

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Honolulu, Hawaii 96813

April 13, 2018

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

REQUEST FOR APPROVAL TO HOLD PUBLIC HEARINGS FOR AMENDMENTS
TO HAWAII ADMINISTRATIVE RULES CHAPTER 13-95,
RULES REGULATING THE TAKING AND SELLING OF CERTAIN MARINE
RESOURCES. THESE AMENDMENTS ARE INTENDED TO GIVE THE
DEPARTMENT AUTHORITY TO AUTHORIZE TAKE OF STONY CORAL AND
LIVE ROCK IN LIMITED CIRCUMSTANCES

Submitted for your consideration and approval is a request to hold a public hearing to amend Hawaii Administrative Rules (“HAR”) chapter 13-95 to allow the Department to issue authorization for the take of stony coral and live rock in limited circumstances related to renewable energy projects and require mitigation for the authorized resource take.

Proposed Management Measures

There are two primary proposed rule changes: 1) definitions of “renewable energy projects” and “mitigation” added to section 13-95-1, and 2) new subsections in 13-95-70 and 71 that allow the department to authorize damage of stony corals and live rocks for the development or operation of renewable energy projects and require mitigation to offset stony coral and live rock damage from any authorized take under this subsection.

The proposed amendments have been reviewed by the Attorney General’s Office and are attached as **Exhibit 1**.

Background

There is currently a need for the Division of Aquatic Resources (DAR) to authorize damage to coral and live rock for purposes that the Division has determined to be justified, after appropriate minimization or mitigation measures have been implemented by the applicant. It has come to the attention of the Division that there are purposes for which the take of coral and live rock is justified other than those purposes outlined under the authority of Section 187A-6, Hawaii Revised Statutes (HRS), Special Activity Permits (SAP).

One such purpose is the installation of infrastructure that would facilitate production, generation, collection or harnessing of renewable energy. The Division has received multiple proposals over the last ten (10) years which would necessitate the placement or

installation of infrastructure on select amounts of stony coral or live rock (hard benthic substrate) resources. These requests range from offshore wind turbines, wave generation buoys to deep-sea cooling air conditioning systems. Some of the infrastructure needed to generate this type of renewable energy requires select preliminary excavation or drilling of stony coral or live rock (hard benthic substrate) resources and/or placement of anchors, mooring blocks or anchoring collars upon stony coral or live rock (hard benthic substrate) resources, when determined to be unavoidable. If the entity installing the infrastructure has taken steps to minimize or mitigate the impact to stony coral or live rock (hard benthic substrate) resources to the extent practicable, the Division would like the ability to authorize projects such as these to proceed, if the impact to or displacement of stony coral and live rock resources is determined to be a minimized or temporary loss of stony coral and live rock resources and the outcome or end result outweighs this loss by benefiting the ecosystem through the reduction of the consumption of non-renewable energy resources and/or production of renewable energy. In addition, the Division would like the ability to determine the appropriate type of mitigative offsets to avoid, minimize, restore, or compensate for losses of certain marine resources due to such authorized activities.

Currently the Division has no mechanism with which to allow the damage of these stony coral and live rock resources other than the purposes outlined under HRS section 187A-6, which include scientific, educational, management, or propagation purposes. If a project that aligns with the conservationist or environmental objectives of the Division, but fails to meet the criteria which constitute scientific, educational, management, or propagation purposes, the Division has no authority to approve the activity. Additionally, the SAP is not the right mechanism to authorize impact to live rock and coral for projects that extend across a period of time exceeding a year, as the SAP is restricted to a one year period of validity and requires annual renewals.

Therefore, to appropriately address the increasing needs for renewable energy in the state while also managing impacts to the state's aquatic resources, this proposed rule change would allow the Department to authorize damage to stony corals and live rock for the development and operation of renewable energy projects and to require mitigation to offset any stony coral or live rock losses.

The proposed rule amendments would add the following definitions:

“Renewable energy projects” means projects developed by renewable energy producers as the term is defined in section 171-95, Hawaii Revised Statutes, that reduce the consumption of non-renewable energy resources and/or produce renewable energy.

“Mitigation” means activities carried out in accordance with this chapter in order to avoid, minimize, restore, or compensate for losses of certain marine resources due to authorized activities.

Potential Concerns

- 1) Would all proposed “renewable energy projects” be authorized by the Department?

The Division would evaluate all projects on a case by case basis, and review all necessary environmental documentation such as environmental impact statements (EIS) and environmental assessments (EA), if required, to evaluate if the proposed damage to or displacement of stony coral and live rock resources is determined to be a minimized or temporary loss to stony coral and live rock resources and whether the outcome or end result outweighs this loss by benefiting the ecosystem through the reduction of the consumption of non-renewable energy resources and/or production of renewable energy. The Department would additionally take steps to determine the appropriate type of mitigative offsets to avoid, minimize, restore, or compensate for losses of certain marine resources due to authorized activities.

- 2) Will this proposed rule change allow the authorization of damage to coral and live rock for other projects with objectives other than the purposes of “renewable energy”?

At this time, the Department would like to limit the scope of authorization to only one new specific purpose: To authorize damage to stony corals and live rock for the development and operation of renewable energy projects and to require mitigation to offset any stony coral or live rock losses. Other than projects currently authorized under HRS section 187A-6 (which include projects with scientific, educational, management, or propagation purposes), projects with “renewable energy” objectives will be the only new addition to eligible purposes considered as justification to allow damage to stony coral or live rock at this time.

