

**STATE OF HAWAI‘I  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
Honolulu, Hawai‘i**

February 12, 2016

**Board of Land and  
Natural Resources  
State of Hawaii  
Honolulu, Hawai‘i**

**REGARDING:** Contested Case request regarding Extension HA-16-01 on Conservation District Use Permit (CDUP) HA-3495 regarding Initiation and Completion of Construction of the Hawaii Oceanic Technology, Inc. Open Ocean Fish Farm

**PETITIONERS:** Jojo Tanimoto

**LANDOWNER:** State of Hawai‘i

**LOCATION:** Offshore of Māla‘e Point, North Kohala, Hawai‘i

**TMK:** submerged lands

**SUBZONE:** Resource

**I. BACKGROUND**

On October 23, 2009 the Board of Land and Natural Resources (BLNR) approved Conservation District Use Permit (CDUP) HA-3495 for an open ocean fish farm to be located approximately three miles offshore of Māla‘e Point, North Kohala, Hawai‘i.

On October 23, 2015 the Board of Land and Natural Resources approved Hawaiian Oceanic Technology Inc.’s request for an extension of the deadlines of the deadlines for the initiation and completion of the construction of the facility, so that Hawai‘i Oceanic Technology, Inc. will have until October 23, 2017 to initiate construction and until October 23, 2020 to complete construction.

No request was made for a contested case at the Board hearing. On October 26, 2015, Ms. Jojo Tanimoto requested contested case forms via email, and filed a contested case request on November 2, 2015. Ms. Tanimoto’s petition is attached as **Exhibit 1**. Ms. Tanimoto requested the contested case as “there have not been any mitigations regarding any impacts to the historic fishing ko‘a located near the south boundary of the facility.”

The Department requested legal assistance from the State Attorney General regarding this petition. The Chair of the Board of Land and Natural Resources has chosen to make the analysis from Deputy Attorney General Bill Wynhoff public; it is attached as **Exhibit 2**.

## II. SUMMARY OF LEGAL FRAMEWORK <sup>1</sup>

### 1. Is a contested case required by law to determine the legal rights, duties, or privileges of a specific person?

A contested case hearing is required by law if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency's decision-making, or if a hearing is mandated by due process.

A claim of due process right to a hearing in turn requires a two-step analysis:

- a. Is the particular interest which the claimant seeks to protect by a hearing *property* within the meaning of the due process clauses of the federal and state constitutions, and
- b. If the interest is *property*, then what specific procedures are required to protect it?

Property interest in this case must be one for which the claimant has "a legitimate claim of entitlement" and must be "more than an abstract need or desire for it" or "a unilateral expectation of it."

### 2. Does the person requesting a contested case have standing?

The question of whether a particular person has standing involves a three part test:

- a. Has suffered an actual or threatened injury as a result of the defendant's wrongful conduct?
- b. Is the injury is fairly traceable to the defendant's actions? and
- c. Would a favorable decision likely provide relief for [the person's] injury?

When a hearing determines the legal rights, duties, or privileges of a specific person, that person will have standing. When the contested case is required by due process, a person with a protectable property interest will have standing.

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<sup>1</sup> Citations for the relevant statutes and case law for this and the following sections are included in the attached memorandum from the Deputy Attorney General

### III. SUMMARY OF DEPUTY ATTORNEY GENERAL'S ANALYSIS OF CURRENT PETITION

#### 1. Is a contested case required by law?

*Question:* What is the statute or rule that would mandate a hearing?

*Answer:* We can find no statute or rule calling for a contested case hearing in the context of a Board extending the deadlines of a CDUP.

*Question:* Does due process require a contested case hearing?

*Answer:* No. The claimant's petition does not discuss what particular interest the claimant has. The claimant has no property interest in the project area itself, and has not identified any property interest that might be affected by the project.

*Question:* Does the protection of traditional and customary rights of Native Hawaiians require a contested case hearing?

*Answer:* No. The claimant's petition does not identify any customary and traditional activities that will be affected by the extension. The final Environmental Impact Statement for the project was published on July 23, 2009, and concluded that the project would have no impact on traditional or cultural activities.

**Conclusion: A contested case is not required by law.**

#### 2. Would the claimant have had standing if a contested case were required?

*Question:* Has the petitioner suffered an actual or threatened injury as a result of the defendant's wrongful conduct?

*Answer:* No. The petitioner speculates that such injury might occur, in the hope that evidence might arise in the future proving it so. The EIS contained studies showing that the project will not have a negative impact on water quality or biological resources. The petitioner does not have the right to institute a back door challenge to the EIS in the guise of challenging a time extension to the CDUP.

