

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

March 22, 2013

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

REQUEST FOR APPROVAL TO HOLD PUBLIC MEETINGS AND HEARINGS
TO AMEND HAWAII ADMINISTRATIVE RULES:

- §13-95-1 DEFINITIONS;
- §13-95-1.1 LICENSES, PERMITS, AND OTHER EXEMPTIONS;
- §13-95-2 PENALTY;
- §13-95-70 STONY CORALS; AND
- §13-95-71 LIVE ROCKS

Submitted for your consideration and approval is a request to hold public meetings and hearings to amend Hawaii Administrative Rules (“HAR”) §§13-95-1, -1.1, -2, -70, and -71, to allow the Department of Land and Natural Resources (“DLNR”) to more effectively regulate and protect stony coral and live rock.

HISTORY

In 1998, the Board of Land and Natural Resource (“BLNR”) adopted HAR §13-95-70 and §13-95-71, regulating the take or damage to stony corals and live rocks. The 1999 Hawaii Legislature amended Hawaii Revised Statutes (“HRS”) §188-68 (Act 85, SLH 1999) by removing the “no take” rule from the statute and effectively transferring management and jurisdiction to DLNR. DLNR was authorized to recognize and respond to specific threats to aquatic resources and adopt appropriate conservation and management measures via statewide administrative rulemaking.

In 2002, BLNR amended HAR title 13, chapter 95, to remove an “intent” requirement and to define “break” and “damage.” The express purpose of these amendments was to broaden the applicability of the rules protecting stony coral and live rock.

On March 13, 2009, BLNR approved DLNR’s request to hold public meetings and hearings to amend HAR § 13-95-70 and §13-95-71. The Attorney General’s Office suggested that DLNR clarify the purpose of the proposed amendments and focus on resource protection and enforcement. The current draft reflects adjustments made based on those comments.

PURPOSE

DLNR's Division of Aquatic Resources ("DAR") proposes to clarify state regulations protecting corals and live rocks. See **Exhibit A**. Both resources benefit marine ecosystems by providing habitat, cover, biomass, and primary production for aquatic plants, animals, and plankton including socially and economically important reef fisheries.¹ Both aid in protection from wave damage, production of beach sand, and ocean recreation (such as fishing, surfing, and diving).² Coral is culturally significant as the first organism described in the Kumulipo.³ Currently, human-caused threats to these resources include physical damage from:

- diver-related activities⁴
- aquatic resource collecting activities⁵
- recreational and commercial vessel operations⁶
- anchoring or mooring activities⁷
- salvage operations⁸

¹ See Division of Aquatic Resources website, Coral Reefs, http://hawaii.gov/dlnr/dar/coral/coral_reefs.html (last visited Sept. 25, 2009).

² *Id.*

³ THE KUMULIPO: A HAWAIIAN CREATION CHANT 55 (Martha Beckwith, ed., trans., 2d ed. 1981) available at <http://www.ulukau.org/elib/cgi-bin/library?c=beckwit2&l=en> ("The selection of hard-coated creatures as the first forms of life on earth harmonizes with the idea of reproductive power inherent in a stone into which a god enters, an idea fundamental to Polynesian thought about the structure of the world"); see also GEORGE HU'EU KANAHELE, KŪ KANAKA, STAND TALL: A SEARCH FOR HAWAIIAN VALUES 223 (1986).

⁴ Carl G. Meyer and Kim N. Holland, *Spatial dynamics and substrate impacts of recreational snorkelers and SCUBA divers in Hawaiian Marine Protected Areas*, 12 J. COAST CONSERVATION 209 (2008); Nola H.L. Barker and Callum M. Roberts, *Scuba diver behaviour and the management of diving impacts on coral reefs*, 120 BIOLOGICAL CONSERVATION 481 (2004).

⁵ See, e.g., JOHN E. RANDALL, ET. AL., THE CASE AGAINST LAY GILL NETS (2006) available at <http://www.faircatchhawaii.org/images/pdf/ScientistPaperFINAL.pdf> ("If not set with care, lay gill nets can damage fish habitat. When removing them, fishermen lift the weighted nets over reefs, and they can break off branch coral. While those branches will grow back in ideal conditions, in the worst cases they can be overgrown by algae, which prevent the coral from recovering. With surge, these nets frequently get hung up on coral and are often abandoned. . . . An entangled and abandoned net can cover and kill an entire coral colony because algae grows where coral is abraded and on the net itself, which smothers the reef area."); BOB ENDRESON, WILLIAM AILĀ, AND LINDA PAUL, DESTRUCTIVE FISHING METHODS: LAY GILLNETS (2002) available at <http://www.pacfish.org/wpapers/gillnets.html>; Michael D. Wilson, *Editorial: Chlorine is Poison to Waters*, HONOLULU STAR-BULLETIN, Feb. 7, 1997, available at <http://archives.starbulletin.com/98/02/12/editorial/viewpoints.html>.

