

Recommendations on the Draft Management Plan and Draft Environmental Impact Statement for the Hawaiian Islands Humpback Whale National Marine Sanctuary

Adopted and Forwarded to Sanctuary Management at July 20th, 2015 Sanctuary Advisory Council Meeting

Prepared by the Management Plan Review (MPR) working group for the Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council

Executive Summary

The Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council (“SAC”) formed a Management Plan Review (MPR) working group to evaluate the Hawaiian Islands Humpback Whale National Marine Sanctuary’s (“Sanctuary”) Draft Management Plan and Draft Environmental Impact Statement (DEIS). The working group met over a period of three months to develop a summary evaluation and specific recommendations for consideration by the SAC for a vote to forward to Sanctuary managers. This report contains the summary recommendations of the MPR working group, which are contained in two primary sections: Overarching Recommendations - on the content of the draft management plan and DEIS as a whole; and a set of specific recommendations in relation to our previously developed and adopted SAC working group recommendations. Overall we are supportive of the Sanctuary’s programmatic shift to ecosystem-based management, and support the Sanctuary’s work on key issues and geographies where they are well-positioned to effect positive change and where there are gaps that are not being filled by other management entities and which the Sanctuary specifically has expertise. We fully support the collaborative partnership and co-management relationship between NOAA and the State of Hawai’i in their ongoing efforts to see the greatest conservation efficiencies, values, and benefits for the management and regulation of our island resources and its multiple user groups. Below, we provide a detailed set of recommendations which if incorporated into Sanctuary management, we believe will improve the management of biocultural resources in the Sanctuary and the benefits they provide to Hawai’i residents and visitors.

Overview of Working Group

The Management Plan Review (MPR) working group was formed by the Sanctuary Advisory Council (SAC) Chair as a working group of the [Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council](#) under its [charter](#), which allows for the SAC Chair to form a working group to address important issues relevant to the management of the Sanctuary.

The purpose of the MPR working group was to evaluate the Hawaiian Islands Humpback Whale National Marine Sanctuary’s [Draft Management Plan and Draft Environmental Impact Statement](#) (DEIS), which was released on March 20, 2015. The MPR working group presented the results of the evaluation and recommendations for discussion and a vote at the 68th meeting of the SAC held on July 20, 2015.

The objectives of the MPR Working Group are two-fold:

- A. **Objective 1: Evaluate the Sanctuary's Draft Management Plan and DEIS.**
Specifically, we review the draft management plan and DEIS in relation to:
 - o A. Content of the plan and DEIS as a whole, with reference to relevant issues related to the Sanctuary in the Hawaiian Islands;
 - o B. Previously developed and adopted [SAC working group recommendations](#).
- B. **Objective 2: Develop a summary evaluation and specific recommendations for consideration by the SAC for a possible vote to forward to Sanctuary managers.**

This working group is co-chaired by Solomon Kaho'ohalahala (SAC Vice-Chair) and Jack Kittinger (SAC Secretary). Working group (WG) members include current and former SAC members that were on the previous 9 working groups that led the development of the working group recommendations. At least one member from each of the previous working groups was included. The members of the working group are:

- Sol Kaho'ohalahala (Lāna'i) –Offshore Development WG, Water Quality WG; Humpback Whale WG
- Jack Kittinger (Research) –Co-chair Ecosystem Protections WG; Maritime Heritage WG
- Robin Newbold (Maui County) – Water Quality WG
- Liz Kumabe (former SAC member) – Chair Ocean Literacy WG; Climate Change WG
- Judy Lemus (Education) – Co-chair Ocean Literacy WG; Ecosystem Protections WG
- Teri Leicher (Business/Commerce) – Chair Maritime Heritage WG; Co-chair Enforcement WG; Ecosystem Protections WG
- Maka'ala Ka'aumoana (Kaua'i County) – Offshore Development WG; Water Quality WG; Ecosystem Protections WG; Humpback Whale WG
- Adam Pack (SAC Chair, Hawai'i County) – Co-chair Ecosystem Protections WG; Humpback Whale WG
- Phil Fernandez (Fishing) – Chair Offshore Development WG; Humpback Whale WG
- Walter Ritte (Moloka'i) – Offshore Development WG; Native Hawaiian WG; Water Quality WG

Working Group Process

Working groups formed by the Sanctuary Advisory Council developed management recommendations to address priority issues identified during the 90-day public scoping period held in 2010. The working groups were made up of council members and non-council members including cultural advisors, representatives of user groups, technical experts, and state and federal agency representatives. Working group reports were presented to the full council at an open public meeting on January 17-18, 2012 and the council voted to forward all recommendation reports to sanctuary management from the following nine working groups: [Climate Change](#), [Ecosystem Protections: Species and Habitats](#), [Enforcement](#), [Humpback Whale Protections](#), [Maritime Heritage](#), [Native Hawaiian Culture](#), [Ocean Literacy](#), [Offshore Development](#), and [Water Quality](#).

A management plan review working group (MPR working group), led by Jack Kittinger and Sol Kaho'ohalahala, was established to evaluate how the working group recommendations were incorporated once the draft management plan was complete, and to provide summary recommendations on the draft management plan and DEIS as a whole (see objectives, above).

After the draft management plan was released, the Sanctuary Advisory Council Executive Committee met on March 30, 2015 and determined the goals and tasks of the MPR working

group. These were presented to the full advisory council by Jack Kittinger and Sol Kaho'ohalahala at the March 31, 2015 SAC meeting and the members of the previous nine working groups were invited to participate.

Sanctuary staff facilitated the working group process by providing logistical and technical support. Staff members included Malia Chow (NOAA, Sanctuary Superintendent), Elia Herman (DLNR, Sanctuary Co-manager), Shannon Lyday (NOAA, Resource Protection Specialist), and Anne Walton (NOAA, Policy & Planning Advisor).

The working group had two all-day, in-person meetings on April 24 and June 4, 2015 at the Inouye Regional Center in Honolulu and conference calls on May 4, 18, and 26, April 20, May 18 and 26, June 15, and July 1, 2015 to develop the draft recommendations. Below is a summary of our evaluation and recommendations on the draft management plan and DEIS.

MANAGEMENT PLAN REVIEW AND RECOMMENDATIONS

The MPR working group commends NOAA's Sanctuary staff for putting together an ambitious resource management plan with a range of alternatives that comprise different management approaches for the stewardship of biocultural¹ resources within the Sanctuary's boundaries.

