

CHAPTER 190D

OCEAN AND SUBMERGED LANDS LEASING

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Unencumbered public lands; penalty for violation, see §171-6.5.

Law Journals and Reviews

State-Federal Conflict Over Naval Defensive Sea Areas in Hawai'i. 14 UH L. Rev. 595.

PART I. SHORT TITLE; PURPOSE; DEFINITIONS

[§190D-1] Short title. This chapter shall be known as the Hawaii Ocean and Submerged Lands Leasing Act. [L 1986, c 91, pt of §1]

§190D-2 Findings and purpose. Article XI of the constitution of the State of Hawaii relating to the conservation, control, and development of resources, provides in section 6 that the State shall have the power to manage and control the marine, seabed, and other resources located within the boundaries of the State, including its archipelagic waters, and reserves to the State all such rights outside state boundaries not specifically limited by federal or international law.

The legislature finds that the State's marine waters offer the people of Hawaii sources of energy, minerals, food, and usable space. The legislature further finds that the proper management and development of these ocean resources require defined rights of usage and tenure.

The purpose of this chapter is to establish procedures for the leasing of state marine waters and to guarantee property rights and protection for any activities approved under these procedures. [L 1986, c 91, pt of §1; am L 1999, c 176, §§2, 11; am L 2002, c 203, §1]

§190D-3 Definitions. As used in this chapter, unless the context clearly requires otherwise:

"Agency" means any federal, state, local, or foreign government or any entity of any such government.

"Application" means a conservation district use application.

"Board" means the board of land and natural resources.

"Chairperson" means the chairperson of the board of land and natural resources.

"Commercial lease" means a lease of state marine waters or submerged lands for marine activities designed for profit.

"Department" means the department of land and natural resources.

"Economic unit" means the water column, state submerged lands beneath the water column, and water surface above the water column which shall be treated as one economic unit for the calculation of lease rents.

"Lessee" means the holder of a valid lease granted pursuant to this chapter.

"Mariculture" means the aquaculture, cultivation, and production for research, development, demonstration, and commercial purposes of aquatic plants and animals within state marine waters, but excludes floating structures that are not anchored.

"Marine activities" means ocean thermal energy conversion (OTEC); mariculture; and other energy or water research, scientific, and educational activities in, on, or under state marine waters, which are exclusive, non-transient in nature, and which occupy a discrete area of state marine waters.

"Noncommercial lease" means a lease of state marine waters for marine activities not designed for profit.

"OTEC" means ocean thermal energy conversion.

"OTEC facility" means an ocean thermal energy conversion facility which is located onshore, standing on submerged lands, or moored in state marine waters, and which is designed to use temperature differences in ocean water to produce energy or energy product equivalents and includes any surface and subsurface structures, intake and discharge pipes, and underwater power cables integrated with or appurtenant to such a facility.

"State marine waters" means all waters of the State, including the water column, water surface, and state submerged lands, extending from the upper reaches of the wash of the waves on shore seaward to the limit of the State's police power and management authority, including the United States territorial sea, notwithstanding any law to the contrary.

"Water column" means the vertical extent of marine waters, including the surface, above submerged lands. [L 1986, c 91, pt of §1; am L 1990, c 126, §5; am L 1999, c 176, §§3, 11; am L 2002, c 203, §1]

PART II. CONSERVATION DISTRICTS

§190D-11 Conservation district use application. (a) Any person desiring to lease state marine waters shall submit to the board an application for specific activities in any specific area or areas. Applications made pursuant to this chapter shall contain:

- (1) An environmental assessment or, if required, an environmental impact statement which shall be prepared and accepted in compliance with the rules adopted under chapter 343;
- (2) A description of the location and boundaries of the state marine waters to be used and a description of the nature of the use desired;
- (3) A statement of the reasons for selecting the proposed location;
- (4) A description of the activities to be conducted, including a specification as to whether such activities are commercial or noncommercial, a timetable for construction, deployment, and operation of facilities, and planned levels of production;
- (5) Where the application is for mariculture, a description of the species to be cultivated and produced;
- (6) A statement on the extent to which the proposed activities will interfere with the use of the state marine waters for the purposes of navigation, fishing, and public recreation;
- (7) A description of any enclosure, fences, stakes, buoys, or monuments proposed to mark off the desired area;
- (8) An initial description of current users (military, governmental, commercial, recreational, and cultural) and their uses of the state marine waters requested for lease, including any practitioners of traditional and customary Hawaiian rights; and
- (9) Other information which the board determines to be necessary or appropriate, including financial and technical information.

