

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

September 14, 2018

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

**REQUEST FOR FINAL APPROVAL TO ADOPT 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 adopt amendments to 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.

The new amendments address the current need for the Department of Land and Natural Resources (“Department”) to be able to authorize damage to coral and live rock for purposes other than those outlined under the authority of Section 187A-6, Hawaii Revised Statutes (HRS), Special Activity Permits (SAP). Specifically, the amendments would allow the take of stony coral and live rock in limited circumstances related to renewable energy projects, such as the installation of infrastructure that would facilitate production, generation, collection or harnessing of renewable energy, and require mitigation for the authorized resource take.

The Department has received proposals 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.

The Division of Aquatic Resources (“Division”) would like the Department to have the ability to authorize projects such as these to proceed and 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 Department 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 renewable energy project fails to meet the criteria which constitute

scientific, educational, management, or propagation purposes, the Department has no authority to approve the activity.

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 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 potential impact. The Division 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. Based on its review, the Division would make a recommendation to the Board of Land and Natural Resources on whether or not to authorize the project, and what mitigation measures to require.

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 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.

On April 13, 2018, the Board approved the proposed amendments to the rules for a public hearing. On June 12, 2018, the Governor approved the proposed amendments to the rules for a public hearing.

The Division of Aquatic Resources ("DAR") accepted public testimony on the proposed rules from July 1, 2018 to August 10, 2018 and held a public hearing on August 1, 2018. DAR received a total of 1 verbal and written testimony. The testimony was in full support of the amendments of the rules as proposed. The minutes from the public hearing and written testimony are attached as **Exhibit 1**.

Based on the written and oral public testimony received by DAR through the chapter 91 public hearings process, DAR recommends adopting amendments as proposed. A Ramseyer draft of the proposed amendments to the rules, is attached as **Exhibit 2**.

RECOMMENDATION:

“That the Board give final approval to adopt amendments to 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.”

Respectfully submitted,



Brian Neilson, Acting Administrator
Division of Aquatic Resources

APPROVED FOR SUBMITTAL



SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

Attachments:

- Exhibit 1 – Public Hearing Minutes
- Exhibit 2 – Ramseyer Draft

Public Hearing Minutes
Amending Hawaii Administrative Rules
CHAPTER 13-95
Rules Regulating the Taking and Selling of Certain Marine Resources

Hearing Location: Kawananako Middle School Cafeteria, 49 Funchal Street,
Honolulu, Oahu
Hearing Date: August 1, 2018

I. Introduction

A. Opening

The Public Hearing was held on Oahu.

The Oahu Public Hearing was called to order at 6:25 P.M. Catherine Gewecke, DAR Oahu Aquatic Biologist conducted the public hearing. Also present was David Sakoda, DAR Oahu Program Specialist.

II. Background

- A. This hearing was held to discuss the proposed amendments to certain sections of the Hawaii Administrative Rules, Chapter 13-95, relating to the protection of stony coral and live rock. The proposed amendments would establish a mechanism for the Department to authorize the take of stony coral and live rock for the development or operation of renewable energy projects and would require the Department to require mitigation to offset losses.

Under current state law, it is unlawful for any person to take, break, or damage stony coral and live rock. The Department may authorize the take of stony coral or live rock through issuance of a Special Activity Permits (SAP), provided the activity or project is done for “scientific, educational, management, or propagation purposes.”

The Department has determined that, in some circumstances, it may be in the State’s best interest to authorize the take of stony coral and live rock for purposes that fall outside the scope of a Special Activity Permit. One such purpose is the installation of infrastructure that would facilitate production, generation, collection, or harnessing of renewable energy.

Over the past ten years, the Department has received multiple proposals which would necessitate the placement or installation of infrastructure on select amounts of stony coral or live rock (or hard benthic substrate). These requests range from offshore wind turbines, wave energy generation buoys to deep-sea

Exhibit 1

cooling air conditioning systems. Some of the infrastructure needed to generate this type of renewable energy requires select preliminary excavation or drilling of hard benthic substrate and/or placement of anchors, mooring blocks or anchoring collars upon stony coral or live rock, when determined to be unavoidable.

The proposed amendments would provide a mechanism for the Department to authorize these types of projects to proceed, provided that the entity installing the infrastructure has taken steps to minimize or mitigate the impact to stony coral or live rock to the extent practicable. In addition, the proposed amendments would require the Department to determine and impose appropriate mitigative offsets to avoid, minimize, restore, or compensate for losses of certain marine resources due to such authorized activities.

- B. Approvals to conduct this public hearing have been obtained from the Board of Land and Natural Resources on April 13, 2018, and Governor Ige on June 12, 2018.
- C. Copies of the administrative rules were made available for inspection at the public hearing.

III. Notice of public hearing

- A. The Legal Notice of this public hearing was published in the July 1, 2018, Sunday issue of the Honolulu Star Advertiser.

IV. Hearing procedures

- A. The hearing officer explained the proposed changes to the administrative rules. Each person who wanted to testify was given 3 minutes or more to provide their testimony.

V. Testimonies

Oahu: Four persons from the public attended. One testimony was presented. The person testified in support of the proposed rule amendments. The testimony is included in Exhibit 1.

Other: Interested persons unable to attend the hearing or wishing to present additional comments, were given the opportunity to submit written testimony to the Department by August 10, 2018. DAR did not receive any written testimonies by mail.

VI. Adjournment

- A. The Oahu Public Hearing was adjourned at 6:37 P.M

Aloha DAR representative,

I am here on behalf of Honolulu Seawater Air Conditioning, LLC (HSWAC) to provide testimony in strong support of the proposed amendments to Hawaii Administrative Rules Chapter 13-95, Rules Regulating the Taking and Selling of Certain Marine Resources, which seek to Give the Department Authority to Authorize Take of Stony Coral and Live Rock in Limited Circumstances associated with renewable energy projects.

HSWAC has been actively developing a project that will use cold, deep seawater as a primary means to cool a freshwater loop that can provide 28,000 tons of air conditioning to downtown Honolulu and parts of Kakaako. Using cold, deep seawater to sustainably generate chilled water will also provide a tremendous opportunity to lower Oahu's dependence on fossil fuels and help conserve other precious resources. A critical part of this project is the bottom mounted seawater intake and discharge pipes, which will extend from a location approximately 1650' offshore of Kakaako seaward to reach cold, deep seawater at 1750' below the surface of the sea. It is this portion of the project that will impact mainly live rock and some small hard coral colonies.

HSWAC has been working with multiple regulatory agencies to ensure the project is constructed and will operate with the least impact to the environment. By amending the existing HAR Chapter 13-95 rules, the Department can accommodate private efforts to utilize another of Hawaii's vast renewable resources – the ocean - to meet Hawaii's Clean Energy Initiative, while ensuring impacts are minimized and mitigated. We feel the amended rule would:

1. Align government regulations and policies to further the implementation of additional renewable/clean energy sources
2. Clarify and provide certainty to processes for developers to implement new sources of renewable/clean energy
3. Help see these new sources of renewable energy come to fruition

Mahalo nui loa for this opportunity to share our perspective.

VICTOR VELASCO


(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 new definitions 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.

Exhibit 2

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