



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office for Coastal Management
Silver Spring Metro Center, Building 4
1305 East-West Highway
Silver Spring, Maryland 20910

March 25, 2021

Justine Nihipali, Manager
Hawaii Coastal Zone Management Program
235 South Beretania Street, 6th Floor,
Honolulu, HI 96813

Dear Mrs. Nihipali,

Thank you for the December 1, 2021, request for approval of changes to the Hawai'i Coastal Zone Management Program pursuant to the National Oceanic and Atmospheric Administration (NOAA) Coastal Zone Management Act (CZMA) regulations at 15 CFR part 923, subpart H.¹

NOAA's Office for Coastal Management approves the request subject to the qualifications, clarifications and exceptions below.

NOAA's regulations require that the state post this decision by the Office for Coastal Management for public notice.² The public notice should state that as of the date of this decision letter the enforceable policies identified in the attached Table of Approved Changes shall be applicable in reviewing federal actions pursuant to the federal consistency requirements of the CZMA and its implementing regulations found at 15 CFR part 930.³ Please send a copy of the public notice to the Office for Coastal Management for our records to close out this file.

PUBLIC AND FEDERAL AGENCY COMMENTS

The Office for Coastal Management received comments on the submission from the Department of the Navy. A response to the Navy comments was submitted by the state.

The Navy comments focused on changes to enforceable policies pertaining to historic preservation reviews for governmental projects (Hawai'i Administrative Rules (HAR) Chapter 13-275); state authority over instrumentalities of the federal government (HAR Chapter 13-76); ballast water management (Subchapter 2 of HAR Chapter 13-76); and the preservation of aviation artifacts (Hawai'i Revised Statutes (HRS) § 6E). The state's response clarifies that the

¹ This program change request was submitted under NOAA's revised CZMA program change regulations at 15 CFR part 923, subpart H (84 Federal Register (FR) 38118 (Aug. 6, 2019)). The Office for Coastal Management's decision due date was January 29, 2021, subject to extension. The Office for Coastal Management extended its review of this program change request to March 26, 2021.

² 15 CFR § 923.81(e)(5), as described at 84 FR 38133 (Aug. 6, 2019).

³ 15 CFR § 923.81(f), as described at 84 FR 38133 (Aug. 6, 2019).

requirements of Chapter 13-275 for historic preservation reviews are only applicable to state and county agencies. The state's response also acknowledges that HAR Chapter 13-76 does not authorize the state to establish regulatory standards for federal agencies, lands or waters, nor does it require federal agencies to apply for state permits. As for the management of vessel ballast water, the state's response clarifies that Subchapter 2 of HAR Chapter 13-76 would act in coordination with federal regulations on ballast water management in state marine waters by establishing state laws that will correspond to and complement federal regulations on ballast water. The state acknowledges that the Vessel Incidental Discharge Act (VIDA) preempts state regulation of discharges covered under VIDA. The state response regarding the Navy comments on changes to HRS Chapter 6E continues to assert state ownership of and management authority over aviation artifacts on state-owned bottomlands.

The Navy submitted a reply to the state comments which found the state's response to be satisfactory with the exception of the state's assertion of ownership and management authority over aviation artifacts.

The Hawai'i state legislature added the term "aviation artifact" to HRS Chapter 6E Historic Preservation to protect the integrity and historical value of aviation artifacts in Hawai'i. The policy applies to aviation artifacts at World War II crash sites that are considered of exceptional historic significance as determined by the Hawai'i Department of Lands and Natural Resources (DLNR). According to HRS § 6E-7 as amended, all historic property located on lands or under waters owned or controlled by the state shall be the property of the state. The state shall not transfer any historic property or aviation artifact under its jurisdiction without the concurrence of the DLNR.

