

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

August 14, 2020

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

REQUEST FOR APPROVAL TO HOLD A PUBLIC MEETING AND HEARING TO AMEND AND COMPILE CHAPTER 13-34, HAWAII ADMINISTRATIVE RULES, PŪPŪKEA MARINE LIFE CONSERVATION DISTRICT; TO AMEND: §13-34-1 (BOUNDARIES) TO PROVIDE MORE ACCURATE GPS COORDINATES AND BOUNDARY DESCRIPTIONS; §13-34-1.1 (DEFINITIONS) TO CLARIFY AND UPDATE DEFINITIONS INCLUDING “LIMU LIPE‘EPE‘E”; §13-34-2 (PROHIBITED ACTIVITIES) TO PROHIBIT THE FEEDING OF MARINE LIFE; §13-34-3 (PERMITTED ACTIVITIES) TO §13-34-4 (EXCEPTIONS; PERMITS) FOR GRAMMATICAL AND TECHNICAL AMENDMENTS; §13-34-5 (PENALTY) TO CLARIFY THE TYPES OF PENALTIES AUTHORIZED BY STATUTE FOR VIOLATIONS OF THIS CHAPTER; TO ADOPT §13-34-6 (ASSET FORFEITURE) TO PROVIDE NOTICE OF THE STATE’S AUTHORITY TO UTILIZE CIVIL ASSET FORFEITURE AS AN ENFORCEMENT TOOL FOR VIOLATIONS OF THIS CHAPTER; LOCATED AT PŪPŪKEA, KO‘OLAULOA, O‘AHU, HAWAI‘I

Submitted for your consideration and approval is a request to hold a public meeting and rulemaking hearing subject to Hawaii Revised Statutes (HRS) chapter 91 to:

1. Amend Hawaii Administrative Rules (HAR) §13-34-1 to provide more accurate GPS coordinates and descriptions for the boundaries of the Pūpūkea Marine Life Conservation District (MLCD), including coordinates delineating the boundary of the Waimea Bay zone of the MLCD;
2. Amend §13-34-1.1 to clarify and update the definition of “limu lipe‘epe‘e”, remove unnecessary definitions, and make grammatical and technical amendments;
3. Amend §13-34-2 to prohibit the feeding of marine life;
4. Amend §§13-34-3 to -4 for grammatical and technical amendments
5. Amend §13-34-5 to clarify the types of penalties authorized by statute for violations of this chapter;
6. Adopt a new section 13-34-6 to provide notice of the State’s authority to utilize civil asset forfeiture as an enforcement tool for violations of this chapter;
7. Replace the “Map of the Pupukea, Oahu Marine Life Conservation District 1/10/02” referenced in chapter 13-34 with a more accurate map reflecting the updated boundary coordinates and the Governor’s set-aside of submerged lands in the Old Quarry tide pools; and
8. Compile HAR chapter 13-34.

PURPOSE

The Department of Land and Natural Resources (Department) proposes to amend and compile HAR chapter 13-34 to reflect the inclusion of the Old Quarry tide pool area in the Pūpūkea MLCD. Section 13-34-1, Boundaries, is being amended to provide more accurate GPS coordinates and descriptions for the boundaries of the Pūpūkea MLCD, including coordinates delineating the boundary of the Waimea Bay zone of the MLCD. To assist in the delineation of the new MLCD boundaries, the current exhibit entitled “Map of the Pūpūkea, Oahu Marine Life Conservation District 1/10/02” is being replaced by a more accurate and up-to-date map of the Pūpūkea MLCD.

The Department proposes to amend section 13-34-1.1, Definitions, to amend the definition of “limu lipe‘epe‘e” to replace the outdated scientific name with the currently accepted scientific names of four species known to practitioners as limu lipe‘epe‘e. This amendment will provide clarity and ensure the rule’s enforceability. The definition of “Waimea Bay” is being removed because it is described in the amended Boundary section. The definition of “legal nets” is being removed because it is no longer necessary due to technical amendments to section 13-34-3, Permitted Activities.