Speculation on hypothetical outcomes without offering supporting evidence is not a sufficient base for standing.

**Conclusion: The petitioner would not have had standing.**

**IV. RECOMMENDATION**

That the Board of Land and Natural Resources deny the requests for a contested case regarding Extension HA-16-01 on Conservation District Use Permit (CDUP) HA-3495 regarding Initiation and Completion of Construction of the Hawaii Oceanic Technology, Inc. Open Ocean Fish Farm, and that the Board deny the request for a contested case without a hearing pursuant to HAR §13-1-29.1.

Respectfully submitted,



Michael Cain, Staff Planner  
Office of Conservation and Coastal Lands

Approved for submittal:



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

HA-16-1

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
ADMINISTRATIVE PROCEEDINGS OFFICE  
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DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

**A. PETITIONER**

Ms. Josephine Tanimoto  
P.O. Box 44337  
Email: [mumukukawaihae@yahoo.com](mailto:mumukukawaihae@yahoo.com)

Contact Person: Ms. Josephine Tanimoto  
Kamuela, Hawaii 96743  
Phone: 808-895-5226 Fax: None

**17. Board Action Being Contested**

On October 23, 2015, regarding Agenda item K-Item 4. The Board of Land and Natural Resources approved a Time Extension Request HA-16-01 by William Spencer of Hawaii Oceanic Technology for a two-year extension of the construction deadlines for Conservation District Use Permit (CDUP) HA-3495 for an open ocean mariculture facility offshore of Malae Point, North Kohala, Hawaii.  
Tax Map Key (3) 5-0-000:000 (submerged lands).

**18. Board Action Date**

October 23, 2015.

**19. Item No.**

K-4 of Agenda

**20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action**

Petitioner opposes awarding another time extension because there have not been any mitigations regarding any impacts to the historic fishing ko'a (spawning area) located near the south boundary of Requestor's facility. There have not been updates for the Commission and community to consider. The failure to address the issues before construction denies Petitioner any opportunity to preserve and protect a historic site and any customary and traditional rights.

**21. Any Disagreement Petitioner May Have with an Application before the Board.**

The Requestor seeks an extension in order to build a facility but has not addressed the impacts to the ocean currents that tend to flow south into the fishing ko'a bringing possible harmful waste that may damage the environment and the fishing habitat.

**22. Any Relief Petitioner Seeks or Deems Itself Entitled to**

Seek the Board rescind approval of time extension request and then conduct a mitigation period to seek redress for the protection of the historic fishing ko'a; to include any and all matters of impact from the Ocean Technology Company before construction.

**23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest.**

Petitioner is a resident of the Kawaihae Hawaiian Homestead subdivision. Petitioner is a member of the Aha Moku System which legislatively seeks preservation and protection of customary and traditional practices. Petitioner is a user of the coastline resources and a supporter of the historic Hawaiian system of fishponds and ko'a. The direct and indirect actions from this company could cause irreparable harm to the marine environment south of this facility. This proceeding

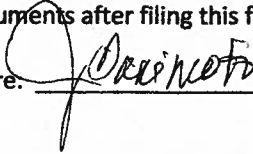
would help develop a more coordinated approach to avoid occurrences in the future.

**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.**  
The Petitioner is the aggrieved party and should qualify under this proceeding.

Petitioner will submit additional supporting documents after filing this form.

Sign: Ms. Josephine Tanimoto  
Petitioner

Signature: \_\_\_\_\_

A handwritten signature in black ink, appearing to read "J. Tanimoto", is written over a horizontal line. The signature is cursive and somewhat stylized.

Date:  
October 30, 2015

NOTE: Request to be exempt from \$100. Fee. Petitioner is retired on Social Security as only means of income.

DEPARTMENT OF ATTORNEY GENERAL

LAND TRANSPORTATION DIVISION

December 21, 2015

2015 DEC 22 AM 10:24  
NATURAL RESOURCES  
STATE OF HAWAII

Memorandum

TO: Suzanne D. Case, Chairperson  
Board of Land and Natural Resources

FROM: William J. Wynhoff *WJW*  
Deputy Attorney General

SUBJECT: Request for Legal Assistance Regarding Petition for a Contested Case Hearing re  
CDUP issued to Hawai'i Oceanic Technology, Inc.

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OFFICE OF CONSERVATION  
AND COASTAL LANDS  
2015 DEC 31 A 11:15  
DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

**I. Introduction**

Your memorandum dated November 19, 2015, asks for our advice as to a request for a contested case concerning an extension of a CDUP issued to Hawai'i Oceanic Technology, Inc.

