to rest when they were inside a bay (Tyne *et al.* 2015). Another important factor was the presence of sand substrate. In general, spinner dolphins spent disproportionately more time over sandy substrates in and out of bays;

however, outside of bays, spinner dolphins were observed mostly travelling over sandy substrates. This supports the finding that the bays themselves are the most important factor for resting behaviors, because even sandy substrate outside of the bays did not significantly predict resting behavior. This work highlights the role that essential daytime habitat areas play in supporting important fitness enhancing behaviors, specifically rest.

Essential daytime habitats have been targeted by commercial operators and individuals interested in viewing or interacting with Hawaiian spinner dolphins because encounters with dolphins in these areas are virtually guaranteed. Tyne *et al.* (2018) found that dolphins using essential daytime habitats off the west coast of Hawai'i are experiencing human activities within 100 m over 82 percent of the time. The rate of exposure to human activities off the west coast of Hawai'i Island is 25 percent higher than reported for other dolphins studied for behavioral response to human activities in other areas of the world (Tyne 2015). At some locations, up to 13 tour boats have been observed jockeying for position on a single dolphin group, with up to 60 snorkelers in the water (Heenehan *et al.* 2014). Apart from commercial tour operations, people also swim, kayak, or paddle into essential daytime habitats to seek interactions with the dolphins (Sepez 2006). In addition, spiritual retreats have flourished in certain areas, further increasing the intensity of dolphin-directed activities in nearshore areas and, especially, within essential daytime habitats (Sepez 2006, Impact Assessment 2018). The rate of exposure at Hawaiian spinner dolphin daytime essential habitats may place resident stocks at risk and long-term disturbance could result in habitat displacement or reduced fitness, as seen in other dolphin populations (Bejder *et al.* 2006a, 2006b; Lusseau and Bejder 2007).

Several studies have investigated how high levels of human activity have impacted the quality of essential daytime habitats for spinner dolphins. Heenehan *et al.* (2017) assessed the acoustic response of Hawaiian spinner dolphins to human activities, such as presence of vessels and swimmers/snorkelers in four Hawai'i Island bays (Makako Bay, Kealakekua Bay, Hōnaunau Bay, and Kauhakō Bay). By using passive acoustic monitoring equipment, Heenehan *et al.* found that human activity drastically altered the quiet daytime soundscape of these four bays. Johnston *et al.* (2013) evaluated the likelihood of spinner dolphins resting, given various human activities occurring at different distances. Researchers found that the presence of swimmers within 150 m significantly decreased the likelihood of resting. Interestingly, the likelihood of dolphins resting was higher when vessels were present between 50 and 150 m, creating the appearance of a positive relationship between resting behavior and vessel presence at this distance. These results may demonstrate a difference in dolphins' perceived risk between swimmers and vessels, or a lack of perceived risk associated with vessels. However, this positive relationship between resting behavior and vessels may also be influenced by the high frequency of observations with vessels present between 50–300 m and few observations with no vessels present (Johnston *et al.* 2013), and therefore provide limited opportunities during the day for resting when vessel are not in close proximity.

The best available scientific evidence documents the effects of dolphin-directed activities on spinner dolphin health and behavior, especially activities that occur within these essential daytime habitats. Peer-reviewed scientific literature documents disturbance of individual spinner dolphins, as well as changes to spinner dolphin group behavioral patterns and effects of swimmers on dolphins' daily resting behavioral patterns. Individual dolphin responses to these activities vary, and in some cases, may not be apparent to an observer (*e.g.,* elevated heart rates or increased watchfulness). However, discernable responses may include aerial displays when closely approached by vessels and swimmers (Forest 2001, Courbis and Timmel 2008); avoidance behaviors, including moving around and away from swimmers and vessels, or leaving the area in response to human pursuit (Ostman-Lind *et al.* 2004, Courbis 2004, Courbis and Timmel 2008); and aggressive behaviors directed at people, including charging or threat displays (Norris *et al.* 1985, Norris *et al.* 1994).

Effects have been documented in the form of changes over time to spinner dolphins' behavioral patterns in essential daytime habitats. Courbis and Timmel (2008) reported differences in peak aerial activity throughout the day in comparison with earlier studies (Forrest 2001), and noted that dolphins may have reduced aerial behavior to avoid human notice and approaches. Timmel *et al.* (2008) noted the dolphins' direction of travel altered more frequently as the number of swimmers and/or vessels near to them increased. Symons (2013) found that spinner dolphins are less likely to rest when swimmers are present within 150 m. Numerous studies report changes in dolphin residence time within essential daytime habitats compared to earlier studies (Courbis 2004, Courbis and Timmel 2008, Ostman-Lind 2007, Forest 2001). In addition, human activities within essential daytime habitats may be affecting where spinner dolphins engage in their daytime behaviors within these areas. Courbis and Timmel (2008) reported changes in the location of resting spots within Kealakekua Bay from previous studies by Doty (1968) and Norris and Dohl (1980), and warned that changes in locations within the bay could be a precursor to abandonment of the bay with future increases in traffic.

When marine mammals respond to disturbance events, they incur a cost in the form of the energy expended to respond, as well as the lost opportunity to engage in natural fitness-enhancing behavior. For example, spinner dolphins disturbed during rest may engage in avoidance or distress behaviors, which require energy, and disturbance detracts from the dolphins' abilities to recuperate from energetically demanding behaviors, such as foraging, transiting to and from offshore foraging grounds, and nurturing their young. In this example, the lack of consistent, undisturbed resting periods can reduce the amount of energy available to forage and care for young.

The predictable patterns of MHI resident spinner dolphins' nearshore distribution, particularly in essential daytime habitats, result in concentrated daily viewing and disturbance pressure on individual dolphins and groups over extended periods of time. In other small cetacean populations, chronic disturbance to natural behavioral patterns has been linked to biologically significant impacts, such as habitat abandonment and reduced female reproductive success (Bejder 2005; Bejder *et al.* 2006a, 2006b; Lusseau and Bejder 2007). Over time, chronic disturbance to the MHI's resident spinner dolphins could ultimately lead to habitat displacement and/or long term impacts to their individual fitness. These types of impacts may be amplified in local populations with barriers to gene flow, such as isolated island-associated spinner dolphin stocks, because the impacts to multiple individuals' health and fitness are quickly reflected in the overall fitness of the population (Bejder 2005). Accordingly, the small resident spinner dolphin populations of the MHI may be more vulnerable to negative impacts from human disturbance. Chronic wildlife disturbance within important habitats may ultimately leading to

population level impacts (Frid and Dill 2002, Bejder 2006).

These time-area closures are necessary and appropriate under the MMPA to reduce take of individual animals in their daytime resting areas. Disturbances to dolphins' daily behavioral patterns in essential daytime habitats may result in ''take,'' as defined and prohibited under the MMPA and its implementing regulations. The chronic nature of these problems in Hawai'i and observed changes to spinner dolphin behavioral patterns over time are a cause for concern and require management action to prevent take and provide sufficient protection for Hawaiian spinner dolphins at essential daytime habitats.

Current MMPA Prohibitions and NMFS Guidelines and Regulations

Under section 102 of the MMPA, 16 U.S.C. 1361 *et seq.,* it is unlawful for any person, vessel, or other conveyance to ''take'' any marine mammal in waters under the jurisdiction of the United States (16 U.S.C. 1372). The prohibition against take includes acts that ''harass'' marine mammals (16 U.S.C. 1362(13)). Harassment means any act of pursuit, torment, or annoyance which has the *potential to injure* a marine mammal in the wild (Level A Harassment), or has the *potential to disturb* a marine mammal in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B Harassment) (16 U.S.C. 1362(18)). In addition, NMFS' regulations implementing the MMPA define 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).

Section 112 of the MMPA authorizes NOAA to implement regulations that are ''necessary and appropriate to carry out the purpose'' of the MMPA (16 U.S.C. 1382). NMFS has developed regulations under the MMPA to protect marine mammals from take throughout the country. In Hawai'i, we are implementing a regulation under the MMPA, along with a EIS, to prohibit (with exceptions) swimming with and approaching a Hawaiian spinner dolphin within 50 yards (for persons, vessels, and objects), including approach by interception, within 2 nmi of the MHI and designated waters in between the islands of Lāna'i, Maui, and Kaho'olawe. NMFS is publishing the final rule implementing the swim-with and approach regulation concurrent with this proposed rule.

In addition to regulations, NMFS has developed national and regional guidelines for conducting responsible marine wildlife viewing to help the public avoid causing any take (harassment or disturbance) of protected wildlife species. On a national level, NMFS guidelines note that the Marine Mammal Protection Act and the Endangered Species Act do not provide for permits or other authorizations to view or interact with wild marine mammals and sea turtles, except for specific listed purposes such as scientific research. NMFS maintains as policy that interacting with wild marine life outside of permitted research should not be attempted and viewing marine mammals and sea turtles must be conducted in a manner that does not harass the animals. NMFS does not support, condone, approve, or authorize activities that involve closely approaching, interacting, or attempting to interact with whales, dolphins, porpoises, seals, sea lions, and sea turtles in the wild. This includes attempting to swim with, pet, touch, or elicit a reaction from the animals (*https://www.fisheries.noaa.gov/topic/marine-life-viewing-guidelines*). In addition to national guidelines, each of the five NMFS Regions has developed recommended viewing guidelines relevant to protected species in the respective regions to assist the general public with information on how to responsibly view and act around these animals in the wild. The guidelines are aimed at assisting the public in meeting their obligations under the MMPA. Although some guidelines address activities that are prohibited under law, others address activities that are not expressly prohibited.

The NMFS Pacific Islands Regional Office's viewing guidelines for Hawai'i recommend that people view wild dolphins from a safe distance of at least 50 yards (45.7 m) and advise against trying to chase, closely approach, surround, swim with, or touch the animals (*https://www.fisheries.noaa.gov/pacific-islands/marine-life-viewing-guidelines/viewing-marine-wildlife-hawaii*). To support the guidelines in Hawai'i, NMFS has partnered with the State of Hawai'i 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, signage, and public service announcements.