The Department proposes to amend section 13-34-2, Prohibited activities, to prohibit the feeding of marine life within the MLCD. Fish feeding has disruptive effects on the natural dynamics of nearshore ecosystems. Fish feeding is already prohibited in numerous other marine managed areas, including the Hanauma Bay MLCD¹, the Molokini Shoal MLCD², the Old Kona Airport MLCD³, and in the various fisheries management areas, marine reserves, fish replenishment areas, netting restricted areas, and MLCDs located within the West Hawai‘i Regional Fisheries Management Area.⁴ This measure will ensure that the unique and relatively pristine natural ecological habitat within the Pūpūkea MLCD is not impacted by fish feeding activities, particularly given the growing number of snorkelers and other visitors to the MLCD.

Finally, the Department proposes to amend §13-34-5 to clarify the range of penalties authorized by statute and to adopt a new section 13-34-6 to recognize the State’s authority to exercise its prerogatives in asset forfeiture as an enforcement tool for violations of this chapter. These amendments will facilitate enforcement of this chapter by providing the Department with the appropriate range of tools to deter violations.

The proposed rules drafted in Ramseyer format are attached as **Exhibit 1**.

LEGAL AUTHORITY:

HRS §190-3 allows DLNR to conduct rulemaking pursuant to HRS chapter 91.

¹ HAR § 13-28-2(4)

² HAR § 13-31-3(4)

³ HAR § 13-37-2(4)

⁴ HAR § 13-60.4-5(a)

REMARKS:

The Pūpūkea MLCD was first established in 1983 and encompassed the submerged lands and waters offshore of the Pūpūkea Beach Park and adjoining areas. At the time, the MLCD had been intended to include the tidepool area within the Pūpūkea Beach Park known as the “Old Quarry”; however, due to a 1956 Governor’s Executive Order (“GEO 1760”) establishing the Pūpūkea beach park, uncertainty as to county ownership of the tide pools precluded their inclusion in the MLCD.⁵

Over the next two decades, the Department encountered numerous challenges relating to the management of the MLCD, including a steady growth in the number of users, and a variety of legal loopholes that made enforcement of the MLCD regulations difficult and often impractical. A community-driven Pūpūkea Task Force subsequently proposed amendments to address these resource and enforcement issues. The Pūpūkea MLCD rules were thus amended in 2002 and 2003, to specifically include waters up to 100 yards offshore, and to bring Waimea Bay into its boundaries. Fishing within the expanded MLCD was also limited to shorecasting at Waimea Bay and netting for akule and ‘ōpelu during certain months. A 2-lb daily limit was also set for the harvest of limu lipe‘epe‘e and limu kohu. However, due to continued uncertainty of county ownership of the tide pools, these rule amendments again did not include the tide pools within the MLCD.

Discussion with county officials eventually indicated a general agreement to transfer the tide pool area back to state jurisdiction, for Pūpūkea Marine Life Conservation District purposes. In 2008, the Board of Land & Natural Resources recommended that the Governor issue an executive order withdrawing both the tide pools and the adjacent area from county jurisdiction, and to set them aside for inclusion within the Pūpūkea MLCD.⁶ Upon fulfillment of the Board’s terms and conditions, the Governor subsequently issued Executive Orders 4275 and 4276, withdrawing approximately 6.5 acres of the tide pool areas conveyed in GEO 1760, and setting aside the 31.5 acres of submerged land along the entire Pūpūkea Beach Park, to DLNR’s Division of Aquatic Resources specifically for “Pupukea Marine Life Conservation District purposes.”⁷ However, the Pūpūkea MLCD boundaries have not yet been amended to reflect these developments.

