

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
Honolulu, Hawaii 96819

January 22, 2021

Chairperson and Members
Board of Land and Natural Resources
State of Hawai'i
Honolulu, Hawai'i

Land Board Members:

SUBJECT: Request for approval and adoption of amendments to Hawaii Administrative Rule Section 13-256-73, Kaneohe Bay ocean waters, to clarify commercial activity provisions.

The proposed rule amendment can be reviewed in person at the Division of Boating and Ocean Recreation (DOBOR) O'ahu District Office from 8:00 am to 3:30 pm, Monday through Friday, except state holidays: 4 Sand Island Access Road, Honolulu, HI 96819.

The proposed rules, including a statement on the topic of the proposed rule amendment, can be reviewed online at: <https://ltgov.hawaii.gov/the-office/administrative-rules/proposed-changes/>. The proposed rules can also be viewed online at: <https://dlnr.hawaii.gov/dobor/draft-rules>.

Location and contact information for DOBOR offices is available online at: <https://dlnr.hawaii.gov/dobor/contact>.

BACKGROUND:

DOBOR received the following regulatory approvals to hold the public hearing for these amendments:

- November 8, 2019: The Board of Land and Natural Resources (Board) approved DOBOR's request to begin the rulemaking process for HAR Section 13-256-73, pursuant to Hawaii Revised Statutes (HRS) Chapter 91.
- December 3, 2019: The Small Business Regulatory Review Board (SBRRB) voted to recommend that the proposed amendments proceed to public hearing. DOBOR informed SBRRB that there would be an impact to small business because Kāne'ohe Bay ocean activity tour operators would be affected.
- March 5, 2020: DOBOR received approval from the Governor to hold a public hearing.

The Department of the Attorney General, Land and Transportation Division has reviewed the draft rules and approved them as to form, pending final approval by the Board, SBRRB, and the Governor pursuant to HRS Chapter 91.

PURPOSE:

The purpose of the rulemaking is to make clarifying amendments to HAR Section 13-256-73 regarding commercial activity regulations relating to educational institutions and not-for-profit use, and to reorganize rule language for clarity (attached as **EXHIBIT A**).

The proposed amendments to HAR Section 13-256-73 will only affect Kāneʻohe Bay on the Island of Oʻahu and repeals language in subsection (q), regarding activities conducted by a bona-fide educational institution or an organization which is registered with the State and classified by the Internal Revenue Service as a not-for-profit (section 501(c)(3)) organization. This subsection is being repealed because other sections within HAR Chapter 13-256 address the intended exemption and because DOBOR does not issue permits that solely authorize educational or not-for profit activities.

Rule sections covering specific ocean activities in Kāneʻohe Bay, including HAR Sections 13-256-73.2, 73.3, 73.4, 73.5, 73.6, and 73.7, all contain a provision stating that education and not-for-profit tours will not be counted towards a commercial permittee's customer limits, and restrict mixing of not-for-profit tour and commercial tour customers at the same time. Therefore, the language being repealed in HAR Section 13-256-73(q) has been unnecessarily ambiguous because it was intended to allow operation of not-for-profit educational tours under existing commercial permits and was not intended to create a separate type of "not-for-profit permit," a category which does not exist.

Map exhibits are being updated with color photos. Additionally, the language of HAR Section 13-256-73 is being reorganized and streamlined to remove duplicative provisions and provide clarity.

PUBLIC HEARING ASSESSMENT

Because the proposed amendments would only affect Kāneʻohe Bay on Oʻahu, legal ads were only placed in the Honolulu Star Advertiser newspaper in accordance with HRS Section 91-3 to notify the public of the public hearing on the proposed amendments. Print copies of the proposed amendments were made available for viewing at the DOBOR Oʻahu District Office. The assessment of the public hearing is as follows:

OAHU 12/2/2020 PUBLIC HEARING ASSESSMENT:

ATTENDANCE

Three individuals attended the public hearing held by Zoom webinar on 12/2/2020.

VERBAL TESTIMONY

One individual provided verbal testimony at the public hearing.