The swim-with and 50-yard approach prohibition regulation is expected to reduce the frequency of human and spinner dolphin encounters in waters within 2nm of the Hawaiian Islands, and in designated waters bounded by the islands of Lāna'i, Maui, and Kaho'olawe. However, specific essential daytime habitats have been a focused target for dolphin directed activities where animals that use these areas are exposed to intense levels of disturbance. Tyne *et al.* 2018, found that Hawaiian spinner dolphins at key essential daytime habitats were exposed to human activity within 100 m for greater than 82 percent of the time. The sites proposed for time-area closures are important areas for the biological needs of Hawaiian spinner dolphins, but animals at these sites are also routinely exposed to chronic levels of disturbance (Heenehan *et al.* 2017 and Tyne *et al.* 2018). Such sites can be effectively protected through time-area closures, as demonstrated by the successful implementation of similar measures in the Red Sea where dolphins were exposed to high levels of disturbance at targeted sites (Heenehan *et al.* 2017). Recent studies (see Heenan *et al.* 2017, Tyne *et al.* 2017, Stack *et al.* 2020) have concluded that time-area closures at essential daytime habitats that are experiencing high levels of disturbance can provide effective protection for Hawaiian spinner dolphins.

The number of dolphin directed activities in Hawaii has increased from 2007 to 2017 (Impact Assessment 2018). The spinner dolphin essential daytime habitats are heavily-targeted for dolphin-directed activities, and dolphins that use these areas are being exposed to intense activity on a daily basis. The additional time-area closures regulation is needed to address this large increase in the number of commercial swim-with tour companies, and the associated increase in take of dolphins that utilize these areas during the day (O'Connor 2009, Impact Assessment 2018; FEIS 2021). Although tourism in Hawaii was heavily impacted from the COVID pandemic in 2020, which reduced dolphin directed activities, the number of visitors arriving in Hawaii has significantly increased in 2021. The number of visitors arriving in December 2020 was 75.2 percent less than the number of visitors in December 2019; however, tourism has increased throughout 2021 with the number of visitors in June 2021 only about 16.5 percent below the number in June 2019 (*https://www.hawaiitourismauthority.org/media/7582/june-2021-visitor-statistics-press-release.pdf*). We expect tourism to continue to increase to reach pre-COVID

levels. The proposed time-area closures are needed to prevent take by prohibiting entry into specific areas of daytime essential spinner dolphin habitat. The sites for the proposed time-area closures were carefully delineated to the smallest area compatible with still meeting the purpose of this action to reduce take of Hawaiian spinner dolphins.

Need for Additional Action

Despite the prohibitions, guidelines, outreach, and stewardship efforts currently in place, the best scientific information available indicates that Hawaiian spinner dolphins require additional protections within their essential daytime habitats, the expansion of commercial swim-with tours has put additional pressures on Hawaiian spinner dolphins (see Background). Consequently, we expect the swim-with and approach regulation alone will not provide sufficient protection to Hawaiian spinner dolphins by reducing close encounters between spinner dolphins and humans that result in take, particularly at the five selected sites that are significant for Hawaiian spinner dolphins and face especially high levels of disturbance (Tyne *et al.* 2018). We expect the swim-with and approach regulation will reduce the intensity of activities within essential daytime habitats to some degree, but effective protection for spinner dolphins residing in these habitats will be provided by implementing time-area closures in the five areas identified in Alternative 4 of the FEIS in addition to the swim-with and approach regulation.

Numerous research studies suggest that restricting human activity in essential daytime habitats for spinner dolphins will minimize disturbance and harm to the dolphins (see Background). Several studies involved in the ''Spinner Dolphin Acoustics, Population Parameters, and Human Impact Research'' (SAPPHIRE) project, recommended that management strategies should focus on reducing human activity that can disturb dolphins in essential daytime habitats, particularly through the use of time-area closures (Thorne *et al.* 2012, Johnston *et al.* 2013, Heenehan *et al.* 2014, Heenehan *et al.* 2016, Heenehan *et al.* 2017, Tyne *et al.* 2014, Tyne 2015, Tyne *et al.* 2015, Tyne *et al.* 2016, Tyne *et al.* 2017, Tyne *et al.* 2018). In addition, we solicited comments regarding the implementation of time-area closures in bays designated as spinner dolphin essential daytime habitats on Hawai'i Island and Maui in the proposed rule published on August 24, 2016 (81 FR 57854). We received comments from individuals, scientific researchers, community groups, Native Hawaiians, and tour operators. Although some commenters opposed implementation of time-area closures, most comments that referenced time-area closures were in favor of implementing a version of these restrictions, and supported the establishment of time-area closures at the five bays proposed in this rulemaking. As discussed earlier, after reviewing the public comments from the 2016 proposed rule and analyzing the scientific literature supporting the inclusion of time-area closures to protect spinner dolphins, and in considering the large increase in commercial swim-with dolphin tours and associated high levels of take from these activities occurring in dolphin daytime essential resting sites since 2016, we believe that mandatory time-area closures should be implemented in Hawaiian spinner dolphins' essential daytime habitats at the five selected sites described in this proposed rule to provide sufficient protective measures for spinner dolphins. The sites proposed for time-area closures include four sites located on Hawai'i Island, Kealakekua Bay, Hōnaunau Bay, Kauhakō Bay, and Makako Bay, and one site located on Maui, La Perouse Bay.

Development of the Proposed Regulation

In 2005, NMFS convened a Spinner Dolphin Working Group with representatives from the MMC, state and Federal agencies, and scientific researchers who work on spinner dolphin conservation concerns. The group evaluated the best available information at the time to understand the scope of the tourist and recreational activities targeting spinner dolphins. As noted above in the Background section, in December 2005, we published an ANPR in the **Federal Register** (70 FR 73426, December 12, 2005) to solicit input from the public on potential ways to better enhance protections for spinner dolphins and mitigate activities of concern (*e.g.,* close approach and swim-with activities). This was followed by a Notice of Intent (NOI) to Prepare an EIS under the National Environmental Policy Act (NEPA) (71 FR 57923; October 2, 2006), in which we identified a preliminary list of potential regulations for future consideration and comment, which included partial time-area closures in certain spinner dolphin essential daytime habitats, a minimum distance limit for approaching dolphins in the wild, restrictions on certain human behaviors in NMFS-identified spinner dolphin resting areas, and complete closure of all known spinner dolphin resting areas in the MHI.

During the ANPR and the NOI comment periods, five public scoping meetings were held on the islands of Kaua'i, O'ahu, Maui, and Hawai'i, and oral statements were taken at each meeting. NMFS received a total of 4,641 public comments in response to the ANPR and the NOI (this includes all emails, letters, and public testimonies). Comments were submitted by concerned citizens, tour operators, scientific researchers, conservation and education groups, and Federal, state, and other government entities.

Comments received through both of the public comment periods for the ANPR and NOI varied widely and recommended numerous actions to consider, ranging from no regulations to permanent closure of areas used by the dolphins for rest and shelter. Additionally, public comments raised concerns about various topics that should be addressed in the EIS or proposed action. These concerns are grouped by topic in the final scoping report, and include the following: Hawaiian spinner dolphin biology and behavior; cultural issues; cumulative effects; data/data gaps; direct and indirect effects; education/outreach; enforcement; the Endangered Species Act (ESA); guidelines/solutions for other species or from other countries; human-dolphin interaction; medical benefits from swimming with dolphins; the MMPA; monitoring; NEPA; public and stakeholder involvement; regulatory regime; social and economic issues; spiritual and religious issues; take and harassment; traditional Hawaiian knowledge; and welfare of the dolphins. Although comments varied greatly, a consistent theme that stood out under several topics was the need for effective and enforceable regulations.

As a result of stakeholder concerns expressed through these public comments, and to prepare a proposed rule to add protections for spinner dolphins and an associated DEIS, we made multiple site visits to areas where concerns have been raised regarding Hawaiian spinner dolphin disturbance in the MHI. During these visits, we met with concerned members of the public to gather information relevant to this analysis. Additionally, we coordinated with state and Federal agencies, and we used the public comments generated from the ANPR and NOI to develop a range of actions and mitigation measures that are reflected in numerous alternatives considered in the EIS.

Presentations made at the public scoping meetings, the April 2007 EIS public scoping summary report, a list of

the attendees, the ANPR, public comments, and background materials are provided at *https://www.fisheries.noaa.gov/resource/document/hawaiian-spinner-dolphin-draft-environmental-impact-statement-and-regulatory.* During the initial scoping period for the DEIS, we received comments that recommended gathering additional information on Hawaiian spinner dolphins, including monitoring local populations to determine impacts to numbers and overall health of the MHI resident spinner dolphins. In response to this recommendation and to inform this rulemaking effort, NMFS internal grant funding was awarded to the SAPPHIRE project, conducted jointly by Duke University and Murdoch University. The SAPPHIRE project's objective was to provide baseline data on the local abundance, distribution, and behavior of spinner dolphins by integrating a suite of visual and acoustic sampling techniques, boat-based and land-based surveys, and acoustic recording devices to assess the following: Spinner dolphin daytime habitat use and resting behavior in study areas and surrounding waters; residency and fidelity patterns of spinner dolphins during the day in nearshore habitats in both the study areas and surrounding waters; spinner dolphin exposure to human activities within the studied resting bays and surrounding waters; and spinner dolphin demographic response to human activities within resting bays and surrounding waters.

Research targeting four bays (Kealakekua Bay, Hōnaunau Bay, Kauhakō Bay, and Makako Bay) and nearshore waters of Hawai'i Island began in August 2010 and was completed in May 2013. Results from this study provided robust population estimates for the Hawai'i Island stock (see Background), as well as additional information about spinner dolphin habitat use and the pressure from dolphin-directed human activities. Many of these studies have been published in scientific literature and reports and were used to inform this rulemaking process (Thorne *et al.* 2012, Johnston *et al.* 2013, Heenehan *et al.* 2014, Heenehan *et al.* 2016, Heenehan *et al.* 2017, Tyne *et al.* 2014, Tyne 2015, Tyne *et al.* 2015, Tyne *et al.* 2016, Tyne *et al.* 2017, Tyne *et al.* 2018). Many of these studies are described in detail in the Background section above.

We relied on the public comments on the ANPR and the NOI, and the best available scientific information to develop a range of regulatory and non-regulatory alternatives in the DEIS. We analyzed the environmental effects of these alternatives and considered options for mitigating effects. On August 24, 2016, we published the DEIS and proposed a rule to implement a prohibition on approaching spinner dolphins within 50 yard and swimming with dolphins, and solicited comments on both the proposed regulation and the consideration of establishing time-area closures (81 FR 57854*).* During the public comment period for the 2016 proposed rule, we received 22,031 written submissions via letter, email, and the Federal eRulemaking Portal. In addition, we hosted 6 public hearings on the islands of Hawai'i, O'ahu, Maui, and Kaua'i, and received 145 oral testimonies. Of these written comments, 2,294 were unique, with anywhere from two to 17,000 near-duplicates of each. Additionally, NMFS received a petition submitted by Kama'āina United to Protect the 'Āina (KUPA)—Friends of Ho'okena Beach Park (Kauhakō Bay), which contained over 285 names and signatures. Comments were submitted by individuals; research, conservation, and education groups; trade and industry associations; tour and retreat operators and participants; and Federal, state, and local government entities. The final swim-with and 50-yard approach prohibition rule, which is publishing concurrent with this proposed rule, includes our responses to these comments.