(b) The department shall process the application pursuant to chapter 183C. Within sixty days after the submission of a completed application with a request for a lease for marine activities in state marine waters and the receipt of the related environmental assessment or environmental impact statement, the department shall issue a public notice that the application has been received. The public notice shall describe:

- (1) The state marine waters for which application has been made;
- (2) The nature of the exclusive use sought; and
- (3) The purpose for which the application has been made.

The notice shall be given on three separate days statewide and in the county nearest the state marine waters for which application has been made. The public notice shall invite public comment.

(c) Notice of hearings shall be provided and hearings shall be conducted in accordance with department rules regarding applications. If the area described in the application adjoins any private property or adjoins or overlaps, above or below, any leased state marine waters, or if the proposed activity will affect the property or property rights of private property owners or lessees of state marine waters, the department also shall notify the owners or lessees of the adjoining, overlapping, or affected property. Notice shall be given in writing, by personal service or by registered or certified mail, and shall describe:

(1) The state marine waters for which application has been made;

(2) The nature of the exclusive use sought; and

(3) The purpose for which the application has been made.

(d) The board shall consider in its evaluation of each application:

(1) The extent to which the proposed activity may have a significant adverse effect upon any existing private industry or public activity, including the use of state marine waters for the purposes of navigation, fishing, and public recreation;

(2) Whether the proposed activity may have an adverse or permanent effect upon the wildlife, aquatic life, or environment of the surrounding area; and

(3) Other potential uses of the area, including competing uses, which may be in the public interest.

(e) The board shall not approve an application unless it finds that:

(1) The applicant has the capacity to carry out the entire project; and

(2) The proposed project is clearly in the public interest upon consideration of the overall economic, social, and environmental impacts.

(f) The board may impose conditions so that the proposed use or extent of the area in which the proposed activity may take place is no greater than is required to conduct the approved activity properly. [L 1986, c 91, pt of §1; am L 1995, c 11, §8 and c 69, §6; am L 1998, c 2, §51; am L 1999, c 176, §§4, 11; am L 2002, c 203, §1]

PART III. OCEAN LEASING GENERALLY; PROCEDURES; PROVISIONS

§190D-21 Leasing of state marine waters and submerged lands for private uses. (a) The board may lease state marine waters for marine activities upon compliance with section 171-53 and with the concurrence of the director of transportation. Leases may be issued only for marine activities which are allowed pursuant to an approved application. The board shall make a determination that each lease is a commercial or noncommercial lease.

(b) The board shall not lease state marine waters when existing programs of the department, such as the marine life conservation district program, shoreline fisheries management area program, or the natural area reserve program will suffer adverse impacts as a consequence of the proposed activities; provided that no lease shall be awarded within state marine waters designated as being necessary for national defense purposes, as determined by the department in consultation with the appropriate federal agencies.

(c) The board shall not lease state marine waters unless the board finds that a lease for the proposed activity, after detailed consideration of the present uses, is clearly in the public interest upon consideration of the overall economic, social, and environmental impacts and consistent with other state policy goals and objectives.

(d) The board shall not lease state marine waters unless the board finds that the applicant for a lease has complied with applicable federal, state, and county statutes, ordinances, and rules.

(e) The board may require any person who has obtained approval of an application for marine activities or the operation of an OTEC facility in state marine waters to enter into a lease for the conduct of those activities.

(f) The board shall not approve an application, if in so doing it would fail to protect the public's use and enjoyment of the reefs in the state marine waters. [L 1986, c 91, pt of §1; am L 1999, c 176, §§5, 11; am L 2002, c 203, §1]

§190D-22 Leasing procedure. (a) Any person who wants to obtain a lease for marine activities in state marine waters shall request a lease from the board at the time of filing an application.

(b) Upon receipt of a completed application and authorization of a lease, the board shall:

(1) Negotiate with and grant a lease to the applicant; or

(2) Conduct a public auction and grant the lease to the highest qualified bidder.

Public auctions shall be conducted in accordance with chapter 171. If an auction is held and the applicant submitting a completed application is not the highest qualified bidder, the board shall require the highest qualified bidder to indemnify the applicant for all legitimate costs incurred in the preparation of any environmental assessment or environmental impact statement

included in the application pursuant to chapter 343 and the rules adopted thereunder. In establishing and following internal procedures for lease applications, the board shall attempt to minimize costs to those applicants submitting completed applications.

