

October 24, 2016

Aloha Dolphin Tours

Comments regarding NOAA's proposed rules concerning dolphins

SUMMARY

We support Alternative 1 – No Action.

We request an extension of the comment period to evaluate NOAA's proposals.

We request a Supplemental EIS.

"Communication with the Cetacea is the highest achievement humans can aspire to"
– John C. Lilly, M.D.

My research into the Mind of the Dolphin began in 1978. Reading Dr. John C. Lilly's new book, *Communication Between Man and Dolphin*, I caught fire with excitement at the possibilities of speaking to a nonhuman intelligence. The implications of establishing communication are enormous. I wanted to learn about what was happening inside the mind of the dolphins, rather than teach them English. I wanted a new perspective on life, one I could share with a human-centric population.

At Marine World/Africa USA in Redwood City, California, three dolphins were available for me to research freely while in physical contact and without feeding them. Intrinsic satisfaction drove both sides of the nonverbal conversations forward towards deeper understanding. My knowledge of dolphins grew faster and further than I had imagined.

In 1981 Diana Reiss asked me to work with her as a full time research volunteer. The dolphin I had spent the most time with now became my subject for study under Reiss' Bilateral Communication Study, Project Circe. In 1982, I became a Diver for the park and cleaned the dolphin tanks. I spent at least 6 hours a week working among four bottlenose and a pilot whale, as well as with seven other dolphins in other tanks. The safety of the divers depended on our careful interpretation and well-considered response to dolphin behavior.

As a volunteer for Dr. Lilly's Human/Dolphin Foundation in 1983-85, I was director of Project Communion and Research Director for Project Janus. As Research Director, I transitioned Joe and Rosie dolphins from *Tanks to Sea*, moving with the bottlenose dolphins from Redwood City, California to the Florida Keys. I designed and implemented numerous experiments on the cognition of bottlenose dolphins during these years.

Since 1986, I have only worked with dolphins in the wild. My guiding study was "What is necessary for dolphins to learn and experience to successfully transition from *Tanks to Sea*?" How can we take previously captive dolphins to levels of comfort and safety in the sea?

The objective with my commercial charter boat business is to learn more about wild dolphin behavior while escorting visitors to the Hawaiian Spinner dolphins. I speak about the differences and similarities between dolphins in captivity and dolphins in the wild. My

guests choose to come out to the wild dolphins rather than going to pet dolphins in the captive facility 25 miles north of the harbor.

During my field work, I have immersed hundreds of people into the ocean to observe dolphins as they pass by or circle around us. I document these viewings. My observations are highly tuned to any signs of disturbance or avoidance by the dolphins. I am also looking for any signs of physical stress or weakness in the dolphins.

My guests are for the most part single time visitors to snorkeling in the offshore ocean with dolphins. Many have seen dolphins in captivity and ask the same three questions, gleaned from a dolphin education program mandated at all such facilities as Dolphin Quest.

“Where, or when, will we find the dolphins?” “Do you feed them?” and “Can we touch them?” Of course none of these apply when going to see dolphins living in their natural environment, the ocean.

These visitors are very cooperative and content with merely floating or gently moving in the visual vicinity of dolphins. In my introduction to our boat trip, I speak of the pod as a *tribe of people* whom we are privileged to visit. Since the mid-nineties, I have shared three "Dolphin Secrets": *breathe, relax and surrender while floating; become present in eye-to-eye contact; and go in grace.*

Three broad categories of dolphin pod behavior have become apparent. In order of frequency, these are:

1. Dolphins continue *natural behavior* as if we are not there. Behaviors such as mating, nurturing, spinning, breaching, tail slapping, traveling, resting, playing, nursing, and even birthing have been documented while in the presence of multiple humans in the water. Natural behaviors occur very frequently, essentially daily, among the pod as a whole.
2. Dolphins *engage* the human floaters and swimmers, with proximity, extra slow forward movement, and eye contact. The humans may engage or simply observe the dolphins' behavior. Engaging behavior occasionally occurs with a single individual dolphin or small subpod of the main pod.
3. *Avoidance or evasion* by the pod as a unit is the least likely scenario. This evaluation has been made during 22 years of observing Spinner dolphin behavior around the Big Island. Before or after such avoidance by the pod, the dolphins may join the boat for bowriding, highly enjoyable by observers and an alternative to entering the water with them.

Aloha Dolphin Tours recognizes the concerns of NOAA and looks forward to changing boat and swimmer behavior to ensure the viability of thriving populations of Hawaiian Spinner dolphins.

