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Part III

**Department of
Commerce**

**National Oceanic and Atmospheric
Administration**

**15 CFR Part 945
Hawaiian Islands Humpback Whale
National Marine Sanctuary Regulations;
Proposed Rule**

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****15 CFR Part 945**

[Docket No.: 950427120-5120-01]

RIN 0648-AH99

Hawaiian Islands Humpback Whale National Marine Sanctuary Regulations

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC)

ACTION: Proposed rule; summary of draft management plan; and Notice of public availability of draft management plan and draft environmental impact statement.

SUMMARY: NOAA, as required by section 2306 of the Hawaiian Islands National Marine Sanctuary Act (the "HINMSA" or "Act"), is proposing a comprehensive management plan and implementing regulations for the Hawaiian Islands Humpback Whale National Marine Sanctuary (the "HIHWNMS" or "Sanctuary"). The Sanctuary was designated by Congress in 1992. This document publishes the proposed Designation Document and regulations for the Sanctuary, and summarizes the proposed management plan. The proposed management plan details the proposed goals and objectives, management responsibilities, research and long-term monitoring activities, interpretive and educational programs, resource protection strategies, and enforcement for the Sanctuary. The proposed regulations would implement the comprehensive management plan and govern the conduct of activities consistent with the HINMSA and the National Marine Sanctuaries Act ("NMSA"), and the Designation Document for the Sanctuary. By this notice NOAA also announces the public availability of the draft environmental impact statement and management plan (DEIS/MP) for the Sanctuary.

The primary purposes of the proposed designation document, proposed regulations and proposed management plan are to protect humpback whales and their Sanctuary habitat; to educate and interpret for the public the relationship of humpback whales to the Hawaiian Islands marine environment; to manage human uses of the Sanctuary consistent with the HINMSA and the NMSA; and to provide for the identification of marine resources and

ecosystems of national significance for possible inclusion in the Sanctuary.

DATES: Comments are invited and will be considered if submitted in writing to the address below on or before December 14, 1995.

ADDRESSES: Comments should be submitted to the Chief, Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1305 East-West Highway, SSMC-4, 12th Floor, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Debra Malek, Regional Manager, Pacific Branch, Sanctuaries and Reserves Division, Silver Spring, Maryland, (301) 713-3141, or Allen Tom, On-site Project Specialist, Kihei, Maui, Hawaii, (808) 879-2818 (Maui), (808) 541-3184 (Oahu) or (800) 831-4888 (inter-island toll-free).

SUPPLEMENTARY INFORMATION:**I. Background**

The establishment of a national marine sanctuary in the waters around Hawaii was first considered in 1977, when NOAA received the nomination for a proposed Humpback Whale National Marine Sanctuary in the waters between the islands of Maui, Molokai, Lanai, and Kahoolawe. Scientists and resource managers, at a workshop convened in December 1977, recommended that a marine sanctuary would be most beneficial for the long-term protection of the endangered humpback whale. Workshop participants concluded that a Sanctuary that encompassed the marine waters around the main Hawaiian islands would provide the greatest protection for humpback whales in the waters off Hawaii. The nomination was placed on NOAA's List of Recommended Areas in October 1979. In accordance with NOAA regulations, NOAA declared the site an "active candidate" for sanctuary designation in March 1982, and public workshops were conducted in Hawaii during April 1982. Both support for a sanctuary and concerns regarding possible regulation of fishing activities and vessel operation were voiced at these meetings. In early 1984, at the request of the State government, NOAA suspended further consideration of the site as a possible national marine sanctuary.

In October 1990 Congress directed NOAA to determine the feasibility of establishing a national marine sanctuary around Kahoolawe Island, the smallest of the eight main Hawaiian islands (Public Law No. 101-515). NOAA's 1992 report to Congress, "Kahoolawe

Island National Marine Sanctuary Feasibility Study", found that although it does not appear that large numbers of humpback whales utilize Kahoolawe Island waters, other biological, cultural and historical resources adjacent to Kahoolawe Island merit further investigation as to their possible national significance. The study recommended that additional areas around the Hawaiian Islands be considered as possible components of a multiple-site, multiple-resource national marine sanctuary.

In 1992, Congress considered the reauthorization of Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.* ("MPRSA"; also cited as the National Marine Sanctuaries Act). During this time, the State of Hawaii presented testimony at reauthorization hearings citing the need and desirability of designating a Humpback Whale National Marine Sanctuary in the waters around Hawaii. Coupled with the Kahoolawe Feasibility Study, the State's testimony renewed Congressional interest in designation of a sanctuary.

On November 4, 1992, Pub. L. No. 102-587 (the Oceans Act), was signed into law. Subtitle A of Title II of the Oceans Act (the National Marine Sanctuaries Program Amendments Act) reauthorized and amended Title III of the MPRSA. Subtitle C of Title II of the Oceans Act, titled the Hawaiian Islands National Marine Sanctuary Act, designated the Hawaiian Islands Humpback Whale National Marine Sanctuary. The Act specifies a boundary for the Sanctuary subject to modification by the Secretary of Commerce ("Secretary") as may be necessary to fulfill the purpose for which the Sanctuary was designated, and identifies waters around Kahoolawe Island for automatic designation as part of the Sanctuary on January 1, 1996, unless certified by the Secretary as being unsuitable for inclusion in the Sanctuary.

Section 2306 of the Act requires the Secretary to develop a comprehensive management plan and implementing regulations following the procedures of sections 303 and 304 of the NMSA (16 U.S.C. 1433 and 1434; these sections set forth designation standards and procedures for designating and implementing the designation of national marine sanctuaries). To meet these requirements, a series of scoping meetings were conducted in March 1993 on each of the main Hawaiian Islands, and in Washington, DC. During March 1994, additional public meetings were conducted on each of the main Hawaiian Islands to aid the

development of a draft management plan for the Sanctuary. On-site staff have also solicited information from Federal, State and county agencies and the public to assist in the development of the DEIS/MP. The DEIS/MP was jointly developed by SRD and the Hawaii Office of State Planning pursuant to a memorandum of agreement signed in June 1993.

The authority of the Secretary to designate national marine sanctuaries was delegated to the Under Secretary of Commerce for Oceans and Atmosphere by Department of Commerce, Organization Order 10-15, § 3.01(z) (Jan. 11, 1988). The authority to administer provisions of Title III of the MPRSA was delegated to the Assistant Administrator for Ocean Services and Coastal Zone Management of NOAA by NOAA Circular 83-38, Directive 05-50 (Sept. 21, 1983, as amended).

Comments are solicited from all interested persons on the proposed Designation Document, the proposed regulations, and the DEIS/MP for the Sanctuary. Comments are in particular invited on the Sanctuary boundary, the adequacy of the regulatory regime to protect humpback whales and their habitat, the research and education programs, the structure and role of the Sanctuary Advisory Council, and the process for identifying other marine resources and ecosystems for possible inclusion in the Sanctuary. After the comments received during the public comment period have been considered, a final environmental impact statement and management plan (FEIS/MP) will be prepared, and a notice of final rule implementing the Sanctuary designation will be published in the **Federal Register**. The Designation Document, management plan, and regulations will take effect and become final 45 days after the date of issuance of the comprehensive management plan and implementing regulations, unless the Governor of Hawaii certifies to the Secretary that the management plan, any implementing regulation, or any term of the plan or regulations is unacceptable. If the Governor makes such certification, the management plan, regulations, or term, respectively, will not take effect in the State waters within the Sanctuary boundary. (The Secretary may then terminate the entire designation for the Sanctuary if he considers that an objection by the Governor will prevent the HINMSA's goals and objectives from being fulfilled.) Upon the close of the 45-day period, a notice will be published in the **Federal Register** announcing the effective date of the implementing regulations.