In the section below, we provide overarching comments on the content of the draft management plan and DEIS as a whole (Objective 1A), with reference to relevant issues that affect biocultural resources and ocean users in the Sanctuary. Subsequently, we present a set of comments related to our detailed review of the draft management plan and DEIS, with reference to our previous working group recommendations (Objective 1B).

Overarching Recommendations

Preferred Alternative in the Draft Management Plan and DEIS

In January 2012, the SAC recommended in an overwhelming majority to approve and forward the report and recommendations of its Ecosystems Protection Working Group (EPWG) to Sanctuary Management. The report stated, "*the EPWG of the SAC recommends that the HIHWNMS future management plan adopt an integrated approach to management that considers the entire ecosystem, including humans, within currently designated sanctuary boundaries*" (page 5). Additionally, a motion to adjust the Sanctuary boundary to align with the Hā'ena (Kaua'i) ahupua'a was forwarded by the SAC to Sanctuary management. The Final Recommendation Reports developed by the EPWG and other working groups (see links in "Working Group Process" section above) provided a range of actions, strategies, and desired outcomes, many of which aligned with a transition to an ecosystem-based management plan that considers the entire ecosystem. Although these working groups and other comments and input forwarded to Sanctuary managers advocated for an ecosystem-based management approach, it was left largely to the Sanctuary managers to determine the best strategies and

¹ "Biocultural" was defined in the Aloha 'Āina guiding document as follows: "Since biological factors in the natural environment make certain social behaviors possible, and those social and cultural behaviors can also influence the biological factors in the environment, the term "biocultural resource(s)" is used to reflect the enhanced value of resources."

actions for programmatic and regulatory changes to implement an ecosystem-based management approach.

In accordance with the SAC's previous recommendations, we are supportive of a programmatic shift to ecosystem-based management. As stated in the draft management plan and DEIS, Alternatives 2, 3, and 4 "propose a revised management plan as a way to coordinate a transition from a single species management approach to an ecosystem-based management approach."² As Alternative 1 comprises a "no action" Alternative and is not congruent with our previous recommendations to shift toward an ecosystem-based management approach, we do not support this Alternative.

Below, we provide a set of recommendations that can be incorporated – together with input from the public, the State of Hawai'i and other partners, into the final management plan and DEIS. Where appropriate, we indicate specific revisions in the detailed sections below.

Sanctuary Co-Management

In our guidance document, entitled [Aloha 'Āina: A Framework for Biocultural Resource Management in Hawai'i's Anthropogenic Ecosystems](#), we advanced a framework for a more cohesive management approach that "can be applied to a range of resource management entities and their respective kuleana [responsibility] to resources and communities" (Aloha 'Āina report, page 31). This framework and approach was unanimously approved by all members of the Sanctuary Advisory Council in September 2012, and it provides a blueprint for the Sanctuary to better engage coastal stakeholders in collective action for stewardship (see Figure on page 29 on Government and Community Relationships).

The Sanctuary is jointly managed (hereafter "co-managed") by the NOAA Office of National Marine Sanctuaries (ONMS) and the State of Hawai'i Department of Land and Natural Resources (DLNR) through a [Compact Agreement](#), an intergovernmental agreement that "clarifies the relative jurisdiction, authority, and conditions of the NOAA-State partnership for managing the Sanctuary," and stipulates that NOAA and the State should manage as "equal partners." NOAA ONMS and the DLNR have been in consultation on the management plan review process since the beginning of the process. Continued engagement between NOAA ONMS and the DLNR – as well as with the diverse stakeholder communities and interests on management priorities, capacity, and shared interests – will best serve the biocultural resources and diverse stakeholders for the Sanctuary.

In order for the co-management of the Sanctuary to best serve the diverse interests of its stakeholders, the relationship between NOAA Sanctuaries and the State of Hawai'i's Department of Land and Natural Resources (DLNR) needs to be strong, not only on the basis of the Compact Agreement, but also in practice. NOAA Sanctuaries and the DLNR possess different comparative advantages in the generation and mobilization of knowledge and stakeholder interests, in their jurisdictional authorities and statutory responsibilities, and in their management capacities as it relates to the Sanctuary. *We recommend that both partners invest the necessary resources, capital (human and financial) and trust-building processes in order to strengthen the partnership for the Sanctuary's successful management – this is consistent with the framework and approach articulated in the Aloha 'Āina workshop report.* As the current draft

² An overview of Alternatives in the draft management plan and EIS is in the section entitled "Description of Proposed Action and Alternatives" (page 47).

management plan and DEIS were released by NOAA, we recommend that moving forward, NOAA Sanctuaries and the DLNR build on their history of past engagement, and develop an integrated co-management plan for the Sanctuary. There is opportunity with the new State of Hawai'i administration and DLNR Chairperson to re-align interests and priorities for the Sanctuary, and to develop a final management plan that best reflects how NOAA and the State can support people, place and bioculturally-based management of resources in the Sanctuary.

Additionally, we recommend that the Sanctuary co-managers (Office of National Marine Sanctuaries and the DLNR) coordinate closely with other State agencies and organizations (e.g., Office of Hawaiian Affairs), as well as and other appropriate Federal agencies (e.g., NOAA's Pacific Islands Fisheries Science Center and Pacific Islands Regional Office) to develop a single, comprehensive, team-oriented ecosystem-based approach in which each entity plays a complimentary role that fills critical areas and gaps that they are best positioned to address. The Sanctuary should focus their management attention on key issues and geographies where they are well-positioned to effect positive change and where there are gaps that are not being filled by other management entities and which the Sanctuary specifically has expertise. Additionally, the Sanctuary should coordinate with other divisions and programs of NOAA and the State of Hawai'i to minimize the overlap and redundancy of major management decisions, announcements, and initiatives (e.g., on protected species), which will help reduce confusion within affected communities (who may not differentiate between different federal and state divisions/programs).

Sanctuary Boundaries and Sanctuary Focus Areas

The decisions to date of this working group regarding proposed boundary changes are to recommend that the Sanctuary include the Hāena ahupua'a and Hanalei River estuary in the National Marine Sanctuary - Na Kai 'Ewalu.

In accordance with the SAC's recommendation in January 2012, we recommend to adjust the sanctuary boundary to align with the Hā'ena (Kaua'i) ahupua'a, which is supported by the Hā'ena community.