In its comments, Navy stated that it does not believe these provisions should be approved as enforceable policies applied pursuant to the federal consistency requirements of the CZMA. The Navy asserts that it is responsible for managing military craft (sunken and terrestrial) under the jurisdiction of the Navy pursuant to the Sunken Military Craft Act (SMCA) (10 U.S.C. 113). Regulations found at 32 CFR part 767 establish procedural rules for the issuance of permits authorizing persons to engage in activities directed at sunken military craft and terrestrial military craft under the jurisdiction of the Navy for archaeological, historical, or educational purposes, when the proposed activities may disturb, remove, or injure the sunken military craft or terrestrial military craft. Furthermore, the regulations impose procedures governing administrative proceedings for assessment of civil penalties or liability damages in the case of a sunken military craft permit violation or violation of section 1402 of the SMCA. The Navy further asserts that federal agencies activities are already required to adhere to a consultation procedure with states for undertakings with potential to effect historic properties under the National Historic Preservation Act (36 CFR part 800).

QUALIFICATIONS, CLARIFICATIONS AND EXCEPTIONS

The NOAA Office for Coastal Management does not approve HRS 6E-7(a), which states, in part, "[a]ll historic property located on lands or under waters owned or controlled by the State shall be the property of the State." As noted by the Department of the Navy, there are federal laws, such as the Sunken Military Craft Act, which establish that not all historic property located on lands

or under waters owned or controlled by the State is the property of the State. However, the Office for Coastal Management approves as enforceable policies the substantive standards for historical preservation under HRS Chapter 6E which may be applied for CZMA federal consistency purposes to the extent that those standards are not in conflict with federal law.

The NOAA Office for Coastal Management finds that HAR Chapter 13-76 is approvable as an enforceable policy, but with the following qualification excepting part of HAR Chapter 13-76-2 which defines a “Person” within the scope of the chapter as “any individual, corporation, partnership, trust, association, or other private entity, *or any officer, employee, agent, department, or instrumentality of the federal government, of any state or political subdivision thereof, or of any foreign government.*” (Italics added). The CZMA authorizes state reviews of proposed federal actions with reasonably foreseeable coastal effects to determine if those actions are consistent with the enforceable policies of the state. A state may concur, conditionally concur or object to the proposed action. The CZMA does not confer regulatory authority to states over federal agencies. As defined at 15 CFR § 930.11(j), a “Federal agency” means any department, agency, board, commission, council, independent office or similar entity within the executive branch of the federal government, or any wholly owned federal government corporation.” In approving HAR 13-76-2 as necessary detail for applying Chapter 13-76, the Office for Coastal Management is not recognizing state regulatory authority over federal agencies. Given the variation among instrumentalities of the federal government and their activities, whether an instrumentality of the Federal government qualifies as a “federal agency” as defined at 15 CFR 930.11(j) would be a case-by-case determination.

In addition, for Subchapter 2 of HAR Chapter 13-76, the NOAA Office for Coastal Management clarifies that once regulations are promulgated pursuant to VIDA, the federal VIDA standards will preempt any state regulation of those discharges subject to the VIDA regulations.

As a standard qualification applying to all program changes, states may not incorporate enforceable policies by reference. If an approved enforceable policy refers to another statute, regulation, policy, standard, guidance, or other such requirement or document, the referenced policy must be submitted to and approved by the Office for Coastal Management as an enforceable policy in order to be applied under the federal consistency review provisions of the CZMA. No referenced policy may be applied for CZMA federal consistency review purposes unless that policy has been separately reviewed and approved as an enforceable policy by the Office for Coastal Management.

CHANGES APPROVED

See the attached Table of Approved Changes to the Hawai’i Coastal Zone Management Program.

Thank you for your cooperation in this review. Please contact Stephanie Bennett at Stephanie.Bennett@noaa.gov if you have any questions. For future correspondence regarding these program changes, please refer to the file number assigned to this action, HI-2020-1

Sincerely,

A handwritten signature in black ink, appearing to read "Joelle", written in a cursive style.

Joelle Gore, Chief Stewardship Division

Attachment: Table of Approved Changes HI-2020-1

TABLE OF APPROVED CHANGES TO THE HAWAII COASTAL MANAGEMENT PROGRAM (HI-2020-1)

Please see the March 25, 2021 decision letter for qualifications, clarifications and exceptions pertaining to this approval.