The swim-with and 50-yard approach prohibition regulation is expected to reduce the frequency of human and Hawaiian spinner dolphin encounters that result in take. However, between the August 24, 2016 proposed rule and finalization of this final swim-with and 50-yard approach prohibition regulation, there has been an increase in commercial swim-with tours putting new pressures and increased take on easily accessible groups of resting Hawaiian spinner dolphins (O'Connor 2009, Impact Assessment 2018). As discussed previously, tourism in Hawaii has continued to increase following significant impacts that began in 2020 resulting from the COVID pandemic; we expect tourism to return to pre-COVID levels. The spinner dolphin essential daytime habitats are targeted for dolphin-directed activities, and dolphins that use these areas are being exposed to high levels of disruption on a year-round, daily basis. Based on extensive review and analysis through internal scoping, external scoping via an ANPR (70 FR 73426, December 12, 2005), public scoping for the spinner dolphin DEIS, public comments on the spinner dolphin proposed rule published on August 24, 2016 (81 FR 57854), and the best available scientific information, we have determined that the existing prohibitions, regulations, and guidelines need to be enhanced to protect Hawaiian spinner dolphins in essential daytime habitats from various forms of take from human activities that cause harassment or disturbance. Although the swim-with and approach regulation will provide protection to Hawaiian spinner dolphins by reducing close encounters between spinner dolphins and humans to some degree, implementing time-area closures will provide effective protection for spinner dolphins at essential daytime habitats while using the smallest size area required to meet the purpose of this action in reducing take of Hawaiian spinner dolphins (Thorne *et al.* 2012, Johnston *et al.* 2013, Heenehan *et al.* 2014, Heenehan *et al.* 2016, Heenehan *et al.* 2017, Tyne *et al.* 2014, Tyne 2015, Tyne *et al.* 2015, Tyne *et al.* 2016, Tyne *et al.* 2017, Tyne *et al.* 2018). We therefore deem it necessary and appropriate to adopt an additional regulation to protect Hawaiian spinner dolphins in essential daytime habitats from human activities that result in take, including harassment or other forms of disturbance, as currently defined by statute and regulation.

Proposed Rulemaking

The mandatory time-area closures described in this proposed rule are designed to protect spinner dolphins from take, including harassment and disturbance, caused by dolphin-directed activities and other human activities that are concentrated in Hawaiian spinner dolphins' essential daytime habitats at five selected sites in the MHI. These proposed mandatory closures prohibit use of waters in effect from 6 a.m. to 3 p.m. daily in areas of Kealakekua Bay, Hōnaunau Bay, Kauhakō Bay (Ho'okena), and Makako Bay on Hawai'i Island, and La Perouse Bay on Maui. NMFS is proposing this regulation pursuant to its rulemaking authority under MMPA sections 112 (a) (16 U.S.C. 1382(a)) and 102 (16 U.S.C. 1372).

Scope and Applicability

Applications to all Hawaiian Spinner Dolphins

The proposed rule's establishment of time-area closures would apply to all Hawaiian spinner dolphins found in the action area (see *Geographic Action Area* section below).

Geographic Action Area

The five time-area closure sites proposed are at the five bays identified

in the 2016 proposed rule (81 FR 57854) and in the DEIS (Figures 4–8). The boundaries for 2 of the proposed sites (Kauhakō Bay and La Perouse Bay) (Figure 6 and Figure 8) have been slightly modified from the boundaries described in the 2016 proposed rule and DEIS to accommodate access by canoe groups, fisherman, and other water users to areas adjacent to the time-area closure areas. The boundary modifications at these two sites result in a slightly reduced size for both areas and do not expand beyond the footprints identified in the DEIS.

The time-area closures' coordinates will be marked using buoys, sight-line markers, and landmarks from shore, and an explanation of the closures' purpose and effective hours will be provided by signs on land. The proposed action areas for the five time-area closures are illustrated in the maps and the boundaries described as follows:

Hawai'i Island—Kealakekua Bay (Figure 4)

The red box between points A, B, C, and D shown in the following map illustrates the closure area for Kealakekua Bay. Approximate segment lengths A–B and C–D are 1,005 m (0.62 mi), and segment lengths A–D and B–C are 220 m (0.14 miles). The total area of closure is 0.09 mi^2. The latitude/longitude coordinates are:

A—19°28′37″ N, 155°55′15″ W
B—19°28′54″ N, 155°55′44″ W
C—19°28′48″ N, 155°55′49″ W
D—19°28′32″ N, 155°55′19″ W

The County of Hawai'i identifies two public access points on Boulder Beach and Nāpō'opo'o Landing at Kealakekua Bay; both points would remain open for access. Additionally, the route used by kayakers to access the Captain Cook Monument at Ka'awaloa from Nāpō'opo'o Pier is located outside of the closure area.

Hawai'i Island—Hōnaunau Bay (Figure 5)

The red lines between points A, B and C in the following map illustrate the closure area for Hōnaunau Bay; the shoreline boundary is at the mean lower low water line between points A and C. The approximate segment length of A–B is 440 m (0.27 mi) and the segment length of B–C is 330 m (0.21 miles). Total area of closure is 0.04 mi^2. The latitude/longitude coordinates are:
A—19°25′27″ N, 155°54′41″ W
B—19°25′22″ N, 155°54′57″ W
C—19°25′31″ N, 155°54′58″ W

The closure site at Hōnaunau would be delineated by means of a single marker buoy at point B to accommodate local native Hawaiians' requests to honor the sacred nature of this cultural site, and would be aligned with site line markers on shore at points A and C. The County of Hawai'i identifies Hōnaunau Bay boat ramp as a public access area for this bay. The boat ramp and the popular access point for swimming and snorkeling known as Two-Step, are located outside of the closure area and would remain open for everyday use.

Hawai'i Island—Kauhakō Bay (Figure 6)

The red box between points A, B, C, and D in the following map illustrate the marine boundaries for the closure area for Kauhakō Bay. The approximate segment length of A–B is 330 m (0.21 mi), and the segment length of B–C is 1,035 m (0.64 miles). The total area of closure is 0.07 mi^2. The latitude/longitude coordinates are:

A—19°22′44″ N, 155°53′49″ W
B—19°22′44″ N, 155°53′57″ W
C—19°22′16″ N, 155°53′49″ W
D—19°22′30″ N, 155°53′46″ W

The County of Hawai'i identifies Ho'okena Beach Park as a public access point for this area, this access point would remain open for everyday use.

Hawai'i Island—Makako Bay (Figure 7)

The red lines between points A, B, C and D in the following map illustrate the closure area for Makako Bay; the shoreline boundary is at the mean lower low water line between points A and D. The approximate segment length of A–B is 315 m (0.20 mi), the segment length of B–C is 758 m (0.47 miles) and the segment length of C–D is 372 m (0.23 mi). Total area of closure is 0.14 mi^2. The latitude/longitude coordinates are:

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

No public access point from shore is identified by the County of Hawai'i for Makako Bay. The closest access points are identified south at Wawaloli Beach, with another access point identified north at Keāhole Point.

Maui—La Perouse Bay (Figure 8)

The red lines between points A, B, C, and D, in Figure 8 illustrate the closure area for La Perouse Bay; the shoreline boundary is at the mean lower low water line between points A and C, and between B and D. 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 mi^2. The latitude/longitude coordinates are:

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

Maui County identifies a public access point for this area (coordinates: 20°36′10″ N, 156°25′22″ W). The area inshore of the line between A and B, which includes this access point, would remain open for everyday use.

Throughout this rule, all coordinates are referenced to the World Geodetic System of 1984 (WGS84).

These proposed time-area closures are not exclusive to all of the nearshore habitats used as essential daytime habitat for the spinner dolphins or all locations where dolphin-directed human activities that may result in take are known to occur. Similarly, the proposed closure time period between 6 a.m.to 3 p.m. for these areas is not exclusive of the only times that spinner dolphins may be present in closed areas, but this proposed closure time period is chosen in order to encompass the dolphins' historical resting period, when spinner dolphins are most likely to be present. (see Rationale section below).

Applications to Time-Area Closures

This proposed rule would create the time-area closures and promulgate a regulation that prohibits entry and use of surface and subsurface waters within the five delineated areas from 6 a.m. to 3 p.m. Prohibited uses include all forms of access to the closed areas including but not limited to all forms of swimming-with and approaching spinner dolphins; operating a manned or unmanned motorized, non-motorized, self-propelled, human-powered, or submersible vessel; and swimming at the water surface or underwater (*i.e.,* SCUBA or free diving). At all locations, activities occurring in the intertidal zone, such as shore-based fishing and subsistence gathering, would not be affected during any time of day. By prohibiting entry, the proposed mandatory time-area closures would reduce take within these important areas during the closure time-period.

Requirements of the Proposed Rule

Mandatory Time-Area Closures

The rule implements mandatory time-area closures at five essential daytime habitats, four of which are located on Hawai'i Island, and one located on Maui. Entry is prohibited in the closure areas every day between the hours of 6 a.m. and 3 p.m. The time-area closure locations are

(1) Kealakekua Bay
(2) Hōnaunau Bay
(3) Kauhakō Bay

(4) Makako Bay
(5) La Perouse Bay

Exceptions

NMFS is proposing 6 specific exceptions for this proposed regulation:

(1) Vessel operations necessary to avoid an imminent and serious threat to a person or vessel;

(2) Activities authorized through a permit or authorization issued by the National Marine Fisheries Service;

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

(4) Vessels participating in organized community-based outrigger canoe races that transit straight through a time-area closure;

(5) 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

(6) Outrigger canoes used for traditional subsistence fishing intended for personal, family, or community consumption or traditional use.