The Hanalei River is biologically and socially connected to Hanalei Bay, which is currently within the Sanctuary's boundaries. As described in Section 7.3 of the draft management plan and DEIS, several marine species utilize the estuary for feeding and refuge, including large fish and sea turtles, and the lower Hanalei River is used for recreational and cultural activities by the community. Additionally, as the State's largest estuary this would ensure the inclusion of this important cultural and ecological resource in the Sanctuary. Local partners such as the Hanalei Watershed Hui and the U.S. Fish and Wildlife Service (USFWS), which manages the Hanalei National Wildlife Refuge, welcome the Sanctuary as a partner in managing the estuary (both organizations have submitted letters of support). These partners recognize that a more comprehensive partnership with the Sanctuary would support much of the work the State and community are undertaking in the Hanalei Watershed.

In the draft management plan and DEIS, other boundary changes have been proposed, including in the areas of Pila'a, Kauai, the island of Ni'ihau, North Shore of Oahu, and Penguin Banks. Proposed boundary changes in these areas were developed by Sanctuary managers in consultation with local partners and community members. As we do not have specialized experience and expertise in these areas, we do not have a recommendation on boundary changes in these areas. However, we urge the Sanctuary to continue their consultations with local community members and organizations in reviewing the proposed boundaries in these

geographies. We therefore recommend that the Sanctuary management consider the following options to address proposed boundary changes in the Sanctuary:

- *Option 1:* Work with the SAC to create a separate boundaries working group, with expertise on these areas and with members of these communities (including constituencies that use these areas); ideally this working group will have some individuals from the MPR working group to ensure consistency;
- *Option 2:* Work with the SAC to create a sub-group of the MPR working group with expertise on these areas and with members of these communities;
- *Option 3:* Continue consultations directly with community stakeholders and constituencies on boundary changes in areas of the Sanctuary that will be affected.

Proposed Regulatory Changes in the Sanctuary

In our original set of working group recommendations, we forwarded a detailed set of recommendations to Sanctuary managers addressing a wide range of issues (see below). The Sanctuary Advisory Council's recommendations, for the most part, focused on the Sanctuary's programmatic content and priorities³ (with a recommended shift toward ecosystem-based management), rather than on new regulations. We find that the *programmatic* shifts proposed in the draft management plan and DEIS (excepting Alternative 1) are congruent with our previous recommendations.

To adequately evaluate the proposed regulations, the MPR working group requested that NOAA Sanctuary managers summarize the regulatory changes that are included in the various alternatives (see Appendix A). Based on our review of the draft management plan and DEIS, and the summary of proposed regulatory changes (Appendix A), we recommend that the Sanctuary more clearly articulate the *value that proposed regulations will produce in terms of conservation benefits, as well as the impacts that the proposed regulations will have on different ocean user groups*. Although the draft management plan and DEIS provide a wealth of details on the proposed regulations in the different Alternatives, the management plan lacks a clear and easy-to-understand articulation of the value (i.e., benefits and risks of not adopting specific actions) and costs of these regulations. Additionally, it is very difficult to assess the impacts of the regulatory regime as the analysis for the regulations proposed in the draft DEIS are spread across several alternatives- this makes it difficult for the SAC and for the general public to evaluate the proposed regulations. Conversely, the draft management plan and DEIS does a good job in terms of articulating the value of an ecosystem-based management approach for the Sanctuary's *program*, and we recommend it take a similar approach in articulating the value of the *proposed regulations* for Sanctuary resources and stakeholders. We suggest this could be addressed through the following approach:

1. Clearly and concisely articulate the value and conservation benefits of the proposed regulations for each Alternative in terms of the specific threats that will be reduced or eliminated as a result of the regulations, and the target biocultural resources that will benefit from these regulations (e.g., what benefits will specific regulations convey to specific resources?) beyond what currently exists.
2. Clearly and concisely articulate the costs the proposed regulations will have for different ocean user groups under each Alternative. This would likely require expanding the social impact assessment of the DEIS beyond the traditional economic impacts approach to include a wider array of impacts (social, cultural, and economic).

³ By program, we mean the core functions that the Sanctuary staff engages in, including the services, resources, and expertise it provides to stakeholders and partners.

Additionally, the working group recommends that, depending on the disposition of the final boundaries and the regulatory package in the final rule, that Sanctuary management periodically brief the SAC on permits issued within the Sanctuary. This will ensure that the SAC and the public are able to be briefed on permitted activities in the Sanctuary. Under the Draft Management Plan and DEIS, the Sanctuary will have the authority to allow an otherwise prohibited activity if such activity is specifically authorized by a valid Federal, State, or City and County permit. We recommend that regulatory authority of the Sanctuary should not be duplicative of other regulations already in place from City and County, State or other Federal agencies, and that proposed regulations are based on a robust gap analysis (beyond Appendix D in the draft management plan and DEIS that starts on pg. 395). Additionally, authorization authority is intended to streamline regulatory requirements by reducing the need for multiple permits. We endorse streamlining permitting practices, but counsel the Sanctuary that permitting oversight may require significant staff resources, and if not implemented properly, may have impacts on specific user groups applying for permits for activities in the Sanctuary.

In addition to these recommendations, below we provide targeted recommendations on regulatory aspects as they relate to our previous working group recommendations on action plans in the draft management plan in the sections below (see recommendations in the Regulatory sub-sections). Overarching recommendations to the proposed regulations are also compiled in Appendix B.

Previous Working Group Recommendations – Review and Recommendations

In this section, we include a set of comments on our review of the draft management plan and DEIS and list a set of recommendations in relation to our previously developed and adopted [SAC working group recommendations](#). Our recommendations are broken down into Programmatic and Regulatory categories. Consistent with our comments above on regulatory aspects of the draft management plan and DEIS, we recommend that should the Sanctuary implement regulatory changes, that they do so with sufficient impact analysis assessing the value versus impacts of these regulations, which will better justify the proposed regulatory regime. Additionally, we recommend that the Sanctuary provide a more in-depth assessment of how the proposed regulations may overlap with and are consistent (or not) with those existing at the State level and/or other Federal agency level, and the extent to which these regulations fill gaps in the regulatory environment. Appendix E in the draft management plan and DEIS cross-references the proposed regulations with existing state and federal regulations, but a more in-depth analysis will help identify redundancies as well as gaps (where new regulations could add value), providing clarity and justification of the need for additional regulations.