Approved Changes from the Hawaii Coastal Zone Management Program

Legal citation	Title of policy, section, or other descriptor	Is the change new, revised, or deleted	Date effective in state	Enforceable policy <i>Yes or No</i>	Enforceable mechanism citation
1. Act 59, Session Laws of Hawaii (SLH) 2003 Establish a South Kona Wilderness Area on the Island of Hawaii	Hawaii Revised Statutes (HRS) Chapter 6E, Part VI South Kona Wilderness Area	Deleted	07/01/2003; Subsequently repealed 12/31/2007	Yes	Repealed by Act 215, SLH 2006
2. Act 178, SLH 2011 Establish a South Kona Wilderness Area on the Island of Hawaii	HRS Chapter 6E, Part VI South Kona Wilderness Area	New	07/01/2011	Yes	HRS § 6E-10.5 Enforcement HRS § 6E-11 Civil and administrative violations HRS § 6E-11.5 Civil penalties HRS § 6E-11.6 Administrative penalties HRS § 6E-13 Injunctive relief
3. Act 224, SLH 2015 Relating to Residential Property	HRS § 6E-42.2 Excluded activities for private-owned single-family detached dwelling units and townhouses	New	07/01/2015	Yes	HRS § 6E-10.5 Enforcement HRS § 6E-11 Civil and administrative violations HRS § 6E-11.5 Civil penalties HRS § 6E-11.6 Administrative penalties HRS § 6E-13 Injunctive relief
4. Hawaii Administrative Rules (HAR) Chapter 13-275	Rules governing procedures for historic preservation review for governmental projects covered under HRS §§ 6E-7 and 6E-8	New	12/11/2003	Yes	HAR § 13-275-14 Penalty HRS § 6E-11 Civil and administrative violations

TABLE OF APPROVED CHANGES TO THE HAWAI'I COASTAL MANAGEMENT PROGRAM (HI-2020-1)

Please see the March 25, 2021 decision letter for qualifications, clarifications and exceptions pertaining to this approval.

Legal citation	Title of policy, section, or other descriptor	Is the change new, revised, or deleted	Date effective in state	Enforceable policy <i>Yes or No</i>	Enforceable mechanism citation
5. HAR Chapter 13-276	Rules governing standards for archaeological inventory surveys and reports	New	12/11/2003	Yes	HAR § 13-276-9 Penalty HRS § 6E-11 Civil and administrative violations
6. HAR Chapter 13-277	Rules governing requirements for archaeological site preservation and development under HRS Chapter 6E	New	12/11/2003	Yes	HAR § 13-277-8 Penalty HRS § 6E-11 Civil and administrative violations
7. HAR Chapter 13-278	Rules governing standards for archaeological data recovery studies and reports under HRS Chapter 6E	New	12/11/2003	Yes	HAR § 13-278-6 Penalty HRS § 6E-11 Civil and administrative violations
8. HAR Chapter 13-279	Rules governing standards for archaeological monitoring studies and reports under HRS Chapter 6E	New	12/11/2003	Yes	HAR § 13-279-7 Penalty HRS § 6E-11 Civil and administrative violations
9. HAR Chapter 13-282	Rules governing permits for archaeological work under HRS Chapter 6E	New	12/11/2003	Yes	HAR § 13-282-5 Penalty HRS § 6E-11 Civil and administrative violations
10. HAR Chapter 13-283	Rules governing standards for osteological analysis of human skeletal remains under HRS Chapter 6E	New	12/11/2003	Yes	HAR § 13-283-6 Penalty HRS § 6E-11 Civil and administrative violations

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11. HAR Chapter 13-284	Rules governing procedures for historic preservation review to comment on Section 6E-42, HRS, projects	New	12/11/2003	Yes. Note that the fees listed at HAR Ch. 13-284-4 may not be charged to federal agencies.	HAR § 13-284-13 Penalty
12. HAR Chapter 13-76	Non-Indigenous Aquatic Species	New	10/12/2007	Yes. See the qualification in the decision letter excepting federal agencies from the definition of a "person" at HAR Ch. 13-76-2. See also the qualification regarding the preemption of state standards under Subchapter 2 once federal VIDA regulations are finalized.	HAR § 13-76-4 Penalties HRS § 187A-12.5 General administrative penalties HRS § 187A-13 General penalty