II. Summary of Draft Environmental Impact Statement/Management Plan

The DEIS/MP for the Hawaiian Islands Humpback Whale National Marine Sanctuary sets forth the Sanctuary's location and provides background information on humpback whales and their habitat, other marine resources located in Hawaii, and human uses of the area. The DEIS/MP describes the proposed resource protection, research and long-term monitoring, education and interpretive programs, and details specific activities to be undertaken in each program. The DEIS/MP also includes a discussion, by program area, of agency roles and responsibilities and a description of Sanctuary administration, including the establishment of a Sanctuary Advisory Council. Major components of the Sanctuary management plan are summarized below.

Resource Protection

Unlike most other national marine sanctuaries, which are based on protecting and managing a marine ecosystem environment, the only resources proposed for protection and management under the Sanctuary regime are humpback whales and their habitat. Thus, the highest management priority for the Sanctuary is the long-term protection of the humpback whales and their habitat in Hawaii. In addition to the HINMSA, the humpback whale is specifically protected by two other Federal laws. The humpback whale is listed as an endangered species under the Endangered Species Act, as amended ("ESA"), 16 U.S.C. 1531 *et seq.*, and is protected under the Marine Mammal Protection Act, as amended ("MMPA"), 16 U.S.C. 1361 *et seq.*, both administered by NOAA's National Marine Fisheries Service ("NMFS"). As many of the activities affecting humpback whales and their habitat are presently regulated or governed by existing Federal, State and county authorities, the Sanctuary would primarily work with these authorities to ensure comprehensive, complementary, coordinated and more efficient management and protection of humpback whales and their habitat. The Sanctuary would also work with existing Federal and State enforcement entities to coordinate enforcement efforts, develop annual enforcement plans, and respond to public concerns.

The goals and objectives of the proposed Resource Protection Program are designed to reinforce, complement and coordinate existing management and regulatory efforts; fill gaps in existing authorities; enhance public

participation and awareness in protecting humpback whales and their habitat; address some of the problems, objectives and policies identified in the Hawaii Ocean Resource Management Plan (1991), the NMFS Final Recovery Plan for the Humpback Whale (1991), and other programs, such as point and non-point source pollution control measures as they relate to the protection of the humpback whale's Hawaiian habitat. Because the only resources proposed for protection and management under the Sanctuary regime—humpback whales and their habitat—already are protected, directly and indirectly, by a number of other laws (*e.g.*, ESA, MMPA, Clean Water Act, Rivers and Harbors Act, and the Coastal Zone Management Act), the Sanctuary would seek to achieve these goals by working with existing authorities. The Sanctuary would reinforce existing management regimes without adding to current regulatory and administrative requirements.

To fulfill the statutory mandate of providing long-term protection for the population of humpback whales and their Sanctuary habitat, the proposed Resource Protection Program has the following objectives and strategies:

(1) Coordinate and complement policies and procedures among the agencies sharing regulatory responsibility for the protection and management of humpback whales and humpback whale habitat within the Sanctuary (Sanctuary habitat), primarily with NMFS, which administers the ESA and MMPA, and also with various State and county agencies of competent jurisdiction;

(2) Develop and issue Sanctuary regulations only as necessary to reinforce and complement existing efforts and fill gaps in existing authorities for the protection and management of humpback whales and their Sanctuary habitat;

(3) Complement coordination among appropriate Federal, State and county authorities to enhance enforcement of existing laws that fulfill Sanctuary goals;

(4) Encourage participation by interested agencies and the public in the development of procedures to address specific management concerns (*e.g.*, research, long-term monitoring, enforcement, education, and emergency-response programs);

(5) Promote public awareness of, and voluntary compliance with, Sanctuary regulations and objectives and other authorities in place that protect humpback whales and their Sanctuary habitat through education and interpretive programs stressing resource

sensitivity and wise use of the marine environment;

(6) Utilize research and monitoring results and other scientific data from resource management agencies and researchers to develop effective, comprehensive resource protection strategies and improve management decision-making; and

(7) Facilitate all public and private uses of the Sanctuary (including uses of Hawaiian natives customarily and traditionally exercised for subsistence, cultural, and religious purposes) consistent with the primary objective of protection of the humpback whales and their Sanctuary habitat.

Research and Long-Term Monitoring Program

Effective management of the Sanctuary's resources requires the development and implementation of a responsive Sanctuary research and long-term monitoring program. The primary goals of the proposed Research and Long-Term Monitoring Program are to improve our understanding of humpback whales and their habitat requirements; identify, address and resolve specific management concerns; establish a long-term ecological monitoring program with respect to humpback whales and their habitat; coordinate and facilitate information exchange among the various researchers and institutions, agencies, and the general public; and enhance the public's participation in resource stewardship. Other research priorities may result from the process to identify additional marine resources and ecosystems of national significance for possible inclusion in the Sanctuary.

The proposed Research and Long-Term Monitoring Program would be part of the overall effort to implement portions of the NMFS Final Recovery Plan for the Humpback Whale and other long-term protection plans for humpback whale habitat (e.g. Hawaii Ocean Resource Management Plan). The specific objectives for the proposed Sanctuary Research and Long-Term Monitoring Program are to:

(1) Improve the present understanding of humpback whales' vital life rates (age at sexual maturity, pregnancy rates, calving intervals, mortality and age-specific mortality), abundance, distribution, movement, behavior, and interrelationships with their Hawaiian habitat;

(2) Characterize the marine environment to establish baseline parameters for identifying, detecting and monitoring natural- and human-induced changes to humpback whales

and their habitat, and to identify research needs and gaps;

(3) Establish a coordinating framework and procedures for identifying, selecting and sponsoring research projects to ensure that the research topics are responsive to management concerns and that research results contribute to improved management decision-making in the Sanctuary;

(4) Develop a long-term ecological monitoring program to detect and determine the cause or causes of future changes and trends in the vital parameters and the important habitat components of the humpback whale population that winters in the Hawaiian Islands;

(5) Develop a data and information management system for tracking and integrating new information into an evolving understanding of humpback whales and their habitat; and

(6) Encourage information exchange among all researchers, organizations and agencies undertaking humpback whale and habitat related research in the Sanctuary and elsewhere to promote more informed management and decision-making.

Education and Interpretation Program

The primary goals of the proposed Education and Interpretation Program are to improve public awareness and understanding of the humpback whale and its habitat; enhance knowledge of the Sanctuary's purposes, goals and resource protection strategies; facilitate responsible human uses within the Sanctuary consistent with the primary objective of protection of the humpback whale and its habitat; encourage public participation; and facilitate information exchange among the various environmental educators and interpreters, researchers, agencies, and the general public. Particular focus would be placed on projects which interpret for the public the relationship of humpback whales to the Hawaiian Islands marine environment.

On-site visitor programs would be instituted consisting of making available printed materials describing the Sanctuary for distribution at statewide government offices, marine recreation businesses, marinas, whalewatching vessels, humpback whale interpretive centers, libraries, schools, airports, harbors and other local establishments. A local Sanctuary headquarters would be established and the Sanctuary would also use other visitor and information centers throughout Hawaii to inform visitors about the Sanctuary, humpback whales and their habitat.