Native Hawaiian Working Group

Programmatic

- We recommend that Article 12, Section 7 of the Hawai'i State Constitution should be reflected in the preamble of the proposed rules – Federal Register page 16225.
- We recommend that Article 12, section 7 of the Hawai'i State Constitution *be cited* and is articulated and applied *in state waters* of the Sanctuary in the DEIS.
 - Consider adopting language such as; “this section shall not be construed to prohibit any person from exercising native Hawaiian gathering rights or traditional

cultural practices as authorized by law or as permitted by the department pursuant to article XII, section 7, of the Hawai'i constitution”

- Section 7: The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.
- Determine if this can be asserted in the new Compact Agreement
- The precautionary principle needs to be specifically articulated in the management plan (see also similar recommendation under Offshore Development).
- Recommend that the Sanctuary engage with the Aha Moku.
- Sanctuary should reference the United Nations Declaration of the Rights of Indigenous Peoples, adopted by the US federal government.

Regulatory

- Ensure that the cultural resource regulation prohibition will allow for an exemption for traditional and customary practices – develop a process/mechanism to ensure these practices are protected.
- Ensure that the cultural resources regulation does not require additional permits for fishpond restoration, maintenance, or production activities. Fishponds are subject to 17 different environmental regulations, and a single unified permitting system was recently developed and implemented by the State of Hawaii's Office of Conservation and Coastal Lands to minimize the regulatory burden on fishpond practitioners. As such, we recommend that any regulations proposed by the Sanctuary do not add any additional regulatory burden to fishpond sites within the Sanctuary.

Ecosystem Protections Working Group

Programmatic

- The incorporation of the WG's definition of ecosystem-based management (EBM) for Hawai'i (page 39 in the draft management plan) is an important step forward in defining, and ultimately implementing, an ecosystem-based management approach in Hawai'i.
- Consider, under the auspices of the SAC, creating a list of subject-matter experts that can provide expertise to the Sanctuary on a wide array of issues now covered under an EBM approach. This relates to the recommendation to create a scientific advisory working group for the sanctuary.
- The programmatic intent to support community-based initiatives is admirable in particular the activities in Community Partnerships 1.1-1.5 and Community Partnerships 2.1-2.5
- For each species and habitat described, the plan should clearly identify examples of gaps in knowledge and explain how the Sanctuary is best positioned to address these beyond what is currently being done by other state and federal agencies or in conjunction with the current efforts of these entities.
- The plan should clearly indicate that the Sanctuary will use its capabilities to convene workshops and meetings with experts in various aspects of the Hawai'i marine ecosystem to identify gaps in knowledge and to coordinate efforts to address these areas, communicate findings to the public, and determine future directions of action.
- Recommend that the Sanctuary provide programmatic support to Community-Based Subsistence Fishing Area initiatives.

Regulatory

- Define clearly what regulatory gaps exist in current state and federal regulations to determine gaps in resource and habitat protection. Determine how the proposed

regulations for the preferred alternative fill these gaps (e.g., discussion on prohibitions on disturbance of the submerged lands and discharge on page 190 is very thin).

- There is a need to assess whether the exemptions listed in the proposed “dredging, drilling...altering in any way the submerged lands...within the Special Sanctuary Management Areas” regulation (pages 190; 392) are adequate. The Sanctuary should assess whether additional exemptions are needed for activities that have little environmental impact and commonly occur within Sanctuary boundaries - for example, an exemption for installing buoys for outrigger canoe races may be needed.
- Recommend the no taking and possessing protected species regulation be extended to all sanctuary waters (not just within SSMAAs).
- Recommend the no discharge regulation be extended to all sanctuary waters (not just within SSMAAs).
- Recommend the enter and injure regulation be extended to all sanctuary waters (not just within SSMAAs).

Humpback Whales Working Group

Currently, the draft management plan contains language to the effect that the humpback whale will continue to be a signature species for the Sanctuary. However, other than describing continuing efforts to disentangle humpback whales, the plan itself largely buries the humpback whale amongst other marine mammal species. Additionally, its overview of the humpback whale does not reflect the current state of knowledge of this species nor the gaps in knowledge that require further study.

The Hawaiian Islands Humpback Whale National Marine Sanctuary (HIHWNMS) has been devoted to the study, education and conservation of humpback whales since 1992 when Congress first designated the Sanctuary. Over that period, the Sanctuary has had a great track record of research into many aspects of the ecology, behavior and communication systems of humpback whales involving local NGOs, as well as an admirable track record of education and outreach at all levels including those involving the Hawai'i community in citizen science. These endeavors positioned the Sanctuary as a world leader in the study and education of humpback whales in their breeding and calving grounds, and galvanized the local community to truly care about and want to protect the whales.

The management plan should be revised to “break out” these success stories with humpback whales as well as provide a detailed road map for future research objectives and education programs to continue this endeavor. While NOAA’s determination that the stocks of humpback whales that visit Hawai’i’s waters each winter and spring are no longer in danger of becoming extinct, which is certainly cause for optimism, the reality is that humpback whales continue to face threats from entanglement, vessel collisions, pollution and anthropogenic noise. It is only through the Sanctuary’s commitment to fundamental research and education that we can succeed in reducing these threats and continue to learn about and effectively protect the humpback whale.

By having the plan clearly show the depth of long-term effort and many successes that the Sanctuary has had with research, education and conservation of humpback whales, it will be much better positioned to make the case that extending this model of excellence to other marine species and to the marine environment is likely to result in a similar track record of excellence in resource research, education and protection.

Programmatic

- Recommend that the plan “break out” the signature species (i.e., humpback whales) from the Species and Habitats Action Plan to detail its history of success thus far, as well as specific recommendations, actions, and outcomes. This includes the recommendation to continue supporting research, whether through the Sanctuary or by partnering with others, to better understand the habitat usage of the animals and risks of vessel-whale contacts.
- Recommend reinserting recommendations related to effects of anthropogenic noise (the “soundscape”) and research related to hearing and communication in humpback whales.
- Recommend that the Sanctuary convenes experts to identify gaps in knowledge of biology and behavior of humpback whales (this should occur for all identified priority species as well)
- Recommend establishing a Sanctuary research fund from which RFP’s will be issued and awarded to address research gaps
- Recommend clarifying that “habitats” include physical and acoustic habitats
- In consideration of delisting, clarify the relationship between the Sanctuary and the Endangered Species Act and agency responsibilities under both

Regulatory

- Suggest modifications to proposed regulatory language (additions/changes in *italics*):
 - Recommend for proposed approach regulations 1. (i): “Approaching in the Sanctuary, by any means, including *by deliberate* interception...”
 - Recommend for proposed approach regulations 1. (iii): “...or by omission of an *action that should be taken to avoid interacting or interfering with humpback whales.*”
 - Recommend that the Sanctuary develop an approach rule for drones.

