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**Journal**

UCLA Journal of Environmental Law and Policy, 25(2)

**Author**

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**Publication Date**

2007

**DOI**

10.5070/L5252019547

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# Turtles and Tourism: Where the Endangered Species Act Ends and Community Activism Begins

*Kamaile A. Nichols\**

## ABSTRACT

Visitors and residents of Hawai'i alike can take a walk along Laniakea Beach and enjoy a rare spectacle: green sea turtles sunbathing on the sand. Over the past six years, human-turtle encounters have grown more frequent and potentially problematic for the well-being of the threatened turtle species. This article addresses the ability of the Endangered Species Act, and Hawai'i state laws, to protect green sea turtles from "harm" or "harassment" arising from chronic, close-proximity wildlife viewing. The article concludes that, although the ESA is not suited to prevent cumulative impacts to the turtles from human beach-going activity, there is ample room in state regulations to develop site-specific turtle protection programs.

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I.

INTRODUCTION

“Look! Another one!” On a sunny Friday afternoon, twenty-plus thrilled turtle watchers strain their eyes and point their cameras at the dark shape bobbing up and down in the waves, and a turtle is met with enthusiastic cries as a gentle wave delivers it onto the beach. There are five turtles on the beach now, and the largest one weighs approximately 250 pounds. Instantly, two individuals wearing official-looking name tags move to the front of the crowd and begin laying down a long, red rope to form a large loop around the turtle. These two individuals are from a small but dedicated group of volunteers who, armed with thin red

ropes and signs, are the only boundary between the turtles and dozens of eager beachgoers.<sup>1</sup>

The Pacific Green Sea Turtle is a common sight at Laniakea Beach on O'ahu's North Shore. The green turtle is also a threatened species, and is protected by the Endangered Species Act ("ESA").<sup>2</sup> This paper discusses the ability, if any, of the ESA and corresponding Hawai'i state laws to protect the green turtles from potentially dangerous situations arising from chronic, close-proximity wildlife viewing. This issue turns on whether crowding and touching rises to the level of "harm" or "harass" under the Section 9 "take" provision of the ESA.<sup>3</sup> The pivotal question is: does the ESA apply to low impact interactions between humans and turtles? The situation at Laniakea reveals the limits of the protection provided by the ESA. This article considers whether there is a need to reform the ESA, or whether the Laniakea situation demonstrates an appropriate limitation to federal statutory oversight that allows community activism to pick up where the ESA leaves off.

## II.

### THE SITUATION AT LANIAKEA: TURTLES, TOURISTS, AND STATUTES

The story about the Laniakea turtles involves government agencies with conflicting mandates, well-intentioned but uninformed beachgoers, anxious local residents, and an overarching threat to a species whose essential life behaviors are not entirely understood.

#### A. *Background Information on the Pacific Green Sea Turtle*

The Pacific Green Sea Turtle, *chelonia mydas*, is listed as "threatened" across nearly its entire habitat range, and throughout Hawai'i.<sup>4</sup> Under the ESA, a threatened species is one which is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."<sup>5</sup>

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1. Author's observations at Laniakea Beach, O'ahu, Haw. (Oct. 2, 2006).

2. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2000 & Supp. 2006); see 50 C.F.R. § 402 (2006).

3. 16 U.S.C. § 1538(a)(1)(B) (Supp. 2006) (prohibiting "taking" of endangered species).

4. Haw. Code R. § 13-124 (unspecified date) (Exhibits 1 & 3), available at <http://www.state.hi.us/dlnr/dofaw/rulesindex.html>.

5. 16 U.S.C. § 1532(20) (Supp. 2006).

The Pacific Green Sea Turtle was listed as threatened on July 28, 1978.<sup>6</sup> The “threatened” designation is world-wide for the entire species, and the turtles that feed and reside mainly in Hawai‘i are not officially listed as a distinct population.<sup>7</sup> Therefore, Hawai‘i’s green turtles are legally indistinguishable from most other green turtle populations around the world. Due to protective laws and conservation efforts put into place following the turtle’s “threatened” designation, scientists have recorded a significant upward trend in population numbers over the past twenty-five years.<sup>8</sup> This upward trend directly relates to the increased number of human-turtle interactions at Laniakea.<sup>9</sup>

Turtles were first observed “hauling out” of the ocean to bask in the sun at Laniakea in 1999.<sup>10</sup> The turtles frequent the waters offshore to feed on the seaweed growing on the rocks, and then come ashore to bask and sleep.<sup>11</sup> After a 2000 news article described this new turtle phenomena, the secret was out, and each year brought more visitors by car and tour bus to observe the turtles.<sup>12</sup> In response to increasing numbers of complaints about the amount of touching and interaction between wildlife viewers

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6. Listing and Protecting Populations of Green Sea Turtles as Threatened Species or Endangered Species, 43 Fed. Reg. 32800 (July 28, 1978) (“The green sea turtle . . . [is] determined to be threatened species under the Act except that the Florida and Mexican Pacific coast breeding populations . . . are determined to be endangered species.”).

7. Telephone Interview with Brandee Gerke, Sea Turtle Recovery Coordinator, Nat’l Oceanic & Atmospheric Admin., in Honolulu, Haw. (Oct. 2, 2006). It is not known what the exact migration pattern of Hawai‘i’s turtles is, but genetic studies indicate that at least ninety percent of the Hawaiian turtles breed in the Northwest Hawaiian Islands and return to Hawai‘i to feed. *Id.* It is possible that, at some point, enough will be known about them to identify Hawai‘i’s turtles as a distinct population. *Id.*

8. This data is based on a significant increase in the number of female turtles nesting in the French Frigate Shoals of the Northwestern Hawaiian Islands, the principal nesting ground for the Hawaiian population of green sea turtles. *See generally* George H. Balazs & Milani Chaloupka, *Thirty-Year Recovery Trend in the Once Depleted Hawaiian Green Sea Turtle Stock*, 117 *BIOLOGICAL CONSERVATION* 491 (2004); Graeme C. Hays, *Good News for Sea Turtles*, 19 *TRENDS IN ECOLOGY AND EVOLUTION* 349 (2004). The species’ recovery is due in large part to restrictions on turtle and turtle egg harvesting and nesting habitat destruction. Balazs & Chaloupka, *supra* at 495.

9. E-mail from George Balazs, Marine Turtle Research Program Leader, Nat’l Oceanic & Atmospheric Admin. to Author (Jan. 2, 2007) (on file with author).

10. Interview with Joanne Pettigrew, Turtle Volunteer, at Laniakea Beach, O‘ahu, Haw. (Oct. 6, 2006). Pettigrew, a local resident, has been protecting the turtles since they arrived on shore in 1999, and Pettigrew is a lead volunteer in the “Show Turtles Aloha” program. *Id.*

11. *Id.*

12. *Id.*

and the turtles, the National Oceanic and Atmospheric Administration (“NOAA”), with the help of concerned citizens, launched a “Show Turtles Aloha” education program in 2005.<sup>13</sup>

The on-site education and awareness program is facilitated by NOAA but conducted by volunteers.<sup>14</sup> When a visitor arrives at the beach with the hope of observing a turtle, he or she cannot possibly ignore the large banners warning against getting too close, the red ropes placed around each turtle marking recommended safe distances, and the volunteers handing out educational flyers.<sup>15</sup> One fact sheet provides basic biological information about the turtles, about the ESA, and about the special situation at Laniakea. A second “Viewing Guidelines” handout recommends that viewers: not feed, touch, or attempt to ride the turtles; observe the turtles from a distance; and allow the turtles a clear escape route to water.<sup>16</sup> With the tour buses clearly in mind, the handouts are available in both English and Japanese.<sup>17</sup>

## B. *Overview of the ESA and Federal Agencies Involved*

### 1. The ESA

The ESA was enacted in 1973 to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species.”<sup>18</sup> The intent of Congress in enacting the statute was to “halt and reverse the trend toward species extinction, whatever the cost.”<sup>19</sup>

The ESA covers a wide breadth of prohibited activities that are of potential relevance to the situation at Laniakea. These are codified in Section 4 (designation of critical habitat and species recovery plan), Section 7 (federal action provisions), Section 9 (“take” provisions), and Section 10 (“incidental take” excep-

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13. Interview with Brandee Gerke, *supra* note 7. George Balazs, a researcher with NOAA, is responsible for spearheading this effort. *Id.*

14. *Id.*

15. Author’s observations at Laniakea Beach, O’ahu, Haw. (Oct. 2, 2006).

16. Handouts on file with author. *See also* NOAA Office of Protected Resources, <http://www.nmfs.noaa.gov/pr/education/hawaii/> (last visited Nov. 25, 2006).

17. E-mail from George Balazs, Marine Turtle Research Program Leader, Nat’l Oceanic & Atmospheric Admin. to Denise Antolini, Assoc. Professor of Law, Univ. of Hawai’i (Sept. 30, 2005) (on file with author).