The specific objectives of the proposed Sanctuary Education and Interpretation Program are to:

(1) Enhance public awareness, understanding and appreciation of humpback whales and their habitat;

(2) Create public awareness of the National Marine Sanctuary Program, the Hawaiian Islands Humpback Whale National Marine Sanctuary, and other humpback whale conservation groups and organizations;

(3) Establish a coordinating framework and procedures for identifying, selecting and sponsoring education projects to ensure that the education topics are responsive to management concerns and that the education products contribute to greater understanding and appreciation of the Sanctuary, humpback whales and the broader Hawaiian Islands marine environment;

(4) Encourage information exchange among all persons, organizations and agencies undertaking environmental education and research activities in the Sanctuary;

(5) Establish a user-friendly Data/Information Center for the location of information and research results pertaining to Sanctuary resources and management information; and

(6) Establish cooperative education programs with native Hawaiian groups to educate people about native Hawaiian traditions, culture, uses and religion as they relate to Hawaii's unique marine environment.

Sanctuary Administration

The National Marine Sanctuary Program is administered by NOAA's Sanctuaries and Reserves Division (SRD). Depending on the resources available to the Sanctuary, staffing would include a Sanctuary manager, administrative assistant, research coordinator, education coordinator, and one or more enforcement/interpreter personnel. Staff would be distributed among the Sanctuary's main office, presently located in Kihei, Maui, other satellite offices located on other islands, or within other agencies. Arrangements may be made among various levels of government agencies and private sector organizations through cooperative agreements or memoranda of understanding to provide personnel and/or resources to carry out the duties associated with the research and education coordinator positions. SRD would coordinate its on-site activities through cooperative arrangements and/or specific memoranda of understanding with other Federal, State, and county agencies, and non-governmental organizations, as appropriate.

A Sanctuary Advisory Council (SAC) would be established pursuant to section 315 of the NMSA (16 U.S.C. 1445a) to enable agencies, interested groups, and individuals to provide advice and recommendations on the management of the Sanctuary. The SAC would consist of a balanced representation of those groups affected by Sanctuary designation, including Federal, State and county authorities, native Hawaiian groups, fishing interests, commercial whalewatching industry, boating industry, environmental interests, researchers, education groups, and members of the community. The SAC would act in an advisory capacity to the Sanctuary Manager and would be instrumental in helping produce annual operating plans and reports by identifying education, outreach, research, long-term monitoring, resource protection and revenue enhancement priorities. The SAC would also play an instrumental role in identifying marine resources and ecosystems of national significance for possible inclusion in the Sanctuary through a process outlined in Part 4(c) of the proposed management plan. The SAC would work in concert with the Manager by keeping her or him informed about issues of concern throughout the Sanctuary, offering recommendations on specific issues, and aiding the Manager in achieving the goals of the Sanctuary program within the context of Hawaii's marine programs and policies.

In order to function efficiently in an advisory capacity and incorporate the different concerns from all the main Hawaiian Islands, the SAC may appoint subcommittees or working groups that correspond to the main Sanctuary management areas of education, research, resource protection, regulations/enforcement, revenue enhancement, and others as necessary. Additional subcommittees or working groups may be formed to provide recommendations to the SAC on the identification and assessment of other marine resources and ecosystems of national significance for possible inclusion into the Sanctuary. To ensure county representation, the SAC would have one seat for each of the four counties (Kauai, Honolulu, Maui and Hawaii (Big Island)).

III. Proposed Designation Document

Section 304(a)(4) of the NMSA requires that the terms of designation include the geographic area included within the Sanctuary; the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or aesthetic value;

and the types of activities that will be subject to regulation by the Secretary to protect these characteristics. Section 304(a)(4) also specifies that the terms of designation may be modified only by the same procedures by which the original designation was made. Thus the terms of designation serve as a constitution for the Sanctuary. In the case of this Congressionally designated Sanctuary, many of the terms of designation are contained in the Hawaiian Islands National Marine Sanctuary Act. The proposed Designation Document follows:

Proposed Designation Document for the Hawaiian Islands Humpback Whale National Marine Sanctuary

On November 4, 1992, President Bush signed into law the Hawaiian Islands National Marine Sanctuary Act ("HINMSA" or "Act"; Subtitle C of the Oceans Act of 1992, Pub. L. No. 102-587) which designated the Hawaiian Islands Humpback Whale National Marine Sanctuary ("HIHWNMS" or "Sanctuary").

The purposes of the Sanctuary are to—

- (1) Protect humpback whales and their Sanctuary habitat;
- (2) Educate and interpret for the public the relationship of humpback whales to the Hawaiian Islands marine environment;
- (3) Manage human uses of the Sanctuary consistent with the designation and Title III of the Marine Protection, Research and Sanctuaries Act, as amended ("MPRSA"; also cited as the "National Marine Sanctuaries Act" or "NMSA"), 16 U.S.C. 1431 *et seq.*; and
- (4) Provide for the identification of marine resources and ecosystems of national significance for possible inclusion in the Sanctuary.

Article I. Effect of Designation

Section 2306 of the HINMSA requires the Secretary to develop and issue a comprehensive management plan and implementing regulations to achieve the policy and purposes of the Act, consistent with the procedures of sections 303 and 304 of the NMSA. Section 304 of the NMSA also authorizes the issuance of such regulations as are necessary and reasonable to implement the designation, including managing and protecting the conservation, recreational, ecological, historical, research, educational and aesthetic resources and qualities of the Hawaiian Islands Humpback Whale National Marine Sanctuary. Section 1 of Article IV of this Designation Document lists

those activities that may be regulated on the effective date of the regulations, or at some later date in order to implement the Sanctuary designation.

Article II. Description of the Area

The HINMSA identified a Sanctuary boundary but authorized the Secretary to modify the boundary as necessary to fulfill the purposes of the designation. The Sanctuary boundary was modified by the Secretary to encompass the submerged lands and waters off the coast of the Hawaiian Islands extending seaward from the mean high-water line—

- (1) To the 100-fathom (183 meter) isobath adjoining the islands of Maui, Molokai and Lanai, including Penguin Bank, but excluding the area within three nautical miles of the upper reaches of the wash of the waves on the shore of Kahoolawe Island;
- (2) To the deep water area of Pailolo Channel from Cape Halawa, Molokai, to Nakalele Point, Maui, and southward;
- (3) To the 100-fathom (183 meter) isobath around the Big Island (Hawaii);
- (4) To the 100-fathom (183 meter) isobath from Kailiu Point eastward to Makahuena Point, Kauai; and
- (5) To the 100-fathom (183 meter) isobath from Puaena Point eastward to Mahie Point, and from the Ala Wai Canal eastward to Makapuu Point, Oahu.

Excluded from the Sanctuary boundary are the following commercial ports and small boat harbors:

Hawaii (Big Island)

Hilo Harbor
Honokohau Boat Harbor
Kawaihae Boat Harbor and Small Boat Basin
Keauhou Bay

Kauai

Hanamaulu Bay
Nawiliwili Harbor

Lanai

Kaumalapau Harbor
Manele Harbor

Maui

Kahului Harbor
Lahaina Boat Harbor
Maalaea Boat Harbor

Molokai

Hale o Lono Harbor
Kaunakakai Harbor

As specified at sections 2305(b)(2) (A) and (B) of the HINMSA, on January, 1, 1996, the area of the marine environment within 3 nautical miles of the upper reaches of the wash of the waves on the shore of Kahoolawe Island will become part of the Sanctuary, unless during the 3 month period immediately preceding January 1, 1996,

the Secretary certifies in writing to Congress that the area is not suitable for inclusion in the Sanctuary. After a certification of unsuitability is made, the Secretary shall annually make a finding concerning the suitability of the area for inclusion in the Sanctuary and submit to Congress a report on the finding and the reasons thereof. If the Secretary finds that the area is suitable for inclusion in the Sanctuary, the area is designated a part of the Sanctuary on the 30th day after such report is submitted.