WRITTEN TESTIMONY

No individuals submitted written testimony at the public hearing.

SUMMARY

The testifier at public hearing supported the proposed rules as presented at the public hearing.

MAILED TESTIMONY (POSTMARKED BY 12/9/2020)

No individuals submitted hardcopy testimony by postal mail within the deadline specified by DOBOR.

EMAILED TESTIMONY (RECEIVED BY 12/9/2020 11:59 P.M.):

The individual who testified at the public hearing also emailed their testimony to DOBOR staff in advance of the public hearing. This testimony supported the proposed rules as presented at public hearing.

RECOMMENDATION:

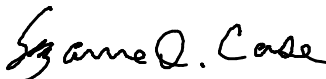
DOBOR requests that the Board approve adoption of the amendments to HAR Section 13-256-73.

Respectfully Submitted,



FOR _____
EDWARD R. UNDERWOOD, Administrator
Division of Boating & Ocean Recreation

APPROVED FOR SUBMITTAL:



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

Attachment:

A. Proposed amendments to HAR Section 13-256-73

EXHIBIT A

DEPARTMENT OF LAND AND NATURAL RESOURCES

Amendments to Section 13-256-73 Hawaii Administrative Rules

[Date of adoption by agency]

1. Section 13-256-73, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-73 Kaneohe Bay ocean waters. (a) Kaneohe Bay ocean waters means the area ~~[encompassed by]~~ within the boundaries shown on [Exhibit "V", "Kaneohe Bay, Oahu, Hawaii," dated April 16, 2001,] "Exhibit V. Kaneohe Bay, Oahu, Hawaii", dated July 25, 2019, incorporated herein, and located at the end of this subchapter. The boundaries are described as follows:

Beginning at the northern point on the shoreline of Mokapu Point, located at approximately 21° 27' 33.6" N / 157° 43' 21.6" W, then in a straight line to Makahonu Point, located at approximately 21° 32' 33.6" N / 157° 50' 34.2" W, then along the shoreline of Kaneohe Bay to the point of beginning.

~~[(b) All commercial ocean use activities in Kaneohe Bay ocean waters are prohibited on Sundays and federal holidays.]~~

~~(c) There shall be no walking, sitting, standing, or anchoring on live coral or otherwise damaging the reef within Kaneohe Bay ocean waters.~~

~~(d) Zone A Kaneohe Bay restricted zone is the area encompassed by the boundaries of the zone shown on Exhibit "X", "Kaneohe, Oahu, Hawaii," dated September 25, 2000, incorporated herein, and located at the end of this subchapter. The boundaries of Zone A are as follows:~~

~~Zone A is a circle with a radius of two hundred feet with its center at approximately 21° 26' 27.5" N / 157° 47' 45.5" W.~~

~~(e) Zone B Kaneohe Bay restricted zone is the area encompassed by the boundaries of the zone shown~~

~~on Exhibit "X", "Kaneohe, Oahu, Hawaii," dated September 25, 2000, incorporated herein, and located at the end of this subchapter. The boundaries of Zone B are as follows:~~

~~Zone B is circle with a radius of two hundred feet with its center at approximately 21° 27' 28.5" N / 157° 48' 08.5" W.~~

~~(f) Zone C restricted zone is the area encompassed by the boundaries of the zone shown on Exhibit "X", "Kaneohe, Oahu, Hawaii," dated September 25, 2000, incorporated herein, and located at the end of this subchapter. The boundaries of Zone C are as follows:~~

~~Zone C is a circle with a radius of two hundred feet with its center at approximately 21° 27' 32" N / 157° 48' 13.5" W.~~

~~(g) Zones A, B, and C are subject to the following:~~

~~(1) Zones A, B, and C are designated as commercial thrill craft zones where full service permittees shall be required to operate. Not more than six rental thrill craft shall operate within each of the zones A and B at any one time. No more than three rental thrill craft shall operate within zone C at any one time. Zone A may be referred to as the Checker Reef commercial thrill craft zone. Zones B and C may be referred to as the commercial thrill craft sand flat zones.~~