RECOMMENDATION:

“That the Board authorize and approve the holding of one combined public meeting and hearing in or near Pūpūkea, O‘ahu to amend Section 13-34-1 (Boundaries) to provide more accurate GPS coordinates and descriptions for the boundaries of the Pūpūkea MLCD; to amend Section 13-34-1.1 (Definitions) to clarify and update the definition of “limu lipe‘epe‘e”; to amend §13-34-2 (Prohibited activities) to provide notice of the prohibition on feeding marine life; to amend §§13-

⁵ Board of Land & Nat’l Resources, Submittal D-13: Withdrawal from Governor’s Executive Order No. 1760 and Reset Aside to Department of Land & Nat’l Resources, Division of Aquatic Resources for Pupukea Marine Life Conservation District, Pupukea, Koolauloa, Oahu, Tax Map Key: (1) 5-9-04-19 portion and seaward (Sept. 26, 2008), available at <http://files.hawaii.gov/dlnr/meeting/minutes/080926-minutes.pdf>.

⁶ *Id.*, at 3-4.

⁷ Governor’s Executive Order No. 4275 (June 4, 2009); Governor’s Executive Order No. 4276 (June 4, 2009).

34-3 (Permitted activities) to -4 (Exceptions; permits) for grammatical and technical amendments; to amend §13-34-5 (Penalty) to clarify the range of penalties authorized by statute for violations of this chapter; to adopt a new section 13-34-6 (Asset Forfeiture) to provide notice of the State's authority to utilize civil asset forfeiture as an enforcement tool for violations of this chapter; to replace the "Map of the Pupukea, Oahu Marine Life Conservation District 1/10/02" referenced in chapter 13-34 with a more accurate map reflecting the updated boundary coordinates and the Governor's set-aside of submerged lands in the Old Quarry tide pools; and to compile Chapter 13-34.

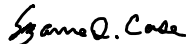
"That the Board delegate to the Chairperson the authority to appoint a hearing officer to conduct the aforementioned public meeting and hearing."

Respectfully submitted,



BRIAN J. NEILSON, Administrator
Division of Aquatic Resources

APPROVED FOR SUBMITTAL



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

Attachment:

Exhibit 1 – Proposed rules (Ramseyer format)

ITEM F-2 EXHIBIT 1

Amendment and Compilation of Chapter 13-34
Hawaii Administrative Rules

(date of adoption)

1. Chapter 13-34, Hawaii Administrative Rules,
entitled "Pupukea Marine Life Conservation District,
Oahu", is amended and compiled to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUBTITLE 4 FISHERIES

PART I MARINE LIFE CONSERVATION DISTRICTS

CHAPTER 34

PUPUKEA MARINE LIFE CONSERVATION DISTRICT, OAHU

§13-34-1	Boundaries
§13-34-1.1	Definitions
§13-34-2	Prohibited activities
§13-34-3	Permitted activities
§13-34-4	Exceptions; permits
§13-34-5	Penalty
§13-34-6	Asset forfeiture

§13-34-1 Boundaries. (a) The Pupukea Marine Life Conservation District [shall include] includes that portion of the submerged lands and overlying waters bounded by a line beginning at Kulalua Point at approximately 21.654826°, -158.063347°, then extending [seaward] due west [(270 degrees) to a point] for one hundred yards [offshore at longitude 21° 39' 44" N latitude 158° 03' 89" W,] to a point at approximately 21.654826°, -158.064036°, then [south to the most seaward exposed rock of Wananapaoa Islets on the southern side of Waimea Bay, including the Wananapaoa Islets at longitude 21° 38' 60" N latitude 158° 03' 50" W,] in a straight line in a southwesterly direction to the western edge of the westernmost Wananapaoa Islet at approximately 21.638840°, -158.070270°, then [due southeast (135 degrees)] in a straight line in a southeasterly direction to shore at approximately 21.637475°, -158.068906°, then northerly along the shoreline to the point of origin, as [further described] shown in [the "Map of the Pupukea Marine Life Conservation District, Oahu 01/10/02" attached] "Exhibit A. Map of the Pupukea Marine Life Conservation District", dated July 1, 2019, incorporated herein, and located at the end of this chapter.

(b) For the purposes of this chapter, Waimea Bay includes that portion of the district lying to the south of an imaginary line drawn between Waimea Point at approximately 21.643299°, -158.064967° and a point directly offshore at approximately 21.644580°, -158.068032°, as shown in "Exhibit A. Map of the Pupukea Marine Life Conservation District", dated July 1, 2019, incorporated herein, and located at the end of this chapter.