18. 16 U.S.C. § 1531(b) (Supp. 2006).

19. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

tions) of the ESA.<sup>20</sup> Both civil and criminal penalties can be rendered upon a violation of the ESA.<sup>21</sup> This paper focuses on Section 9 and Section 10 takings.

Section 9<sup>22</sup> of the ESA protects the Laniakea turtles from a “take.” The term “take” means “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>23</sup> Although the Section 9 provisions were written in reference to endangered species only, these protections for endangered species have been administratively extended to threatened species, and thus the Laniakea turtles are protected by Section 9.<sup>24</sup> Whereas most of the “take” actions are

20. Critical habitat designation, the turtle recovery plan, and possible federal action violations are interesting issues outside the scope of this paper.

Section 4 of the ESA describes the process by which species can be listed as endangered or threatened, as well as the procedure for critical habitat designation and recovery plan formulation. 16 U.S.C. § 1533 (Supp. 2006). Critical habitat is defined as the specific area occupied by the turtle that has features “essential to the conservation of the species” and which “may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A) (Supp. 2006). If a species is not designated habitat at the time of listing, the agency has discretion to establish critical habitat. 16 U.S.C. § 1532(5)(B) (Supp. 2006). To the “maximum extent prudent and determinable,” the Secretary is ordered to designate a species’ critical habitat concurrently when listing. 16 U.S.C. § 1533(a)(3)(A) (Supp. 2006).

The agency has the discretion to not designate critical habitat when it is “not prudent” to do so, or when not enough information is known about the species to do so. See 16 U.S.C. § 1533(b)(6)(C) (Supp. 2006) (extending the time period for determination if critical habitat is not yet determinable at the final listing).

No critical habitat has been designated for the green turtles in the Hawaiian Islands. Critical habitat has, however, been designated at Culebra Island, Puerto Rico. Designated Critical Habitat, 63 Fed. Reg. 46693 (Sept. 2, 1998) (codified at 50 C.F.R. pt. 226).

Although critical habitat has not been designated for the green turtles at Laniakea, there is a species-wide recovery plan. Interview with Brandee Gerke, *supra* note 7; see 16 U.S.C. § 1533(f)(1)(B) (Supp. 2006). NOAA has developed two different sets of recovery plans for the green turtle: one for the Atlantic Region and one for the Pacific Region. The Pacific Region plan encompasses the turtles at Laniakea. Interview with Brandee Gerke, *supra* note 7; see Recovery Plan for U.S. Pacific Populations of the Green Turtle (1998), available at [http://www.nmfs.noaa.gov/pr/pdfs/recovery/turtle\\_green\\_pacific.pdf](http://www.nmfs.noaa.gov/pr/pdfs/recovery/turtle_green_pacific.pdf).

Section 7 of the ESA regulates all federal actions and requires that the action is “not likely to jeopardize the continued existence” of threatened and endangered species or destroy or adversely modify critical habitat. 16 U.S.C. § 1536 (Supp. 2006). It does not appear that there is a trigger for a violation of Section 7 at Laniakea. One stretch of the regulations worth investigating is whether the federal agencies’ failure to regulate beachgoers would be a violation by omission.

21. 16 U.S.C. § 1540 (Supp. 2006).

22. 16 U.S.C. § 1538 (Supp. 2006).

23. 16 U.S.C. § 1532(19) (Supp. 2006).

24. 50 C.F.R. § 223.205(a) (2006) (“[P]rohibitions of section 9 of the Act . . . relating to endangered species apply to threatened species of sea turtle”).

fairly straightforward, what constitutes “harass” and “harm” is not clear. These vague terms are nonetheless directly relevant to wildlife viewing at Laniakea.

Section 10 lists various exceptions to the general rules of the ESA, the most relevant exception being that for “incidental take[s].” A person, state agency, or organization can be issued a permit that grants the right to “take” a turtle in limited circumstances.<sup>25</sup>

## 2. NOAA: The Lead Federal Agency

The ESA is administered at the federal level by both the Fish and Wildlife Service (“FWS”) (under the Secretary of the Interior) and by NOAA (under the Secretary of Commerce).<sup>26</sup> Generally, FWS regulates land species and NOAA handles marine species. Although the Laniakea turtles are on land during many of the interactions with beachgoers, for practical reasons NOAA’s National Marine Fisheries Service and Pacific Island Regional Office lead the federal response at Laniakea.<sup>27</sup>

### C. Overview of Turtle Protection at the State Level

Any species that is listed as threatened or endangered on the ESA list is deemed to be threatened or endangered in Hawai‘i.<sup>28</sup> Furthermore, Section 6 of the ESA provides that the federal agencies shall cooperate, to the extent practicable, with states that establish their own adequate conservation programs.<sup>29</sup>

Hawai‘i’s statutory protection for threatened and endangered species is codified in Hawai‘i Revised Statutes Chapter 195D “Conservation of Aquatic Life, Wildlife, and Land Plants.”<sup>30</sup> The state code, in many ways, mirrors the ESA. Section 3(c) of the code is the corollary to ESA’s Section 9 prohibition against “taking.”<sup>31</sup> A threatened species is defined as, in pertinent part,

25. 16 U.S.C. § 1539(a)(1)(B) (Supp. 2006). To receive an incidental take permit, the applicant must also submit a conservation plan. *Id.* § 1539(a)(2)(A).

26. *See* 16 U.S.C. § 1532(15) (Supp. 2006).

27. Interview with Brandee Gerke, *supra* note 7.

28. HAW. REV. STAT. § 195D-4(a) (2005).

29. 16 U.S.C. § 1535(b)-(c) (Supp. 2006). DLNR may receive federal funding to assist it in its efforts. *Id.* § 1535(d). If a state law conflicts with a federal law, the state law is void. *Id.* § 1535(f).

30. HAW. REV. STAT. §§ 195D-1 to -10 (2005). The agency regulations implementing these statutory regulations are in Hawai‘i Administrative Rules 13-124.

31. HAW. REV. STAT. § 195D-3(c) (2005). To “take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect endangered or threatened species of aquatic life or wildlife, or to cut, collect, uproot, destroy, in-



“any species of aquatic life . . . which appears likely, within the foreseeable future, to become endangered . . . ”<sup>32</sup> A turtle is classified as “aquatic life” under the statute.<sup>33</sup> The Department of Land and Natural Resources (“DLNR”) has the authority to enforce the provisions and is tasked with taking “positive actions to enhance [endangered and threatened species] prospects for survival.”<sup>34</sup> If a violation occurs, DLNR Division of Conservation and Resources Enforcement is authorized to take enforcement action in coordination with the NOAA Office for Law Enforcement.<sup>35</sup> DLNR agents are given certain police powers to enforce the regulations, including the power to issue citations and serve and execute warrants and arrests.<sup>36</sup>

#### D. *Turtles as Tourist Attractions: Protection Versus Economic Exploitation*

The efforts by DLNR and NOAA to protect Hawai'i's endangered and threatened species are in tension with the State's economic incentive to capitalize on Hawai'i's natural resources and encourage tourism. The Hawai'i Tourism Authority (“HTA”),<sup>37</sup> a state agency under the Department of Business, Economic Development & Tourism, is as important to the State's pocketbook as DLNR is to the state's environment. HTA is responsible for “promoting, marketing, and developing the tourism industry in the State”<sup>38</sup> and “developing a tourism marketing plan.”<sup>39</sup> As

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jure, or possess endangered or threatened species of aquatic life or land plants, or to attempt to engage in any such conduct.” *Id.* § 195D-2. Neither “harm” nor “harass” is expressly defined in the statute. *See id.*

32. *Id.*

33. *See id.* (defining aquatic life as “any type of species of mammal, fish, amphibian, reptile . . . or other animals that inhabit the freshwater or marine environment, and includes any part, product, egg, or offspring thereof”).

34. *Id.* § 195D-1.

35. E-mail from Jeffrey Walters, Co-Manager, Dep't of Land and Natural Res. to Author (Sept. 21, 2006) (on file with author).

36. HAW. REV. STAT. § 195D-7(a) (2005). A first time violation is a fine of at least \$250 and/or imprisonment for up to one year. *Id.* § 195D-9(a)(1). Subsequent violations may double the civil fine. *Id.* § 195D-9(a)(2). More egregious violations carry greater fines, including \$5,000 for each specimen of a threatened species “knowingly, intentionally, or recklessly killed or removed from its original location.” *Id.* § 195D-9(b).

37. HAW. REV. STAT. § 201B-1 to -16 (2005). The HTA is primarily funded by the tourists themselves, who are taxed a “transit accommodation tax” upon arrival. Telephone Interview with Winfred Pong, Project Manager, Haw. Tourism Auth., in Honolulu, Haw. (Oct. 4, 2006).