~~(2) Commercial thrill craft shall be operated in a clockwise direction only within zones A, B, and C only between the hours of 9:00 a.m. and 5:00 p.m., Mondays through Saturdays. No commercial thrill craft shall be operated within Zones A, B, or C on Sundays or federal holidays.~~

~~(h) Zone D Kaneohe Bay restricted zone is the area encompassed by the boundaries of the zone shown on Exhibit "W", "Kaneohe, Oahu, Hawaii," dated September 25, 2000, located at the end of this~~

~~subchapter and incorporated herein. The boundaries of Zone D are as follows:~~

~~Zone D is rectangular in shape which borders the Kaneohe Bay entrance channel day beacon 11 beginning at a point in the water which is located at approximately 21° 28' 32" N / 157° 49' 39" W, then by a straight line in a due East (true) direction to approximately 21° 28' 32" N / 157° 49' 32" W, then in a straight line to approximately 21° 28' 10.5" N / 157° 49' 27" W, then in a straight line due West (true) to approximately 21° 28' 10.5" N / 157° 49' 34" W, then in a straight line back to beginning.~~

~~Zone D is restricted to commercial SCUBA, snorkeling and sightseeing cruises only. Anchoring on live coral is prohibited. No person shall walk, stand or sit on live coral formations. Commercial snorkeling operators shall have a snorkel vest available for each snorkeler in the water and encourage snorkelers to use the vest to decrease the likelihood of standing on coral. Activity shall take place only near the reef, not on the reef. Vessels entering this zone shall use extreme caution while this zone is occupied during diving activities.~~

~~(i) Zone E Kaneohe Bay restricted zone is the area encompassed by the boundaries of the zone shown on Exhibit "X", "Kaneohe, Oahu, Hawaii," dated September 25, 2000, located at the end of this subchapter and incorporated herein. The boundaries of Zone E are as follows:~~

~~Zone E is a circle with a radius of three hundred ten yards with its center located at approximately 21° 27' 25" N / 157° 47' 46.5" W. Zone E is restricted to SCUBA, snorkeling, underwater activities, and sightseeing cruises only. Anchoring on live coral is prohibited. No person shall walk, stand or sit on live coral formations. Commercial snorkeling operators shall have a snorkel vest available for each snorkeler in the water and encourage snorkelers to use the vest to decrease the likelihood of standing on coral. Vessels entering this zone shall use~~

~~extreme caution while this zone is occupied during diving activities.~~

~~(j) Zone F Kaneohe Bay restricted zone is the area encompassed by the boundaries of the zone shown on exhibit "X", "Kaneohe, Oahu, Hawaii," dated September 25, 2000, located at the end of this subchapter and incorporated herein. The boundaries of Zone F are as follows:~~

~~Beginning at a point in the water which is located at approximately 21° 26' 50" N / 157° 47' 45" W, then by a straight line to approximately 21° 26' 23.5" N / 157° 47' 25" W, then by a straight line to approximately 21° 26' 16" N / 157° 47' 34" W, then by a straight line to approximately 21° 26' 20.5" N / 157° 47' 59.3" W, then by a straight line to approximately 21° 26' 28.5" N / 157° 48' 09" W, then in a straight line to the point of beginning.~~

~~Zone F is designated as non-exclusive commercial ocean water sports zone. All vessels entering this zone shall exercise extreme caution while it is being utilized for commercial ocean water sports activities. Anchoring on live coral is prohibited. No person shall walk, stand or sit on live coral formations. Commercial operators operating in this zone shall have a snorkel vest available for each snorkeler in the water and encourage snorkelers to use the vest to decrease the likelihood of standing on coral. All activity on top of Checker Reef in Zone F is prohibited.~~

~~(k) Zone G Kaneohe Bay restricted zone is the area encompassed by the boundaries of the zone shown on Exhibit "X", "Kaneohe, Oahu, Hawaii," dated September 25, 2000, located at the end of this subchapter and incorporated herein. The boundaries of Zone G are as follows:~~