- We do not overhand swim nor pursue dolphins.
- We do not attempt to touch the dolphins.
- We do not rush the dolphins as they rise to breathe, rather we stop and watch the dolphins rise, who then often turn towards us while breathing.
- We do not dive down to interrupt dolphins in their natural behaviors.

We have photos and videos of a huge variety of natural behaviors, including birthing. Our educational outreach is important to the wellbeing of cetaceans in all the world's oceans. Educating the public with gentle observations of wild dolphins is clearly beneficial to the longterm success of dolphins everywhere-- as familiarity engenders respect and care.

People from all over the world want to meet dolphins in Hawaii and this demand can be accommodated rather than stopping our important growing relationships with Cetacea. Dolphins teach us to be better humans. It's crucial to our survival that people learn harmony. To this end, let us learn how to best cooperate in partnership with NOAA. To establish that partnership, we need transparency and honesty, as well as a common mission of protecting Cetaceans for future generations to enjoy while coming to terms with acknowledging Cetaceans as a nonhuman intelligence sharing our Planet.

Comment #1

Is it legal for NOAA to **change the law** regarding the definition of harassment? According to the MMPA, "take" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. The term "harassment" means any act of ***pursuit, torment, or annoyance*** which has the potential to injure a marine mammal or marine mammal stock in the wild; or has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering. But, from page 119 of the Draft EIS, the definition of the law changes to:

Threat Types: •Swim-with interactions - human activities that involve closely pursuing or approaching spinner dolphins to swim near the animals or activities that include people floating in the water with the intent of having the animals swim nearby.

The bias of NOAA is given above where even just floating in the water is "intent to pursue, torment or annoy," the criteria of harassment. To make *swimming* or *floating* into **harassment** is thus ***changing the law***. Therefore, the NOAA rule change is against the law because it would change the meaning of harassment without legislative due process.

An extension of the public comment period and a Supplemental EIS are therefore requested to investigate the legitimacy of a regulation redefining harassment as the *INTENT* of having dolphins swim nearby and such *intention* being classified as a felony, "people floating in the water with the intent of having the animals swim nearby."

Comment #2

The NOAA database on studies of human-based dolphin effects has hardly changed since the year 2000. One notable exception is the thesis work of Julian Tyne in 2015.ⁱ Interestingly, Tyne concludes that: "***The results of this study didn't show any significant negative effect on the behavioral response of the Spinner dolphins to human activities. This could be a consequence of the lack of control data and the tolerance of the dolphins to the chronic exposure to human activities. However, chronic exposure experienced by the Spinner dolphins and the negative behavioral responses from populations elsewhere suggest a precautionary approach to the management of this Spinner dolphin population.***" A "tolerance of the dolphins to human activity" makes Hawaiian Spinner dolphins a *habituated* population. Samuels was inaccurate in calling them "*unhabituated*".

An extension of the public comment period and a Supplemental EIS are requested to investigate the implications of the Hawaiian Spinner dolphins as a habituated

population, tolerant to swimmers and boaters, with little disturbance to resting patterns and other natural behaviors while in the presence of respectful swimming and boating practices.

Comment #3

Tyne's 2015 research, in his thesis it states: *"Project Funding of this research was made possible by the financial commitment of the National Oceanic and Atmospheric Administration (NOAA), The Marine Mammal Commission, Murdoch University and Dolphin Quest."*

The inclusion of funding by Dolphin Quest opens the question of an obvious conflict of interest and collusion with NOAA and its rule making procedures. Dolphin Quest has a vested interest as a provider of dolphin swims at the Hilton Waikaloa Resort and the Mandarin Hotel on Oahu. Dolphin Quest has a long term investment in the success of expanding captive dolphin facilities by the sale of baby dolphins as a result and profit from its Dolphin Breeding Program. Dolphin Quest stands to be given a lucrative monopoly on dolphin swims in Hawaii should the suggested NOAA rules be put in action.

A NOAA official denied the support or sponsorship by Dolphin Quest at the first public meeting in Hawaii, with the conclusion: *"it was only a little bit of money, and right at the end."*

It can be argued that NOAA is complicit in the proposed regulations in creating a captive dolphin monopoly with Dolphin Quest as beneficiary in return for research funds from them. The scientists and studies so sponsored are biased in determining that swimmers engage in acts of pursuit, torment or annoyance of Spinner dolphins. Even so biased, scientists are reluctant to conclude in their papers that wild dolphin encounters in Hawaii are forms of harassment as described.