The Precise Boundary of the Sanctuary is Set Forth at the End of This Designation Document

Article III. Characteristics of the Area That Give It Particular Value

The Hawaiian Islands comprise an archipelago which consists of eight major islands and 124 minor islands, with a total land area of 6,423 square miles, and a general coastline of 750 miles. The central North Pacific stock of endangered humpback whales, the largest of the three North Pacific stocks, estimated to be at approximately 10% of its pre-whaling abundance, uses the waters around the main Hawaiian Islands for reproductive activities including breeding, calving and nursing. The warm, calm waters around the main Hawaiian Islands provide protective environments required for such activities. Of the known wintering and summering areas in the North Pacific used by humpback whales, the waters around the main Hawaiian Islands maintain the largest seasonally-resident population; approximately 2,000 to 3,000 humpback whales use these waters. The proximity to shore helps support an active commercial whalewatch industry, which is supported annually by millions of visitors who either directly or indirectly enjoy the Sanctuary waters.

In sections 2302 (1) and (4) of the HINMSA, Congressional findings state that "many of the diverse marine resources and ecosystems within the Western Pacific region are of national significance," and "the marine environment adjacent to and between the Hawaiian Islands is a diverse and unique subtropical marine ecosystem." In addition, Congress found that that Sanctuary could be expanded to include other marine resources of national significance. The waters around the Hawaiian Islands contain 24 other species of cetaceans, the highly endangered Hawaiian monk seal, three species of sea turtles and many other marine species endemic to this environment. Coastal Hawaiian waters

also support spectacular coral reef ecosystems which provide local people with an abundant source of fish and are a popular dive destination for visitors worldwide. These waters also contain a number of cultural/historical resources.

Article IV. Scope of Regulations

Section 1. Activities Subject to Regulation. In order to implement the Sanctuary designation, the following activities are subject to regulation to the extent necessary and reasonable to ensure the protection and management of the characteristics and values of the Sanctuary described above; primarily the protection and management of humpback whales and their Sanctuary habitat. Regulation may include governing the method, location, and times of conducting the activity, and prohibition of the activity, after public notice and an opportunity to comment. If a type of activity is not listed it may not be regulated, except on an emergency basis, unless Section 1 of Article IV is amended by the procedures outlined in section 304(a) of the NMSA. Such activities are:

- a. Approaching by any means a humpback whale in the Sanctuary, or causing another vessel, aircraft or other object to approach a humpback whale;
- b. Flying over a humpback whale in the Sanctuary in any type of aircraft except when in any designated flight corridor for takeoff or landing from an airport or runway;
- c. Discharging or depositing, from within or from beyond the boundary of the Sanctuary, any material or other matter that enters or could enter the Sanctuary, without, or not in compliance with, the terms or conditions of a required, valid Federal, State or county permit, license, lease or other authorization;
- d. Drilling into, dredging or otherwise altering the seabed of the Sanctuary; or constructing, placing or abandoning any structure, material or other matter on the seabed of the Sanctuary without, or not in compliance with, the terms or conditions of a required, valid Federal, State or county permit, license, lease or other authorization;
- e. Taking, removing, moving, catching, collecting, harvesting, feeding, injuring, destroying or causing the loss of, or attempting to take, remove, move, catch, collect, harvest, feed, injure, destroy or cause the loss of any humpback whale or humpback whale habitat;
- f. Operating a vessel (*i.e.*, watercraft of any description) in the Sanctuary in a manner that may adversely impact any humpback whale or humpback whale habitat;

g. Possessing within the Sanctuary a humpback whale or part thereof regardless of where taken, removed, moved, caught, collected or harvested; and

h. Interfering with, obstructing, delaying or preventing an investigation, search, seizure or disposition of seized property in connection with enforcement of the HINMSA or NMSA or any regulation or permit issued under the HINMSA or NMSA.

Section 2. Emergencies. Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality; or minimize the imminent risk of such destruction, loss or injury, any activity, including those not listed in Section 1 of this Article, is subject to immediate temporary regulation, including prohibition. If such a situation arises, the Director of NOAA's Office of Ocean and Coastal Resource Management or his or her designee shall seek to notify and consult to the extent practicable with any relevant Federal agency and the Governor of the State of Hawaii.

Article V. Effect on Leases, Permits, Licenses, and Rights

Pursuant to section 304(c)(1) of the NMSA, 16 U.S.C. 1434(c)(1), no valid lease, permit, license, approval or other authorization issued by any Federal, State, or local authority of competent jurisdiction, or any right of subsistence use or access, may be terminated by the Secretary of Commerce, or his or her designee, as a result of this designation, or as a result of any Sanctuary regulation, if such authorization or right was in existence on the effective date of Sanctuary designation (November 4, 1992).

Article VI. Alteration of This Designation

The terms of designation, as defined under section 304(a) of the NMSA, may be modified only by the procedures outlined in section 304(a), including public hearings, consultation with interested Federal, State, and county agencies, review by the appropriate Congressional committees, and the Governor of the State of Hawaii, and approval by the Secretary of Commerce, or his or her designee.

Appendix I—Hawaiian Islands Humpback Whale National Marine Sanctuary Boundary Coordinates

The boundary of the Hawaiian Islands Humpback Whale National Marine Sanctuary—
(Appendix I will set forth the precise boundary based on the comments received on the DEIS/MP)

End of Proposed Designation Document

IV. Summary of Proposed Regulations

The proposed regulations set forth the boundary of the Sanctuary and would augment existing authorities by prohibiting a relatively narrow range of activities that are conducted without, or not in compliance with required, valid authorizations from Federal, State, or local authorities of competent jurisdiction. The proposed regulations set forth the maximum per-day penalties for violating the National Marine Sanctuaries Act (NMSA), Hawaiian Islands National Marine Sanctuaries Act (HINMSA), or any Sanctuary regulation; identify the interagency cooperation requirements under the NMSA; and set forth procedures for administrative appeals.

The HIIHWNMS is unlike most other national marine sanctuaries for a number of reasons. First, while most national marine sanctuaries are designated to protect ecosystem environments, the Congress designated the HIIHWNMS primarily to protect the humpback whale and its habitat. These are the only resources proposed for protection and management under the Sanctuary regime. Second, the humpback whale is directly protected under two other Federal laws: the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*, both administered by NOAA's NMFS.

The proposed regulations reflect the uniqueness of the Sanctuary. For example, with one exception (hindering law enforcement activities) the regulations would not place additional or independent substantive restrictions or prohibitions on activities conducted in the Sanctuary to those already in place under other regulatory authorities. Rather, to protect humpback whales and their Sanctuary habitat the proposed regulations essentially rely on and incorporate restrictions or prohibitions already in place under Federal, State, and county authorities that protect, directly and indirectly, humpback whales and humpback whale habitat within the Sanctuary. By essentially incorporating into the Sanctuary regulatory regime restrictions or prohibitions already existing under other authorities, these restrictions or prohibitions are strengthened because they could be enforced by Sanctuary personnel and would be subject to enforcement mechanisms and penalties of the NMSA. Moreover, monies collected as civil penalties under the NMSA would be available to manage and improve the Sanctuary.