~~Beginning at a point in the water which is located at approximately 21° 26' 25" N / 157° 47' 49" W, then by a straight line to approximately 21° 26' 22" N / 157° 47' 34" W, then by a straight line to approximately 21° 26' 16.5" N / 157° 47' 36" W, then by a straight line to~~

~~approximately 21° 26' 19" N / 157° 47' 51" W, then by a straight line to the point of beginning. Zone C is designated as non-exclusive commercial water ski and water sledding zone. Commercial water skiing and water sledding and the operation of towed devices used to carry passengers for commercial purposes shall be restricted to this zone. No more than one commercial vessel for water sledding shall be permitted to tow at any speed within this zone at any one time for safety purposes. Commercial large full service permittees and non-commercial recreational users shall share the zone equally. All towing shall be conducted in a clockwise direction. No person shall moor or anchor a vessel within this zone. High speed operations shall take place in deep water 200 feet or more from any reef edge, reef crest, or sand flat.]~~

(b) The boundaries of zones in Kaneohe Bay ocean waters are as indicated in Table 1, "Summary of Kaneohe Bay Ocean Waters Zones & Uses", dated July 25, 2019. The zones of Kaneohe Bay ocean waters are shown on "Exhibit X. Kaneohe Bay, Oahu, Hawaii", dated July 25, 2019, incorporated herein, and located at the end of this subchapter.

(c) Restrictions in Kaneohe Bay ocean waters shall be as follows:

- (1) All commercial ocean use activities in Kaneohe Bay ocean waters are prohibited on Sundays and federal holidays.
- (2) There shall be no walking, sitting, standing, or anchoring on live coral or otherwise damaging the reef within Kaneohe Bay ocean waters. All participants in underwater activities, including, but not limited to, SCUBA, snorkeling, and sea-walker use, shall avoid touching coral or any living parts of a reef.
- (3) All sea-walker activity shall only be conducted on a flat, sandy bottom.
- (4) Commercial SCUBA activities shall be prohibited in Kaneohe Bay ocean waters,

except that commercial SCUBA activities shall only be allowed in Kaneohe Bay ocean waters zone D.

(d) Kaneohe Bay ocean waters are designated according to the following restricted zone uses. See Table 1, "Summary of Kaneohe Bay Ocean Waters Zones & Uses", dated July 25, 2019.

- (1) Zones A, B, and C are designated for operation of commercial thrill craft by full service permittees between the hours of 9:00 a.m. and 5:00 p.m. At any one time, not more than six rental thrill craft shall be allowed to operate in zones A and B, and not more than three rental thrill craft shall be allowed to operate in zone C. All commercial thrill craft shall only be operated in a clockwise direction within zones A, B, and C.
- (2) Zone D is designated for SCUBA, snorkeling, and sightseeing cruises only. Activity is limited to near the reef, and not on the reef.
- (3) Zone E is designated for SCUBA, snorkeling, underwater activities, and sightseeing cruises only.
- (4) Zones F and I are for non-exclusive commercial ocean water sports activities. All activity on top of Checker Reef in zone F is prohibited. Vessels operating in zone I shall exercise care to stay clear of sea turtles, which may migrate to the north central part of the zone. Commercial operators whose passengers are not operating thrill craft in zone I shall keep those passengers out of zones B and C.
- (5) Zones G and H are for non-exclusive use by commercial large full-service permittees and non-commercial recreational users which shall share this zone for water skiing, water sledding, and operations of towed devices used to carry passengers. For safety, no more than one commercial vessel

for water sledding shall be permitted to tow at any speed in zone G at any one time. No more than two commercial vessels for water sledding shall be permitted to tow at high speed in zone H. All towing shall be conducted in a clockwise direction. No person shall moor or anchor within these zones. High speed operations shall take place in water at least two hundred feet from any reef edge, reef crest, or sand flat.