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13. HAR Chapter 13-168	Rules relating to water use, wells, and stream diversion works	New	05/27/1988; Amended 03/21/1997, and 08/09/2018	Yes	HAR § 13-168-3 Penalties
14. HAR Chapter 13-171	Designation and regulation of water management areas	New	5/27/1988; Amended 02/18/1994, and 06/10/1995.	Yes	HAR § 13-171-24 Revocation of water use permit Authority of the State Attorney General
15. Hawaii State Building Code	Hawaii State Building Code, based on International Building Code (IBC), 2012 Edition.	New	11/13/2019	Yes	HRS § 107-31 State building code; compliance
16. Act 97, SLH 2012, Relating to Geothermal Resources	HRS § 182-1 Definitions under HRS Chapter 182 Reservation and Disposition of Government Mineral Rights	New	04/30/2012	Yes	HRS § 182-17 Penalty for violation
17. Act 97, SLH 2012 Relating to Geothermal Resources	HRS § 183C-4 Zoning; amendments, under HRS Chapter 183C Conservation District	Revised	04/30/2012	Yes	HRS § 183C-7 Penalty for violation

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18. Act 97, SLH 2012 Relating to Geothermal Resources	HRS § 205-2 Distributing and classification of lands § 205-4.5 Permissible uses within the agricultural districts, and § 205-5 Zoning under HRS Chapter 205 Land Use Commission	Revised	04/30/2012	Yes	HRS § 205-12 Enforcement HRS § 205-13 Penalty for violation
19. Act 97, SLH 1996 Relating to Aviation Artifacts in Hawaii (See decision letter excepting HRS 6E-7(a) from this approval)	HRS § 6E-2 Definitions § 6E-3 Historic preservation program § 6E-6 Depositories for certain specimens and objects § 6E-7 State title to historic property § 6E-8 Review of effect of proposed state projects § 6E-12 Reproductions, forgeries and illegal sales § 6E-42 Review of proposed projects	Revised	06/12/1996	Yes	HRS § 6E-10.5 Enforcement HRS § 6E-11 Civil and administrative violations HRS § 6E-11.5 Civil penalties HRS § 6E-11.6 Administrative penalties HRS § 6E-13 Injunctive relief
20. Act 85, SLH 2013 Relating to the Review of Historic Preservation Projects	HRS § 6E-2 Definitions § 6E-8 Review of effect of proposed state projects § 6E-42 Review of proposed projects	Revised	05/21/2013	Yes	HRS § 6E-10.5 Enforcement HRS § 6E-11 Civil and administrative violations HRS § 6E-11.5 Civil penalties HRS § 6E-11.6 Administrative penalties HRS § 6E-13 Injunctive relief

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21. Act 56, SLH 2012, Relating to Accreted Lands	HRS § 171-2 Definition of public lands under HRS Chapter 171 Public Lands, Management and Disposition of	Revised	04/23/2012	Yes	HRS § 171-6.4 General administrative penalties
22. Act 203, SLH 2002 Relating to Ocean Leasing	HRS § 190D-2 Findings and purpose § 190D-3 Definitions § 190D-11 Conservation District Use Application § 190D-22 Leasing Procedures § 190D-23 Leasing Provisions § 190D-33 Revenues, and § 190D-34 Penalties under HRS Chapter 190D Ocean and Submerged Lands Leasing	Revised	06/25/2002	Yes	HRS § 190D-31 Enforcement HRS § 190D-34 Penalties HRS §190D-35 Civil liability HRS §190D-36 Criminal liability
23. Act 16, SLH 2020 Relating to Coastal Zone Management	HRS § 205A-1 Definitions § 205A-2 Objectives and policies § 205A-22 Definitions § 205A-26 Special management area guidelines § 205A-43 Establishment of shoreline setbacks § 205A-44 Prohibitions § 205A-46 Variances under HRS Chapter 205A Coastal Zone Management	Revised	09/15/2020	Yes	HRS § 205A-5 Compliance HRS § 205A-6 Cause of action HRS § 205A-28 Permit required for development HRS §205A-32 Penalties HRS § 205A-33 Injunctions