(c) For the purposes of this chapter, the shoreline shall be determined by the upper reaches of the wash of the waves on shore. Should there be a stream or river flowing into the ocean, the shoreline shall be determined by an imaginary straight line drawn between the upper reaches of the wash of the waves on either side of the stream or river. [Eff 1/13/83; am and comp 3/25/02; am and comp 9/8/03; am

and comp] (Auth: HRS §190-3) (Imp:
HRS §§190-1, 190-2, 190-3)

§13-34-1.1 Definitions. As used in this chapter, unless the context clearly indicates otherwise:

"Akule" means any fish of the species known as *Selar crumenophthalmus*. This also includes the various life stages known as pa'a'a, hahalalu, halalu, and mau.

"District" means the Pupukea Marine Life Conservation District.

"Finfish" means any of various species of marine life that uses fins to swim, not including marine mammals or sea turtles.

"Hook-and-line" means a type of fishing gear consisting of a length of fishing line, to which is attached one or more hooks or other device for capturing marine life. A weight and a pole may also be used to aid in the placement of the fishing line in the water.

~~["Legal nets" means any net that is not in violation of any law, rule or regulation.]~~

"Limu kohu" means any seaweed known as *Asparagopsis taxiformis* or a recognized synonym.

"Limu lipe'epe'e" means any seaweed known as ~~[*Lawrencia succisa*]~~ *Chondrophyucus dotyi*, *C. succisus*, *C. undulatus*, *Palisada parvipapillata*, or a recognized synonym.

"Net" means any of various fishing devices of mesh material made into various shapes, such as but not limited to, a bag, sack, pouch, or curtain, used to entangle, surround, or concentrate aquatic life.

"Opelu" means any fish of the species known as *Decapterus macarellus* or a recognized synonym.

~~["Opihi"]~~ "'Opihi" means any mollusk of the genus ~~[*Cellana*]~~ *Cellana* or a recognized synonym. The animal is also known as ko'ele, alinalina, maka-ia-uli, and ~~[limpets.]~~ limpet.

§13-34-1.1

"Personal safety" means any defensive action that a person or persons may engage in to prevent life threatening injury or death.

"Snag" means to engage in the act of pulling on a line that is attached to one or more hooks quickly enough across a fish for the purpose of hooking the fish anywhere except by the mouth.

"Spear" means any fishing device consisting of a straight rigid shaft with one or more sharpened points at one end of the shaft, along with any device that aids in the aiming accuracy or the force of propulsion of the shaft. A spear includes, but is not limited to, spear gun, bow and arrow, Hawaiian sling, and three-prong spear. A spear also includes any similar device that is capable of impaling aquatic life to allow capture, with or without the aid of artificial propulsion.

"Take" means to fish for, catch, capture, confine, or harvest, or to attempt to fish for, catch, capture, confine, or harvest, aquatic life. The use of any gear, equipment, tool, or any means to fish for, catch, capture, confine, or harvest, or to attempt to fish for, catch, capture, confine, or harvest, aquatic life by any person who is in the water, or in a vessel on the water, or on or about the shore where aquatic life can be fished for, caught, captured, confined, or harvested, shall be construed as taking.

"Trap" means any of various fishing devices of mesh, perforated, or solid material made into the shape of a box, container, or enclosure, with one or more openings that allow aquatic life to enter into the interior of the box, container, or enclosure, but restrict exit out, thereby capturing the aquatic life within.