~~[(1)]~~ (e) Recreational thrill craft shall not be operated in any area of Kaneohe Bay except in the designated recreational thrill craft zone as described in section 13-256-77. Recreational thrill craft shall access the recreational thrill craft zone by transiting from Heeia Kea small boat harbor directly ~~[(to)]~~ through the Sampan channel to the Kaneohe recreational thrill craft zone as described in section 13-256-77.

~~[(m)] Zone H restricted zone is the area encompassed by the boundaries of the zone shown on Exhibit "X", "Kaneohe, Oahu, Hawaii," dated September 25, 2000, located at the end of this subchapter and incorporated herein. The boundaries of Zone H are as follows:~~

~~Beginning at a point in the water which is located at approximately 21° 27' 32.5" N / 157° 48' 19.5" W, then by a straight line to approximately 21° 27' 26.5" N / 157° 48' 10" W, then by a straight line to approximately 21° 27' 14.5" N / 157° 48' 17" W, then by a straight line to approximately 21° 27' 20" N / 157° 48' 27" W, then in a straight line to the point of beginning.~~

~~Zone H is designated as non-exclusive commercial water ski and water sledding zone. Commercial water skiing and water sledding and the operation of towed devices used to carry passengers for commercial purposes are restricted to this zone. No more than two commercial vessels for water sledding shall be permitted to tow at high speed within this zone at any one time for~~

~~safety purposes. Commercial full service permittees and non-commercial recreational users shall share the zone equally. All towing shall be conducted in a clockwise direction. No person shall moor a vessel within this zone. High speed operations must take place in deep water 200 feet or more from any reef edge, reef crest, or sand flat.~~

~~(n) Zone I restricted zone is the area encompassed by the boundaries of the zone shown on Exhibit "X", "Kaneohe, Oahu, Hawaii," dated September 25, 2000, located at the end of this subchapter and incorporated herein. The boundaries of Zone I are as follows:~~

~~Beginning at a point in the water located at approximately 21° 27' 41" N / 157° 48' 18" W, then by a line parallel to the edge of the sand flat to approximately 21° 27' 32" N / 157° 48' 02" W, then by a straight line to approximately 21° 27' 25" N / 157° 48' 07" W, then by a straight line to approximately 21° 27' 34" N / 157° 48' 22.5" W, then by a straight line to the point of beginning.~~

~~Zone I is designated as non-exclusive commercial ocean water sports zone. Other vessels entering this zone shall exercise extreme caution while it is being used for commercial ocean water sports activities. Commercial operators operating in this zone shall have a snorkel vest available for each snorkeler in the water and encourage snorkelers to use the vest. Commercial operators whose passengers do not operate thrill craft must keep their passengers out of Thrill Craft Zones B and C. Vessels operating in Zone I shall maintain a watch for sea turtles, which may migrate to the north central part of the zone, and exercise care to stay clear of any turtle observed.~~

~~(o) Kaneohe Bay speed restrictions. In addition to speed restrictions found in section 13-244-9, slow-no-wake restrictions shall apply in Kaneohe Bay offshore mooring areas, Kaneohe Bay ocean waters zones D, E, F, and I, Kualoa waters zone B, and anywhere within the Kaneohe Bay when a vessel is within two hundred feet of Kapapa Island and the Central Reef~~

~~shallows defined as areas having a depth of less than or equal to five feet mean lower low water, including the area of Ahu O Laka Island, ("The Sand Bar").~~

~~(p) No increase in the level of commercial ocean use activities existing on July 1, 1993 will be permitted within Kaneohe Bay waters.~~

~~(q) Activities conducted by a bona-fide educational institution or an organization which is registered with the State and classified by the Internal Revenue Service as a not-for-profit (section 501(c)(3)) organization shall not be subject to the restrictions of subsection (p), but shall operate only in accordance with a permit issued by the department pursuant to chapter 13-231 or chapter 13-256 or both.~~

~~(r) Anchoring or mooring on living coral is prohibited.~~

~~(s) All sea walker activity shall be done on a flat sandy bottom, not on sea grass beds.~~

~~(t) All underwater activity, including but not limited to SCUBA, snorkeling, and sea-walker, shall prohibit participants from touching coral and/or living parts of a reef.]~~

(f) Slow-no-wake restrictions shall apply in Kaneohe Bay ocean waters zones D, E, F, and I; Kaneohe Bay offshore mooring areas; Kualoa waters zone B; within Kaneohe Bay for vessels within two hundred feet of Kapapa Island; and the Central Reef shallows where mean lower low water areas are less than or equal to five feet in depth including the area of Ahu o Laka (the "Sand Bar"); in addition to speed restrictions found in section 13-244-9.