Dolphin Quest, for at least 20 years, has included in its educational program several statements about swimming with dolphins in the wild. Their stance is that swimming with wild dolphins is dangerous for humans, with the possibility of bodily harm. Rather than being proven with behavioral studies, this statement has never been upheld. They also maintained for the past 20+ years that swimming with wild dolphins is illegal. Its illegality is only now being decided. These two pieces of constant misinformation in public educational programs daily over 20+ years is only one part of a misinformation campaign waged since at least 1993. NOAA is a partner in this misinformation campaign, in fact a sponsor of the campaign to misinform the public.

University of Hawaii at Hilo Marine Science department professors and scientists put a stop to the departments of English as a Second Language and Foreign Exchange students from organizing group trips taken every semester to view dolphins in the wild in Kona, claiming that to take students out is "unethical." These primarily young Japanese students face their fears of the ocean and snorkel for the first time to observe wild dolphin behavior. They return home with stories and experiences which have the potential to change a culture which ritualizes and sanctifies dolphin killing.

UHH scientists determined to prove that human observation is unethical and detrimental to Hawaiian Spinner dolphins, even without a basis, are complicit in this misinformation campaign which has cost loss of income and reputation to all commercial charter boats involved in dolphin tours. The misinformation campaign includes attempting to categorize dolphin tours as illegal, dangerous, and detrimental to the Spinner populations.

Many people misunderstand the intentionally qualitative statements such as, “Swimmers *may* disturb the Spinners” or “Swimmers *can* disturb the Spinners” or “Swimmers *may* endanger the lives of Spinners.” Because the statements are attributed to recognized scientists in the field and the public trust in such authority, these sentences are taken as if based on proven studies of swimmers disturbing the pods and contributing to the deaths of dolphins.

Statements such as these may be made to marginalize dolphin viewing, to discredit our intentions and businesses, and lead to the demise of our businesses. Scientists cannot say swimmers *ARE* causing harm to the Spinners. Scientists are biasing and basing their conclusions on wishful thinking. Support of one economic interest to its benefit and to the demise of competing commercial interests may be the basis for a civil suit.

An extension of the public comment period and a Supplemental EIS are therefore requested to investigate the relationship between the proposed regulations and Dolphin Quest’s role as a competitor with wild dolphin encounters with much to gain financially and in credibility.

An extension of the public comment period and a Supplemental EIS are requested to investigate Dolphin Quest’s sponsorship / funding of studies cited by NOAA in these proceedings and a projected increase in profits of Dolphin Quest by eliminating all such wild dolphin encounters in Hawaii.

An extension of the public comment period and a Supplemental EIS are therefore requested to investigate the consequences of misinforming the public with the intent to kill a burgeoning ecotourism industry, and face the liability of a civil suit.

Comment #4

According to the proposed felony regulation, “The *National Oceanic and Atmospheric Administration* (NOAA) Proposed Rule: [Protective Regulations for Hawaiian Spinner Dolphins under the Marine Mammal Protection Act](#),” “helps protect against declines in the fitness of the population over time.”

What measures not considered here are assured of helping to protect against declines in the fitness of the population over time?

Attention must be given to *equal protection of the law* and massive threats to Cetacean populations in the State of Hawaii.

“The following activities are *exempted* from Papahānaumokuākea's permitting program: Activities and exercises of the Armed Forces (including the United States Coast Guard).” The fact that NOAA *exempts* the Navy from obtaining permits for the takes of 11,000+ Spinner dolphins in the *Papahānaumokuākea Marine National Monument* and elsewhere in Hawaiian and International waters, for which NOAA rules these massive takes as “negligible,” while now targeting respectful swimmers and boaters with no proven violations or longterm harm under the definition of *take*, violates the equal protection principle that the law shall be applied equally.

An extension of the public comment period and a Supplemental EIS are therefore requested to investigate all causes of potential longterm diminishment of the Hawaiian Spinner dolphin populations and make a comparison to the scientific conclusions of verified data describing the exact toll that swimmers and boaters take on the Hawaiian Spinner dolphin populations.

Comment #5

Economic impact of the proposed rules is unknown and unstudied, with a meager replacement given in the DEIS for the eradication of Hawaii's cottage industry economic footprint based around wild dolphin in-water viewing.