The proposed regulations would prohibit the following activities also prohibited under the MMPA or ESA: approaching any humpback whale; operating an aircraft above a humpback whale; and taking or possessing any humpback whale. However, any of these activities could be conducted if permitted or authorized under the MMPA or ESA. Additionally, the proposed regulations would prohibit the following activities conducted without, or not in compliance with, a required Federal, State or county permit, license, lease or other authorization: discharging or depositing in the Sanctuary any material or other matter; discharging or depositing outside the Sanctuary any material or other matter that subsequently enters the Sanctuary and injures a humpback whale or habitat; and altering the seabed of the Sanctuary. It is important to note that these proposed regulations would prohibit these activities only if a permit, license, lease, or other authorization from a Federal, State, or county authority of competent jurisdiction is required to conduct them and they are conducted without, or not in compliance with, such authorization. The only independent prohibition proposed in the regulations is interfering with, obstructing, delaying or preventing an investigation, search, seizure or disposition of seized property in connection with enforcement of either the NMSA or HINMSA or any regulation issued under either of those Acts.

Also, unlike the regulations in effect for other sanctuaries, the proposed regulations do not contain any provision for the issuance of Sanctuary permits or authorizations to conduct an otherwise prohibited activity. Since the regulations essentially incorporate restrictions or prohibitions imposed by other existing authorities, the SRD will recognize permits or other authorizations issued by those authorities to conduct an otherwise prohibited activity. SRD will coordinate with NMFS on the issuance of permits or authorizations under the ESA and MMPA, and with other Federal, State and county agencies that issue permits or other authorizations for activities that could impact humpback whales, or humpback whale habitat within the Sanctuary. Such coordination should eliminate potentially duplicative administrative processes while still allowing the Sanctuary to fulfill its trustee responsibilities to protect and manage humpback whales and humpback whale Sanctuary habitat.

The proposed scheme of relying on, and coordinating with, other authorities is possible because the only resources

proposed for protection and management under the Sanctuary regime are humpback whales and humpback whale Sanctuary habitat, and those resources already are protected, directly and indirectly, under other laws and regulations.

Specifically, the proposed regulations would add a new part 945 to Title 15, Code of Federal Regulations.

Proposed § 945.1 would set forth the purpose of the regulations which is to implement the designation of the Hawaiian Islands Humpback Whale National Marine Sanctuary, consistent with the terms of that designation, by regulating a narrow range of activities in order to protect and manage the North Pacific population of humpback whales, and their wintering habitat in the Sanctuary.

Proposed § 945.2 and proposed Appendix 1 would set forth the boundary of the Sanctuary. Although not presently included in the Sanctuary boundary, pursuant to sections 2305(b)(2)(A) and (B) of the HINMSA, on January 1, 1996, the area of the marine environment within 3 nautical miles of the upper reaches of the wash of the waves on the shore of Kahoolawe Island will become part of the Sanctuary, unless during the 3 month period immediately preceding January 1, 1996, the Secretary certifies in writing to Congress that the area is not suitable for inclusion in the Sanctuary. After a certification of unsuitability is made, the Secretary must annually make a finding concerning the suitability of the area for inclusion in the Sanctuary and submit to Congress a report on the finding and the reasons thereof. If the Secretary finds that the area is suitable for inclusion in the Sanctuary, the area is designated a part of the Sanctuary 30 days after such report is submitted.

Proposed § 945.3 would define various terms used in the regulations. Other terms appearing in the proposed regulations are defined at 15 CFR 922.2 and/or in the Marine Protection, Research and Sanctuaries Act, as amended (33 U.S.C. 1401-1445, and 16 U.S.C. 1431-1445). "Sanctuary resource" would be defined as "any humpback whale, or the humpback whale's habitat within the Sanctuary," because these are the only resources proposed for protection and management under the Sanctuary regime.

Proposed § 945.4 would allow all activities except those prohibited by § 945.5 to be undertaken subject to any emergency regulation promulgated pursuant to § 945.6, subject to the interagency cooperation provisions of section 304(d) of the NMSA, 16 U.S.C.

1434(d), subject to the liability established under section 312 of the NMSA, 16 U.S.C. 1443, and subject to all prohibitions, restrictions, and conditions validly imposed by any other authority of competent jurisdiction. Under proposed § 945.4, the regulatory prohibitions in § 945.5 expressly would not apply to military activities conducted by the United States Department of Defense, including combined military activities conducted by the Department of Defense and the military forces of a foreign nation, in existence on the effective date of the regulations as identified and listed in the Environmental Impact Statement/Management Plan (EIS/MP) for the Sanctuary. Military activities proposed after the effective date of the regulations would be subject to the regulatory prohibitions unless they are not likely to destroy, cause the loss of, or injure any humpback whale or humpback whale habitat in the Sanctuary, or if after consultation under section 304(d) of the NMSA, the Director of NOAA's Office of Ocean and Coastal Resource Management (OCRM) or his or her designee expressly finds that the regulatory prohibitions do not apply to the military activity. Exemption from the regulatory prohibitions should not result in significant adverse impacts to humpback whales or their Sanctuary habitat. Department of Defense operating procedures require military activities to be conducted in a manner that avoids adverse impacts to humpback whales and requires compliance with applicable authorities already in place to protect humpback whales. Department of Defense military activities remain subject to the statutory requirements of the NMSA (e.g., interagency cooperation provisions of section 304(d), and the liability established by section 312), any emergency regulations promulgated pursuant to § 945.6, and all other applicable laws (e.g., ESA and MMPA).

Proposed § 945.5 would prohibit a relatively narrow range of activities and thus make it unlawful to conduct them. As discussed above, the Sanctuary is unlike most other national marine sanctuaries in that the only resources that would be protected and managed under the Sanctuary regime are humpback whales and their Sanctuary habitat and those resources are already protected under other laws. Therefore, unlike any other national marine sanctuary, the regulations, with the exception of a prohibition on hindering enforcement activities, would not place additional or independent substantive restrictions or prohibitions on activities

conducted in the Sanctuary. Rather, the proposed regulations would essentially incorporate restrictions or prohibitions already in place under existing Federal, State, or county authorities, that protect, directly or indirectly, humpback whales and humpback whale habitat. Thus, the proposed regulations prohibit certain activities only if they are conducted without, or not in compliance with, a valid Federal, State or county permit, license, lease or other authorization required to conduct the activity. For example, if a person is discharging any material or matter into the Sanctuary without, or not in compliance with, a required National Pollutant Discharge Elimination System (NPDES) permit from the Hawaii Department of Health, that person will be in violation of the Sanctuary regulations. Similarly, if a person approaches a humpback whale in the Sanctuary in violation of the MMPA or ESA, that person will also be in violation of the Sanctuary regulations. Reinforcing existing restrictions provides additional protection for humpback whales, and humpback whale habitat in the Sanctuary necessary to achieve the purposes of the designation.

The prohibitions would be applied to foreign persons and foreign-flag vessels in accordance with recognized principles of international law, and in accordance with treaties, conventions, and other agreements to which the United States is a party.