(g) Commercial operators conducting snorkeling activities shall have a snorkel vest available for each snorkeler in the water and encourage use of vests to avoid the likelihood of snorkelers standing on coral.

(h) Vessels entering any Kaneohe Bay ocean waters zones shall use extreme caution, especially while in a zone with diving activities taking place.

(i) No increase in the level of commercial ocean use activities existing on July 1, 1993 will be permitted within Kaneohe Bay ocean waters." [Eff

2/24/94; am 11/7/11; am] (Auth: HRS
§§ 200-22, 200-24, 200-37) (Imp: HRS §§ 200-22, 200-
23, 200-24, 200-37)

Table 1. Summary of Kaneohe Bay Ocean Waters Zones & Uses
July 25, 2019

Zone	Origin*	Boundary 1	Boundary 2	Boundary 3	Boundary 4	Use Restrictions
A Checker reef 200-foot radius circle	21° 26' 27.5"N 157° 47' 45.5"W (center)					Comm. thrill craft zone (full service permit); no more than 6. Clockwise only 9am – 5pm
B (Sand flat) 200-foot radius circle	21° 27' 28.5"N 157° 48' 08.5"W (center)					(Same as Zone A)
C (Sand flat) 200-foot radius circle	21° 27' 32"N 157° 48' 13.5"W (center)					Comm. thrill craft zone (full service permit); no more than 3. Clockwise only 9am – 5pm
D	21° 28' 32"N 157° 49' 39"W	21° 28' 32"N 157° 49' 32"W	21° 28' 10.5"N 157° 49' 27"W	21° 28' 10.5"N 157° 49' 34"W		SCUBA, snorkel, & sightseeing cruises; near reef, not on reef; comm. SCUBA zone.
E 310-yard radius circle	21° 27' 25"N 157° 47' 46.5"W (center)					SCUBA, snorkel, U/W activities, & sightseeing cruises.
F Including Checker Reef	21° 26' 50"N 157° 47' 45"W	21° 26' 23.5"N 157° 47' 25"W	21° 26' 16"N 157° 47' 34"W	21° 26' 20.5"N 157° 47' 59.3"W	21° 26' 28.5"N 157° 48' 09"W	Non-exclusive comm. water sports zone. No activity on Checker Reef.
G	21° 26' 25"N 157° 47' 49"W	21° 26' 22"N 157° 47' 34"W	21° 26' 16.5"N 157° 47' 36"W	21° 26' 19"N 157° 47' 51"W		Non-exclusive comm. & rec. water ski and water sledding. Clockwise, one permittee at time. Rec. thrill craft only.
H	21° 27' 32.5"N 157° 48' 19.5"W	21° 27' 26.5"N 157° 48' 10"W	21° 27' 14.5"N 157° 48' 17"W	21° 27' 20"N 157° 48' 27"W		Non-exclusive comm. & rec. water ski and water sledding zone. No more than 2 comm. water sleds at high speed. Clockwise towing, no mooring. High speed areas designated.
I	21° 27' 41"N 157° 48' 18"W	21° 27' 32"N 157° 48' 02"W	21° 27' 25"N 157° 48' 07"W	21° 27' 34"N 157° 48' 22.5"W		Non-exclusive comm. ocean water sports zone. Comm. operators must keep passengers who are not operating thrill craft out of B & C.

*Unless indicated, points are connected by straight lines with the final point back to the point of origin.

Exhibit V. Kaneohe Bay, Oahu, Hawaii, July 25, 2019.
 (All boundaries are unchanged.)