Rationale

Proposed Action—Time-Area Closure Regulations

Hawaiian spinner dolphins resident to the MHI are made up of small, genetically isolated stocks that exhibit a specialized behavioral ecology that makes them easy to access in coastal environments during their daytime resting hours. This leaves these resident stocks vulnerable to human-caused disturbance and its effects, such as habitat abandonment or declines in reproductive success (Norris *et al.* 1994, Andrews *et al.* 2010, Tyne *et al.* 2014). In the MHI, dolphin-directed activities have increased in recent years, and the public's expectation of close interactions has placed increased pressure on resident stocks of Hawaiian spinner dolphins and the habitats that support these stocks, particularly at essential daytime habitats included in the proposed time-area closures (see Background above). Despite outreach, guidelines, and current prohibitions, MHI resident Hawaiian spinner dolphins' natural behaviors are disrupted by human activities (Ostman-Lind *et al.* 2004, Danil *et al.* 2005, Courbis 2004, Courbis and Timmel 2008), and spinner dolphin group behavioral patterns may be changing in essential daytime habitats as a result of these pressures (Norris *et al.* 1994, Forest 2001, Courbis 2004, Courbis and Timmel 2008).

In other locations globally, intense dolphin-directed human activities have resulted in changes to dolphin populations' habitat use and even caused habitat abandonment (Bejder *et al.* 2006a, 2006b; Gannier and Petiau 2006; Nature Conservation Sector 2006; Lusseau and Bejder 2007; Notarbartolo-di-Sciara *et al.* 2009). For example, in Samadai Reef, Egypt, spinner dolphins were reported as distressed from excessive numbers of visitors and people attempting to interact with the dolphins, which eventually abandoned this preferred resting area (Notarbartolo-di-Sciara *et al.* 2009). The spinner dolphins did not return to the site until after management measures were established which included prohibiting human entry into the core resting area, and restricting certain activities in areas surrounding the core resting area to prevent disturbance (Nature Conservation Sector 2006, Notarbartolo-di-Sciara *et al.* 2009).

Studies on Hawai'i Island suggest that dolphins are unlikely to rest outside of resting bays (Tyne *et al.* 2015; Lammers 2004; Norris *et al.* 1994). If dolphins are displaced from their preferred resting habitat due to intense human presence in those bays, there is no guarantee that they will find habitat close to their night time feeding grounds that has fewer human users or less anthropogenic noise, and they may not be able to rest. Chronic disturbance of spinner dolphins at essential daytime habitats could negatively affect the habitat use or health of resident populations. This may be amplified in the MHI's resident stocks, which exhibit high site fidelity and restricted gene flow, because the impacts to multiple individuals' health and fitness are quickly reflected in the overall fitness of these small populations (Bejder 2005).

Area closures have been shown to be an effective management tool for addressing the intensity of wildlife viewing and interaction in other areas globally (Notarbartolo-di-Sciara *et al.* 2009, Nature Conservation Sector 2006). Area closures provide members of the public with precise boundaries so that they may readily tailor their conduct accordingly. Additional management in these essential areas are therefore important to ensure that Hawaiian spinner dolphins are given sufficient space for groups to engage in deep resting behaviors that allow dolphins to recuperate from other energy demanding activities, such as foraging.

In the August 24, 2016 proposed rule initiating a protective regulation for the Hawaiian spinner dolphin, we considered and requested public comment on the use and scope of time-area closures as additional measures to reduce take and increase the protection of spinner dolphins in their daytime resting habitat. We received numerous public comments on the use of time-area closures, and while some comments were opposed to the implementation of time-area closures, the majority of comments were supportive of the time-area closures.

We are concerned that the swim-with and approach regulation alone will not sufficiently protect Hawaiian spinner dolphins in their essential daytime habitats. The swim-with and approach regulation will likely reduce the frequency of human and spinner dolphin encounters; however, we believe that effective protection for essential daytime habitats will be provided by implementing time-area closures in the five areas identified in the this proposed rule, which uses the smallest area compatible with the purpose of this regulation to reduce take of Hawaiian spinner dolphins.

In the August 24, 2016 proposed rule, we stated that we were considering whether additional management measures may be necessary and appropriate to protect Hawaiian spinner dolphins from take, especially in essential daytime habitats that are regularly targeted by humans for dolphin-directed activities, and we included information about the time-area closures for public comment (81 FR 57854). In that same August 24, 2016 proposed rule (81 FR 57854) we stated that we believed a ''careful phased-in approach'' with the swim-with and approach prohibition and time-area closures protective regulations would be warranted, and that by first implementing a swim-with and approach regulation, we expect to reduce the amount of take. However, since the 2016 proposed rule, there has been a rapid and large expansion of commercial swim-with tours putting new pressures and increased take on easily accessible groups of resting Hawaiian spinner dolphins (O'Connor 2009, Impact Assessment 2018). The spinner dolphin essential daytime habitats are targeted for dolphin-directed activities, and dolphins that use these areas are being exposed to high levels of disruption on a year-round, daily basis. Additionally, public comments from this proposed rule questioned whether the swim-with and approach prohibition regulation alone would be sufficient to protect spinner dolphins in their essential daytime resting habitats. These comments and our responses are included in the final swim-with and approach rule. Based on the increased impacts to spinner dolphins, and after considering these additional public comments from the August 24, 2016 proposed rule, as well scientific literature concluding the need for time-area closures to provide

effective protections for Hawaiian spinner dolphins (Heenan *et al.* 2017, Tyne *et al.* 2017, Stack *et al.* 2020), we believe that the swim-with and approach regulation alone provides insufficient protection for Hawaiian spinner dolphins using essential daytime habitats. Accordingly, NMFS has determined that time-area closures are immediately needed to reduce the take occurring in high intensity areas.

The proposed mandatory time-area closures are intended to prevent a range of human activities that occur in close proximity to Hawaiian spinner dolphins (and constitute take) by prohibiting entry into specific areas of daytime essential spinner dolphin habitat. The time-area closures are expected to reduce direct close encounters and disruptions between spinner dolphins and the intensity of activities within essential daytime habitats. NMFS considered the appropriate times for the closures and is proposing a closure time of 6 a.m. to 3 p.m. daily. This time period was chosen in order to encompass the dolphins' historical resting period, allowing the dolphins to enter the bay undisturbed and stay throughout the main portion of their daytime rest period, while also allowing for other human uses to occur (at a distance greater than 50 yards (45.7 m) in accordance with the swim-with and approach regulations before 6 a.m. and after 3 p.m.

Historic spinner dolphin resting times (before human interactions were likely a major factor in the dolphins' resting patterns) were observed to occur between dawn and dusk (Norris and Dohl 1980). Norris *et al.* (1994) noted dolphins entering the bay approximately an hour after sunrise and staying late into the afternoon. Research indicates that Hawaiian spinner dolphin resting behavior still occurs throughout daytime hours (generally 6 a.m. to 6 p.m.) with the highest resting activity occurring between 10 a.m. and 2 p.m. (Tyne *et al.* 2015). The late afternoon hours are considered a time of transition when dolphins rally together to engage in movements as they are waking from rest, prior to moving offshore to their foraging grounds (Norris *et al.* 1994).

Some Hawaiian spinner dolphin groups have been deterred from entering their essential daytime habitat if human presence in the area was too high early in the day (Danil *et al.* 2005). Preventing disturbance in these habitats during early morning hours is intended to reduce disruption and disturbance of spinner dolphin behavior during their arrival to the essential daytime habitat and descent into rest.

To limit some potential impacts to the public from the time-area closure regulations, we propose exceptions that are designed to allow for transit into and out of ports, harbors, and restricted channels; ingress and egress to private residential property adjacent to the restricted areas; public safety measures; avoidance of penalties when the animal has closely approached a boat or person; organized outrigger canoe races and traditional fishing practices in outrigger canoes; and continuation of essential government and permitted activities (see *Exceptions* section above). These exceptions occur infrequently and at such a low intensity that these actions do not individually, or cumulatively, raise the threat to take.

The reduction in disturbance to Hawaiian spinner dolphins, as addressed through each element of the rule as described above, provides a benefit to the dolphins, as well as to members of the public who value the dolphins. Reducing threats to the dolphins also supports the long-term sustainability of the responsible dolphin watching. Therefore, to reduce the threat of take occurring (including harassment and disturbance) in important essential day-time habitats, NMFS is proposing mandatory time area-closures for five selected essential daytime habitats from 6 a.m. to 3 p.m. daily. We are proposing the time-area closure regulations at this time, after further consideration since the August 2016 propose rule, because of the specific added benefits of implementing time-area closures in conjunction with a swim-with and approach regulation, extensive public comments in support of time-area closures, and the best available science supporting time-area closures as a protective measure.

Geographic Scope (Time-Area Closures)

The proposed regulation would establish mandatory time-area closures at five nearshore sites (bays) identified as essential daytime habitat for the Hawaiian spinner dolphin: Kealakekua Bay, Hōnaunau Bay, Kauhakō Bay, and Makako Bay on the Hawai'i Island, and La Perouse Bay on Maui. We selected these five areas for time-area closures using a step-down process. In this approach, we identified important habitats that might benefit from additional protection, and then considered additional factors that may promote or obstruct the effectiveness of the closure (See Appendix A of the DEIS for more detail). The five proposed sites are essential daytime habitats where human activities are largely Hawaiian spinner dolphin-directed and where closures are logistically feasible. Once the sites were selected for time-area closures, we delineated core areas within each of the five sites where spinner dolphins are most often engaged in resting activities. The core areas would be subject to closure, while leaving other areas of the bays open in order to minimize impacts on other human activities (*e.g.,* snorkeling, surfing) (Figures 1–5).

The boundaries of the time-area closures were specifically designed to cover the portion of the bays where the dolphins are known to rest while leaving other portions open to various activities. These closures were carefully designed with community input to ensure access to the bays from, and use of, as much of the shoreline as possible. Two of the proposed closure areas, (Kauhakō Bay and La Perouse Bay) (Figures 3 and 5) have been slightly modified from the boundaries described in the 2016 proposed rule and DEIS to accommodate access by canoe groups, fisherman, and other water users to areas adjacent to the time-area closure areas.

Additional Measures Eliminated From Consideration

NMFS did not propose some of the regulatory options suggested in the DEIS and public comments, including voluntary time-area closures and implementing time-area closures in other essential daytime habitat areas throughout the Hawaiian Islands. NMFS does not anticipate that participation will be high for voluntary time-area closures, because resource users' motivations and beliefs vary widely within the five closure areas, and voluntary compliance measures have had limited success in the past. We expect that compliance with voluntary measures would be generally lower than compliance with mandatory regulations, and within the five bays, resource users are diverse and have varying motivations and beliefs with regard to Hawaiian spinner dolphin conservation. The lack of a common understanding about the value of these conservation measures may make it difficult to achieve voluntary compliance for the closures. Further, inconsistent compliance with voluntary measures could lead to increased tension between resource user groups that have conflicting views about Hawaiian spinner dolphin conservation. Therefore, the intensity of spinner dolphin-directed activities may still remain high in essential daytime habitats with voluntary time-area closures in place, and spinner dolphins may receive no additional benefit. Voluntary time-area closures were,

therefore, eliminated from consideration, and mandatory time-area closures are being proposed. Implementing closures of all identified essential daytime habitats throughout the Hawaiian Islands would create many restrictions on activities that are not dolphin-directed, obstruct some harbors, be costly, and require a larger infrastructure to institute and enforce. For these reasons, the consideration of this option was eliminated from further consideration in the development of this proposed rule.