The first activity prohibited would be approaching, while in the Sanctuary, by any means, within 100 yards (90 m) of any humpback whale except as authorized under the MMPA and the ESA.

The second activity prohibited would be causing a vessel or other object to approach, while in the Sanctuary, within 100 yards (90 m) of a humpback whale except as authorized under the MMPA and the ESA.

The third activity prohibited would be operating any aircraft above the Sanctuary within 1,000 feet (300 m) of any humpback whale except when in any designated flight corridor for takeoff or landing from an airport or runway, or as authorized under the MMPA and the ESA.

The intent of the first three prohibitions is to extend protection to humpback whales from harassment or other disturbance from human approaches by strengthening existing protections under the MMPA and the ESA. These three prohibitions essentially already are in effect through regulations promulgated by the NMFS at 50 CFR 222.31(a) (1)-(3). As prohibitions under the Sanctuary

regulations, they would be strengthened since they could be enforced by Sanctuary personnel and would be subject to enforcement mechanisms and civil penalties under the NMSA. Moreover, monies collected as civil penalties under the NMSA would be available to manage and improve the Sanctuary.

The fourth activity prohibited would be the taking of humpback whales in the Sanctuary, except as authorized under the MMPA and the ESA. As with the first three prohibitions, the intent of this prohibition also is to extend protection to humpback whales from taking, as defined by the ESA and MMPA, by reinforcing the protections afforded under these laws.

The fifth activity prohibited would be the possession within the Sanctuary of any living or dead humpback whale or part thereof taken in violation of the MMPA or the ESA (regardless of where taken, moved or removed from). This prohibition is designed to facilitate and supplement enforcement for violations of the MMPA, ESA and Sanctuary regulations.

The sixth activity prohibited would be discharging or depositing any material or other matter in the Sanctuary; altering the seabed of the Sanctuary; or discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures any humpback whale or humpback whale habitat; provided that such activity requires a Federal, State or county permit, license, lease or other authorization, and is conducted (i) without such permit license, lease or other authorization, or (ii) not in compliance with the terms and conditions of such permit, license, lease, or other authorization. Degradation of water quality, sediment quality, and modification of the seabed within the Sanctuary could adversely affect the humpback whale's habitat and, therefore, regulation of discharges and deposits and activities that alter the seabed is necessary. However, this prohibition recognizes that the humpback whale's Hawaiian habitat may not necessarily entail every aspect of the marine environment, and is, therefore, intended to enhance existing protections by supplementing enforcement authority and providing for the application of greater maximum civil penalties under the NMSA against illegal, and potentially harmful, discharge or deposit, or alteration of the seabed activities. Also, this provision does not prohibit or otherwise regulate discharge or deposit, or alteration of the seabed activities which do not require a

Federal, State or county permit, license, lease or other authorization. Rather, this prohibition only applies in instances when a person is conducting a particular activity without, or not in compliance with, a required Federal, State or county permit, license, lease or other authorization. This provision will help ensure that general water quality and seabed conditions in the Sanctuary will not degrade. As a result of the ongoing research and long-term monitoring program contained in the management plan for the Sanctuary, information will identify those specific features and qualities of the marine environment that are significant habitat components. Such information will aid the Sanctuary and other relevant Federal, State and county agencies in devising specific management techniques and, if necessary, additional regulations to further protect humpback whale habitat.

The seventh activity prohibited would be interference with, obstruction, delay or prevention of any investigation, search, seizure or disposition of seized property in connection with enforcement of the HINMSA or NMSA or any regulation issued under either of those Acts. The intent of this prohibition is to ensure the facilitation of Sanctuary enforcement activities, which enhance resource protection.

Proposed § 945.6 would authorize the immediate temporary regulation, including prohibition, of any activity where necessary to prevent or minimize the destruction of, loss of, or injury to any humpback whale or humpback whale Sanctuary habitat, or minimize the imminent risk of such destruction, loss or injury. If such a situation arises, the Sanctuaries and Reserves Division would seek to notify and consult with potentially affected Federal agencies and the Governor of Hawaii prior to taking such action.

Proposed § 945.7 would set forth the maximum statutory civil penalty per day for violating the NMSA, HINMSA or any Sanctuary regulation at \$100,000. Each day of a continuing violation would constitute a separate violation. This section would also establish the right of any person subject to a Sanctuary enforcement action to appeal pursuant to applicable procedures in 15 CFR Part 904.

Proposed § 945.8 would implement the consultation with NOAA requirements of section 304(d) of the NMSA, 16 U.S.C. 1434(d), for any proposed Federal agency action internal or external to the Sanctuary, including private activities authorized by licenses, leases, or permits, that is likely to destroy, cause the loss of, or injure any

Sanctuary resource, in this case the humpback whale or its Sanctuary habitat. The Federal agency proposing the action would be required to determine whether the activity is likely to destroy, cause the loss of, or injure a humpback whale or humpback whale Sanctuary habitat at the earliest practicable time, but no later than 45 days before final approval of the action, unless a different schedule is agreed upon by the Federal agency and the Director of OCRM. However, should SRD obtain information that a Federal agency action is likely to destroy, cause the loss of, or injure any Sanctuary resource, SRD would notify the Federal agency in writing that it believes section 304(d) applies, and the reasons why. SRD and NMFS are developing a Memorandum of Understanding that will specify agency coordination and cooperation with respect to consultations required under section 304(d) of the NMSA and section 7 of the ESA for Federal activities that may affect humpback whales or their Sanctuary habitat. In essence, the MOU identifies the NMFS as the lead contact agency for consultations pertaining to humpback whales or their habitat.

Proposed § 945.9 repeats the provisions in section 312 of the NMSA that any person who destroys, causes the loss of, or injures any Sanctuary resource is liable to the United States for response costs and damages resulting from such destruction, loss or injury, plus interest. Any vessel used to destroy, cause the loss of, or injure any Sanctuary resource is liable in rem to the United States for response costs and damages resulting from such destruction, loss or injury. Person, includes any private person or entity, or any officer, employee, agent, department, agency, or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

V. Miscellaneous Rulemaking Requirements

National Marine Sanctuaries Act

Section 2306 of the HINMSA requires the development of a comprehensive management plan and implementing regulations to achieve the policy and purposes of the Sanctuary. To meet the requirements of section 2306, the comprehensive management plan and implementing regulations must be developed in accordance with sections 303 and 304 of the NMSA. Section 304 of the NMSA requires, on the same day as this notice is published, the submission of documents to the appropriate Senate and House

Committees, which contain, among other things, the proposed regulations, a draft management plan detailing the goals and objectives, management responsibilities, research activities, interpretive and educational programs, and enforcement, including surveillance activities, for the area, and a draft environmental impact statement. In accordance with section 304(a)(1), the required documents are being submitted to the specified Congressional Committees.

Executive Order 12866: Regulatory Impact

This action has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

The regulations proposed in this notice would allow all activities to be conducted in the Sanctuary other than a relatively narrow range of prohibited activities. The prohibitions primarily reinforce existing authorities and do not place additional substantive restrictions on any person. For this reason, the proposed regulations, in total, if adopted in final form as proposed, are not expected to have a significant economic impact on a substantial number of small entities, and the Assistant General Counsel for Legislation and Regulation of the Department of Commerce has so certified to the Chief Counsel for Advocacy of the Small Business Administration. As a result, an initial Regulatory Flexibility Analysis was not prepared.