38. HAW. REV. STAT. § 201B-3(b)(1) (2005).

39. HAW. REV. STAT. § 201B-6(a) (2005).

part of its strategy to entice tourists from around the world, HTA emphasizes Hawai'i's natural beauty and diverse wildlife.<sup>40</sup>

Although promoting tourism is its primary objective, HTA is also directed to "implement state policies . . . taking into account the economic, social, and physical impacts of tourism on the State and its natural resources infrastructure."<sup>41</sup> There appears to be a disconnect, however, between HTA's activities and its statutory mandate to consider the environmental impacts of tourism. HTA's "Sustainable Tourism Project"<sup>42</sup> and "Hawai'i Tourism Strategic Plan: 2005-2015"<sup>43</sup> both incorporate a general study on natural resources; neither study, however, specifically examines the impact of tourism on wildlife behavior. Instead, managing beach erosion, removing litter, preventing theft, and maintaining public restroom facilities are the primary focuses.<sup>44</sup> Wildlife behavior patterns are not studied because they are considered "outside the scope of the natural resources survey."<sup>45</sup> It is the position of HTA that federal and state agencies and tour group operators are responsible for monitoring tourist behavior, not HTA.<sup>46</sup>

HTA is required to provide at least one million dollars annually to support efforts to "manage, improve, and protect Hawaii's natural environment and areas frequented by visitors."<sup>47</sup> These funds do not, however, go to manage places like Laniakea; historically, the funds have been allocated to trail maintenance in state parks.<sup>48</sup> For the 2006-2007 year alone, HTA allotted approximately three million dollars towards trail maintenance.<sup>49</sup> Thus, the money from HTA is cycled back into projects that will primarily benefit the tourist experience; this money is not directed toward researching or mitigating the effects of tourism on wildlife.

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40. See Official Website of Hawaii Tourism Europe, <http://www.hawaii-tourism.co.uk/index.php?PID=517> (last visited Nov. 24, 2006).

41. HAW. REV. STAT. § 201B-3(a)(14) (2005).

42. Hawai'i Tourism Authority, Planning for Sustainable Tourism (2006), available at <http://www.hawaii.gov/dbedt/info/visitor-stats/sustainable-tourism-project/>.

43. Hawai'i Tourism Authority, Hawai'i Tourism Strategic Plan: 2005-2015 (2005), available at [http://www.hawaiitourismauthority.org/pdf/tsp2005\\_2015\\_final.pdf](http://www.hawaiitourismauthority.org/pdf/tsp2005_2015_final.pdf).

44. See Hawai'i Tourism Authority, *supra* note 42, at 59 (Part I Summary Report); Hawai'i Tourism Authority, *supra* note 43, at 36-41.

45. Interview with Winfred Pong, *supra* note 37.

46. *Id.*

47. HAW. REV. STAT. § 201B-11(c)(2) (2005).

48. Interview with Winfred Pong, *supra* note 37.

49. *Id.*

HTA is also directed to “[e]stablish a program to monitor, investigate, and respond to complaints about problems resulting directly or indirectly from the tourism industry.”<sup>50</sup> At first blush, it appears that a citizen could complain to HTA about tour buses at Laniakea. However, the term “complaints” has been interpreted by HTA to refer not to complaints about tourists, but to complaints by tourists about their visit.<sup>51</sup> HTA responds to complaints from tourists about long lines to get into Hanauma Bay, but directs complaints made by residents about Laniakea to DLNR or the police. This redirection occurs for two primary reasons: one, policing tour bus operations runs counter to HTA’s mandate to promote the economy and tourism; and two, HTA has not been granted authority to regulate or police tour bus operations.<sup>52</sup>

In addition to the State’s interest in generating tourism revenue, private businesses also have an economic incentive to exploit the turtles as tourist attractions. Numerous companies offer circle-island bus tours that include stops at Laniakea.<sup>53</sup> In addition, at least three guidebooks list Laniakea’s turtles as an attraction.<sup>54</sup> Guidebooks competing for a share of the tourist market publicize Laniakea as a “secret destination” for visitors. A general internet search about Laniakea Beach returns a handful of commercial websites advertising the beach and encouraging turtle viewing.<sup>55</sup>

In sum, the interests of state and federal conservation agencies, state business agencies, private companies, and concerned citizens converge on a small beach on O’ahu’s North Shore.

50. HAW. REV. STAT. § 201B-3(a)(23) (2005).

51. Interview with Winfred Pong, *supra* note 37.

52. *Id.* HTA has received no complaints from tourists about the situation at Laniakea. *Id.*

53. Interview with Joanne Pettigrew, *supra* note 10. This activity persists despite the fact that roadside bus parking is illegal. *Id.*

54. *E.g.*, ANDREW DOUGHTY & HARRIETT FRIEDMAN, OAHU REVEALED: THE ULTIMATE GUIDE TO HONOLULU, WAIKIKI & BEYOND 156 (2d ed. 2006); JERRY SPROUT & JANINE SPROUT, OAHU TRAILBLAZER: WHERE TO HIKE, SNORKEL, SURF FROM HONOLULU TO THE NORTH SHORE 170 (Diamond Valley 2005); NED FRIARY & GLENDA BENDURE, HONOLULU, WAIKIKI & OAHU 202 (3d ed. 2000).

55. *E.g.*, Fodor’s Travel, <http://www.fodors.com/forums/threadselect.jsp?fid=1&tid=34778127> (last visited Nov. 24, 2006); Virtual Tourist, <http://members.virtualltourist.com/m/175e8/505/6/> (last visited Nov. 24, 2006); NorthShore.com, <http://www.northshore.com/hawaii/beach-lani.asp> (last visited Nov. 24, 2006).

### E. *Human-Turtle Interactions at Laniakea*

There are many levels of human-turtle interactions occurring at Laniakea, including some that are, and some that might be, violations of the law. The interactions can be divided into three main categories (see Figure 1). Level one interactions constitute clear violations of the ESA and Hawai'i law, and include acts such as killing, maiming, or removing a turtle from the beach.<sup>56</sup> Currently, although both DLNR and NOAA have the authority to prevent such interactions, NOAA is the lead enforcement agency. Level two and three interactions, or "low impact interactions,"<sup>57</sup> are not clear violations of the law. Nonetheless, low impact interactions may have negative impacts on the turtles.

Level two interactions include acts such as: light touching, briefly placing a small child on the turtle, or briefly standing in the way of the turtle as it attempts to exit the water. These actions constitute a legal gray area. Level three interactions include chronic, non-contact activities—such as constant crowding. Policy development to prohibit level two and three interactions requires scientific evidence that the interactions injure the turtles.

The most common types of human-turtle interactions at Laniakea are light touching and crowding.<sup>58</sup> The crowding can be dense and chaotic, with dozens of people jostling around the turtles, children running, and people yelling at once and in different languages.<sup>59</sup> The volume of visitors is astounding: turtle volunteers have observed over 100 people on the beach when more than one tour bus arrives at the same time.<sup>60</sup>

## III.

### THE ESA AND LOW IMPACT INTERACTIONS

The ESA does not offer clear guidance as to whether close-proximity wildlife viewing or light touching constitutes a taking.

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56. See 16 U.S.C. § 1532(19) (Supp. 2006); HAW. REV. STAT. § 195D-3(c) (2005).

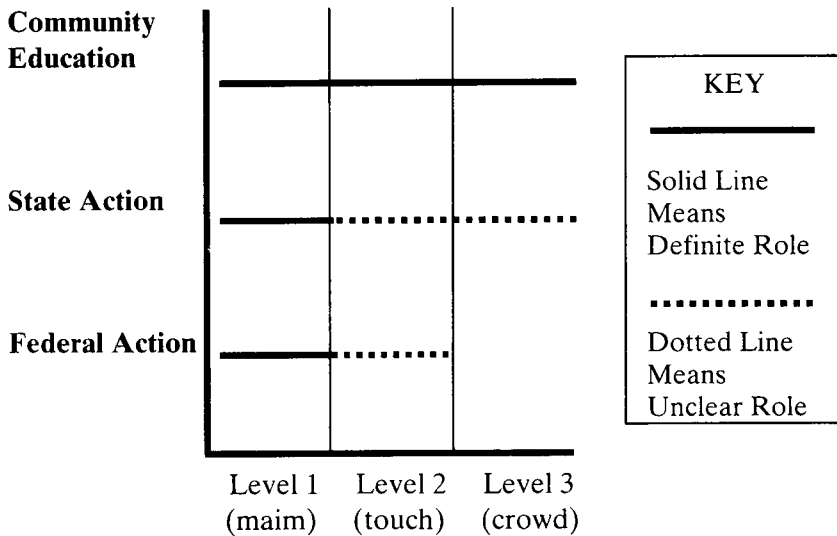
57. The term "low impact interactions" is not intended to imply that no injury is occurring. The term distinguishes those actions that are not clear violations of the law from those actions currently considered takes. The three interaction levels are a category system created by the author for the purposes of this paper.