RECOMMENDATIONS:

That the Board:

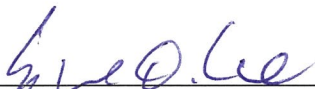
- 1) Authorize and approve the holding of a public hearing on O'ahu to amend Chapter 13-95, RULES REGULATING THE TAKING AND SELLING OF CERTAIN MARINE RESOURCES.
- 2) Delegate to the Chairperson the authority to appoint a hearings officer to conduct the aforementioned public hearings.

Respectfully submitted,



Bruce S. Anderson, Ph.D., Administrator
Division of Aquatic Resources

APPROVED FOR SUBMITTAL



Suzanne Case., Chairperson
Board of Land and Natural Resources

Attachment:

Exhibit 1 – Ramseyer Draft

(Ramseyer Format)
(3/7/2018)

DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF AQUATIC RESOURCES

Amendments to Chapter 13-95
Hawaii Administrative Rules

(date of adoption)

1. Section 13-95-1, Hawaii Administrative Rules, is amended by adding a new definition to read as follows:

"Renewable energy projects" means projects developed by renewable energy producers, as the term is defined in section 171-95, Hawaii Revised Statutes, that reduce the consumption of non-renewable energy resources or produce renewable energy.

"Mitigation" means activities carried out in accordance with this chapter in order to avoid, minimize, restore, or compensate for losses of certain marine resources due to authorized activities.

[Eff 12/3/98; am 1/11/02; am 12/19/02; am 5/1/14; am] (Auth: HRS §§ 187A-3.5, 187A-5, 190-3) (Imp: HRS §§ 3.5, 187A-5, 190-3)

2. Section 13-95-70, Hawaii Administrative Rules, is amended to read as follows:

§ 13-95-70 Stony Corals. (a) Except as otherwise provided in this section or authorized by law:

- (1) Subject to [subsection] subsections (b) and (c), it is unlawful for any person to take, break, or damage any stony coral, except as

provided in sections 171-58.5 and 205A-44, HRS;

- (2) It is unlawful for any person to damage any stony coral by any intentional or negligent activity causing the introduction of sediment, biological contaminants, or pollution into state waters;
- (3) It is unlawful for any person to sell any stony coral; except that stony coral rubble pieces or fragments imported for the manufacture and sale of coral jewelry, or dead stony coral obtained through legal dredging operations in Hawaii for agricultural or other industrial uses, may be sold.

(b) No liability shall be imposed under subsection (a)(1) of this section for inadvertent breakage, damage, or displacement of an aggregate area of less than one half square meter of coral if caused by:

- (1) A vessel with a single anchor damage incident, in an area where anchoring is not otherwise prohibited, and not more frequently than once per year; or
- (2) Accidental physical contact by an individual person.

(c) The Department may authorize damage to stony corals for the development or operation of renewable energy projects and shall require mitigation to offset any stony coral losses.

~~[(e)]~~(d) Any person found in violation of any provision of this section pursuant to a criminal prosecution shall be subject to penalty as provided under section 187A-13, HRS. Any person found in violation of any provision of this section pursuant to civil or administrative action shall be subject to penalty as provided under section 187A-12.5, HRS." [Eff 12/3/98; am 12/9/02; am 5/1/14; am] (Auth: HRS §§ 187A-5, 189-6, 190-3) (Imp: HRS §§ 187A-6, 187A-12.5, 187A-13, 189-6, 190-1, 190-3, 190-5)

3. Section 13-95-71, Hawaii Administrative Rules, is amended to read as follows:

§ 13-95-71 Live Rocks. (a) Except as otherwise provided in this section or authorized by law:

- (1) Subject to [subsection] subsections (b) and (c), it is unlawful for any person to take, break, or damage any live rock;
- (2) (2) Subject to subsection (b), it is unlawful for any person to damage any live rock by any intentional or negligent activity causing the introduction of sediment, biological contaminants, or pollution into state waters; and;
- (3) It is unlawful for any person to sell any live rock.

(b) No liability shall be imposed under subsections (a)(1) or (a)(2) of this section for inadvertent breakage, damage, or displacement of an aggregate area of less than one square meter of live rock bottom cover.

(c) The Department may authorize damage to live rock for the development or operation of renewable energy projects and shall require mitigation to offset any live rock losses.

~~[(e)]~~ (d) Any person found in violation of any provision of this section pursuant to a criminal prosecution shall be subject to penalty as provided under section 187A-13, HRS. Any person found in violation of any provision of this section pursuant to civil or administrative action shall be subject to penalty as provided under section 187A-12.5, HRS." [Eff 12/3/98; am 12/9/02; am 5/1/14; am] (Auth: HRS §§ 187A-5, 189-6, 190-3) (Imp: HRS §§ 187A-6, 187A-12.5, 187A-13, 189-6, 190-1, 190-3, 190-5)

4. Material, except source notes and other notes, to be repealed is bracketed and stricken. New material is underscored.

5. Additions to update source notes and other notes to reflect this amendment are not underscored.

6. The amendments to chapter 13-95, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on _____, and filed with the Office of the Lieutenant Governor.

Suzanne D. Case
Chairperson
Board of Land and Natural
Resources

APPROVED FOR PUBLIC HEARING:

Deputy Attorney General