Enforcement Working Group

Programmatic

- Enforcement actions are addressed sufficiently in the actions plans (especially Compliance and Enforcement AP)
- Consider improving the process for civilian involvement (through the SAC) in enforcement decision-making (e.g., the Task Force). The Enforcement Working Group Recommendations report describes a Sanctuary Interagency Law Enforcement Task Force that was formed at the direction of the ONMS. We recommend that this existing Task Force could be a venue for increasing civilian involvement and engagement on enforcement issues in the Sanctuary.
- Consider adding the following recommendation in its entirety in the Compliance and Enforcement AP: “Sanctuary management should continue its excellent work of addressing resource protection issues primarily via education and by working directly with user groups to address those activities that have the potential to impact Sanctuary resources. For example, the Sanctuary’s Ocean Etiquette program has developed brochures targeted to boaters and other ocean users. It has also coordinated with U.S. Coast Guard, OLE, and NOAA Office of General Counsel to host boater workshops in order to minimize whale-vessel interactions. These types of programs should be supported, continued and expanded to address specific user groups of concern.”
- Make it clear whether the regulations for the preferred alternative require additional enforcement capacity and Sanctuary’s role in facilitating this capacity

Regulatory

- We recommend the Sanctuary assess the enforceability of proposed regulations and describe the expected level of enforcement activity required to maintain effective compliance. This analysis will help determine whether current enforcement personnel have the capacity to cover the anticipated increase in workload and coverage.
- This working group addressed the concern for disposal of cremated human remains and is satisfied that this will be addressed through the exemption for ceremonial purposes within the discharge regulation (see Appendix A for language on this exemption).

Offshore Development Working Group

Programmatic

- The precautionary principle, as defined in the [Rio Declaration](#), also adopted by the National Ocean Council, should be specifically adopted and recorded in the Draft Management Plan.
- The Sanctuary should inform the SAC when Section 304(d) federal consultation is triggered.

Regulatory

- Recommend the no disturbance of the seabed regulation be extended to all Sanctuary waters (not just within SSMA's)

Ocean Literacy Working Group

Programmatic

- Request to collaborate with partners on ocean literacy is not specified in plan (add community partnership / collaboration language to Ocean Literacy plan)
- The intent of developing “place-based” education programs is not clear; use “sense of place” terminology. See: Stedman, R.C. 2003. Sense of place and forest science: Toward a program of quantitative research. *Forest Science*, 49:822–829. Sense of place refers to the meanings, values, and attachments people individually or collectively affix to places. Sense of place includes the physical setting or space, the activities in which human engage there, and the social, psychological, and cultural constructs associated with a place. People’s personal experiences are what transform “space” into “place”.
- Recommend that the Sanctuary make it a priority to educate and effectively communicate to ocean users about permissible and non-permissible activities in the Sanctuary, as well as the scientific basis for all proposed regulations and management actions in the Sanctuary
- Recommend that the Sanctuary work together to communicate about and educate ocean users about the entire archipelago, in concert with other management partners (e.g., Papahaānaumokuākea Marine National Monument)

Regulatory

- Reiterate the recommendation in the Ecosystems Protections section: “The Sanctuary should assess whether additional exemptions are needed for activities that have little environmental impact and commonly occur within Sanctuary boundaries”, especially those related to educational endeavors.

Climate Change Working Group

Programmatic

- Revisit language of Climate-Smart Sanctuary certification now that this effort has been revitalized in NOAA. To existing language add, “To the extent possible/relevant, include Climate-Smart certification requirements as outlined by NOAA, as well as forthcoming climate change regional action plans.”
- Add the following language to Resilience to a Changing Climate Activity–1.4: “Work with Native Hawaiian communities *and science research* communities to identify natural and cultural resources that are vulnerable to climate change (e.g., fishponds, lo‘i, limu, *coral reefs and humpback whales*).
- Add the following language to Resilience to a Changing Climate Activity –2.7: “Engage with other agencies, institutions, *and local efforts* in the Pacific Islands region on climate change planning efforts to develop integrated, management approaches to maximize resiliency of coastal and marine resources and human communities.”

Regulatory – None

Water Quality Working Group

Programmatic

- Recommend that the Sanctuary partner with community groups to develop, implement, and support a Sanctuary-wide Quality Assurance Project Plan (QAPP) for communities to use for monitoring, which will be useful to Department of Health.
- Recommend that the Sanctuary take a lead role in convening agencies, non-profits, and stakeholders at an annual workshop/conference to collaborate on ecosystem priorities (currently captured in management plan as participating versus taking a lead role).
- Recommend that the Sanctuary collaborate with appropriate local community-based management programs and watershed or place-based management groups.
- Add language to the Draft Management Plan to support the implementation of Best Management Practices (BMPs) and ecological restoration practices that control the movement of water upon the land, prevent erosion and significantly reduce the flow of sediment and pollutants into coastal waters.
- Recommend the Sanctuary utilize the Precautionary Principle regarding all water quality issues.
- Consider supporting water quality research areas in more geographic areas than Southern Maui Nui.
- Recommend the Sanctuary support water quality monitoring to establish a baseline for water chemistry.
- Consider supporting pump out stations in more geographic areas
- Recommend the Sanctuary support the collection of traditional ecological knowledge in regards to upland water flow management and impacts on nearshore marine resources (this is currently limited in the Draft Management Plan to language regarding fishponds).
- Recommend the Sanctuary track, review, and analyze and provide written comment on decisions by other agencies that permit activities that may affect water quality and subsequently marine resources within the Sanctuary.
- The working group supports the Sanctuary proposed activities regarding pump-out stations.
- Recommend the Sanctuary work with other partners such as the EPA to explore how to phase out older 2-cycle engines Sanctuary-wide

Regulatory

- Remove providing an exemption for aquaculture and only allow by authorization of other agency permits, after an assessment of impacts.
- Require monitoring of existing open ocean aquaculture operations.

- Recommend the Sanctuary expand the proposed no discharge regulation (including proposed exemptions) Sanctuary-wide (not just limited to SSMA's).

Maritime Heritage Working Group

Programmatic

- Recommend removing the misprint in the draft management plan and DEIS that states that rules surrounding maritime heritage resources were discussed in the Maritime Heritage working group's recommendation. The working group did not recommend additional rules, only that existing rules were better enforced.