Paperwork Reduction Act of 1980

This rule does not contain collection of information requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act (Pub. L. No. 96-511).

Executive Order 12612

A Federalism Assessment (FA) was prepared for the draft management plan and proposed implementing regulations. The FA concluded that all were fully consistent with the principles, criteria, and requirements set forth in sections 2 through 5 of Executive Order 12612, Federalism Considerations in Policy Formulation and Implementation (52 FR 41685, Oct. 26, 1987). Copies of the FA are available upon request from the Office of Ocean and Coastal Resource Management at the address listed above.

National Environmental Policy Act

In accordance with section 304(a)(2) of the NMSA (16 U.S.C. 1434(a)(2)) and the provisions of the National

Environmental Policy Act of 1969 (42 U.S.C. 4321–4370(a)), a DEIS has been prepared for the proposed implementation of the designation and the proposed regulations. As required by section 304(a)(2) of the NMSA, the DEIS includes the resource assessment report required by section 303(b)(3) of the NMSA (16 U.S.C. 1433(b)(3)), maps depicting the proposed boundary of the designated area, and the existing and potential uses and resources of the area. Copies of the DEIS are available upon request to the Office of Ocean and Coastal Resource Management at the address listed above.

Executive Order 12630

This proposed rule, if issued in final form as proposed, would not have any takings implications within the meaning of Executive Order 12630 because it would not appear to have an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally potential property interest to its owner or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation.

List of Subjects in 15 CFR Part 945

Administrative practices and procedure, Coastal zone, Education, Environmental Protection, Marine resources, Natural Resources, Penalties, Recreation and recreation areas, Reporting and recordkeeping requirements, Research.

Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program
Dated: September 6, 1995.

David L. Evans,

Acting Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

Accordingly, for the reasons set forth above, 15 CFR chapter IX is proposed to be amended as follows.

A new part 945 is added to subchapter B to read as follows:

PART 945—HAWAIIAN ISLANDS HUMPBACK WHALE NATIONAL MARINE SANCTUARY

- Sec.
- 945.1 Purpose.
 - 945.2 Boundary.
 - 945.3 Definitions.
 - 945.4 Allowed activities.
 - 945.5 Prohibited activities.
 - 945.6 Emergency regulations.
 - 945.7 Penalties; appeals.
 - 945.8 Interagency cooperation.
 - 945.9 Response costs and damages.

Appendix I to Part 945—Hawaiian Islands Humpback Whale National Marine Sanctuary Boundary Coordinates

Authority: Title II, subtitle C, Pub. L. 102–587, 106 Stat. 5055–5059 (16 U.S.C. 1431 *et seq.*).

§ 945.1 Purpose.

(a) The purpose of the regulations in this Part is to implement the designation of the Hawaiian Islands Humpback Whale National Marine Sanctuary by regulating activities affecting the resources of the Sanctuary or any of the qualities, values, or purposes for which the Sanctuary was designated, in order to protect, preserve, and manage the conservation, ecological, recreational, research, educational, historical, cultural, and aesthetic resources and qualities of the area. The regulations are intended to supplement and complement existing regulatory authorities; to facilitate to the extent compatible with the primary objective of protecting the humpback whale and its habitat, all public and private uses of the Sanctuary, including uses of Hawaiian natives customarily and traditionally exercised for subsistence, cultural, and religious purposes, as well as education, research, recreation, commercial and military activities; to reduce conflicts between compatible uses; to maintain, restore, and enhance the humpback whale and its habitat; to contribute to the maintenance of natural assemblages of humpback whales for future generations; to provide a place for humpback whales that are dependent on their Hawaiian Islands wintering habitat for reproductive activities, including breeding, calving, and nursing, and for the long-term survival of their species; and to achieve the other purposes and policies of the Hawaiian Island National Marine Sanctuary Act and National Marine Sanctuaries Act.

(b) These regulations may be modified to fulfill the Secretary's responsibilities for the Sanctuary, including the provision of additional protections for humpback whales and their habitat, if reasonably necessary, and the conservation and management of other marine resources, qualities and ecosystems of the Sanctuary determined to be of national significance. The Secretary shall consult with the Governor of the State of Hawaii on any modification to the regulations contained in this part. For any modification of the regulations contained in this part that would constitute a change in a term of the designation, as contained in the Designation Document for the Sanctuary, the Secretary shall follow the

applicable requirements of sections 303 and 304 of the NMSA, and sections 2305 and 2306 of the HINMSA.

§ 945.2 Boundary.

(a) Except for excluded areas described in paragraph (b) of this section, the Hawaiian Islands Humpback Whale National Marine Sanctuary consists of the submerged lands and waters off the coast of the Hawaiian Islands seaward from the mean high-water line:

- (1) To the 100-fathom (183 meter) isobath adjoining the islands of Maui, Molokai and Lanai, including Penguin Bank, but excluding the area within three nautical miles of the upper reaches of the wash of the waves on the shore of Kahoolawe Island;
- (2) To the deep water area of Pailolo Channel from Cape Halawa, Molokai, to Nakalele Point, Maui, and southward;
- (3) To the 100-fathom (183 meter) isobath around the Big Island (Hawaii);
- (4) To the 100-fathom (183 meter) isobath from Kailiu Point eastward to Makahuena Point, Kauai; and
- (5) To the 100-fathom (183 meter) isobath from Puaena Point eastward to Mahie Point and from the Ala Wai Canal eastward to Makapuu Point, Oahu.

(b)(1) Excluded from the Sanctuary boundary are the following commercial ports and small boat harbors:

Hawaii (Big Island)

Hilo Harbor
Honokohau Boat Harbor
Kawaihae Boat Harbor and Small Boat Basin
Keauhou Bay

Kauai

Hanamaulu Bay
Nawiliwili Harbor

Lanai

Kaumalapau Harbor
Manele Harbor

Maui

Kahului Harbor
Lahaina Boat Harbor
Maalaea Boat Harbor

Molokai

Hale o Lono Harbor
Kaunakakai Harbor

(2) The precise boundary of the Sanctuary appears in Appendix I of this Part.

§ 945.3 Definitions.

(a)(1) *Acts* means the Hawaiian Islands National Marine Sanctuary Act (HINMSA; sections 2301–2307 of Pub. L. 102–587), and the National Marine Sanctuaries Act (NMSA; also known as Title III of the Marine Protection, Research, and Sanctuaries Act (MPRSA), as amended, 16 U.S.C. 1431 *et seq.*).

(2) *Adverse impact* means an impact that independently or cumulatively damages, diminishes, degrades, impairs, destroys, or otherwise harms.

(3) *Alteration of the seabed* means drilling into, dredging, or otherwise altering a natural physical characteristic of the seabed of the Sanctuary; or constructing, placing, or abandoning any structure, material, or other matter on the seabed of the Sanctuary.

(4) *Director* means the Director of the Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration.

(5) *Habitat* means those areas that provide space for individual and population growth and normal behavior of humpback whales, and include sites used for reproductive activities, including breeding, calving and nursing.

(6) *Injure* means to change adversely, either in the long or short term, a chemical, biological, or physical attribute of, or the viability of. To "injure" therefore includes, but is not limited to, to cause the loss of and to destroy.

(7) *Military activities* means those military activities conducted by or under the auspices of the Department of Defense and any combined military activities carried out by the Department of Defense and the military forces of a foreign nation.

(8) *Person* means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency, or instrumentality of the Federal Government or of any State, regional, or local unit of government, or of any foreign government.