From page 187 of the DEIS: “*NMFS does not believe that the impact from implementing the preferred alternative (of outlawing wild dolphin in-water viewing) would exceed \$100 million per year, or adversely affect the economy or sector of the economy in any material way.*”

“NMFS concludes that there would be disproportionate impacts to the swim-with-wild-dolphin tour operators from implementation of this preferred alternative relative to all other general wildlife viewing tour operators. Similarly, because of the focus of activities, it is also likely that the dolphin watch tour industry will face greater impacts than the generalized wildlife tour companies. As a result, dolphin-watch tour entities may face disproportionate impacts relative to the generalized commercial boat tour companies, which are likely to incur few direct economic impacts from the proposed action. We note that dolphin watch tour entities are all believed to be small entities...” And, “Among the non-selected action alternatives, only Alternative 2 (no swimming with Hawaiian spinner dolphins) would result in a lower direct economic impact to small entities.”

As one of those “small entities” involved in in-water viewing of Spinner dolphins, my boat business is less than 3 years old and not expected to yet break even this year with expenses. I have a commercial boat ramp permit, pay taxes based on 3% of a projected revenue rather than actual revenue, and a business license to conduct dolphin tours. I will be in debt and struggling if the proposed regulation passes. I have worked with dolphins since 1978. I have been a dolphin swim guide since moving to Hawaii Island in 1994. This is only one story of numerous individuals and companies basing their modest livelihoods on in-water Spinner dolphin viewing.

Economically, one must include the air fare, meals, lodging, rental vehicles, boat excursions, wages, and taxes in proportion to the Islands' total economic base in cottage industry. This has a considerable impact on the Hawaii economy which would be lost with your rulings.

In what economic model does \$100 million become the lower limit to excuse any economic consequences of a decision to eradicate a cottage industry in Hawaii?

Sixty-four percent (64%) of visitors to Hawaii cite "Swim with the dolphins" as a primary desire. "Swim with the dolphins" is consistently one of the Top 10 in *bucket list* polls nationally. Conferences choose Hawaii in part because of the chance to meet *wild* dolphins. Your regulations will effectively deliver all these visitors to Dolphin Quest and other captive dolphin facilities.

The captive dolphin industry has no controls on the psychological wellbeing of the dolphins entrusted into their care. They do not own these dolphins, but are entrusted to provide for their wellbeing. Without an assessment of captive dolphin wellbeing, the proposed regulation gives preference and in fact a monopoly on dolphin viewing to the captive facilities here. The estimated revenue of such industry in Hawaii is greater than \$100 million per year.

Is there any relationship between the projected increase in revenues to the captive dolphin industry and breeding facilities, donations and sponsorship by Dolphin Quest and the Brookfield Zoo, and the proposed regulations?

An extension of the public comment period and a Supplemental EIS are therefore requested to investigate the true cost of eradicating wild dolphin in-water viewing and observations from the cottage industries of Hawaiian economy, instead of relying on the assessment and justification that the economic impact is under \$100 million dollars a year.

Comment #6

Dolphin protection and the MMPA mandate is a complex issue. Are native Hawaiians and those who are students of the kumus afforded an exception to the proposed regulation for the practice of traditional rites involving calling the dolphins to shore?

Kumu, a Kahuna of Oli, and teacher of Ho'oponopono, Lomilomi, and Hawaiian ceremony and rites in regards to Pele, has told me that all dolphins in Hawaii should be protected equally. Hawaii should then become a true sanctuary for all dolphins, including captive Bottlenose dolphins.

The Hawaiian Elder's culturally-derived opinion is that wild and captive dolphins should be protected from human harassment.

If a 50 yard limit to approach is deemed sufficient and necessary in new regulations, then that approach limit should apply equally to dolphins in captivity as well as in the wild. Protect the dolphins under our managed care from harassment which stresses the dolphins and shortens their lives. Limit approaches by strangers in captivity to greater than 50 yards. Define harassment in captive situations. Protect dolphins in captivity from lifelong suffering in the hands of humans who have no interest in understanding the natural behavior and the innate intelligence of Cetaceans. Define a path of permanent retirement in open sea facilities with security as well as opportunity for dolphins now spending a lifetime in captivity.

An extension of the public comment period and a Supplemental EIS are therefore requested to investigate Hawaiian cultural beliefs in regard to exceptions to the proposed regulations on approaching Spinners and to application of dolphin protection measures to include all dolphins, including those held in captivity at Dolphin Quest and elsewhere.