Appendix A:
Summary of Proposed Regulatory Changes and Permits
Hawaiian Islands Humpback Whale National Marine Sanctuary
[Prepared by Sanctuary staff]

Shift to Ecosystem Based Management

- NOAA is proposing to shift from single species to ecosystem based management within the HIHWNMS by including other sanctuary resources. The definition of a sanctuary resource would be the existing national definition, “any living or non-living resource of a National Marine Sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the Sanctuary, including, but not limited to, the substratum of the area of the Sanctuary, other submerged features and the surrounding seabed, carbonate rock, corals and other bottom formations, coralline algae and other marine plants and algae, marine invertebrates, brine-seep biota, phytoplankton, zooplankton, fish, seabirds, sea turtles and other marine reptiles, marine mammals and historical resources.”
- To reflect the transition to ecosystem based management, the name of the sanctuary would be changed to “Hawaiian Islands National Marine Sanctuary - Nā Kai ‘Ewalu”.
- NOAA is proposing to expand the current boundaries to include five additional areas.
- NOAA would continue to co-manage the sanctuary in partnership with the State of Hawai‘i.

Existing Regulations

- Prohibition on approaching humpback whales;
- Prohibition on operating an aircraft within 1,000 feet of humpback whales;
- Prohibition on taking any humpback whale;
- Prohibition on possessing any humpback whale;
- Prohibition on discharging material into the sanctuary that injures a humpback whale;
- Prohibition on discharging material outside the sanctuary that subsequently enter and injures a humpback whale;
- Prohibition on altering the seabed of the sanctuary in violation of any permit, license, lease or other authorization;
- Prohibition on interfering with an investigation.

Note: The discharge regulations are tied to other agency permits.

Overview of Proposed Regulatory Changes

- Existing regulations for the HIHWNMS would be modified and new regulations added.
- The regulations would apply either sanctuary-wide or within three Special Sanctuary Management Areas (SSMAs), depending on specific alternatives. The SSMAs consist of two areas in federal waters, Penguin Bank and Maui Nui, and one area in state waters, Maunalua Bay.
- The sanctuary-wide regulations would be:
 - New regulations:
 - Prohibition on marking or defacing signs;
 - Prohibition on removing or damaging cultural and maritime heritage resources;
 - Clarification of current regulations:
 - Prohibition on approaching humpback whales;

- Prohibition on taking or possessing humpback whales;
 - Current regulations now applied in proposed expansion area
 - Prohibition on operating an aircraft within 1,000 feet of humpback whales
 - Prohibition on interfering with an investigation.
- The SSMA-specific regulations would be:
 - New regulations:
 - Prohibition on taking or possessing any marine mammal, sea turtle, seabird, or ESA listed species or Hawai'i listed species;
 - Prohibition on introducing or releasing introduced species;
 - Prohibition on possessing or using explosives;
 - Clarification of current regulations:
 - Prohibition on discharging material into the SSMA's;
 - Prohibition on discharging material outside the SSMA's that subsequently enter and injures a sanctuary resource;
 - Prohibition on dredging, drilling into or otherwise altering the submerged lands of the SSMA's.

Site Specific Exemptions to Specific Proposed Regulations

- Activities authorized by a National Marine Fisheries Service or other valid permit are exempt from the humpback whale approach regulation.
- The following materials are exempt from the discharge regulation: fish, fish parts, chumming materials or bait used in fishing activities; effluents incidental to vessel use; water generated by routine vessel operations; engine exhaust; or materials for traditional ceremonies.
- The following activities are exempt from the altering submerged land prohibition: anchoring a vessel on sandy bottom or substrate other than live rock; routine maintenance of docks, seawalls, breakwaters, jetties, or piers; installation and maintenance of navigational aids; harbor maintenance activities; aquaculture activities authorized under a permit; and lawful fishing activities authorized under a permit.
- Valid law enforcement purposes are exempt from the prohibition on possessing or using explosives.
- Species cultivated by aquaculture activities under a valid permit are exempt from the introduced species prohibition.

Existing Program-wide Exemptions under the National Marine Sanctuary Act

- Activities necessary to respond to emergencies threatening life, property or the environment; or to activities necessary for valid law enforcement purposes.
- All classes of military activities, internal or external to the Sanctuary.

Proposed Site Specific Permits

1. Proposed General Permits

The sanctuary may allow a person to conduct a prohibited activity by issuing a permit. The sanctuary may consider a permit application if the activities fall within one of the following four categories:

- Research - activities that constitute scientific research on or scientific monitoring of national marine sanctuary resources or qualities;
- Education - activities that enhance public awareness, understanding, or appreciation of a national marine sanctuary or national marine sanctuary resources or qualities;
- Management - activities that assist in managing a national marine sanctuary; or
- Installation of submarine cables – activities that involve the installation of a submarine cable

Note: Permits would only be issued for the following prohibited activities: discharging material into the sanctuary; discharging material from outside the sanctuary that enters and injures a sanctuary resource; disturbing the submerged lands; and damaging cultural and maritime resources.