Public Comments

We request that interested persons submit comments, information, and suggestions concerning this proposed rule during the comment period (see **DATES**). We are soliciting comments or suggestions from the public, other concerned governments and agencies, the scientific community, industry, or any other interested party concerning this proposed rule. You may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES**). Copies of the proposed rule and supporting documentation can be found on the NMFS Pacific Islands Regional website at *http://www.fpir.noaa.gov/.* We will consider all comments pertaining to this proposed rule received during the comment period in preparing the final rule.

References Cited

A complete list of all references cited in this proposed rule can be found on our website at *https://www.fisheries.noaa.gov/action/enhancing-protections-hawaiian-spinner-dolphins,* or at *www.regulations.gov,* and is available upon request from the NMFS office in Honolulu, Hawai'i (see **ADDRESSES**).

Classification

National Environmental Policy Act (NEPA) and Regulatory Impact Review (RIR)

NMFS has prepared an EIS and an RIR pursuant to NEPA (42 U.S.C. 4321 *et seq.*) and Executive Order (E.O.) 12866, to support this proposed rule. The EIS/RIR contains a full analysis of a No Action Alternative and five action alternatives. There are a number of elements that were common to all of the action alternatives analyzed, and a number of exceptions that would apply to these alternatives. The mandatory time-area closures proposed in this rule are included as Alternative 4 in the EIS and along with swim-with and approach constitute Alternative 4 of the EIS. The EIS/RIR and supporting documents are available for review and comment and can be found on the NMFS Pacific Islands Region website at *https://www.fisheries.noaa.gov/action/enhancing-protections-hawaiian-spinner-dolphins.* If NMFS finalizes this rule to implement Alternative 4, a separate ROD will be issued documenting that decision. NMFS will revisit the analysis in the FEIS to determine whether any supplementation or modification might be required.

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.

Pursuant to the RFA, NMFS prepared the following Initial Regulatory Flexibility Analysis (IRFA). A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble to this proposed rule. This proposed rule does not duplicate, overlap, or conflict with other Federal rules. The analysis contains a description of and, where feasible, an estimate of, the number of small entities to which the proposed rule will apply. The Small Business Administration (SBA) establishes criteria for defining a ''small entity'' for purposes of the RFA. This IRFA analyzes the alternatives described in the preamble to the rule and does not address alternatives previously considered and subsequently dismissed in the DEIS. There are no record-keeping or reporting requirements associated with this proposed rule.

Description and Estimate of the Number of Small Entities to Which the Proposed Rule Applies

There are several types of industries directly affected by this proposed rulemaking: Swim-with-wild-dolphins tour operators; dolphin watch tour operators; non-motorized vessel ocean wildlife viewing tour operators; and generalized commercial boat tour operators. This analysis uses size standards prescribed by the SBA. Specifically, for scenic and sightseeing water transportation operators (North American Industry Classification System Code 487210), the SBA size standard for a small business is average annual receipts of $8.0 million or less. Much of the background information for potentially affected entities is based on a 2018 report (2018 report) that summarized information collected in 2017 with regard to participants within these industries that potentially interact with Hawaiian spinner dolphins to varying degrees in the MHI (Impact Assessment 2018). The 2018 report provides information that suggests that most, if not all, businesses operating in the swim-with-wild-dolphins tour and the dolphin watch tour industries operating in 2017 could be considered small entities, and most of the generalized commercial boat tour operators were assumed to be small entities (Impact Assessment 2018).

Swim-with-wild-dolphins tour operators are those that bring clientele into close proximity with spinner dolphins. This includes health and/or spiritual retreat operations as well as dolphin-oriented swim tours. Health and spiritually-linked businesses provide opportunities for persons wishing to interact with spinner dolphins for perceived physical, mental, and/or spiritual well-being enhancement. The number of businesses in this category had increased between 2007 and 2017, especially on the Island of Hawai'i. Spiritually-linked tour operations may charter vessels through other established dolphin-swim companies to transport customers as part of an overall per-person package consisting of lodging, swimming with dolphins, and other activities. According to the 2018 report, an estimated six to eight locally owned spiritual retreat businesses and at least 33 non-local (*i.e.,* mainland United States, Europe, Japan, South Africa, and Australia) spiritual retreat businesses operating on Hawai'i Island reportedly provided direct Hawaiian spinner dolphin interaction in 2017. No numbers were provided for spiritual retreat businesses operating on O'ahu, Maui, and Kaua'i.

Dolphin-oriented swim tours operate by transporting passengers by boat or having them swim from shore to areas in which dolphins are known to be present during daytime hours. Customers may also be provided with facemasks, fins, flotation devices, and snorkels to enhance viewing. The 2018 report suggests that at least 41 swim-with-dolphins tour companies operated on Hawai'i and seven operated on O'ahu. The report also indicated that commercial boat tours on Maui did not appear to advertise underwater encounters with spinner dolphins, nor did those on Kauai, although unplanned

encounters may occur. All are believed to be small entities. Dolphin-watch tour operators involve taking clients out specifically to view wild dolphins. These companies tend to operate smaller boats than the more generalized commercial boat tours described below and are more likely to view dolphins at a closer range. Revenue information for this specific business category is not available. The 2018 report did not provide estimated number of businesses that primarily focused on dolphin viewing, but NMFS had previously estimated the number of dolphin watch tour businesses to be as follows in 2015: Hawai'i (3), Maui (21), O'ahu (3), and Kaua'i (11) (NOAA Fisheries, PIRO).

More generalized commercial boat tours offer a range of ocean activities, which may include sightseeing, snorkeling, diving, viewing various forms of sea life from a vantage point in and/or above the water, or just generally spending time on the ocean. The majority of the general tour boats derive revenue from whale watching and sightseeing operations, while a number of the dive/snorkel vessels offer snorkeling or diving trips. The 2018 report provided economic or operational information from 28 generalized commercial boat tour businesses (Hawai'i Island: 5, O'ahu: 2, Maui: 16, and Kaua'i: 15), although there are likely more businesses that fall in this category. NMFS believes that most, but not all, would be considered small entities.

Non-motorized vessel ocean wildlife viewing tour operators, specifically kayak tour businesses around the MHI, provide a general wildlife viewing experience, with very few, if any, operators advertising direct or intentional interactions with dolphins. The 2018 report indicated that these operations were designed to provide clients with a variety of recreational and sightseeing experiences that typically did not include dolphin interactions. The 2018 report did not provide estimated number of businesses in this category, but NMFS had previously estimated that in 2015, the numbers of companies that either operate kayak tours or rent out kayaks was as follows: Hawai'i (6), Maui (9), O'ahu (6), and Kaua'i (13) (NOAA Fisheries, PIRO). Based on the information from the 2018 report and/or obtained by NMFS for 2015, the estimated numbers of small entities directly affected by the proposed rulemaking, by industry, on the MHI are as follows: At least 60 or 70 swim-with-wild-dolphins tour operators (including health and/or spiritual retreats enabling opportunities to swim with wild dolphins), and at least 38 generalized commercial boat tour operators (one or more of which are likely to be considered large entities).

Because information on these entities was collected in 2017, these numbers might differ currently and in the near term, as these are businesses whose customer base are often comprised of tourists and visitors to the State of Hawaii or interisland travelers. Restrictions resulting from the COVID pandemic have significantly impacted the tourism industry in Hawaii. Following the onset of the COVID pandemic and restrictions that began in March 2020 to slow the spread of COVID–19 in the state, a total of 4,564 visitors arrived in Hawaii in April 2020, representing a 99.5 percent decrease from the previous year in which there were 856,250 visitors in April 2019 (*https://www.hawaiitourism authority.org/media/4635/april-2020-visitor-statistics-press-release-final.pdf*). The number of tourists visiting Hawaii has increased steadily throughout the first half of 2021. In December 2020 visitor arrivals in Hawaii were down 75.2 percent compared to the number of visitors in December 2019; however, June 2021 showed an approximate 16.5 percent decrease compared to June 2019 (*https://www.hawaiitourism authority.org/media/7582/june-2021-visitor-statistics-press-release.pdf*). With the steady increase in arrivals to Hawaii during the first half of 2021, we expect tourism to continue to increase to reach pre-COVID levels.

Economic Impacts to Small Entities Resulting From the Proposed Action (Mandatory Time-Area Closures in Five Selected Essential Daytime Habitats)

This proposed rule would prohibit people from using areas closed in five selected essential daytime resting habitats during specific times. NMFS believes that this restriction is needed within established resting areas because research has indicated that Hawaiian spinner dolphins show high site fidelity, returning from offshore feeding grounds to the same protected bays and shallow, sandy-bottomed habitats to rest. Spinner dolphins appear to select these specific locations because they are located close to the feeding grounds while also offering protection from predators. Yet, the consistency in which spinner dolphins return to these resting sites has also encouraged tour operators to visit these same locations in order to increase the opportunity for clientele to view or otherwise interact with spinner dolphins. Because of constant reliance that spinner dolphins have shown for these locations, NMFS has decided to propose the mandatory time-area closures within these resting areas.

Businesses that rely on providing activities within locations potentially subject to time-area closures, would potentially see a reduction in revenue in the short term and potentially in the long term. The decrease in revenue could come from the reduction in the number of customers, specifically those who seek the experience of viewing spinner dolphins at these locations where dolphins can regularly be seen. The loss in overall revenue to individual businesses and the industry as a whole that rely on providing access to these bays for revenue is uncertain.

For generalized tour boat operators with a clientele base that does not have a specific goal of viewing spinner dolphins, the direct economic impact of the proposed action is likely to be minimal. Individuals or companies that conduct kayak tours or other non-motorized vessel tours in or near time-area closures may see a slight reduction in revenues relative to their dependence on dolphin-directed customers. Additionally, due to the closed areas, these tour companies may choose to offer alternative tour locations that set fewer viewing restrictions.