58. Telephone Interview with Frank Thomas, Conservation Police Officer, Dep't of Land & Natural Res. in Honolulu, Haw. (Nov. 17, 2006); Interview with Joanne Pettigrew, *supra* note 10.

59. Author's observations at Laniakea Beach, O'ahu, Haw. (Oct. 2, 2006).

60. Interview with Joanne Pettigrew, *supra* note 10.

FIGURE 1  
 Human-Turtle Interactions and the Role of Government  
 Action and Community Education in  
 Turtle Injury Prevention



A. *Vague Meaning of “Harm” and “Harass” Hinders Agency Enforcement Against Low Impact Interactions*

Agency enforcement against low impact interactions is complicated by the lack of a clear understanding of what constitutes “harm” or “harass” under Section 9 of the ESA.<sup>61</sup> Under the ESA’s take provision, “harass” is defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.”<sup>62</sup> “Harm” is defined as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>63</sup>

61. Telephone Interview with Gary Moniz, Chief of Law Enforcement, Dep’t of Land and Natural Res., in Honolulu, Haw. (Sept. 18, 2006); Interview with Brandee Gerke, *supra* note 7.

62. 50 C.F.R. § 17.3 (2006).

63. *Id.*

The ESA does not provide guidance as to what constitutes "standing too close" to a threatened species.<sup>64</sup> There is no statute that sets a minimum distance from a turtle.<sup>65</sup> Neither the definition of harm nor the definition of harass explicitly identify touching or crowding as a violation. Both provisions do, however, require that an action *significantly* disrupt the turtle's *essential* or *normal* behavior patterns.

Neither NOAA nor DLNR has authority to interfere with wildlife viewing unless an actual prohibited take is occurring.<sup>66</sup> Examples of clear violations include picking up and throwing a turtle, killing a turtle, or removing a turtle from the beach and bringing it home.<sup>67</sup> The enforcement process generally begins when a citizen calls NOAA's enforcement hotline to file a complaint and alert the authorities.<sup>68</sup> After receiving a complaint, NOAA uses its discretion to decide whether to follow up on the complaint and/or formally pursue a criminal investigation or issue a civil citation. The act must be fairly malicious before NOAA will respond, due to the difficulty in proving that a lesser act qualifies as a taking under the definition of harm or harass.<sup>69</sup> Therefore, under the current legal framework, most of the activity going on at Laniakea will not result in agency action.

There are at least three possible ways for which a violation of Section 9 could be argued at Laniakea: 1) beachgoer crowding and touching constitutes harassment of a turtle's resting behavior; 2) takes have occurred in the past and are likely to occur again unless regulations are passed; and 3) continual human presence on the beach amounts to a harm by habitat modification.

All these theories broaden the definition of a take and, ultimately, require scientific proof that the interactions in question

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64. Interview with Brandee Gerke, *supra* note 7.

65. Interview with Gary Moniz, *supra* note 61; Interview with Brandee Gerke, *supra* note 7.

66. *Id.*

67. Interview with Brandee Gerke, *supra* note 7.

68. The number is: 800-853-1964. After receiving a complaint, the dispatcher will, at his or her discretion, contact an on-call agent in the appropriate state office. <http://www.nmfs.noaa.gov/ole/copps.html> (last visited Nov. 26, 2006).

69. Interview with Brandee Gerke, *supra* note 7. For example, NOAA and DLNR are currently investigating a man who allegedly cut the head off of a dead monk seal. Diana Leone, *Kauai Man Allegedly Cuts Off Head of Dead Seal*, Honolulu Star Bulletin, May 18, 2006, available at <http://starbulletin.com/2006/05/18/news/story06.html>. DLNR does periodically receive calls from witnesses who have observed a turtle being carried off the beach and placed into the back of a truck. Unfortunately, without a license plate number for the truck, these types of complaints are very difficult to follow up on. Interview with Frank Thomas, *supra* note 58.

significantly impact the turtles. Such policy decisions typically rely on the “best scientific data” to prove that policies are appropriate.<sup>70</sup>

### 1. Interruption of Resting Behavior

Both DLNR and NOAA operate under the policy that crowding around and lightly touching a turtle, without more aggressive behavior, is not harm or harassment.<sup>71</sup> Thus far, observations by NOAA’s turtle scientists indicate that the turtles’ behavior is not significantly disrupted by the presence of large groups of people or by light touching.<sup>72</sup> In essence, scientists have decided that if the turtles were being bothered, they would stop coming onto the beach. Indeed, even when turtles are temporarily blocked from basking on shore by a line of beachgoers, the turtles often circumvent the line or simply “plow through” it.<sup>73</sup> When people are nearby, the turtles tend to “ignore” the beachgoers and continue to sleep. This behavior has been interpreted as an indication that turtles are habituated to humans and not bothered by their presence.<sup>74</sup>

To change the status quo assumption that crowding and touching does not constitute harassment, data would have to show that there was significant disruption of behavior likely to result in injury to the turtle. The first step might be to show that crowds either alter the frequency with which the turtles haul out of the ocean or cause the turtles to reduce their basking time. (Based on the definition of harassment, see above, there is flexibility in the ESA to include resting along with feeding, breeding, or shelter as a “normal” behavior.) The next step would be to prove that the behavior has been sufficiently changed to amount to a significant disruption of behavioral patterns. The third step would require proof that this disruption of behavioral patterns injures the turtle. The Desert Tortoise of the California and Ne-

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70. Interview with Lisa Van Atta, Marine Mammal Prot. Act Specialist, Nat’l Oceanic & Atmospheric Admin., in Honolulu, Haw. (Nov. 20, 2006); see 16 U.S.C. §§ 1533, 1536, 1540 (Supp. 2006) (provisions requiring best scientific data available).

71. Interview with Gary Moniz, *supra* note 61; Interview with Brandee Gerke, *supra* note 7.

72. Interview with Brandee Gerke, *supra* note 7; see Cody Hooven, A Sociological Study: Human Interactions with Sea Turtles at Laniakea 12 (May 13, 2004) (unpublished report submitted to University of Hawai’i Marine Option Program) (on file with author).

73. Interview with Joanne Pettigrew, *supra* note 10.

74. *Id.*

vada deserts may provide an example of behavior modification amounting to harassment. When the Desert Tortoise is startled, it releases the contents of its bladder. This response can be significant because the tortoise uses the ability to reabsorb water from its bladder to survive droughts. Thus, losing this moisture can be detrimental to the tortoise's survival.<sup>75</sup> Likewise, human disruption of the Laniakea turtles' rest might constitute a taking if the disruption could be shown to limit the turtles' fecundity, ability to forage, or ability to escape from predators. The legislative history of the ESA indicates that the statute could conceivably allow regulation of wildlife viewing: in 1973, a Representative in the United States House commented that the ESA could regulate birdwatchers if the bird watching disturbed the young.<sup>76</sup>

## 2. Past Takings May Be an Indication of Future Takings

If it was proven that a clear harm, such as maiming, had been committed by wildlife viewers in the past, that fact could be used to bar public access to the turtles in the future. Past harms can be indicative of future harms, and at least one other jurisdiction has taken a proactive approach and banned behavior that has caused harm in the past.<sup>77</sup>

Thus, under the future-takings theory, authority to regulate beach activity does not depend on proving that disrupting resting

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75. California Bureau of Land Management, [http://www.blm.gov/ca/cdd/desert\\_tortoise.html](http://www.blm.gov/ca/cdd/desert_tortoise.html) (last visited Nov. 26, 2006). The recovery plan for this threatened species does not address wildlife viewing regulations, but instead focuses on restricting vehicle access to critical habitat. Nevada Fish and Wildlife Office, [http://www.fws.gov/Nevada/desert\\_tortoise/dt\\_threats.html](http://www.fws.gov/Nevada/desert_tortoise/dt_threats.html) (last visited Nov. 26, 2006). To date, there has not been a lawsuit about wildlife viewing distances, but there was a settlement between public interest groups and the California BLM resulting in closure of roads in the desert. <http://www.blm.gov/ca/cdd/lawsuit.html> (last visited Nov. 26, 2006).

76. *Palila v. Haw. Dep't of Land and Natural Res.*, 852 F.2d 1106, 1108 (9th Cir. 1988) (citation omitted).

77. *See United States v. Town of Plymouth*, 6 F.Supp.2d 81, 82 (D. Mass. 1998) (enjoining town from allowing off-road vehicles onto a beach with piping plover nests because of history of vehicle-caused takings, and ordering the town to maintain a "buffer zone" around the endangered species); *Loggerhead Turtle v. County Council of Volusia*, 896 F. Supp. 1170, 1182 (D. Fla. 1995) (finding that the county had the ability to regulate nighttime beach driving found harmful to turtles). These court rulings are not controlling but may be persuasive in a Hawai'i district court.