~~["Waimea Bay" means that portion of the district bounded by an imaginary line from, and including, the Wananapaoa Islets across the mouth of Waimea Bay to Waimea Point.]~~ [Eff and comp 3/25/02; am and comp 9/8/03; am and comp] (Auth: HRS §190-3) (Imp: HRS §§190-1, 190-2, 190-3)

§13-34-2 Prohibited activities. It is unlawful for any person to engage in the following activities within the Pupukea Marine Life Conservation District, except as may be allowed under sections 13-34-3 and 13-34-4, or other applicable law:

- (1) Fish for, catch, take, injure, kill, possess, or remove any finfish, crustacean, mollusk including sea shell and [~~opihī,~~] 'opihī, live coral, or other marine life, or eggs thereof;
- (2) Take, alter, deface, destroy, possess, or remove any sand, coral, rock, or other geological feature, or specimen; [~~or~~]
- (3) Have or possess in the water, any spear, trap, net, crowbar or other device that may be used for the [~~taking,~~] taking, injuring, or killing of marine life, or the altering of a geological feature[~~-~~]; or
- (4) Introduce any food, substance, or chemical into the water to attract marine life for any purpose other than the taking and removing of such marine life as permitted under section 13-34-3. [Eff 1/13/83; comp 3/25/02; am and comp 9/8/03; am and comp] (Auth: HRS §190-3) (Imp: HRS §§190-1, 190-3)

§13-34-3 Permitted activities. In compliance with all other state laws and rules, [A] a person may:

- (1) Take and possess any finfish with hook-and-line only from the [~~shoreline~~] shore of Waimea Bay [~~only;~~]; provided that no person may snag any akule and further provided that no person may use more than two poles with one line per pole and with no more than two hooks per line;

§13-34-3

- (2) Take and possess any opelu with [~~legal~~] nets from Waimea Bay only during August and September;
- (3) Take and possess any akule with [~~legal~~] nets from Waimea Bay only during November and December;
- (4) Possess within the [~~District~~] district any knife for the sole purpose of personal safety; and
- (5) Take and possess limu kohu and limu lipe'epe'e within the district by hand harvesting only; provided that no person shall take limu kohu and limu lipe'epe'e with the holdfast or roots attached and no person shall take or possess more than two pounds (squeezed dry) of either limu kohu or limu lipe'epe'e or a combined total of two pounds of both per day. [Eff 1/13/83; am and comp 3/25/02; am and comp 9/8/03; am and comp] (Auth: HRS §190-3)
(Imp: HRS §§190-1, 190-3)

§13-34-4 Exceptions; permits. The department may issue permits to engage in activities within the district, that may be otherwise prohibited by law and section 13-34-2, provided that:

- (1) The permits may be issued for scientific, propagation, or other purposes as provided by law, or as reasonably necessary to protect the public health, safety, and welfare;
- (2) The board may impose terms and conditions it deems necessary to carry out the [~~purpose~~] purposes of chapter 190, HRS;
- (3) The board may revoke any permit for any infraction of the terms and conditions of the permit; and
- (4) A person whose permit is revoked shall not be eligible to apply for another permit until the expiration of a specified period

from the date of revocation as provided by law. [Eff 1/13/83; am and comp 3/25/02; am and comp 9/8/03; am and comp]
(Auth: HRS §190-3) (Imp: HRS §§187A-6, 190-4)

§13-34-5 Penalty. (a) [A] Any person violating [the provisions] any provision of this [rule] chapter or the terms and conditions of any permit issued as provided by this [rule,] chapter, shall be [guilty of a petty misdemeanor, and may be] subject to [administrative penalties as provided by law.]:

(1) Administrative penalties as provided by section 187A-12.5, HRS;

(2) Criminal penalties as provided by section 190-5, HRS; and

(3) Any other penalty as provided by law.

(b) Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this State. [Eff: 1/13/83; am and comp 3/25/02; am and comp 9/8/03; am and comp] (Auth: HRS §190-3) (Imp: HRS §§187A-12.5, 190-5)

§13-34-6 Asset forfeiture. Any equipment, article, instrument, aircraft, vehicle, vessel, business record, or natural resource used or taken in violation of this chapter, may be seized and subject to forfeiture as provided by section 199-7 and chapter 712A, HRS." [Eff and comp] (Auth: HRS §190-3) (Imp: HRS §199-7, ch. 712A)

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

3. Additions to update source notes and other notes to reflect these amendments and compilation are not underscored.

4. These amendments to and compilation of chapter 13-34, 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 Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on (date) 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