⁶ See, e.g., Jan TenBruggencate, *Freed ship leaves 'a lot of damage'*, HONOLULU ADVERTISER, Feb. 12, 2005, available at <http://the.honoluluadvertiser.com/article/2005/Feb/12/ln/ln01p.html>; *Proposal would lower fine for coral reef damage*, MAUI NEWS, July 21, 2009 available at <http://www.mauinews.com/page/content.detail/id/521268.html>; Audrey McAvoy, *Coral Costs*, HONOLULU STAR-BULLETIN, Aug. 4, 2009 available at http://www.starbulletin.com/news/20090804_Coral_costs.html.

⁷ *Id.*

⁸ *Id.* ("No tourists were hurt when the ship sank after developing mechanical problems, but the company tripled the original coral damage area by bungling salvage attempts").

- grading and construction activities⁹
- other activities resulting in the discharge of pollution or disease into state marine waters¹⁰

PROPOSAL

Given the diverse range of activities now identified as posing a serious risk to the health of Hawai'i's coral reefs, the following amendments are designed to provide clearer and more enforceable protection for stony coral and live rock.

HAR §13-95-1 currently defines “damage” of coral and live rock using an “extensive injury resulting in irreparable [sic] harm or death” standard. Given the colonial and regenerative nature of coral and live rock, however, “irreparable [sic] harm” does not necessarily address the type of damage sought to be prevented by this rule. Protection is still important for colonial species because re-growth can take decades or longer during which time ecosystem services are lost. “Extensive injury” is also a term which both staff and enforcement feel does not provide sufficient guidance for assessing violations in the field. DLNR therefore proposes to amend the definition of “damage” to reflect the types of harms recognized as specific to coral and live rock.

In certain cases, extensive coral or live rock damage occurs where there are multiple specimens. HRS §187A-12.5 provides for violations to be charged on a per-specimen basis. However, the common understanding of “specimen” is ambiguous when used in reference to colonial stony corals and the collective definition of live rock. Therefore, DLNR proposes to amend HAR §13-95-2(b) to clarify how fines per specimen are to be applied.

In addition, DLNR proposes to limit liability for inadvertent taking, breaking, or damaging stony coral that is less than one-half square meter in area or live rock that is less than one square meter in area. Similar standards based on bottom cover are currently used in Florida to assess penalties for damage to coral reefs.¹¹

Finally, the current language of HAR §13-95-70 and §13-95-71 makes it unlawful for a person to take, break, or damage stony coral or live rock using an “implement” (i.e., a crowbar, chisel, hammer, or other implement).¹² Although “implement” may be interpreted broadly, prohibiting the use of an “implement” may not provide adequate protection for stony coral and live rock, and has led to confusion for ocean users and enforcement agents. DLNR proposes to eliminate the use of an “implement” as an element of the rule. Damage is damage however it is caused.

⁹ See, e.g., Anthony Sommer, *Kauai mudslide's effects debated*, HONOLULU STAR-BULLETIN, July 21, 2004, available at <http://archives.starbulletin.com/2004/07/21/news/story10.html>;

¹⁰ http://www.fordham.edu/images/academics/programs/environmental_studies/essaydanamitchell.doc

¹¹ See Fl. Stat. § 403.93345(8) available at http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0403/SEC93345.HTM&Title=->2009->Ch0403->Section%2093345#0403.93345

¹² See HAR §§ 13-95-70, -71.

NOAA is currently proposing to list three Hawai'i coral species as "threatened" under the Endangered Species Act ("ESA"). Listing these coral species may impose a significant administrative burden on the State and could open the door to new federal oversight and authority in State waters. Enacting stronger "no take" rules will help to demonstrate the State's ability and commitment to properly manage and protect our coral reefs, enabling us to maintain our lead role in managing State coral resources.

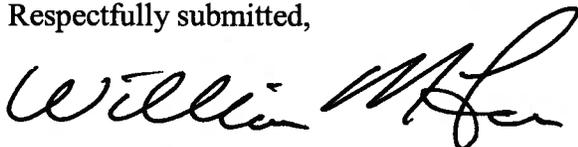
The proposed rule amendments do not affect small business. Thus, the Department is not required to prepare a small business impact statement pursuant to HRS § 201M-2(b).

RECOMMENDATIONS:

That the Board:

1. Authorize and approve DLNR to hold public meetings and hearings to amend HAR §§ 13-95-1 (Definitions), 13-95-1.1 (Licenses, permits, and other exemptions), 13-95-2 (Penalty), 13-95-70 (Stony Corals), and 13-95-71 (Live Rocks).
2. Delegate to the Chairperson the authority to appoint a hearings officer to conduct the aforementioned public meetings and hearings.