**II. Question and summary of answer**

Question: Is petitioner entitled to a contested case to review the Board's action extending the deadlines in a CDUP?

Answer: No. The Board extended deadlines contained in a previously issued permit. No rule or statute requires a contested case as to that action. The action does not affect petitioner's property rights. Petitioner does not have standing. She is not entitled to a contested case.

**III. Background**

Hawai'i Oceanic Technology, Inc. (HOT) proposes to cultivate tuna in a "closed loop aquaculture process." Cultivation will take place in spheres, located in submerged ocean water. The spheres are self-powered and are not tethered to the ocean floor. The project is located in a

Suzanne D. Case, Chairperson

December 21, 2015

Page 2

one square kilometer site 1320-feet deep, located 2.6 miles offshore Malae Point, North Kohala.

The project is fully described in an environmental impact statement dated May 25, 2009.<sup>1</sup>

On October 23, 2009, the Board approved issuance of a conservation district use permit (CDUP) to HOT pursuant to Haw. Rev. Stat. chapter 183C. Two persons requested a contested case as to the decision. By memorandum dated March 24, 2009, our office advised that the applicants were not entitled to a contested case. The Board denied their request.

Since that original decision, we understand that HOT has obtained at least the following permits or entitlements for the project:

- A lease for the project site from the Department
- A permit from the Army Corps of Engineers
- A National Pollution Discharge Environmental System permit from the EPA through the State Department of Health

The 2009 CDUP required HOT to start construction by October 2011 and end construction by October 2014. The Board has granted three extensions of that time limit. Most recently, the Board granted an extension at its October 24, 2015, meeting.

#### **IV. Request for a Contested Case**

Ms. Josephine Tanimoto was not at the Board meeting and did not make an oral request for a contested case as required by the Board's rules. Ms. Tanimoto made a written request for a contested case, received by the department on November 2, 2015. The request may be denied for failure to comply with the rules regarding a timely oral request.

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<sup>1</sup> The EIS may be accessed at the Office of Environmental Quality's website.  
[http://oeqc.doh.hawaii.gov/Shared%20Documents/EA\\_and\\_EIS\\_Online\\_Library/Hawaii/2000s/2009-07-23-HA-FEIS-Ahi-Aquaculture-Kohala.pdf](http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Hawaii/2000s/2009-07-23-HA-FEIS-Ahi-Aquaculture-Kohala.pdf)



In any event, Ms. Tanimoto's petition is spare. She says there has been no mitigation to a "historic fishing ko'a (spawning area)" located "near" the project. She says she has not had an opportunity to preserve and protect a "historic" site and "any" customary and traditional rights.

As for her personal interest, petitioner claims to live in the Kawaihae Hawaiian Homestead subdivision. She is a "member of the Aha Moku System." She is a "user of the coastline resources" and a supporter of the historic Hawaiian system of fishponds and ko'a.

## V. Discussion

### A. Legal framework

A contested case is defined by Haw. Rev. Stat. § 91-1(5) (2012) as "a proceeding in which the legal rights, duties, or privileges of specific persons are required by law to be determined after an opportunity for agency hearing." An "agency hearing" is defined by section 91-1(6) as "such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14."<sup>2</sup>

The question of whether a contested case must be afforded in any particular matter may usefully be divided into two parts. First, could anyone be entitled to a contested case, i.e. are rights of any "specific person" "required by law" to be determined after an "agency hearing"? Second, does the particular person requesting a contested case have standing, i.e. is the requestor one of the specific persons at issue in the first part of the inquiry? Cf. HAR § 13-1-29.1 (distinguishing "a subject that is not within the adjudicatory jurisdiction of the board" from "a

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<sup>2</sup>The Board's sunshine meeting is not an "agency hearing" as that term is used in these definitions. *Simpson v. Department of Land and Natural Resources, State of Hawai'i*, 8 Haw.App. 16, 25, 791 P.2d 1267, 1273 (1990), overruled on other grounds, *Kaniakapupu v. Land Use Com'n*, 111 Haw. 124, 139 P.3d 712 (2006) and *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 69, 881 P.2d 1210, 1215 (1994) (holding that a Board sunshine meeting is "a public hearing required by law" but not "a contested case hearing").

petitioner [who] does not have a legal right, duty, or privilege entitling one to a contested case proceeding”); *Kaleikini v. Thielen*, 124 Hawai‘i 1, 17, 237 P.3d 1067, 1083 (2010) (noting separate requirements that the contested case must have been “required by law and determined the rights, duties, and privileges of specific parties” and “the claimant’s legal interests must have been injured- *i.e.*, the claimant must have standing to appeal”) (internal punctuation and citation omitted).