(c) The board shall not revoke or modify its approval of an application in such a way as to invalidate, impair, limit, or affect, directly or indirectly, in whole or in part, the rights of a lessee as set forth in the lease granted to the lessee pursuant to this chapter. [L 1986, c 91, pt of §1; am L 1999, c 176, §§6, 11; am L 2002, c 203, §1]

§190D-23 Lease provisions. (a) Leases issued by the board shall be drawn up in accordance with the following requirements, in addition to any other requirements determined by the board:

(1) Each lease shall specify the term of the lease and the nature of the exclusive use of the area being granted;

(2) Each lease shall specify the marine activities or other resources which may be cultivated, produced, harvested, removed, or used pursuant to the lease;

(3) Each lease shall specify an annual rent set by the board for the leased area. The basic rental charged in a commercial lease may be supplemented by royalty payments. No royalty shall be charged in a noncommercial lease;

(4) Leases may specify that failure of the lessee to perform substantially the activities for which the lease was granted shall constitute grounds for revocation of the lease and forfeiture to the State of all structures and, in the case of mariculture activities, all plants or animals cultivated, in and upon the leased area;

(5) Each lease shall require that the lessee execute a bond conditioned upon the substantial performance of the activities described in the lease. The amount of the bond so executed shall be appropriate to the size, scale, and risk of the activity for which the lease is granted, and shall be sufficient to protect the public interest in the removal of all structures and, in the case of mariculture activities, all marine plants or animals cultivated, as well as to restore or remediate the water and state submerged lands to the satisfaction of the department in and upon the leased state marine waters, if the lease is forfeited for nonperformance or the board requires the removal or eradication of marine plants or animals pursuant to paragraph (11);

(6) Each lease shall specify that if a lessee abandons a leased area, the board may order the removal or sale at public auction of all improvements, assets, marine plants or animals, and equipment remaining in and upon the leased area, and shall transmit to the state general fund the entire amount received from any public auction and any proceeds received from the lessee's performance bond. Alternatively, the board may permit the use of the improvements, assets, marine plants or animals, and equipment for purposes which benefit the general public;

(7) Each lease for mariculture shall specify that the marine plants or animals described in the lease to be cultivated and contained within the leased area are the exclusive harvest of the lessee; provided that any marine plant or animal which escapes from the leased area and is not clearly identifiable as the property of the lessee, shall become common property and may be taken or

caught by any person, subject to the fishing laws of the State, without violating the rights of the lessee;

(8) Each lease for mariculture shall specify that:

(A) The lessee is responsible for the removal of any cultivated marine plants or animals found outside the leased area but within state marine waters if removal is required to protect the environment or public health and safety, and removal is demanded by the board;

(B) The lessee is solely responsible for all costs of removal of such marine plants or animals; and

(C) If action must be taken by the department to eradicate escaped marine plants or animals, all costs of eradication shall be borne by the lessee; provided that the costs borne by the lessee shall be no greater than the amount of the bond required under paragraph (5);

(9) Leases may specify that the lessee shall construct and maintain gates, openings, or lanes at reasonable distances from one another throughout a leased area which includes surface waters and in which any type of enclosure is an obstacle to free navigation, unless public transit in or through the enclosed waters will cause undue interference with the operation being conducted by the lessee within the leased area;

(10) Leases may require, where necessary, that:

(A) All lessees mark off the areas under lease by appropriate ranges, monuments, stakes, buoys, fences, or any other devices placed so that they do not interfere unnecessarily with navigation and other traditional uses of the water surface;

(B) All lessees identify the area under lease and the names of the lessees on signs appropriately placed pursuant to specifications established by the board; and

(C) All limitations upon the use by the public of an ocean area under lease shall be clearly posted by the lessee pursuant to specifications established by the board;

(11) Leases shall specify that if the chairperson finds or has reasonable cause to believe that an activity conducted by the lessee in or upon the area described in the lease is causing an immediate danger to human or marine life or the environment of the state marine waters, the chairperson may direct a temporary or permanent suspension of commercial or research activities in the affected area. The chairperson shall then notify the board. The board shall immediately order the lessee or lessees affected by such notice to show cause why their activities should not be terminated, or why any structures, cultivated marine plants or animals, or equipment should not be removed from state marine waters. The board shall proceed to hold a public hearing and issue its order with respect to such hearing within a reasonable period. In its order following such hearing, the board may direct a temporary or permanent suspension of commercial or research activities in the affected area, removal of equipment or cultivated marine plants or animals, or such other measures as shall be deemed necessary for protection of human or marine life and environment of state marine waters, including forfeiture to and destruction by the State of any marine plant or animal species;

