

December 16, 2021

Mr. Kevin Brindock
Deputy Assistant Regional Administrator
Protected Resources Division
National Marine Fisheries Service
Pacific Islands Regional Office
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Sent via regulations.gov

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

Aloha Mr. Brindock:

We submit the following comments on behalf of the Native Hawaiian Organizations (NHOs) Moana 'Ohana, Kai Palaoa, and Mauna Kea Anaina Hou. The above named NHOs are comprised of Native Hawaiian Traditional and Customary Cultural and Religious Practitioners of Kanaloa (Hawaiian God of the Sea) and his many Kinolau or bodily manifestations including but not limited to the Hawaiian Spinner Dolphins.

We submit the following comments on the proposed rule, as published in 86 FR 53844, to establish time-area closures for Hawaiian spinner dolphins, *Stenella longirostris longirostris*, in five bays of the Main Hawaiian Islands under the Marine Mammal Protection Act (MMPA). We incorporate by reference our previous comments submitted during the comment period for the proposed rule on swim-with and approach regulations, as published in 81 FR 57854.

We wish to record to reflect that while we generally support protections of our 'Ohana Kanaloa, we have serious concerns over the absence of protections for Kanaka Maoli (Native Hawaiian) Traditional and Customary Cultural and Religious Rights, including the rights of the lineal descendants of places encompassed in the rule, including Kauhako, Honaunau, Kealakekua Bay, Makako Bay, Keoninuioio Bay.

Kanaka Maoli have protected rights under Federal Statutes, the Hawai'i Constitution, and under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). See note 1 below. NOAA is obligated to acknowledge and to affirmatively protect Kanaka Maoli rights. Our state constitutional rights as well as our rights established under the Hawai'i Admissions Act encompass all lands (including submerged lands) in Hawai'i, which are held in trust for the betterment of the conditions of Native Hawaiians. These rights are implicated and potentially infringed upon by NOAA's proposal to completely close certain bays in Hawai'i to all human activity.

All of the bays NOAA is proposing for closure are part of the public trust, are sacred to Kanaka Maoli, and contain sacred things including the Nai'a (Spinner Dolphins), who are manifestations of Kanaloa.

These bays proposed for closure are where Kanaka Maoli continue to engage in their traditional and cultural practices and have co-existed with the Nai'a for countless generations. Our traditional and customary rights and associated cultural practices therefore are not the reason for NOAA seeking to close off these bays, but if these bays are closed, our rights will be negatively impacted because Kanaka Maoli could be regulated out of existence and even criminalized simply for practicing age-old traditions and customs.

The greatest threat to the Nai'a in these bays is without a doubt commercial use, and the abuse and exploitation of these charismatic dolphins for profit. Kanaka Maoli cultural practices are not a threat to the Nai'a. What was regulated recently regarding barring swimming with Nai'a was a necessary regulatory action taken by NOAA because it was meant to regulate the human footprint that has been negatively impacting the Nai'a and the families connected to those bays for decades. We supported the no-swim regulation because it regulates the people with commercial licenses who have and continue to abuse their licenses and increase their commercial footprint, increasingly harassing the Nai'a.

The Nai'a come into the bays to seek sanctuary, respite, and to sleep. Our cultural and religious practices do not impact the Nai'a and that is why we have co-existed with them for generations. However, the bottom line motive behind all commercial activities is profit, and in this case, profit gained on the backs of our Kanaloa family.

The purpose of government regulation under the Marine Protection Act (MMPA) is to regulate in the interest of the life forms NOAA is mandated to protect. The purpose is not therefore to protect the profits of the exploiters or to injure and excessively limit the rights of Kanaka Maoli and their cultural practices relating to the restoration of abundance for our ocean lifeforms.

Here, NOAA has not demonstrated that closing these bays will not excessively burden or curtail Kanaka Maoli cultural and religious rights and associated practices. The recent NOAA proposal to close the bays lacks the necessary acknowledgment of NOAA's responsibility to uphold other relevant laws (State, Federal and International law) put in place to protect Kanaka Maoli and their practices. Therefore it is discriminatory, excessive and will negatively impact Kanaka Maoli practices and rights.

NOAA must take an affirmative position to uphold all relevant laws (State, Federal and International) that protect Kanaka Maoli rights to continue their traditional and customary cultural and religious practices. There is precedent that affirms if NOAA does regulate Kanaka Maoli cultural and religious rights it must be done in the way least restrictive and burdensome to Kanaka Maoli practices. NOAA is expressly required to acknowledge, uphold, and protect our

cultural rights. Our traditional and customary cultural and religious rights should be acknowledged, affirmed, and expressly recognized in the proposed bay closure rule.

Aloha and Mahalo for the opportunity to provide these comments,

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Note 1: The Hawai'i Admission Act, for example, expressly provides for the betterment of the conditions of native Hawaiians. This trust responsibility does not permit the diminishment of the rights of the native tenant but provides a responsibility on the part of the United States to protect such rights. A public trust is created by Admission Act §5(f). The federal-state compact recognizes the significance of Native Hawaiian rights and culture in circumstances such as these. *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 739 F.2d 1467, 1472 (9th Cir. 1984), held that the trust created by Admission Act § 5(f) stands as a compact between the United States and the State of Hawai'i: "the trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law (citation omitted). Congress imposed the trust obligation as a condition of statehood and as 'a compact with the United States'" (citing the Admissions Act § 4).

In other words, the public trust is part of what the state accepted, and Congress approved, as a condition of statehood – each government is therefore bound by those provisions. Cf. *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wash.2d 652, 171 P.2d 838, 842, 168 A.L.R. 539 (1946), appeals dismissed by 330 U.S. 803, 67 S.Ct. 972, 91 L.Ed. 1262 (1947) and 330 U.S. 803, 67 S.Ct. 972, 91 L.Ed. 1262 (1947) (each government was bound by the provisions of Washington state's admission act as a federal-state compact).

Among the express purposes of the § 5(f) public trust, "bettering conditions of native Hawaiians" has been a subject of repeated discussion in state and federal cases. *Pele Defense Fund v. Paty*, 73 Haw. 578, 591, 837 P.2d 1247, 1256 (1992), said "[t]he Ninth Circuit Court of Appeals has long recognized that a claim may be brought pursuant to § 1983 to enforce federal rights created by § 5(f) of the Admission Act".

Congress has repeatedly expressed support of Native Hawaiians as indigenous people with protections pursuant to law. *Akina v. Hawaii*, 141 F. Supp. 3d 1106, 1130 (D. Haw. 2015). Kanaka Maoli (NH) are afforded further protections pursuant to the United States Constitution. The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000b et seq., ("RFRA") is a U.S. federal law which provides in essence a reinstatement of relevant part the "Sherbert Test," which was set forth by *Sherbert v. Verner*, and *Wisconsin v. Yoder* – cases which required constitutionally

mandated strict scrutiny standard be used when determining whether the Free Exercise Clause of the First Amendment to the United States Constitution, guaranteeing religious freedom, has been violated. Congress stated in its findings of RFRA that a religiously neutral law can burden a religion just as much as one that was intended to interfere with religion such that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." Pursuant to strict scrutiny analysis, NOAA would only be permitted to act in "furtherance of a compelling government interest" in a manner that is the least restrictive way to further the governmental interest.