**1. Whether a contested case is required by law to determine the legal rights, duties, or privileges of specific persons**

A contested case hearing is “required by law” if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency’s decision-making, or if a hearing is mandated by due process. *Bush v. Hawaiian Homes Com’n*, 76 Hawai‘i 128, 134, 870 P.2d 1272, 1278 (1994).

As to due process, the Hawai‘i Supreme Court has said, “[I]n order to assert a right to procedural due process, [a party] must possess an interest which qualifies as ‘property’ within the meaning of the constitution.” *Sandy Beach Defense Fund v. City Council of City and County of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989). *Accord Brown v. Thompson*, 91 Hawai‘i 1, 10, 979 P.2d 586, 595 (1999):

a claim of a due process right to a hearing requires a two[-] step analysis: (1) is the particular interest which the claimant seeks to protect by a hearing “property” within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is “property” what specific procedures are required to protect it.

Citations omitted.

Property rights are protected by the federal and State Constitution. They are not, however, “created by the [federal] Constitution. Rather they are created and their dimensions are

defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). ““To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”” *In re Robert’s Tours & Transp., Inc.*, 104 Hawai‘i 98, 106, 85 P.3d 623, 631 (2004) (quoting *Board of Regents*).

## **2. Standing**

The question of whether a particular person has standing involves a three part test:

(1) whether the person “has suffered an actual or threatened injury as a result of the defendant’s wrongful conduct,” (2) whether “the injury is fairly traceable to the defendant’s actions,” and (3) whether “a favorable decision would likely provide relief for [the person’s] injury.”

*E & J Lounge Operating Co., Inc. v. Liquor Com’n of City and County of Honolulu*, 118 Hawai‘i 320, 346, 189 P.3d 432, 458 (2008). *See also* HAR § 13-1-31(b).

Obviously, whether a particular person has standing can overlap with whether a contested case is required. When a hearing determines the legal rights, duties, or privileges of a specific person, that person will have standing. When the contested case is required by due process, a person with a protectable property interest will have standing.

### **B. Application of the law to this specific petition**

#### **1. A contested case is not required by law**

We have not found any statute or rule calling for a contested case hearing in the context of the Board extending a deadline in a CDUP. Nothing in HRS Chapter 171 or in the

Department's administrative rules mandates a contested case hearing in this instance. Petitioner has not addressed this issue or cited any authority.

Without a statute or rule requiring the Board to hold a contested case hearing, the remaining question is whether constitutional due process requires a contested case hearing. *Bush*, 76 Hawai'i at 135, 870 P.2d at 1279. To establish a due process right to a contested case hearing, the claimant must first show that "the particular interest which claimant seeks to protect by a hearing [is] 'property' within the meaning of the due process clauses of the federal and state constitutions[.]" *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989).

Again, petitioner makes no effort to address this issue. She clearly has no property interest in the project area itself. Nor has she identified any property interest in any area that might be affected by the project. She has not identified herself as a native Hawaiian or identified any traditional and customary activities that she engages in and that might be affected by the project.

In the absence of any protected interest, there is no due process requirement to provide a contested case.

## **2. Petitioner does not have standing**

As discussed, a contested case is not required by law which is itself dispositive. We discuss standing for the sake of completeness.

Even assuming that petitioner somehow had a property interest in a spawning area or other resources, she has not "suffered an actual or threatened injury as a result of the defendant's wrongful conduct." Her petition does not identify any such injury. The petition does nothing

more than speculate that such injury might occur and hopes that further proceedings (such as a contested case) might identify such injury.

A mere hope that evidence might arise in the future is not sufficient to afford standing to petitioner.

And importantly, the EIS for the project indicates that the project will not have significant negative affects on the environment. Specifically the project will not have a negative affect on water quality, biological resources including fish, or cultural resources. No one – including petitioner – challenged the EIS. Petitioner cannot now institute a back door challenge to the EIS in the guise of challenging the extension of time in the CDUP.

Actions of other regulatory bodies, most especially the DOH's issuance of an NPDES permit, confirm that petitioner's speculation about impacts to resources is unfounded.

Petitioner does not have standing.

## **VI. Conclusion**

It is "clear as a matter of law" that petitioner does "not have a legal right, duty, or privilege entitling [her] to a contested case proceeding." We recommend that the matter be placed on the Board's agenda and that petitioner's request for contested case be denied pursuant to HAR § 13-1-29.1.