(12) Each lease shall specify that the lease may be assigned in whole or in part, or amended, only if the board determines that such assignment or amendment is in the public interest and meets the provisions of this chapter and consents to the assignments. The board may consent to the mortgage of a lease pursuant to section 171-22;

(13) Each lease shall specify that the lease may be revoked by the board for violation of any lease provision. The board shall deliver a written notice of the breach or default of any lease agreement by registered or certified mail to the party in default and to each holder of record having any security interest in the state marine waters covered by or subject to the lease, making demand upon the party to cure or remedy the breach or default within sixty days from the date of receipt of the notice. Upon failure of the party to cure or remedy the breach or default within sixty days from the date of receipt of the notice, or within such additional period the board may allow for good cause, the board may revoke the lease; and

(14) Each lease shall contain a statement describing the degree of exclusivity or access to the site by the public that will be based on an analysis of the user listing and descriptions provided in the application, and comments made by the public and in consideration of, but not limited to the following: compatibility of the operation with existing uses, perceived liability to the lessee and the public, and perceived risk to the lessee's investment.

(b) The chairperson or chairperson's authorized agents shall have the authority to enter and inspect any and all areas leased by the board for the purpose of determining compliance with the terms and provisions of any such lease. [L 1986, c 91, pt of §1; am L 1999, c 176, §§7, 11; am L 2002, c 203, §1]

[§190D-24] Konohiki fishing rights. (a) The provisions of this chapter shall not abridge or alter in any way konohiki fishing rights recognized in chapter 187A, including the right to sublease private konohiki fishing grounds for marine activities. No lease shall be granted by the board which conflicts with or impairs konohiki fishing rights.

(b) Any traditional fishing or marine activity conducted within konohiki fishing grounds is subject to all applicable state laws and rules enacted pursuant to the State's police powers over fisheries and navigable waters. [L 1986, c 91, pt of §1]

PART IV. ADMINISTRATION AND ENFORCEMENT

[§190D-31] Enforcement. Enforcement of this chapter shall be in accordance with chapter 199. [L 1986, c 91, pt of §1]

§190D-32 Rules. The board may adopt such rules as are necessary and appropriate to carry out the purposes and provisions of this chapter. The adoption of these rules shall be in accordance with chapter 91. [L 1986, c 91, pt of §1; am L 1999, c 176, §§8, 11; am L 2002, c 203, §1]

§190D-33 Revenues. The revenues obtained from the leasing of state marine waters pursuant to this chapter shall be deposited into the special land and development fund to be used for planning, research, and development of the aquaculture industry; provided that the portion of revenues subject to chapter 10, shall be deposited into the public land trust fund as provided by law. [L 1986, c 91, pt of §1; am L 1999, c 176, §§9, 11; am L 2002, c 203, §1]

§190D-34 Penalties. Any person who conducts any mariculture or OTEC activities prohibited by a lease granted by the board, or who conducts these activities in or upon state marine waters without having obtained the approval of the board, shall be fined not more than \$10,000 for each separate offense. Each day of violation shall constitute a separate offense. Any action taken to impose or collect the penalty provided for in this section shall be considered a civil action. [L 1986, c 91, pt of §1; am L 1999, c 176, §§10, 11; am L 2002, c 203, §1]

Cross References

General administrative penalties, see §187A-12.5.

[§190D-35] Civil liability. Any person who wilfully or recklessly damages, disturbs, or interferes with any mariculture or OTEC activity which has been approved by the board, or who wilfully or recklessly damages, disturbs, interferes with, takes, or possesses any improvements, assets, marine plants or animals, or equipment in an area leased to a person, without the permission of that person, shall be subject to civil proceedings initiated by any person damaged thereby, notwithstanding the result in any criminal proceedings commenced under section 190D-36. [L 1986, c 91, pt of §1]

[§190D-36] Criminal liability. Any person who negligently or wilfully damages, disturbs, or interferes with any mariculture or OTEC activity which has been approved by the board or who negligently or wilfully damages, disturbs, interferes, takes, or possesses any improvements, assets, marine plants or animals, or equipment in an area leased to a person, without the permission of that person, shall be treated in accordance with the applicable provisions of chapter 708. [L 1986, c 91, pt of §1]