The time area closures are expected to affect tour operators that typically operate within or nearby areas subject to these restrictions. Dolphin-viewing tour operators using these areas may choose to view dolphins from outside the closures or otherwise experience increased costs to travel to alternative sites not subject to closure to allow more flexibility in viewing the dolphins from the required 50 yard minimum distance. Similarly, generalized commercial boat tour operators may continue to use areas or times outside of the closures for their tours or choose alternative locations that allow greater viewing flexibility. Those individuals or companies that conduct kayak tours or other motorized or non-motorized vessel tours in or near time-area closures may see a slight reduction in revenues if their customer base is comprised of individuals who wish to view dolphins within those areas. For those operators who operate within or nearby the bays subject to time-area closures, the economic impact on generalized commercial tour boat operators is likely to be minimal while non-motorized vessel tour operators may see a slight reduction in revenue, and there should be little to no impact on these operators that primarily operate outside of the time-area closures.

NMFS concludes that there would be disproportionate impacts to the operators with dolphin-directed

activities or other ocean-based recreational entities operating near the time-area closures from implementation of this proposed action relative to all other general wildlife viewing tour operators. As a result, dolphin-watch tour entities may face disproportionate impacts relative to the generalized commercial boat tour companies, which are likely to incur few direct economic impacts from the proposed action. We note that dolphin watch tour entities are all believed to be small entities, and most of the generalized commercial boat tour companies are as well, although a few might be considered large entities with revenues exceeding $8.0 million.

NMFS considered Alternative 1, the No Action Alternative, in addition to Alternative 4, the mandatory time-area closures. Alternative 4 would result in a slightly higher direct economic impact to individual small entities and the dolphin-viewing industry as a whole, relative to the proposed action compared to the No Action Alternative, but Alternative 4 would also offer more protection to spinner dolphins in specific resting habitat. NMFS has determined that the final action meets the goals and objective of reducing human-caused disturbances that Hawaiian spinner dolphins are facing in their natural habitat, and will help protect against declines in the fitness of the population over time.

No additional reporting, record keeping, and other compliance requirements are anticipated for small businesses. NMFS has identified no Federal rules that may duplicate, overlap, or conflict with the action alternatives.

Executive Order 12866, Regulatory Planning and Review

This rule was determined to be not significant for purposes of 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 proposed regulation includes no new collection of information, so further analysis is not required.

National Historic Preservation Act (NHPA)

The goal of the National Historical Preservation Act (NHPA; 16 U.S.C. 470 *et seq.*) is to have Federal agencies act as responsible stewards of our nation's resources when their actions affect historic properties. Section 106 of the NHPA requires Federal agencies to take into account the effects of undertakings they carry out, assist, fund, or permit on historic properties. Federal agencies meet this requirement by completing the section 106 process set forth in the implementing regulations, ''Protection of Historic Properties,'' 36 CFR part 800. The goal of the section 106 process is to identify and consider historic properties (or sites eligible for listing) that might be affected by an undertaking, and to attempt to resolve any adverse effects through consultation. The process provides for participation by State Historic Preservation Officers, Tribal Historic Preservation Officers, tribal, state and local governments, Indian tribes and Native Hawaiian organizations, applicants for Federal assistance, permits, or licenses, representatives from interested organizations, private citizens, and other members of the public. Federal agencies and consulting parties strive to reach agreement on measures to avoid, minimize, and mitigate adverse effects on historic properties and to find a balance between project goals and preservation objectives.

Under the NHPA, an ''effect'' means an alteration to the characteristics of a historic property qualifying it for inclusion or eligibility for the National Register. In April 2012, NMFS sent a letter to the Hawaii State Historic Preservation Division (SHPD) describing the undertaking and requested assistance in identifying organizations that may have an interest in preserving any historic properties that may occur in the time-area closures. In July and August 2012, NMFS held scoping meetings on Hawaii Island and Maui to determine if historic or cultural properties may be affected by the proposed regulation. In 2013, NMFS conducted interviews with 15 individuals from three lineal descendants from each of the five bays identified for time-area closures to assist in providing additional information about historic properties or practices that may be affected by the proposed action. By letter to the Hawaii State Historic Preservation Division dated June 7, 2021, NMFS has determined that this undertaking constitutes a finding of no historic properties affected (36 CFR 800.4(d)(1)). NMFS has requested review and concurrence with SHPD for our determination for the undertaking to establish time-area closures at essential daytime habitats for Hawaiian spinner dolphins. NMFS invites public comment on this determination.

Coastal Zone Management Act

Section 307(c)(1) of the Federal Coastal Zone Management Act of 1972 requires that all Federal activities that affect any land or water use or natural resource of the coastal zone be consistent with approved state coastal zone management programs to the maximum extent practicable. We have determined that these proposed time-area closures are consistent to the maximum extent practicable with the enforceable policies of the approved Coastal Zone Management Program of Hawai'i. This determination, a copy of this document, and the EIS will be submitted for review by the Hawai'i Coastal Zone Management Program.

Executive Order 13132, Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations in which a regulation may preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). As described in a May 13, 2020 letter NMFS received from the State of Hawai'i DLNR, the State supports implementing time-area closures in the 5 sites, as described in the FEIS, to increase protection of Hawaiian spinner dolphins from harassment and disturbance pursuant to the MMPA. NMFS has determined that the proposed time-area closures regulation does not have federalism implications.

Information Quality Act (IQA)

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 **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Marine mammals.

Dated: September 20, 2021.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216, as amended elsewhere in this issue of the **Federal Register**, effective October 28, 2021, is proposed to be amended 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.*

■ 2. Section 216.20 amended by adding paragraphs (f) through (j) to read as follows:

§ 216.20 Special restrictions for Hawaiian spinner dolphins.

* * * * *

(f) *Applicability.* The following special restrictions designed to protect Hawaiian Spinner Dolphins apply:

(1) Hawai'i Island—Kealakekua Bay (Figure 3):

(i) The time-area closure in place between 6 a.m. to 3 p.m. Hawai'i Standard Time (HST) daily for Kealakekua Bay includes all surface and subsurface waters between points A, B, C, and D (Figure 3 to § 216.20). Approximate segment lengths A–B and C–D are 1,005 meters (m) (0.62 miles (mi)), and segment lengths A–D and B–C are 220 m (0.14 mi). The total surface area of closure is 0.09 square miles (mi^2). The latitude/longitude coordinates are:

(A) A—19°28′37″ N, 155°55′15″ W;
(B) B—19°28′54″ N, 155°55′44″ W;
(C) C—19°28′48″ N, 155°55′49″ W;
(D) D—19°28′32″ N, 155°55′19″ W.

(ii) [Reserved]

(2) Hawai'i Island—Hōnaunau Bay (Figure 4):

(i) The time-area closure in place between 6 a.m. to 3 p.m. HST daily for Hōnaunau Bay includes all surface and subsurface waters between points A, B, and C (Figure 4 to § 216.20); the shoreline boundary is at the mean lower low water line between points A and C. The approximate segment length of A–B is 440 m (0.27 mi) and the segment length of B–C is 330 m (0.21 miles). The total surface area of closure is 0.04 mi^2. The latitude/longitude coordinates are:

(A) A—19°25′27″ N, 155°54′41″ W;
(B) B—19°25′22″ N, 155°54′57″ W;
(C) C—19°25′31″ N, 155°54′58″ W.

(ii) {Reserved]

(3) Hawai'i Island—Kauhakō Bay (Figure 5):

(i) The time-area closure in place between 6 a.m. to 3 p.m. HST daily for Kauhakō Bay includes all surface and subsurface waters between points A, B, C, and D (Figure 5 to § 216.20). The approximate segment length of A–B is 290 m (0.18 mi), the approximate segment length of A–D is 540 m (0.34 mi), and the segment length of B–C is 915 m (0.57 miles). The total surface area of closure is 0.06 mi^2. The latitude/longitude coordinates are:

(A) A—19°22′44″ N, 155°53′49″ W;
(B) B—19°22′44″ N, 155°53′57″ W;
(C) C—19°22′16″ N, 155°53′49″ W;
(D) D—19°22′30″ N, 155°53′46″ W.

(4) Hawai'i Island—Makako Bay (Figure 6):

(i) The time-area closure in place between 6 a.m. to 3 p.m. HST daily for Makako Bay includes all surface and subsurface waters between points A, B, C, and D (Figure 6 to § 216.20); the shoreline boundary is at the mean lower low water line between points A and D. The approximate segment length of A–B is 315 m (0.20 mi), the segment length of B–C is 758 m (0.47 miles) and the segment length of C–D is 372 m (0.23 mi). The total surface area of closure is 0.14 mi^2. The latitude/longitude coordinates are:

(A) A—19°44′21″ N, 156°3′16″ W;
(B) B—19°44′25″ N, 156°3′26″ W;
(C) C—19°44′2″ N, 156°3′36″ W;
(D) D—19°43′57″ N, 156°3′23″ W.

(ii) [Reserved]

(5) Maui—La Perouse Bay (Figure 7):

(i) The time-area closure in place between 6 a.m. to 3 p.m. HST daily for La Perouse Bay includes all surface and subsurface waters between points A, B, C, and D (Figure 7 to § 216.20). The approximate segment length of A–B is 1,120 m (0.70 mi), the segment length of C–D is 1,290 m (0.80 mi), the segment length of A–C is 670 m (0.42 mi), and the segment length of B–D is 510 m (0.32 mi). The total surface area of closure is 0.31 mi^2. The latitude/longitude coordinates are:

(A) A—20°35′53″ N, 156°25′12″ W;
(B) B—20°35′31″ N, 156°24′50″ W;
(C) C—20°35′35″ N, 156°25′26″ W;
(D) D—20°35′13″ N, 156°24′54″ W.

(ii) All coordinates referenced to The World Geodetic System of 1984 (WGS 84)).

(g) *Prohibitions.* Unless otherwise excepted in paragraph (c) of this section, it is unlawful for any person or vessel, during the hours from 6 a.m. to 3 p.m. (HST), to enter, cause to enter, solicit to enter, or remain within any of the five time-area closures identified in paragraph (f) of this section. This prohibition includes all means of accessing the closed area during the relevant times, including on or below the surface of the water;

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

(1) Vessel operations necessary to avoid an imminent and serious threat to a person or vessel;

(2) Activities authorized through a permit or authorization issued by the National Marine Fisheries Service;

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

(4) Vessels participating in organized community-based outrigger canoe races that transit straight through a time-area closure;

(5) Vessels that transit straight through 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

(6) Outrigger canoes used for traditional subsistence fishing intended for personal, family, or community consumption or traditional use;

(i) *Affirmative defense.* In connection with any action alleging a violation of this section, any person claiming the benefit of any exemption, exception, or permit listed in paragraph (c) of this section has the burden of proving that the exemption or exception is applicable, or that the permit was granted and was valid and in force at the time of the alleged violation.