A controlling case in Hawai'i's federal jurisdiction has held that "harm" to an animal can include future harm. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783-84 (9th Cir. 1995) (noting that to rule that the ESA does not apply to a future injury would be "antithetical to the basic purpose of the ESA to . . . prevent [threatened species'] further decline").



behavior is an on-going “take”; rather, this authority stems from precautionary principles and the need to take precautions in light of past harm or harassment. It is conceivable that the Laniakea turtles might be intentionally or accidentally harmed, for example, while tourists scramble for a photograph. If past takings at Laniakea could be documented as resulting from tourist photography, this could be used to enjoin people from using Laniakea beach or approaching the turtles.<sup>78</sup>

The evidence available to date, however, may not justify enjoining touching or crowding. A DLNR officer tasked with enforcing the North Shore area reports that he has witnessed what he would term “harassment” only a few times in his many years on the job.<sup>79</sup> And even the observed activity (parents briefly placing small children on a turtle’s shell for a photograph) was not clearly prohibited by the ESA. Further, data collected by NOAA’s turtle injury hotline does not show a correlation between turtle viewing and injury. Since 1999, only two complaints regarding human-turtle interactions have been formally filed with NOAA.<sup>80</sup> Both reports lacked the type of specific information, such as the perpetrator’s identity or an associated license plate number, needed for NOAA to take enforcement action.<sup>81</sup>

### 3. Continual Human Presence May Amount to Harm by Habitat Modification

Harm includes habitat modification that significantly impairs “essential behaviors, including breeding, feeding, or sheltering” such that it kills or injures wildlife.<sup>82</sup> If it could be shown that the chronic presence of crowds effectively changes the landscape of

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78. See *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996) (holding that “[a] reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of the ESA,” and affirmed an injunction against logging operations that would destroy nesting habitat).

79. Interview with Frank Thomas, *supra* note 58.

80. Telephone Interview with Marc Cline, Dep’t Special Agent, Nat’l Oceanic & Atmospheric Admin., in Honolulu, Haw. (Nov. 6, 2006) (providing information in response to Freedom of Information Act request filed by author on October 23, 2006).

81. *Id.* On June 23, 2003, a complaint was filed about unspecified harassment by an unknown person to an unspecified turtle. On March 21, 2005, a complaint submitted by a Hawai’i resident about an unknown person “riding” and “grabbing” a sea turtle in the water was received. The resident stated that a DLNR officer had arrived and effectively ordered the person out of the water. No further enforcement action was taken. On November 26, 2003 a complaint was submitted about a dog attacking a sea turtle on the beach. *Id.*

82. 50 C.F.R. § 17.3 (2006).

the beach and impairs turtles' essential behaviors, an argument that a taking has occurred could be made. This would extend the definition of harm, but such an extension has happened before in a lawsuit involving the Palila, an endemic Hawaiian bird.<sup>83</sup> In that case, the Ninth Circuit Court of Appeals determined that destruction of mamane trees constituted a taking of the Palila because the Palila relied on the mamane for food, shelter, and breeding habitat.<sup>84</sup> Extending the "sheltering" behavior associated with habitat to include resting may provide the rationale for prohibiting crowding and light touching of turtles. Arguably, one purpose for shelter is resting; if data were to show that constant human surveillance disrupted the turtles' necessary sleep cycle, making each individual less fit for survival and thus hastening extinction or reducing the chances for species recovery, then chronic human presence might amount to a taking.

There are several problems, however, with arguing that touching or crowding is a taking. First, humans—at least in modern, recorded history—were at Laniakea first.<sup>85</sup> If a turtle begins to utilize a habitat already frequented by humans, can mere human presence be considered harm? Second, causation is a hurdle because it is not certain that touching or crowding results in any injury.<sup>86</sup> Third, it is debatable whether, in a state with strong

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83. *Palila v. Haw. Dep't of Land & Natural Res.*, 852 F.2d 1106, 1110 (9th Cir. 1988) (finding that by allowing sheep to destroy the mamane, the state had limited the Palila's chance for recovery and allowed "habitat destruction that could result in extinction," but declining to address the issue of whether harm includes degradation that retards recovery). See also *Palila v. Haw. Dep't of Land & Natural Res.*, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (concluding that failure to remove sheep and goats constituted harm because it led to "significant environmental modification or degradation" which actually killed or injured wildlife).

The United States Supreme Court has held that including "significant habitat modification or degradation that actually kills or injures wildlife" within the definition of harm is reasonable. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 708 (1995).

In light of *Sweet Home* and *Palila*, there is controlling precedent that habitat modification is a taking if it results in death or injury to wildlife. Applying this theory to the Laniakea turtles, evidence of more severe injury than currently observed is required.

84. *Palila*, 852 F.2d at 1110.

85. The first observation of a basking turtle was made in 1999, but people used the beach and the water to surf for years prior. Interview with Joanne Pettigrew, *supra* note 10.

86. See *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (holding that there was no ESA violation when the U.S. Navy diverted water because there was no evidence showing causal connection between the diverted water and fish spawning).

protection for public beach access, beachgoers should be held liable for such an attenuated injury.

The fourth difficulty is even more fundamental. It has not been established that the resting behavior of the Laniakea turtles is essential or even normal. It is not known whether all green turtles in Hawai'i bask on the sand as the Laniakea turtles do.<sup>87</sup> And, in Florida, which has a huge population of the same species of green sea turtle, none of the turtles bask on the beach during the day.<sup>88</sup> The only time green turtles come on land in Florida is at night—and they do so specifically to lay eggs.<sup>89</sup> The fact that not all green turtles exhibit basking behavior raises serious questions as to whether the behavior is “essential” or “normal,” or whether any injury would come to the turtles if crowding caused them to stop basking altogether.

The “fit” of the ESA at Laniakea is imperfect. Chronic wildlife viewing scenarios with the potential for injury are outside the bounds of the ESA's current, inflexible structure.

### B. *State Agencies, Tourism, and Incidental Take Permits*

Under Section 10 of the ESA, a taking is allowed if it occurs incidentally during lawful activity and the actor has been granted an incidental take permit (“ITP”).<sup>90</sup> The permit may allow a certain number of takes without liability, but the permit can be revoked and/or penalties enforced if this number is exceeded or the requirements of the permit are not met.<sup>91</sup> If it is ever determined that crowding and touching is a take under the ESA, then those state agencies or private businesses that regulate or commercially profit from the turtles might be required to obtain a Section 10 ITP. (There is a similar provision for ITPs under state law.<sup>92</sup>)

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87. Interview with Brandee Gerke, *supra* note 7.

88. Telephone Interview with Meghan Conti, Environmental Specialist, Fla. Fish and Wildlife Conservation Comm'n, in Tallahassee, Fla. (Nov. 22, 2006); Telephone interview with David Godfrey, Executive Director, Caribbean Conservation Corp., in Gainesville, Fla. (Nov. 21, 2006); Telephone interview with Curt Kaloostian, Administrative Lieutenant, Fla. Fish and Wildlife Comm'n Office of Law Enforcement, in Tallahassee, Fla. (Nov. 20, 2006).

89. *Id.*

90. 16 U.S.C. § 1539(a)(1)(B) (Supp. 2006).

91. *See id.* § 1539(a).

92. Telephone Interview with Paul Conry, Div. of Forestry and Wildlife Administrator, Dep't of Land and Natural Res., in Honolulu, Haw. (Sept. 25, 2006); *see* HAW. REV. STAT. § 195D-22(b)(7) (2005). Both the federal and state ITPs require habitat conservation plans. Hawai'i's ITP requirements are stricter than the federal requirements because they require habitat conservation plans with net environmen-

Under Section 10, these State or private sponsored activities could continue legally only if the State or company had an ITP.

### 1. Private Entity Liability and ITPs

One option for finding liability in the Laniakea scenario would be to hold an individual tour company liable for any injuries inflicted on turtles by tour company patrons during company-sponsored activities.<sup>93</sup> The tour company would need to apply for an ITP in order to legally continue touring Laniakea. Admittedly, such a policy would be an aggressive and unusual remedy to the problem. The counterargument to this proposal is that a tour company should not be held responsible for ESA violations by persons independently breaking the law. Additionally, for practical reasons, holding tour companies responsible may not be the most effective way to protect the turtles. First, most tourists arrive at the beach by car.<sup>94</sup> Second, tour buses typically stay in the area for less than 10 minutes, leaving patrons time only to run out, snap a picture, and leave the beach.<sup>95</sup> This indicates that, for each discrete company, tourists arriving by bus are not responsible for prolonged crowding of the turtles.