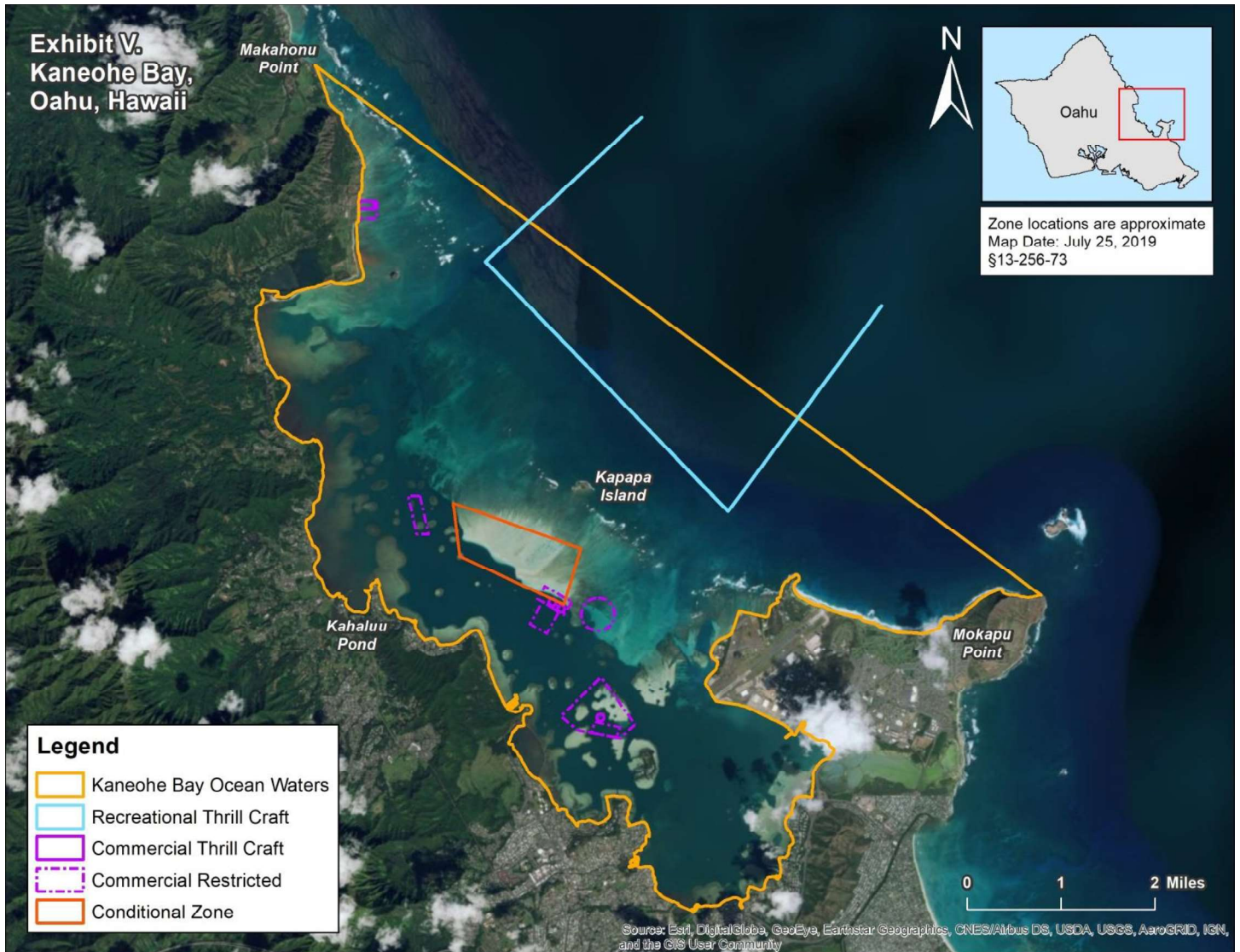
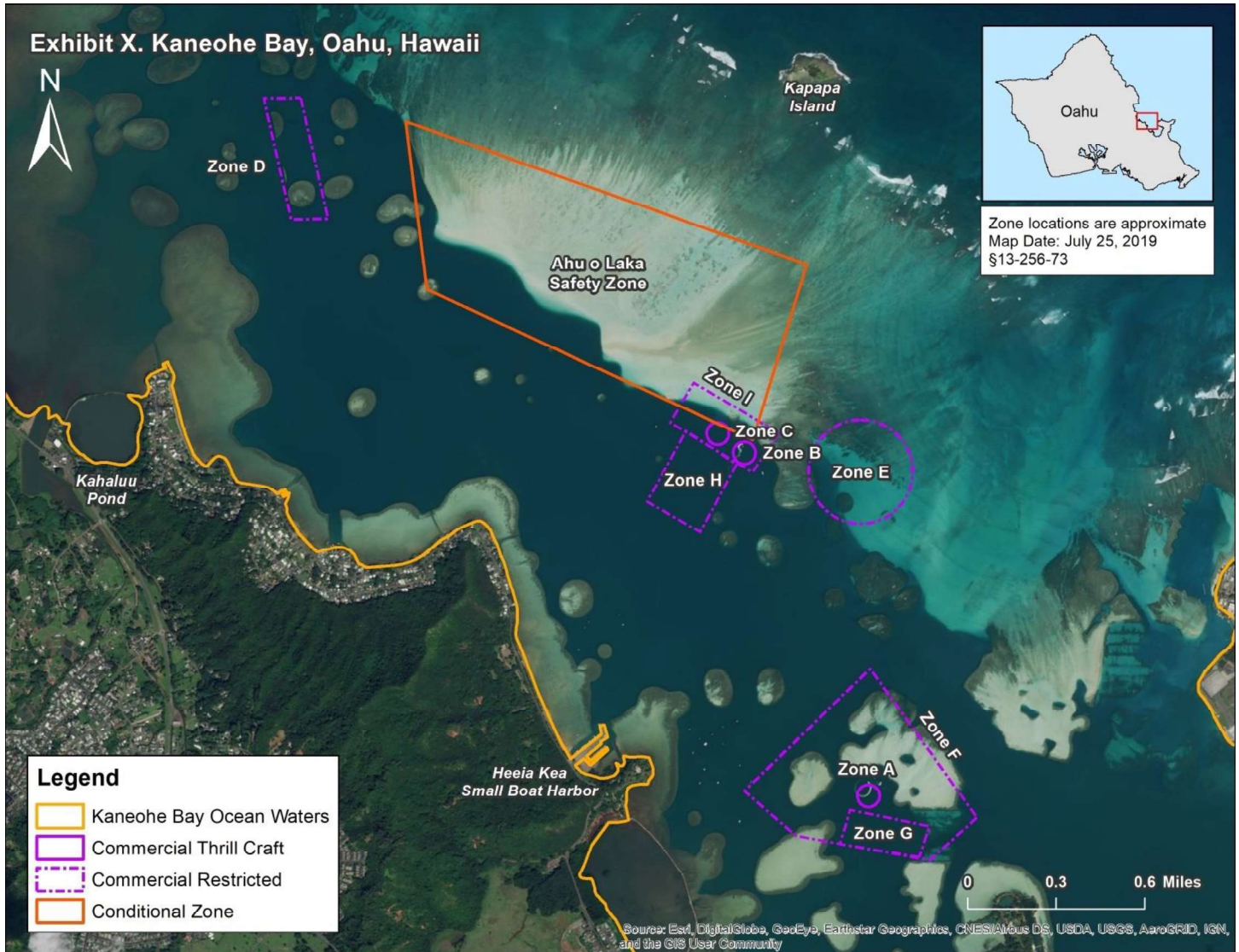


Exhibit X. Kaneohe Bay, Oahu, Hawaii, July 25, 2019.
 (All boundaries are unchanged.)



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

3. The amendments to Section 13-256-73, 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 _____ by the Board of Land and Natural Resources, 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