(j) *Maps of areas for Hawaiian spinner dolphin special restrictions.* Figures 3 through 7 to this section are overview maps. Table 2 to paragraph (j) provides the corresponding coordinate data for the time-area closure areas for Hawaiian spinner dolphin special restrictions.

TABLE 2 TO PARAGRAPH (j)—COORDINATES FOR THE FIVE TIME-AREA CLOSURES DESIGNATED IN HAWAI'I AND MAUI

	Latitude	Longitude
Coordinates for the Hawai'i Island—Kealakekua Bay time-area closure (Figure 3 to § 216.20) Hawai'i Island—Kealakekua Bay		
Figure 1 Label:		
A	19°28′37″ N	155°55′15″ W
B	19°28′54″ N	155°55′44″ W
C	19°28′48″ N	155°55′49″ W

TABLE 2 TO PARAGRAPH (j)—COORDINATES FOR THE FIVE TIME-AREA CLOSURES DESIGNATED IN HAWAI'I AND MAUI—Continued

	Latitude	Longitude
D	19°28′32″ N	155°55′19″ W
Coordinates for the Hawai'i Island—Hōnaunau Bay time-area closure (Figure 4 to § 216.20)		
Hawai'i Island—Hōnaunau Bay		
Figure 2 Label:		
A	19°25′27″ N	155°54′41″ W
B	19°25′22″ N	155°54′57″ W
C	19°25′31″ N	155°54′58″ W
Shoreline boundary—Mean low water line between A and C.		
Coordinates for the Hawai'i Island—Kauhakō Bay time-area closure (Figure 5 to § 216.20)		
Hawai'i Island—Kauhakō Bay		
Figure 3 Label:		
A	19°22′44″ N	155°53′49″ W
B	19°22′44″ N	155°53′57″ W
C	19°22′16″ N	155°53′49″ W
D	19°22′30″ N	155°53′46″ W
Shoreline boundary—Mean low water line between C and D.		
Coordinates for the Hawai'i Island—Makako Bay time-area closure (Figure 6 to § 216.20)		
Hawai'i Island—Makako Bay		
Figure 1 Label:		
A	19°44′21″ N	156°3′16″ W
B	19°44′25.18″ N	156°3′26.07″ W
C	19°44′2″ N	156°3′36″ W
D	19°43′57″ N	156°3′23″ W
Shoreline boundary—Mean low water line between A and D.		
Coordinates for the Maui—La Perouse Bay time-area closure (Figure 7 to § 216.20)		
Maui—La Perouse Bay		
Figure 1 Label:		
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

* * * * *

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Figure 3 to § 216.20 -- Hawai'i Island – Kealakekua Bay Proposed Time-area Closure