Another possibility is to hold guide books that advertise the location of Laniakea liable, and thus require an ITP before the guidebook can continue publicizing and profiting from the location. When asked whether guide books should be held responsible for harm that visitors cause to wildlife, one publisher answered that they should not be because the books are only informing the public about a public beach and not encouraging bad behavior.<sup>96</sup> In an instructive case, the Hawai'i Supreme Court has already ruled that a guidebook does not incur tort liability when a visitor is injured at a beach that is advertised in the guidebook.<sup>97</sup> Furthermore, according to the same publisher, the au-

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tal benefits, whereas the federal program simply requires that there be no net loss. *Id.*

93. George Balazs sent many of the tour companies PDF information files about Laniakea. E-mail from George Balazs, Marine Turtle Research Program Leader, Nat'l Oceanic & Atmospheric Admin., to Author (Oct. 4, 2006) (on file with author).

94. Interview with Joanne Pettigrew, *supra* note 10; E-mail from George Balazs, *supra* note 93.

95. Interview with Joanne Pettigrew, *supra* note 10.

96. E-mail from Margaret M., Customer Service Manager, Wizard Publications, Inc., to Author (Oct. 31, 2006) (on file with author).

97. In *Birmingham v. Fodor's Travel Publications, Inc.*, the Supreme Court of Hawai'i held that Fodor's could not be held liable for the injury sustained by plain-

thors of the book located Laniakea after pulling over to investigate why three tour buses were parked along the side of the road. It is, therefore, questionable whether it is possible to hold a publisher liable for revealing something that is common knowledge.

## 2. State Agency Liability and ITPs

The most likely candidates for ITPs are state agencies. If beachgoers commit takings in the course of legal activities, the State of Hawai'i itself could be required to apply for an ITP from the federal government. Such a requirement is not without precedent: DLNR is currently applying to obtain an ITP for incidental by-catch of turtles by fishermen.<sup>98</sup> This fishing ITP will pertain to takings of turtles by state-licensed fishermen in the course of their otherwise legal fishing activity. Because the State is permitting the fishing, the State may be liable for the injury to turtles. A similar program is already underway in North Carolina.<sup>99</sup> The fishing ITP is an imperfect analogy because fishermen need permit approval from the State to fish in the first instance, whereas the public does not need a permit to walk on the beach. Nevertheless, the basic premise that the State may be held responsible under Section 10 for takings by individuals is the same. In light of the State's responsibility to threatened species under its conservation statute, and the chronic nature of the problem at Laniakea, the State may have heightened responsibility for protecting Laniakea when it otherwise would not be liable for activities on other beaches.

HTA, which encourages tourism in Hawai'i, could arguably be required to apply for an ITP to cover any takings caused by tour-

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tiff when hurt while swimming at a beach, which Fodor's had publicized. 833 P.2d 70, 77 (Haw. 1992). The court reasoned that the publisher owed no duty to warn the plaintiff. *Id.* at 74. It was significant that Fodor's had merely printed, and not authored or guaranteed the content of the book. *Id.* at 74-75. Birmingham is silent as to an author's liability. *See id.* at 77.

Likewise, Wizard Publications published but did not author the article on Laniakea. E-mail from Margaret M., *supra* note 96.

98. Sea Turtle Conservation, 67 Fed. Reg. 31172 (May 9, 2002). This 2002 application was done in response to a 2001 notice of intent to sue by the Hawai'i Longliners Association. Telephone Interview with Jeffrey Walters, Co-Manager, Dep't of Land and Natural Res., in Honolulu, Haw. (Nov. 1, 2006). NOAA required DLNR to draft a combined sea turtle and monk seal ITP application, and DLNR is currently revising the ITP application to incorporate monk seals. *Id.*

99. The North Carolina Division of Marine Fisheries was granted an ITP by NOAA for incidental catch of turtles by commercial gill net fisheries. Receipt of an Application for an Incidental Take Permit, 67 Fed. Reg. 67150 (Nov. 4, 2002).

ists. The current law, however, is stacked against this claim. Proving that the tourists are at Laniakea specifically because of HTA's marketing campaign is difficult. Most people arrive at Laniakea by car, not by tour bus.<sup>100</sup> Thus, it is more difficult to demonstrate that HTA should, or could, track and regulate tourist behavior at Laniakea. It also does not appear that HTA has been burdened by an affirmative duty to monitor all tourists in Hawai'i.<sup>101</sup> According to an HTA project manager, HTA does not have the authority to issue rules or policies on how individual tour groups operate.<sup>102</sup> HTA has already successfully defended itself against a lawsuit brought by conservationists seeking to hold HTA responsible for the negative environmental impacts of tourism.<sup>103</sup>

### C. *Expansion of Federal Take Provisions: An ESA "Approach Rule"*

The most direct way to address the "takings" confusion is to amend the ESA to prohibit the touching of turtles and to set approach distances. Such regulations have already been proposed for some marine mammals under the Marine Mammal Protection Act ("MMPA").<sup>104</sup> The MMPA has a takings provision similar to that of the ESA, with equally vague definitions of harm and harass.<sup>105</sup> NOAA has proposed amending the MMPA to prohibit approaching Hawaiian Spinner Dolphins within a certain dis-

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100. Interview with Joanne Pettigrew, *supra* note 10; E-mail from George Balazs, *supra* note 93.

101. *See generally* HAW. REV. STAT. § 201B-1 to -16 (2005).

102. Interview with Winfred Pong, *supra* note 37.

103. The Hawai'i Supreme Court ruled in favor of HTA when the Sierra Club sued to require HTA to assess the impacts that its decision to contract for tourism marketing services would have on the environment. *Sierra Club v. Haw. Tourism Auth.*, 59 P.3d 877, 885 (Haw. 2002). The court ruled that the plaintiff did not have standing to bring the suit. *Id.* Because there was no proof that increasing expenditures meant that there would be more tourists on the island, there was no proof of injury. *Id.* at 886. Furthermore, the plaintiff could not prove that traffic congestion and recreation-area crowding was in fact due to tourists, and even if it was demonstrated that tourists were the cause of congestion, there was no proof that the tourists had come because of HTA's marketing plan. *Id.*

Similarly, a plaintiff will have a difficult time proving that the crowds are at Laniakea because of HTA's marketing campaign or HTA's failure to educate tour companies.

104. 16 U.S.C. § 1361 *et seq.* (2000). The MMPA does not cover sea turtles, which are not mammals.

105. *See* 16 U.S.C. § 1372(a) (2000).

tance.<sup>106</sup> The amendment was proposed in response to an increase in irresponsible viewing practices by individuals and by tour boat operators,<sup>107</sup> as well as new research indicating that if dolphins' resting behavior is disturbed, there may be negative effects at the population level.<sup>108</sup> Strict approach rules provide whales with additional protection within the Hawaiian Islands Humpback Whale National Marine Sanctuary, where it is illegal to approach any humpback whale within 100 yards.<sup>109</sup>

NOAA's "Show Turtles Aloha" program, with its red ropes and viewing guidelines, has established the framework for a statutory "turtle approach" amendment to the ESA. Until such an amendment is enacted, NOAA personnel have little true authority over the events at Laniakea. A staff person at NOAA's regional office stated that it is critical for there to be statutory backing for NOAA's current turtle viewing guidelines in order for them to be enforceable.<sup>110</sup>

The main obstacle to passing approach or touch regulations is that changes must be based on "best scientific data" demonstrating that injury is actually occurring to the turtles. To date, such data is not available.<sup>111</sup>

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106. Protection of Marine Mammals Notice of Intent to Prepare an Environmental Impact Statement, 71 Fed. Reg. 57923, 57925 (Oct. 2, 2006). Research has shown that increased tour boat and skin-diver presence in shallow-water dolphin resting areas may negatively impact their normal resting behaviors. *Id.* at 57924.

107. These practices include separating individuals from a pod of dolphins, feeding dolphins, or staying near a pod of dolphins longer than is advisable and thus robbing the dolphins of needed rest time. Interview with Lisa Van Atta, *supra* note 70.

108. The general standard for modifying the MMPA is harm at the population level. Interview with Lisa Van Atta, *supra* note 70. To date, only harm to Hawaiian Spinner dolphins on an individual basis has been recorded. *Id.* However, NOAA has supplemented this research with findings from other areas around the world, including an Australia report showing that population number decreases with increase in tour boat operation. *Id.*

109. 15 C.F.R. § 922.184(a)(1) (2006). The rule also applies, with lesser penalties, out to a 200-mile radius. Telephone Interview with Naomi McIntosh, Sanctuary Superintendent, Hawaiian Islands Humpback Whale National Marine Sanctuary, in Honolulu, Haw. (Oct. 25, 2006). Thus, humpback whales in Hawai'i are free to move about the ocean as though protected by an invisible protective legal "bubble."

