

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

October 24, 2014

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

**DENIAL OF REQUEST FOR CONTESTED CASE HEARING BY PAUL CHRISTENSEN  
REGARDING HAENA COMMUNITY BASED SUBSISTENCE FISHING AREA, KAUAI**

**SUMMARY**

A Petition for Contested Case Hearing was received after a public hearing to adopt Hawaii Administrative Rules (HAR) chapter 13-60.8. As no board action has occurred, a contested case is inappropriate, however, the petition may be considered as testimony to the rulemaking public hearing.

**BACKGROUND**

On May 23, 2014, the Board, at its regular meeting held under HRS chapter 92 (sunshine law) heard and approved Item F-7 of the agenda to hold public meetings and hearings to adopt proposed Hawaii Administrative Rules (HAR) chapter 13-60.8 to establish aquatic resource regulations for the Hā'ena Community-Based Subsistence Fishing Area on Kaua'i. The Board authorized the Division of Aquatic Resources to hold public meetings and hearings to adopt the proposed chapter by HRS chapter 91 rulemaking, and delegated authority to the Chairperson to appoint a hearings officer to conduct the public meetings and hearings.

No public meeting was conducted, but the public hearing on Kaua'i for Oct. 3, 2014 was noticed in the Honolulu Star-Advertiser and The Garden Island. Further written comments or testimony were to be received by October 17, 2014. Before the deadline for submission of further written testimony, a petition for a contested case was received from Petitioner Paul Christensen on October 13, 2014. See **Exhibit 1**.

**DISCUSSION**

Although the Board approved a public meeting, none was held. The rulemaking public hearing was neither a board meeting nor conducted by the Board. Consequently, no board action has occurred to which a person may request a contested case.

HRS section 91-1, defines a contested case as

a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

However in the context of a rulemaking hearing, no legal rights, duties, or privileges of specific parties are determined or required to be determined. Rulemaking is instead considered a quasi-legislative process.

Without a further discussion on the appropriateness of applying a quasi-judicial adjudicative process during a quasi-legislative function, it appears that Mr. Christensen's comments may be validly received and have been considered as part of the public testimony on the proposed chapter adoption.

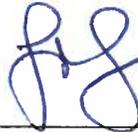
Based on the foregoing, we recommend, pursuant to HAR section 13-1-29.1 (Determination of entitlement to a contested case hearing), that the following occur.

**RECOMMENDATION:**

That the Board:

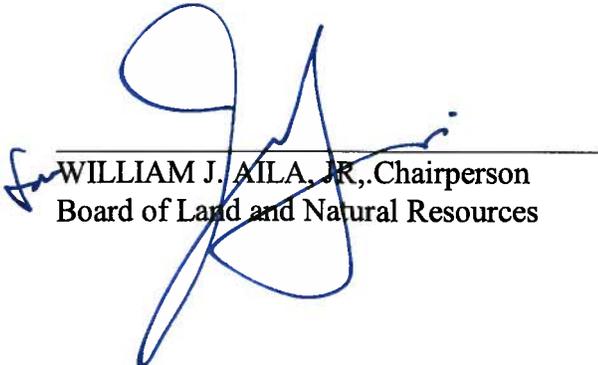
1. Deny the petition for contested case hearing filed by Paul E.K. Christensen.
2. That such petition be considered as written comment timely submitted for purposes of public testimony to the rulemaking proceeding.

Respectfully submitted,



\_\_\_\_\_  
FRAZER MCGILVRAY, Administrator  
Division of Aquatic Resources

APPROVED FOR SUBMITTAL:

  
\_\_\_\_\_  
WILLIAM J. AILA, JR., Chairperson  
Board of Land and Natural Resources



STATE OF HAWAII  
BOARD OF LAND AND NATURAL RESOURCES

2014 OCT 13 PM 2:21

**PETITION FOR A CONTESTED CASE HEARING**

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

**INSTRUCTIONS:**

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:  
 Department of Land and Natural Resources  
 Administrative Proceedings Office  
 1151 Punchbowl Street, Room 130  
 Honolulu, Hawaii 96813  
 Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.
- All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Paul E.K. Christensen	2. Contact Person	
3. Address [REDACTED]	4. City [REDACTED]	5. State and ZIP [REDACTED]
6. Email [REDACTED]	7. Phone [REDACTED]	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

**C. SUBJECT MATTER**

<b>17. Board Action Being Contested</b> Haena Community Based Subsistence Fishing Area, Kauai	
<b>18. Board Action Date</b> 10/3/14	<b>19. Item No.</b> Kauai
<b>20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action</b> Bias shown by DAR Administrator and staff during the public meeting that allowed supporters of the rule change more time to speak. Opponents of the rule change were cut off at 3 minutes. Mr. Wilson was rudely cut off from speaking a fishing his point. The public hearing should be administered by Department officials fairly and without bias. Shows the Department's position--it was portrayed that this rule change is a "done deal" and that this meeting was a matter of "just going through the motions.	
<b>21. Any Disagreement Petitioner May Have with an Application before the Board</b> Additionally, posting on the public notice should mention a 3 minute speaking time limit so testifiers can prepare accordingly and not be cut off before their main point is made without time given to amend testimony and summarize. Furthermore, bias has also been shown by having only one public hearing for the island of Kauai. Everyone on Kauai must have the opportunity to give public testimony regardless if they live in the area or not.	
<b>22. Any Relief Petitioner Seeks or Deems Itself Entitled to</b> A fair process. However, the Department has already shown a bias on this proposal, and the rule change does not stand a fair chance of review by the public. This invalidates the process and the Department should not move forward with any rule change that clearly shows a predetermined bias which predetermines an outcome. Opponents to the rule did not stand a chance and re-doing the public process cannot undo a pre-determined outcome. Based on the aforementioned, a fair process cannot be achieved for this matter so the request would be to void/strike the rule change proposal entirely.	
<b>23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest</b> Strive to provide fair and balanced information to the public. This is not a housekeeping measure but one that will impact the public. Allowing for biased implementation of policy erodes the public's faith in government. Allowing for biased implementation of policy without a fair hearing of the issue erodes the policy making process and places the onus on the public to bear the burden of proof as to "why not" instead of the Department as to "why so?" If the public has to fight the uphill battle against a Department's bias on a position, what is the point of the public hearing process? The process is designed to provide for public input BEFORE a determination is made on an administrative rule change, not have public input on a rule change that has already been decided on.	
<b>24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR</b> Because this affects all people in Hawaii, there needs to be substantial reevaluation of community based management efforts.	

- Check this box if Petitioner is submitting supporting documents with this form.
- Check this box if Petitioner will submit additional supporting documents after filing this form.

Paul E. K. Christensen  
Petitioner or Representative (Print Name)

Paul E. K. Christensen  
Signature

10/13/14  
Date