(9) *Sanctuary* means the Hawaiian Islands Humpback Whale National Marine Sanctuary.

(10) *Sanctuary resource* means any humpback whale, or the humpback whale's habitat within the Sanctuary.

(11) *Take or taking* a humpback whale means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect or injure, or to attempt to engage in any such conduct. The term includes, but is not limited to, any of the following activities: collecting any dead or injured humpback whale, or any part thereof; restraining or detaining any humpback whale, or any part thereof, no matter how temporarily; tagging any humpback whale; operating a vessel or aircraft or doing any other act that results in the disturbing or molesting of any humpback whale.

(12) *Vessel* means a watercraft of any description, including, but not limited to, motorized and non-motorized watercraft, personal watercraft, airboats, and float planes used while

maneuvering on the water, capable of being used as a means of transportation in/on the waters of the Sanctuary.

(b) Other terms appearing in the regulations in this Part are defined at 15 CFR 922.2, and/or in the Marine Protection, Research, and Sanctuaries Act, as amended, 33 U.S.C. 1401 *et seq.*, and 16 U.S.C. 1431 *et seq.*

§ 945.4 Allowed Activities.

(a) All activities except those prohibited by § 945.5 may be undertaken in the Sanctuary subject to any emergency regulations promulgated pursuant to § 945.6, subject to the interagency cooperation provisions of section 304(d) of the NMSA (16 U.S.C. 1434(d)) and § 945.8 of this Part, and subject to the liability established by section 312 of the NMSA and § 945.9 of this Part. All activities are also subject to all prohibitions, restrictions, and conditions validly imposed by any other Federal, State or county authority of competent jurisdiction.

(b) Included as activities allowed under the first sentence of paragraph (a) of this section are all classes of military activities, internal or external to the Sanctuary, that are being or have been conducted before the effective date of these regulations, as identified in the FEIS. Paragraphs (a) (1) through (6) of § 945.5 do not apply to these classes of activities, nor are these activities subject to further consultation under section 304(d) of the NMSA.

(c) Military activities proposed after the effective date of these regulations are also included as allowed activities under the first sentence of paragraph (a). Paragraphs (a) (1) through (6) of § 945.5 apply to these classes of activities unless—

(1) They are not subject to consultation under section 304(d) of the NMSA and § 945.8 of this Part, or

(2) Upon consultation under section 304(d) of the NMSA and § 945.8 of this Part, NOAA's findings and recommendations include a statement that paragraphs (a) (1) through (6) of § 945.5 do not apply to the activity.

(d) If an activity described in paragraphs (b) or (c)(2) of this section is modified such that it is likely to destroy, cause the loss of, or injure a Sanctuary resource in a manner significantly greater than was considered in a previous consultation under section 304(d) of the NMSA and § 945.8 of this Part, or if the modified activity is likely to destroy, cause the loss of, or injure any Sanctuary resource not considered in a previous consultation under section 304(d) of the NMSA and § 945.8 of this Part, the modified activity will be

treated as a new activity under paragraph (c) of this section.

(e) If a proposed military activity subject to section 304(d) of the NMSA and § 945.8 of this Part is necessary to respond to an emergency situation and the Secretary of Defense determines in writing that failure to undertake the proposed activity during the period of consultation would impair the national defense, the Secretary of the military department concerned may request the Director or designee that the activity proceed during consultation. If the Director or designee denies such a request, the Secretary of the military department concerned may decide to proceed with the activity. In such case, the Secretary of the military department concerned shall provide the Director or designee with a written statement describing the effects of the activity on Sanctuary resources once the activity is completed.

§ 945.5 Prohibited activities.

(a) The following activities are prohibited and thus unlawful for any person to conduct or cause to be conducted.

(1) Approaching, within the Sanctuary, by any means, within 100 yards of any humpback whale except as authorized under the Marine Mammal Protection Act, as amended (MMPA), 16 U.S.C. 1361 *et seq.*, and the Endangered Species Act, as amended (ESA), 16 U.S.C. 1531 *et seq.*;

(2) Causing a vessel or other object to approach, within the Sanctuary, within 100 yards of any humpback whale except as authorized under the MMPA and the ESA;

(3) Operating any aircraft above the Sanctuary within 1,000 feet of any humpback whale except when in any designated flight corridor for takeoff or landing from an airport or runway or as authorized under the MMPA and the ESA;

(4) Taking any humpback whale in the Sanctuary except as authorized under the MMPA and the ESA;

(5) Possessing within the Sanctuary (regardless of where taken) any living or dead humpback whale or part thereof taken in violation of the MMPA or the ESA;

(6) Discharging or depositing any material or other matter in the Sanctuary; altering the seabed of the Sanctuary; or discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures a humpback whale or humpback whale habitat; provided that such activity requires a Federal, State or county permit, license, lease or other

authorization, and is conducted (i) without such permit, license, lease or other authorization, or (ii) not in compliance with the terms and conditions of such permit, license, lease, or other authorization.

(7) Interfering with, obstructing, delaying or preventing an investigation, search, seizure or disposition of seized property in connection with enforcement of either of the Acts or any regulations issued under either of the Acts.

(b) The regulations in this Part shall be applied to foreign persons and foreign vessels in accordance with generally recognized principles of international law, and in accordance with treaties, conventions and other international agreements to which the United States is a party.

§ 945.6 Emergency regulations.

Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource, or to minimize the imminent risk of such destruction, loss, or injury, any and all activities are subject to immediate temporary regulation, including prohibition. Before issuance of such regulations the Director or designee shall consult to the extent practicable with any relevant Federal agency and the Governor of the State of Hawaii.

§ 945.7 Penalties; appeals.

(a) Pursuant to section 307 of the NMSA, each violation of either of the Acts, or any regulation in this Part is subject to a civil penalty of not more than \$100,000. Each such violation is subject to forfeiture of property or Sanctuary resources seized in accordance with section 307 of the NMSA. Each day of a continuing violation constitutes a separate violation.

(b) Regulations setting forth the procedures governing the administrative proceedings for assessment of civil penalties for enforcement reasons, issuance and use of written warnings, and release or forfeiture of seized property appear at 15 CFR Part 904.

(c) A person subject to an action taken for enforcement reasons for violation of these regulations or either of the Acts may appeal pursuant to the applicable procedures in 15 CFR Part 904.

§ 945.8 Interagency Cooperation.

Under section 304(d) of the NMSA, federal agency actions internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Director or designee. The federal agency proposing an action shall determine

whether the activity is likely to destroy, cause the loss of, or injure a Sanctuary resource. To the extent practicable, consultation procedures under section 304(d) of the NMSA may be consolidated with interagency cooperation procedures required by other statutes, such as the ESA. The Director or designee will attempt to provide coordinated review and analysis of all environmental requirements.

§ 945.9 Response costs and damages.

Under section 312 of the NMSA, 16 U.S.C. 1443, any person who destroys, causes the loss of, or injures any Sanctuary resource is liable to the United States for response costs and damages (plus interest) resulting from such destruction, loss, or injury, and any vessel used to destroy, cause the loss of, or injure any Sanctuary resource is liable in rem to the United States for response costs and damages resulting from such destruction, loss, or injury.

Appendix I to Part 945—Hawaiian Islands Humpback Whale National Marine Sanctuary Boundary Coordinates

[Note: Appendix I will set forth the precise boundary coordinates based on the comments received on the DEIS/MP.]

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