2. **Proposed** Authorizations

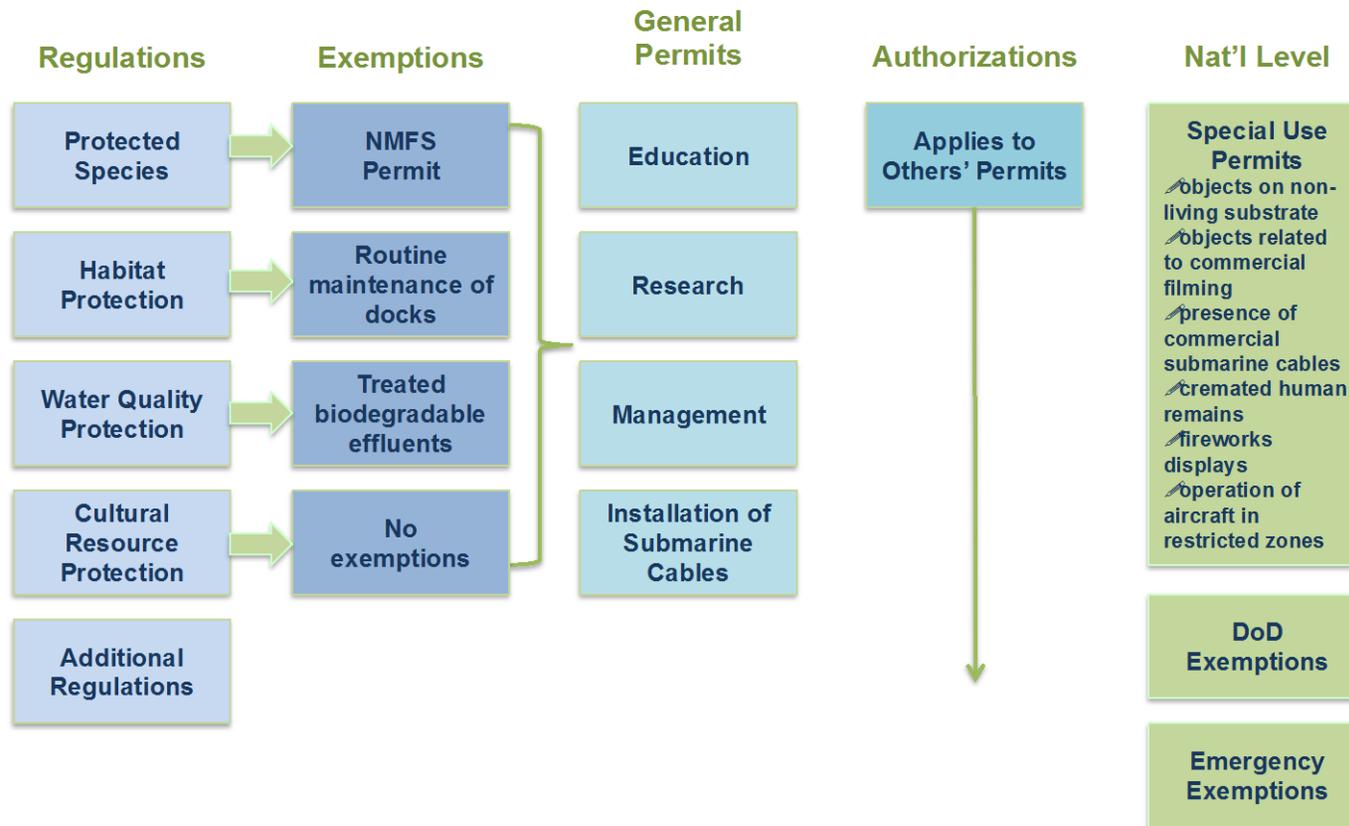
The sanctuary will have the authority to allow an otherwise prohibited activity if such activity is specifically authorized by a valid Federal, State, or local permit. Authorization authority is intended to streamline regulatory requirements by reducing the need for multiple permits.

Existing Special Use Permits (Program Wide, Authority Under the NMSA)

The sanctuary may issue special use permits (SUPs) to authorize the conduct of specific activities in a sanctuary if such authorization is necessary 1) to establish conditions of access to and use of any sanctuary resource; or 2) to promote public use and understanding of a sanctuary resource. The list of categories subject to the requirements of special use permits is:

- The placement and recovery of objects associated with public or private events on non-living substrate of the submerged lands of any national marine sanctuary.
- The placement and recovery of objects related to commercial filming.
- The continued presence of commercial submarine cables on or within the submerged lands of any national marine sanctuary.
- The disposal of cremated human remains within or into any national marine sanctuary.
- Recreational diving near the USS Monitor.
- Fireworks displays.
- The operation of aircraft below the minimum altitude in restricted zones of national marine sanctuaries.

REGULATORY FRAMEWORK FOR NATIONAL MARINE SANCTUARIES (as applied to HIHWNMS proposed regulations)



**Appendix B:
Summary of Specific Recommendations on Proposed Regulations
From the MPR working group**

- Ensure that the cultural resource regulation will allow for traditional and customary practices – develop a process/mechanism to ensure these practices are protected.
- Ensure that the cultural resources regulation does not require additional permits for fishpond restoration, maintenance, or production activities.
- Suggest modifications to proposed regulatory language (additions/changes in *italics*):
 - Recommend for proposed approach regulations 1. (i): “Approaching in the Sanctuary, by any means, including *by deliberate* interception...”
 - Recommend for proposed approach regulations 1. (iii): “...or by omission of *an action that should be taken to avoid interacting or interfering with humpback whales.*”
 - Recommend for that the Sanctuary develop an approach rule for drones.
- We recommend the Sanctuary assess the enforceability of proposed regulations and describe the expected level of enforcement activity required to maintain effective compliance. This analysis will help determine whether current enforcement personnel have the capacity to cover the anticipated increase in workload and coverage.
- Recommend the no taking and possessing protected species regulation be extended to all sanctuary waters (not just within SSMA’s).
- Recommend the no discharge regulation be extended to all sanctuary waters (not just within SSMA’s).
- Recommend the enter and injure regulation be extended to all sanctuary waters (not just within SSMA’s).
- Recommend the no disturbance of the seabed regulation be extended to all Sanctuary waters (not just within SSMA’s)
- Remove exemption to aquaculture and only allow by authorization of other agency permits, after an assessment of impacts.
- Recommend the sanctuary consider phasing out 2-cycle engines (through regulatory action) Sanctuary-wide.
- Reiterate the recommendation in the Ecosystems Protections section: “The Sanctuary should assess whether additional exemptions are needed for activities that have little environmental impact and commonly occur within Sanctuary boundaries”, especially those related to educational endeavors.

Appendix C: Existing Regulatory Language

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

(1) Approaching, or causing a vessel or other object to approach, 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) Operating any aircraft above the Sanctuary within 1,000 feet of any humpback whale except as necessary for takeoff or landing from an airport or runway, or as authorized under the MMPA and the ESA;

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

(4) 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;

(5) Discharging or depositing any material or other matter in the Sanctuary; altering the seabed of the Sanctuary; or discharging or depositing any material or other matter outside the Sanctuary if the discharge or deposit subsequently enters and injures a humpback whale or humpback whale habitat, provided that such activity:

(i) requires a Federal or State permit, license, lease, or other authorization; and

(ii) is conducted: (A) without such permit, license, lease, or other authorization, or

(B) not in compliance with the terms or conditions of such permit, license, lease, or other authorization.

(6) 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 prohibitions in paragraphs (a)(1) through (a)(5) of this § 922.184 do not apply to activities necessary to respond to emergencies threatening life, property or the environment; or to activities necessary for valid law enforcement purposes. However, while such activities are not subject to paragraphs (a) (1) through (a)(5) of this § 922.184, this paragraph (b) does not exempt the activity from the underlying prohibition or restriction under other applicable laws and regulations (e.g., MMPA, ESA, and CWA).

