

Hi George,

After much review I've arrived at the same "place" we were nearly 20 years ago. There are three recognized enforcement entities that enforce laws with respect to human interactions with sea turtles in Hawaii (two federal and one state). I'll address the issue from the federal (FWS & NOAA enforcement) perspective and my understanding of the state (DLNR/DOCARE) perspective. Recall that I am not an attorney.

Sea Turtles

From the **federal** standpoint, as far as I'm aware, the standard(s) of "protection" for sea-turtles remains as the definition of "take"¹ in the federal endangered species act and the sub-definitions of "harm"² and "harass"³ as defined by federal regulation. Court rulings have upheld the constitutionality of all three terms but offered little in the form of clarification beyond existing wording, leaving their application to discretion (see note on discretion below). I am unaware of any statutory or regulatory clarifications or additions to these legal standards including any imposition of buffer zones that are federally enforceable. I've found the following (bold and underline added):

NOAA encourages the public to view sea turtles responsibly from a distance of **10 feet (3 meters)**⁴

The **State** of Hawaii directly addresses the question (emphasis added)⁵:

Q. How close can I get to sea turtles?

A. There is no law specifying the minimum distance people can approach a sea turtle. However, getting close to these animals may constitute a federal or state violation if the animal is disturbed or if your action has the potential to disturb its natural behavioral patterns. NOAA and DLNR recommend, for your safety and the animals' protection, that everyone stay at least **10 feet (3 meters)** from all sea turtles. If maintaining this distance isn't possible, keep safety in mind and move away from the animal as carefully as possible, avoiding sudden movements and other actions that might disturb the animal. For wildlife viewers, please enjoy from a distance – use binoculars and telephoto lenses to get the best views without disturbing the wildlife.

I would've preferred the use of the terms "harm or harass" instead of "disturb" in the above.

In my opinion, **State** authority, administered by DLNR/DOCARE is derived from Chapter 195D of the Hawaii Revised Statutes and Chapter 13-124 of Hawaii Administrative Rules and the State's definition of "take"⁶ which is virtually identical to (but, importantly, not controlled by) the federal definition. It follows that measured buffer zones are offered by the state as (non-legally-binding) guidelines or pleas. For example see this statement⁷ in a press release (emphasis and bold added):

DLNR *urges* people to give basking honu space to allow them to rest undisturbed, and *suggests* keeping a **6- to 10-foot** buffer as a *best practice* for sea turtle viewing....

The statement continues:

...Feeding or touching turtles in any way is considered a disturbance and therefore illegal.⁷

Regarding the latter part of the statement (above), I found no mention of "feeding", "touching" or "disturbance" during a brief review of both Chapter 195D of the Hawaii Revised Statutes and Chapter 13-124 of the Hawaii Administrative Rules. Either this part of DLNR's statement was an error or it is the opinion of DLNR that feeding or touching represent disturbances that equate to "take".

Recalling again that I'm not an attorney: I understand that states are not limited by parallel federal laws (other than on constitutional matters), so, the state is free to exceed Federal prohibitions and can make the argument that feeding and touching sea turtles violates State law. Note, however, under State law, it is facially illegal to "disturb" the *nests* of indigenous, threatened and endangered species (HAR 13-124-3(c)). This fact makes me wonder if the author of the statement above, misread "disturb" as applying to individuals as opposed to nests or whether the author accurately reflected the legal opinion of the state.

In my opinion, which was greatly informed by discussions with you and others, mere feeding of naturally occurring forage or touching of green sea turtles would not represent "take" (via harm or harass) under federal law. In contrast, grasping or "riding" would equate to take (via "capture") pursuant to both federal and state law. From the standpoint of Federal law: one anxiety I've had for 20 years is whether there are cumulative effects of repeated feeding and light touching to individual turtles that ultimately do equate to take by "significantly impairing essential behaviors". For many wild mammals habituation to humans particularly through intentional or even inadvertent feeding, does result in harm. The slogan "A fed bear is a dead bear" is fairly fitting, as bears and many other species that become habituated to humans may be killed or harmed from traffic, zoonotic disease, poor diet, or (and most ironically) suffer the consequences of being deemed a "nuisance" animal. But for sea turtles, this question remains unanswered to my knowledge.

Note on discretion: In my view, American society establishes five levels of "judges" of conduct (the latter four being our parallel state and federal legal systems): (1) social mores (i.e. peer-to-peer assessment of what is "good" or "bad" behavior), (2) trained enforcement officers, (3) prosecutors, (4) Justices/Magistrates (as aided by prosecutors and defense attorneys), (5) juries (which are a formal version of (1)). Each of the lower "judges" has discretion whether to refer a matter to the next level. Thus far, our society has not codified (i.e. placed sideboards onto) that discretion by mandating physical distances between humans and sea turtles. Note that we have done so with some whales (e.g. 100 yards for humpback whales in Hawaii⁸ and 500 yards for northern right whales⁹).

Note on signage: When I see a sign, I always have to remind myself to check who put the sign up (i.e. a well-intended but possibly ill-informed citizen vs. a well-intended but possibly ill-informed state official vs. a well-intended but possibly ill-informed federal official). Presumably, the latter two categories have greater opportunity for both peer and legal review and therefore less chance of being ill-informed.

¹ The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. (16 USC 1532)

² Harm in the definition of "take" in the Act means 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. (50 CFR 17.3)

³ Harass in the definition of "take" in the Act means 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 behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:

(1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,

(2) Breeding procedures, or

(3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife. (50 CFR 17.3)

⁴ November 2017 NOAA press release. <https://www.fisheries.noaa.gov/feature-story/men-fined-capturing-hawaiian-green-sea-turtle>

⁵ <https://dlnr.hawaii.gov/dar/species/sea-turtles/>

⁶ "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect endangered or threatened species of wildlife, or to attempt to engage in any such conduct. (HAR 13-124-2)

⁷ June 2014 DOCARE press release. <https://dlnr.hawaii.gov/blog/2014/06/06/nr14-068/>

⁸ <https://www.federalregister.gov/documents/2016/09/08/2016-21277/approach-regulations-for-humpback-whales-in-waters-surrounding-the-islands-of-hawaii-under-the>

⁹ <https://www.govinfo.gov/content/pkg/CFR-1998-title50-vol2/xml/CFR-1998-title50-vol2-sec222-32.xml>