One factual distinction between whales and turtles is that the Hawaiian Islands are one of the most important breeding and nursing locations in the entire Pacific Ocean for humpback whales, whereas green turtles do not nest on the main Hawaiian Islands. *Id.*

110. Interview with Lisa Van Atta, *supra* note 70.

111. *Id.*; see 16 U.S.C. §§ 1533, 1536, 1540 (Supp. 2006); *Ctr. for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223, 1236 (W.D. Wash. 2003) (stating that the best

## IV.

BEYOND THE ESA: ALTERNATIVE  
PROTECTION STRATEGIES

There are alternatives to stretching the ESA statutory framework to accommodate Laniakea-type scenarios where human activities blur the line between legal and “harm” or “harass.” Policymakers may elect to forgo strict federal penalties and instead focus on nuanced, local control of low impact interactions.

A. *Community-Based Volunteer Protection*

The fact that the ESA does not provide guidance about wildlife viewing is not necessarily a critical flaw. One NOAA officer contends that, although the lack of guidance from the ESA makes NOAA’s job “trickier,” the vague nature of the directive allows NOAA officers to use their best professional judgment and discretion on a situation by situation basis.<sup>112</sup> Many within DLNR and NOAA view education and wildlife guidelines as the best compromise between those who want to allow limited interaction with wildlife and those who want people to stay away.<sup>113</sup>

Both DLNR and NOAA currently handle the legal gray area of the harm and harass provisions by focusing on public education instead of citations. One officer stated that DLNR’s primary goal is to create a “robust public information campaign” and to raise public awareness to a level such that the turtles are accepted as a part of everyday life at the beach and treated with respect.<sup>114</sup>

One of the values of the “Show Turtles Aloha” education program is that it creates “people who are fans of turtles.”<sup>115</sup> Most people who come to the beach leave with an enhanced appreciation for the turtles, which may result in broader public support for turtle protection and the ESA in general.<sup>116</sup> By allowing

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scientific evidence available, not absolute certainty, is required when listing a species on the ESA).

112. Interview with Brandee Gerke, *supra* note 7.

113. *Id.*; Interview with Gary Moniz, *supra* note 61.

114. Interview with Gary Moniz, *supra* note 61. Moniz stated that in the early years, whenever a turtle was seen basking in the sun on the beach, it was cause for alarm and beachgoers would assume that the turtle was in distress. Out of concern, a citizen would contact the authorities and try to get them to “arrest everybody on the beach.” *Id.* Moniz views this as an attitude towards turtles that will hurt the species’ recovery in the long run. *Id.*

115. Interview with Brandee Gerke, *supra* note 7.

116. *Id.*



community volunteers to take the lead in protecting the turtles and informing visitors, the program is fostering goodwill towards the turtles, as opposed to alienating people with citations.

The community response to the agencies' current method of dealing with human-turtle interaction at Laniakea is varied, but predominantly favorable. NOAA has kept a log of comments submitted by beachgoers. Between July 7, 2005 and June 30, 2006, there were 1,151 "primarily favorable, non-negative, and/or neutral" comments and forty-eight "primarily negative" comments cataloged.<sup>117</sup> Most viewers expressed an appreciation for the opportunity to see the turtles and for the site monitoring. If the goal of the program is to foster love and respect for the turtles, then the program is working: one visitor said "I'm falling in love . . . I saw all the beauty of the world in the sweet eyes of this animal."<sup>118</sup> A visitor from New Mexico wrote: "You're doing a great job of protecting a wonderful species of wildlife. You make me proud of our federal government."<sup>119</sup> A resident of Hau'ula encouraged even more outreach, believing that "people love what they are educated to love."<sup>120</sup> Another local said: "As a local I feel I can take a deep breath knowing that tourists are not grabbing or handling the turtles."<sup>121</sup>

Most of the negative comments related to wanting more, not less, protection for the turtles. One visitor noted that, in a spot further away from the signage, swimmers were "doing everything to the turtles the banner warns against. 'Feeding, touching, crowding, harassing.'"<sup>122</sup> A Kane'ohe resident complained that it was a "shame" not more was being done to protect the turtles from crowds that "surround, touch, and yell."<sup>123</sup>

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117. MTRP Honulani Visitors Logbook, Laniakea Beach on Oahu's North Shore, July 7, 2005-June 30, 2006 (on file with author).

118. *Id.* at Sept. 8, 2005.

One visitor from Norway expressed a common sentiment- that seeing the turtles was a "memorable experience." *Id.* at July 9, 2005. A visitor from Honolulu thanked NOAA for "all the work." *Id.* at Aug. 8, 2005. A visitor from Florida said: "Turtles put life and smiles in my heart." *Id.* at Sept. 28, 2005.

119. *Id.* at Aug. 10, 2005.

120. *Id.* at July 31, 2005.

121. *Id.* at Dec. 8, 2005. A repeat visitor from California appreciated the presence of NOAA personnel because, during a prior visit, it had been "awful to watch all the tourists touching and feeding the honu." *Id.* at Aug. 8, 26005.

122. *Id.* at Aug. 13, 2005.

123. *Id.* at July. 29, 2005. One repeat visitor from Ohio lamented that over the last two years, tourist behavior had become increasingly aggressive toward the turtles. *Id.* at Aug. 4, 2005. Another visitor from California expressed outrage that the

A handful of comments expressed frustration with the regulation. One visitor commented that NOAA had “turned [Laniakea] into a rules and regulations ‘zoo’ and ruined the natural miracle that was happening [there].”<sup>124</sup> Voicing a similar sentiment, a second viewer stated: “Go home! Keep Hawaiian Lands in Hawaiian Hands!”<sup>125</sup> Another Hawai‘i resident said: “I am a local resident and I don’t even like to come here anymore because I’m so worried someone’s going to yell at me for stepping too close to the turtle. I respect this program but feel it may have some backlash.”<sup>126</sup>

In all, the education approach has proven successful at minimizing risk to the turtles, but there are problems with this volunteer-based approach. First, the effectiveness of the program depends on the goodwill of the beachgoers.<sup>127</sup> If a beachgoer refuses to obey the viewing guidelines, and steps within the red rope boundary, neither the volunteers nor NOAA has the authority to stop them. Only when the action becomes a “take” may NOAA intervene. Therefore, if the ESA regulations were modified to include crowding and touching as a take, the education programs would have more authority. Second, the viability of the monitoring program also hangs on the availability of volunteers. For example, a similar wildlife viewing situation is occurring at Punalu‘u on the Big Island. NOAA has not yet launched a comparable “Show Turtles Aloha” campaign there, however, because there are not enough people around the relatively isolated beach to sustain the program.<sup>128</sup>

## B. *Opportunities for State Regulation*

Gaps in the protection afforded to turtles by federal law can be filled by state law.

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turtles were not being treated with respect and were being “crowded, sat on and touched.” *Id.* at May 11, 2006.

124. *Id.* at [unidentified]. Another person said “Get over it, we are not harming them, we are respecting them.” *Id.* at July 8, 2005. A Waialua resident said “Give it a rest! Leave it natural—take the bureaucracy back to town!” *Id.* at Sept. 11, 2005.

125. *Id.* at Jan. 5, 2006. Turtle and beach regulation may also raise Native Hawaiian rights issues, which is a topic outside the scope of this article.

126. *Id.* at May 16, 2006.

127. Interview with Joanne Pettigrew, *supra* note 10.

128. Interview with Brandee Gerke, *supra* note 7.

## 1. Statutory Amendment

The most direct way to grant the State regulatory authority over low impact interactions is to amend Chapter 195D to prohibit touching or crowding. The legislature can also amend the statute to include stringent approach rules, such as the minimum wildlife viewing distances applied to whale-watchers.<sup>129</sup> New York's taking statute is instructive, and it prohibits takings plus "lesser acts such as disturbing, harrying or worrying."<sup>130</sup>

## 2. Statewide Wildlife Conservation Strategy

A statewide conservation plan recently formulated by DLNR indicates that the State is considering a proactive role in turtle protection at the agency level. In 2005, the State of Hawai'i formulated a Comprehensive Wildlife Conservation Strategy ("CWCS").<sup>131</sup> The CWCS is not mandated by the ESA but does have overlapping goals.<sup>132</sup> The State will receive funds for CWCS under the federal "State Wildlife Grant Program."<sup>133</sup> DLNR's Division of Forestry and Wildlife and Division of Aquatic Resources are the lead agencies for the CWCS. Under the CWCS, the State is tasked with identifying the geographical distribution, abundance, and major threats to species with the "greatest conservation need," and then developing conservation plans for these species. The green sea turtle is included in this list of species, and the stated goal of the associated conservation plan is to protect current populations and establish additional populations to prevent extinction.<sup>134</sup> The conservation strategy contains

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129. Strict turtle approach rules may not be appropriate for Hawai'i. Practically speaking, because dolphins and whales are in the water, there is less of an interference with the average person's beach activities if required to stay fifty or one hundred feet away from dolphins or whales. Turtles may be on a narrow strip of beach where a fifty-yard distance rule may effectively block access to the beach.