(c) Any Sanctuary fishery regulations shall not take effect in Hawai'i State waters until established by the State Board of Land and Natural Resources

Appendix D: Proposed Regulatory Language

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

- (1) (i) Approaching in the Sanctuary, by any means, including by interception (e.g. by placing a vessel or person in the path of an oncoming humpback whale so that the whale surfaces within 100 yards (91.4m) of the vessel or person), within 100 yards (91.4 m) of any humpback whale;
 - (ii) Causing a vessel or other object to approach within 100 yards (91.4 m) of a humpback whale;
 - (iii) Disrupting the normal behavior or prior activity of a whale by any other act or omission. A disruption of normal behavior may be manifested by, among other actions on the part of the whale, a rapid change in direction or speed; escape tactics such as prolonged diving, underwater course changes, underwater exhalation, or evasive swimming patterns; interruptions of breeding, nursing, or resting activities, attempts by a whale to shield a calf from a vessel or human observer by tail swishing or by other protective movement; or the abandonment of a previously frequented area;
 - (iv) Exceptions:

This paragraph (1) does not apply to any approach is authorized by the National Marine Fisheries Service through a permit issued under 50 C.F.R. Part 222, subpart C, General Permit Procedures or through a similar authorization;
- (2) Operating any aircraft above the Sanctuary within 1,000 feet of any humpback whale except as necessary for takeoff or landing from an airport or runway, or as authorized under the MMPA and the ESA;
 - (3) (i) Taking or possessing any humpback whales within the Sanctuary except as authorized by the Marine Mammal Protection Act (MMPA), or the Endangered Species Act (ESA);
 - (ii) Taking or possessing any marine mammal, sea turtle, seabird, Endangered Species Act-listed species or Hawai'i Revised Statutes chapter 195D listed species, within or above the Special Sanctuary Management Areas, except as authorized by the Marine Mammal Protection Act (MMPA); the Endangered Species Act (ESA); the Migratory Bird Treaty Act (MBTA); the Magnuson Stevens Fishery Conservation and Management Act; or Hawai'i State Law.
- (4) Discharging or depositing any material or other matter in the Special Sanctuary Management Areas, except:
 - (i) Fish, fish parts, chumming materials or bait used in or resulting from lawful fishing activities within the Sanctuary, provided that such discharge or deposit is during the conduct of lawful fishing activities within the Sanctuary;
 - (ii) Biodegradable effluents incidental to vessel use and generated by Type I and II marine sanitation devices approved in accordance with section 312 of the Federal Water Pollution Control Act 33 U.S.C. 1322;
 - (iii) Water generated by routine vessel operations (e.g., cooling water, deck wash down, and gray water as defined by section 312 of the Federal Water Pollution Control Act 33 U.S.C. 1322) excluding oily wastes from bilge pumping;
 - (iv) Engine exhaust; or
 - (v) Discharge of biodegradable materials for traditional ceremonies associated with culturally important customs and usage (e.g. the discharge of leis, paper lanterns).

- (5) Discharging or depositing any material or other matter outside of the Special Sanctuary Management Areas if the discharge or deposit subsequently enters and injures a sanctuary resource within the Special Sanctuary Management Areas.
 - (6) Dredging, drilling into, or otherwise altering in any way the submerged lands (including natural bottom formations, live rock and coral) within the Special Sanctuary Management Areas, except:
 - (i) To anchor a vessel on sandy bottom or substrate other than live rock or coral;
 - (ii) Routine maintenance of docks, seawalls, breakwaters, jetties, or piers authorized by any valid lease, permit, license, approval, or other authorization issued by any Federal, State, or local authority of competent jurisdiction;
 - (iii) Installation and maintenance of navigational aids by, or pursuant to valid authorization by, any Federal, State, or local authority of competent jurisdiction;
 - (iv) Activities associated with conducting harbor maintenance in accordance with a federal or state permit issued prior to [date final rule is effective], including dredging of entrance channels during the time period of one year from the [final rule effective date];
 - (v) Aquaculture activities authorized under a permit issued by the State of Hawai'i Department of Land and Natural Resources, the State of Hawai'i Department of Health, the U.S. Army Corps of Engineers, or the National Marine Fisheries Service pursuant to applicable regulations under the appropriate fisheries management plan.
 - (vi) Lawful fishing activities authorized under a permit issued by the State of Hawai'i or the National Marine Fisheries Service pursuant to applicable regulations under the appropriate fisheries management plan.
 - (7) Possessing or using explosives within the Special Sanctuary Management Areas, except for valid law enforcement purposes.
 - (8) Introducing or otherwise releasing from within or into the Special Sanctuary Management Areas an introduced species, except species cultivated by aquaculture activities in state or federal waters pursuant to a valid lease, permit, license or other authorization issued by the State of Hawai'i Department of Natural Resources, or the National Marine Fisheries Service in effect on the effective date of the final regulation.
 - (9) Removing, damaging, or tampering with any historical or cultural resource within the sanctuary.
 - (10) Marking, defacing, or damaging in any way, or displacing or removing or tampering with any signs, notices, or placards, whether temporary or permanent, or with any monuments, stakes, posts, or other boundary markers related to the Sanctuary including boundary markers related to the Special Sanctuary Management Areas.
 - (11) 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 prohibitions in paragraph (a) of this § 922.184 do not apply to activities necessary to respond to emergencies threatening life, property or the environment; or to activities necessary for valid law enforcement purposes. However, while such activities are not subject to paragraphs (a)(1) through (a)(11) of this § 922.184, this paragraph (b) does not exempt the activity from the underlying prohibition or restriction under other applicable laws and regulations (e.g., MMPA, ESA, and CWA).
- (c) (1) The prohibitions in this section do not apply to any activity authorized by any lease, permit, license, approval, or other authorization issued after the effective date of regulatory amendments to this section and issued by any Federal, State, or local authority of competent jurisdiction, provided that the applicant complies with 15 CFR 922.49, the Director notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization,

and the applicant complies with any terms and conditions the Director deems necessary to protect Sanctuary resources and qualities.

(2) The prohibitions in this section do not apply to activities associated with harbor maintenance including dredging of entrance channels, provided the applicant requests an authorization of a valid federal or state permit from the Director.

(d) The prohibitions in this section do not apply to any activity conducted in accordance with a general permit issued pursuant to § 922.188.