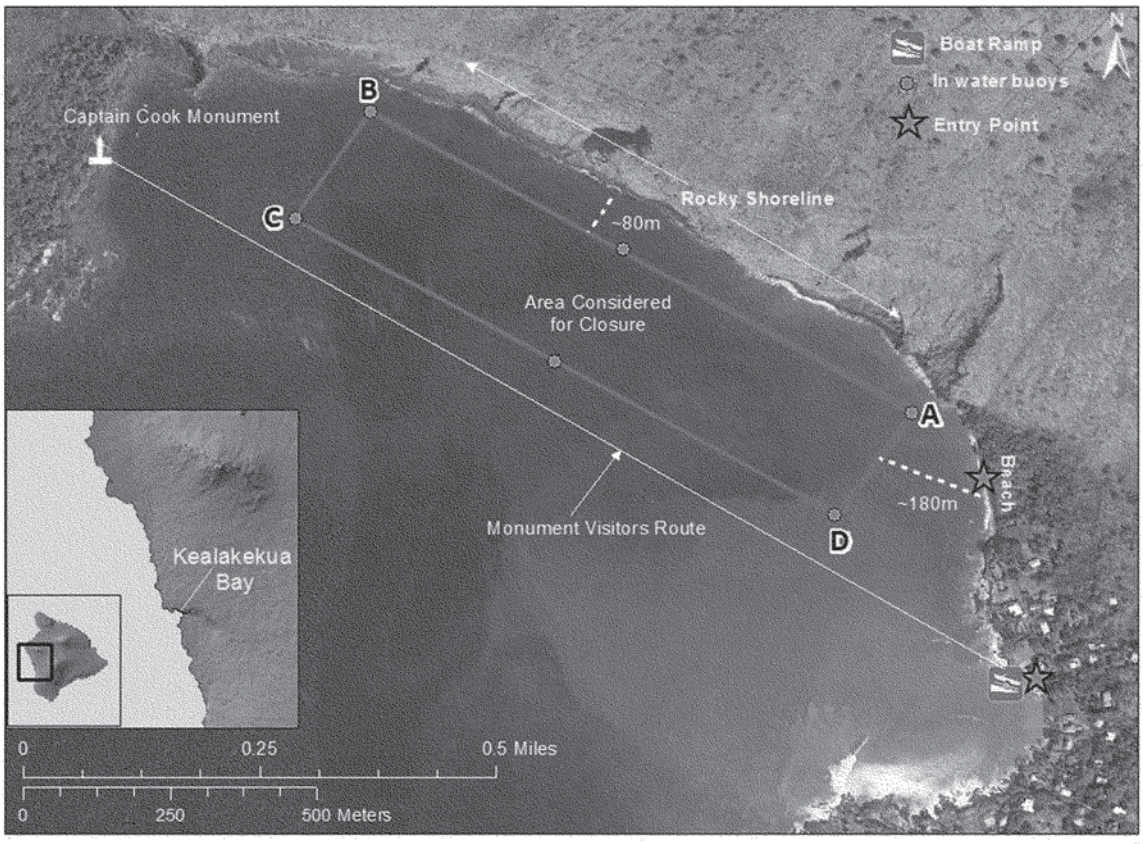


Figure 4 to § 216.20 -- Hawai'i Island – Hōnaunau Bay Proposed Time-area Closure

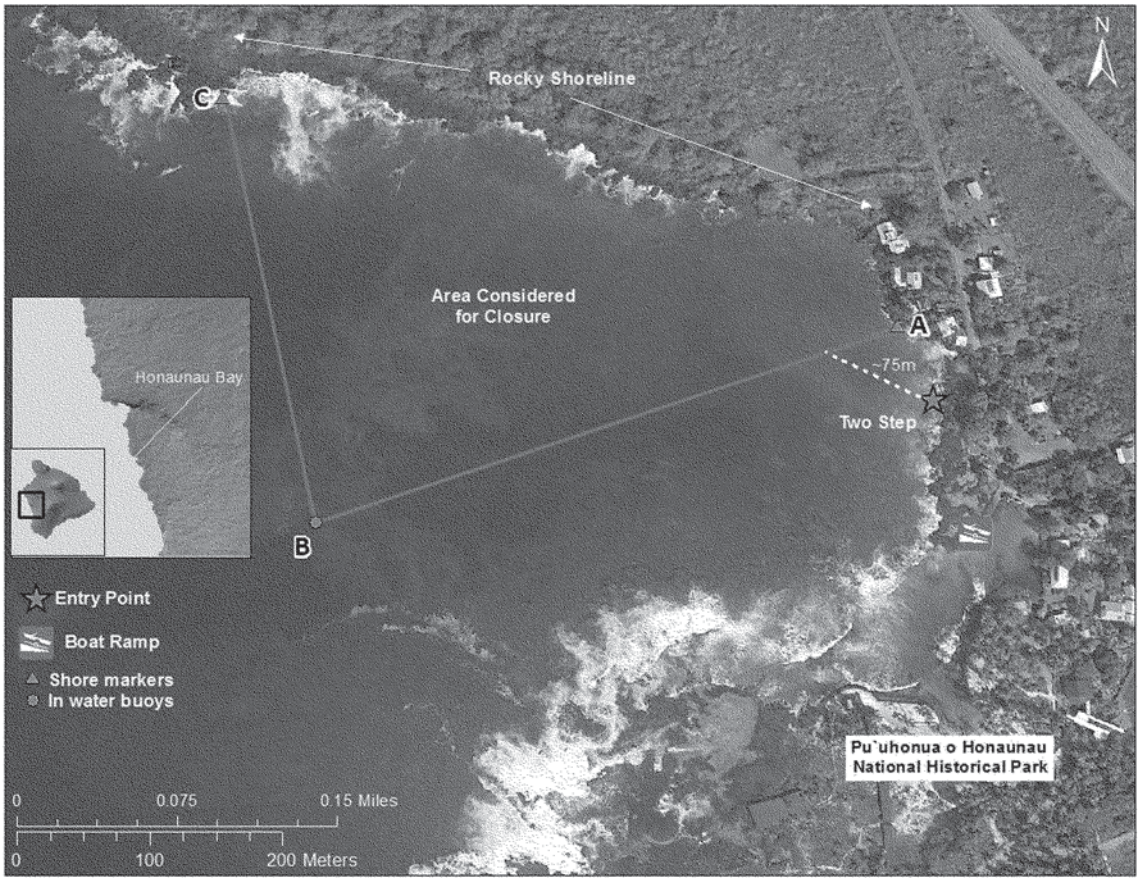


Figure 5 to § 216.20 -- Hawai'i Island – Kauhakō Bay Time-area-Closure

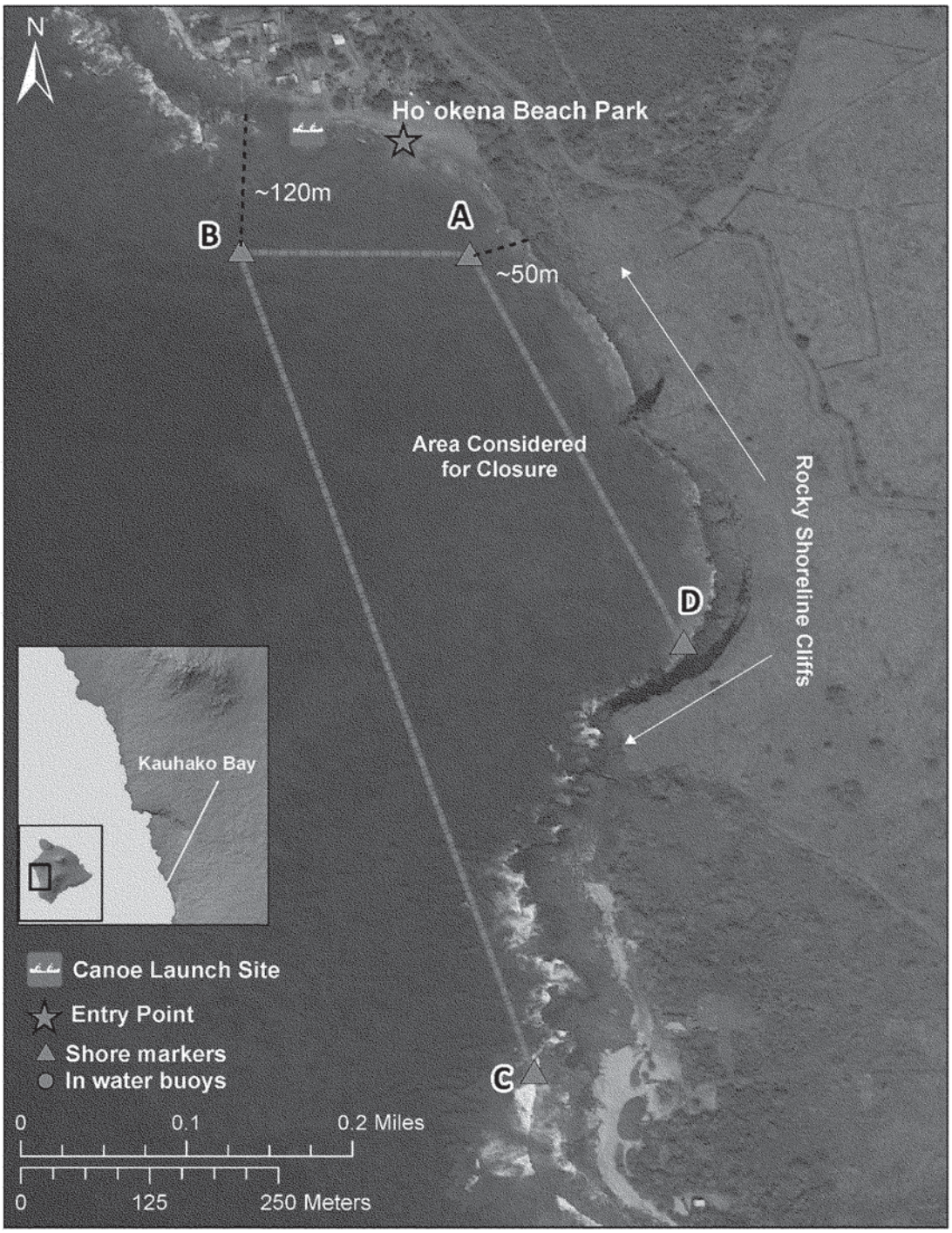


Figure 6 to § 216.20 -- Hawai'i Island – Makako Bay Time-area Closure

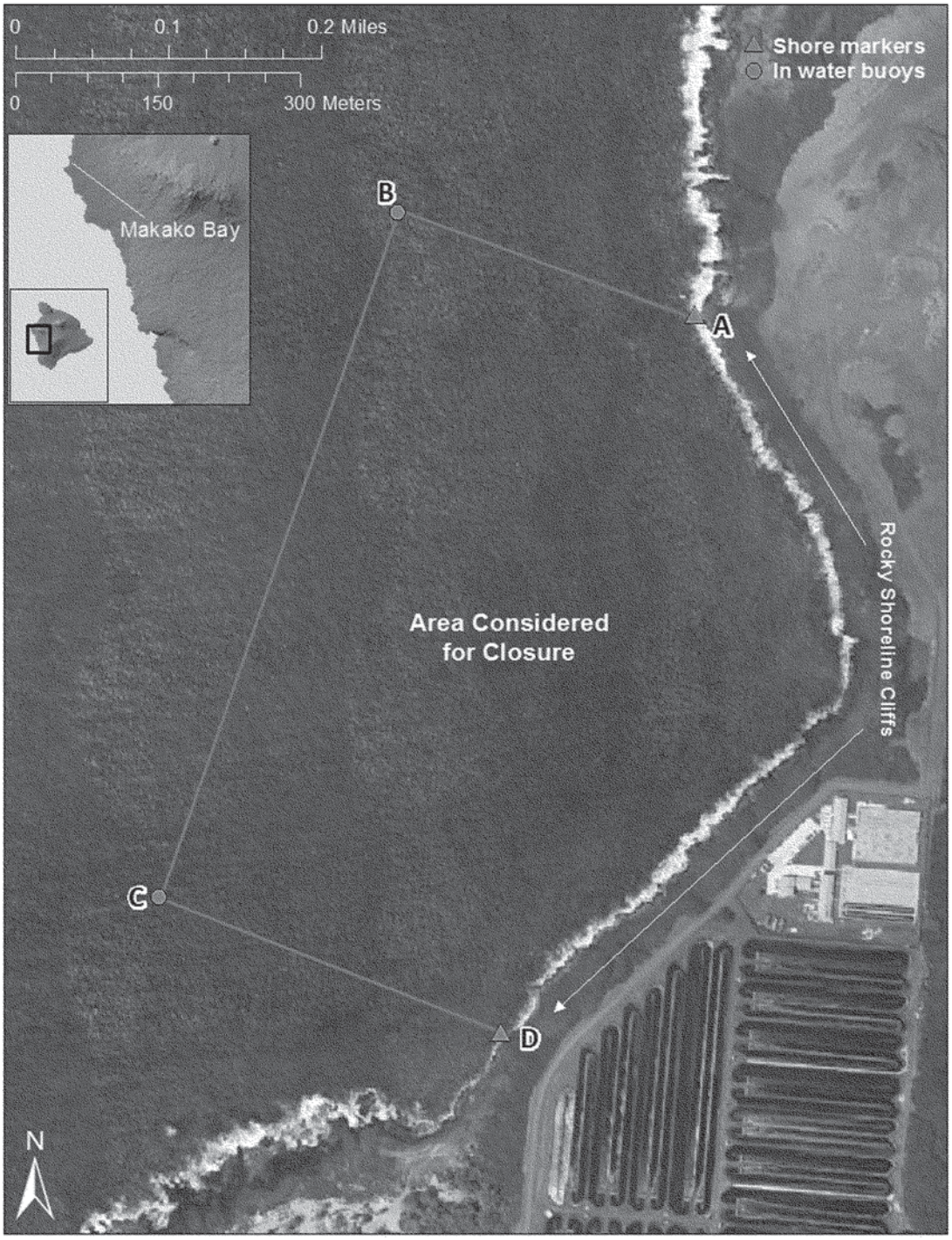
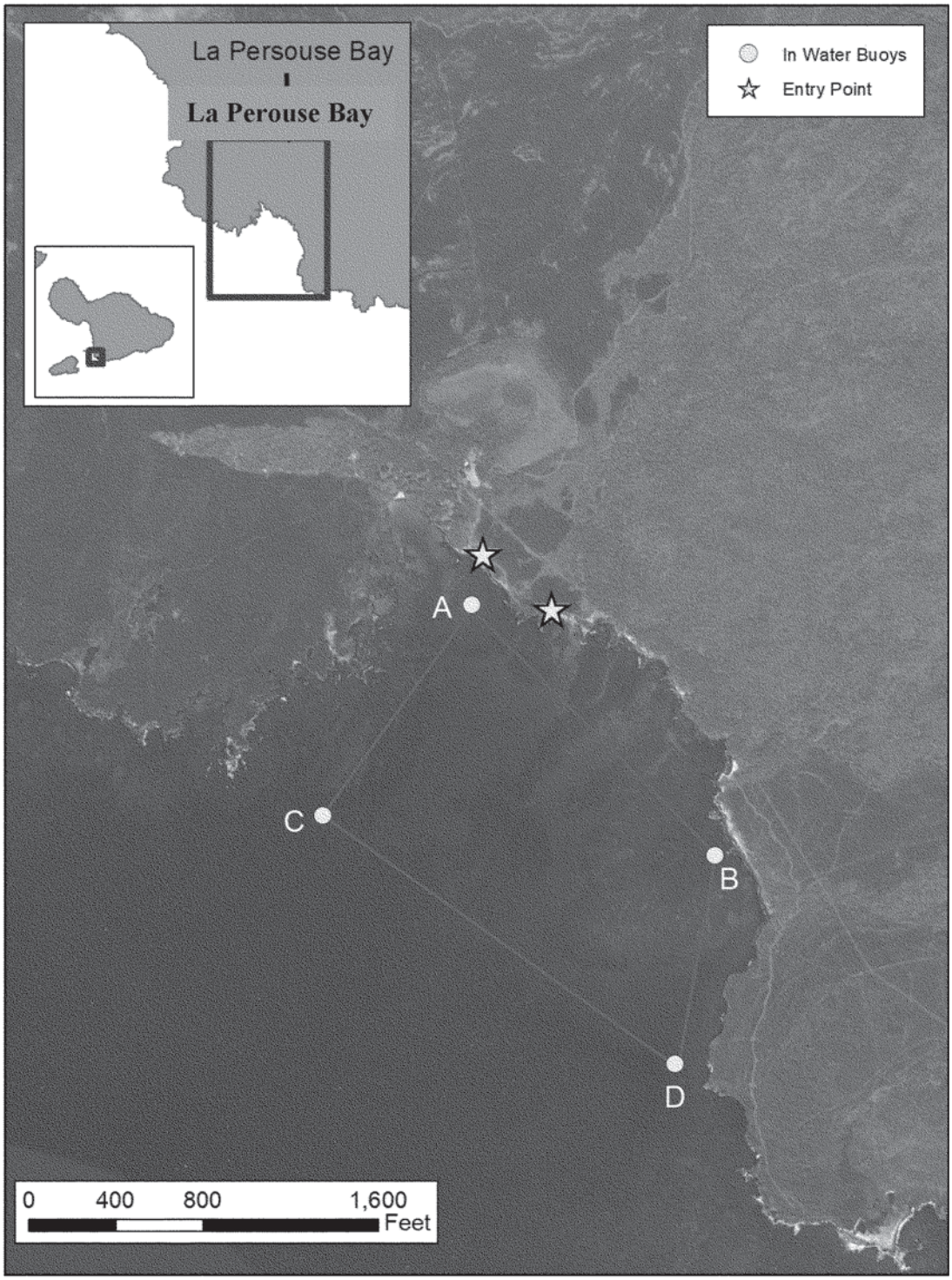


Figure 7 to § 216.20 -- Maui – La Perouse Bay Time-area Closure



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