130. N.Y. ENVTL. CONSERV. LAW § 11-0103(13) (2006). "Taking" includes "pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting fish, wildlife and all lesser acts such a disturbing, harrying or worrying, or placing, setting, drawing or using any net or other device commonly used to take any such animal." *Id.*

131. Dep't of Land and Natural Res., Hawaii's Comprehensive Wildlife Conservation Strategy (2005), available at [http://www.state.hi.us/dlnr/dofaw/cwcs/process\\_strategy.htm](http://www.state.hi.us/dlnr/dofaw/cwcs/process_strategy.htm).

132. [http://www.state.hi.us/dlnr/dofaw/cwcs/Conservation\\_need.htm](http://www.state.hi.us/dlnr/dofaw/cwcs/Conservation_need.htm) (last visited Nov. 26, 2006).

133. Interview with Jeffrey Walters, *supra* note 98.

134. <http://www.state.hi.us/dlnr/dofaw/cwcs/files/> (follow "NAAT final CWCS/" hyperlink; then follow "Chapters/" hyperlink; then follow "DAR/" hyperlink; then follow "Green Sea Turtle.pdf" hyperlink) (last visited Nov. 26, 2006).

a provision for improving the protection and management of nesting, foraging, and resting habitats. Additionally, one of the stated research priorities for turtles is researching the effects of tourism-related activities. According to one DLNR manager, the sections dedicated to protecting foraging areas and researching effects of tourism were influenced by the situation at Laniakea.<sup>135</sup>

### 3. Florida's State-permitted Turtle Tours: A Model for a Different Approach

Florida's Marine Turtle Protection Act is broader than the ESA.<sup>136</sup> There is no approach rule, but in addition to the typical taking provision, the act prohibits a person from knowingly disturbing or molesting a turtle.<sup>137</sup> According to a staff person at the Florida Fish and Wildlife Conservation Commission Division of Law Enforcement, Florida takes disturbance of turtles very seriously. What constitutes "disturbing" is left up to the judgment of the state officer on the scene.<sup>138</sup> As discussed earlier, Florida's green turtles haul out of the ocean only at night for the purpose of laying eggs.<sup>139</sup> As such, the disturbing and molesting rules are very important for protecting a reproductive function of the turtles. Even under Florida's broad statute, however, an officer might not have the authority to prevent crowding around an egg-laying turtle—unless the crowding clearly disrupted the turtle's behavior.<sup>140</sup>

Instead of enacting laws against turtle viewing or crowding, Florida has embraced the public's enthusiasm for the turtles and created a community-group tour guide program. Since 1994, Florida has granted permits to organizations to facilitate night-

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135. Interview with Jeffrey Walters, *supra* note 98. The initial focus of the strategic plan, however, will be on terrestrial and freshwater ecosystems because the funding comes from FWS, not NOAA. Telephone Interview with Scott Fretz, Dep't of Land and Natural Res., in Honolulu, Haw. (Nov. 21, 2006). Hawai'i receives approximately \$600,000 per year, of which only \$150,000 is directed to the Division of Aquatic Resources. *Id.*

136. FLA. STAT. § 370.12 (2006).

137. *Id.* § 370.12(1)(d)(2) (2006) (stating that a person may not "[k]nowingly take, disturb, mutilate, destroy, cause to be destroyed, transfer, sell, offer to sell, molest, or harass any marine turtles or the eggs or nest of any marine turtles").

138. Interview with Curt Kaloostian, *supra* note 88. Kaloostian estimates that there are ten violations per year across the state. *Id.*

139. *Id.*; Interview with Meghin Conti, *supra* note 88; Interview with David Godfrey, *supra* note 88.

140. Interview with Curt Kaloostian, *supra* note 88.

time group walks, in which participants observe turtle nesting behavior.<sup>141</sup> The State's authority to run this program ultimately comes from an agreement with FWS under Section 6 of the ESA for state-run conservation programs.<sup>142</sup> Participating organizations do not pay for the permit, nor may they profit from the tours, and the organizations are trained in responsible turtle viewing practices.<sup>143</sup> The program has been successful to date; more than 328 walks, with over 8,700 participants, were conducted in 2005 alone. Further, there has never been a report of a turtle being harmed during a tour.<sup>144</sup>

The State of Hawai'i has a number of options available to it. The State may: maintain the status quo; amend the state statute to expand the definition of take; or formally create a site-specific education and protection program at Laniakea. If the State chooses the proactive approach, Hawai'i will join those states that have implemented creative policies to extend protection of turtles beyond that afforded by the ESA.

## V. CONCLUSION

Neither the ESA nor Hawai'i's conservation statute currently protect the Pacific Green Sea Turtle against low impact interactions such as crowding and light touching. The "harm" and "harass" provisions of both statutes are vague, but have generally been interpreted to apply to interactions that cause more definite, quantifiable injuries than those documented at Laniakea. This gap in the statutory framework is problematic because the chronic presence of crowds at Laniakea is a "take" just waiting to happen.

Government officials interviewed for this paper are unified in their opinion that public education is the most effective method to protect the turtles from human-turtle interactions, particularly

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141. Interview with Meghin Conti, *supra* note 88.

142. *Id.*; see 16 U.S.C. § 1535 (Supp. 2006) (regulations pertaining to federal cooperation with states).

143. Interview with David Godfrey, *supra* note 88. The state permits tours to the threatened loggerhead species only, and does not grant permits for the two endangered species. *Id.* Florida's population of green sea turtles is listed as endangered, therefore tours to the green turtle are not offered. *Id.*

144. Interview with Meghin Conti, *supra* note 88. Conti stated that people involved with the tour are so protective that it is "nearly impossible" for a "rogue" participant to harm the turtle in any way. It is technically legal, although discouraged, for individuals to do nighttime viewing independently. *Id.*

low impact interactions that are not motivated out of malice.<sup>145</sup> This being said, education and enforcement must go hand in hand.

The best solution for Hawai'i is not an amendment to the ESA but instead a state-driven education program backed by stronger statutory protection. First, Hawai'i's conservation statute should be amended to add a clause prohibiting "disturbing" wildlife, as has been done by the State of New York. The regulation would grant DLNR officers greater authority to prevent activities that may be detrimental to the turtles without reaching the "take" threshold. This flexible "disturbance" standard is appropriate for enforcement in Hawai'i. In a state that prides itself on public beach access and close ties with wildlife, the cultural, political, and practical barriers to passage and enforcement of laws absolutely prohibiting approaching turtles would be substantial. As expressed by one devoted Laniakea turtle volunteer, a "recovery by separation"<sup>146</sup> model will not work in Hawai'i. The less restrictive "disturbance" standard grants DLNR additional enforcement authority but does not suppress the public's natural enthusiasm for turtles.

Second, Hawai'i should take notice of Florida's state-permitted tour guide program and adapt it to regulate day time turtle viewing. Places like Laniakea and Punalu'u, with persistent turtle presence and high visitor demand, can be singled out and focused on. This way, protection and education is low-cost to the State of Hawai'i and remains in the responsible hands of concerned community members. A state-permitted program would also provide the support necessary to maintain a long-term "Show Turtles Aloha"-type program.

For any turtle protection program to be successful, the tourism industry must be dealt with. HTA has dodged responsibility for the harmful environmental effects of tourism for too long. While focusing on short-term economic prosperity at the expense of the environment, HTA loses sight of Hawai'i's most valuable resources: a rich host culture and healthy environment. The educa-

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145. Interview with Lisa Van Atta, *supra* note 70; Interview with Brandee Gerke, *supra* note 7; Interview with Naomi McIntosh, *supra* note 109; Interview with Gary Moniz, *supra* note 61; Interview with Frank Thomas, *supra* note 58; Interview with Jeffrey Walters, *supra* note 98.

146. Interview with Joanne Pettigrew, *supra* note 10.

tion program currently run at Hanauma Bay,<sup>147</sup> which educates visitors about proper etiquette for snorkeling around marine life, is an excellent model that can be implemented on a much wider scale to educate visitors. Requiring HTA to promote responsible tourism should be a component of the State's Comprehensive Wildlife Conservation Strategy. The State could require that HTA put posters in every hotel in Waikiki informing visitors how to behave around wildlife. Taking a cue from the Department of Agriculture's imported pest announcement, which is given on plane rides from the mainland to Hawai'i, the State should require that all tour buses post information about wildlife viewing and instruct tour bus drivers on the statutes and regulations protecting endangered and threatened species.

The situation at Laniakea, thankfully, has not yet resulted in disaster for a green sea turtle. But it could. These beautiful creatures, so loved and revered by the people of Hawai'i, deserve our best protection efforts, and the volunteers willing to spend all day in the hot sun guarding the turtles deserve the State's support.

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147. Visitors to Hanauma Bay are required to watch a short video on proper behavior toward marine life while swimming in the bay. <http://www.honolulu.gov/parks/facility/hanaumabay/welcome.htm> (last visited Nov. 26, 2006).