Respectfully submitted,



WILLIAM M. TAM, Interim Administrator
Division of Aquatic Resources

APPROVED FOR SUBMITTAL



WILLIAM J. AILĀ, JR., Chairperson
Department of Land and Natural Resources

Attachment(s): Proposed rule (clean and Ramseyer version)

Ramseyer Draft
(Date)

Rules Amending Title 13
Hawaii Administrative Rules

(Date)

1. Section 13-95-1, Hawaii Administrative Rules, is amended by amending the definitions of "damage", "live rock", and "stony coral" to read:

"§13-95-1 Definitions. As used in this chapter, unless otherwise provided:

"Damage" means to [smash , trample,]scrape, smother, poison, or otherwise cause [extensive injury resulting in irreparable] any physical or physiological harm [or death] to the living portion of a stony coral or live rock.

"Live rock" means any [rock or coral]natural hard substrate to which marine life is visibly attached or affixed.

"Stony coral" means any [variety of]invertebrate species belonging to the [o]Order [Scleractinia]Scleractinia, characterized by having a hard, calcareous skeleton, that are native to the Hawaiian islands."

[Eff 12/03/98; am 12/09/02; am 12/19/02; am
] (Auth: HRS §§187A-3.5, 187A-5, 190-3)
(Imp: HRS §§187A-3.5, 187A-5, 190-3)

2. Section 13-95-1.1, Hawaii Administrative Rules, is amended to read as follows:

"13-95-1.1 Licenses, permits, and other exemptions. Notwithstanding the provisions of this chapter, the department may issue the following licenses and permits to exempt persons from the provisions of this chapter:

- (1) Licenses issued pursuant to [section]sections 187A-3.5 or 189-6, HRS;
- (2) Permits issued pursuant to [section]sections 187A-6, 188-23, 188-37, 188-44, 188-57, 188-68, or 190-4, [HRS;
- (3) Permits issued pursuant to section 188-23, HRS;
- (4) Permits issued pursuant to section 188-37, HRS;
- (5) Permits issued pursuant to section 188-44, HRS;
- (6) Permits issued pursuant to section 188-57, HRS;
- (7) Permits issued pursuant to section 188-68, HRS;
- (8) Licenses issued pursuant to section 189-6,]HRS; and
- [(9)] (3) As may be otherwise provided by law." [Eff 12/19/02; am] (Auth: HRS §§187A-3.5, 187A-6, 188-23, 188-37, 188-44, 188-45, 188-57, 188-68, 190-4) (Imp: HRS §§187A-3.5, 187A-6, 188-23, 188-37, 188-44, 188-45, 188-57, 188-68, 190-4)

3. Section 13-95-2, Hawaii Administrative Rules, is amended by adding subsections (a) and (b) to read as follows:

"§13-95-2 Penalty. (a) A person violating any section of this chapter [shall be punished as provided by law.] may be subject to any applicable criminal or administrative penalties or both. 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.

(b) For the purpose of calculating the administrative penalties for violations of this chapter, if a fine per specimen may be applicable, fines per specimen may be imposed on the following basis:

- (1) For finfish, each individual;
- (2) For invertebrates, not including stony corals or live rock, each individual;
- (3) For solitary (having a single polyp) stony corals, each individual;
- (4) For colonial stony corals:
 - (A) Each damaged head or colony less than one square meter in surface area; or
 - (B) For a colony greater than one square meter in surface area, each square meter of colony surface area and any fraction remaining constituting an additional specimen;
- (5) For live rocks, each individual; but if the violation involves greater than one square meter of bottom area, on the basis of each square meter of bottom area." [Eff 12/03/98; am] (Auth: HRS §§187A-5, 187A-12.5, 187A-13, 188-53, 188-70, 189-4) (Imp: HRS §§187A-5, 187A-12.5, 188-53, 188-70, 189-4)

4. Section 13-95-70, Hawaii Administrative Rules, is amended to read as follows:

"§13-95-70 Stony corals. (a) Except as otherwise provided in this section or authorized by law:

[(a)](1) Subject to subsection (b), [I]it is unlawful for any person to take[stony coral, or to break or damage any stony coral with a crowbar, chisel, hammer, or any other implement.], break, or damage any stony coral, except as provided in sections 171-58.5 and 205A-44, HRS;

(2) It is unlawful for any person to damage any stony coral by any intentional or negligent activity

causing the introduction of sediment, biological contaminants, or pollution into state waters;

[(b)](3) It is unlawful for any person to sell any stony coral; except that stony coral rubble pieces or fragments imported for the manufacture and sale of coral jewelry, or dead stony coral obtained through legal dredging operations in Hawaii for agricultural or other industrial uses, may be sold.

(b) No liability shall be imposed under subsections (a)(1) of this section for inadvertent breakage, damage, or displacement of an aggregate area of less than one half square meter of coral if caused by:

- (1) A vessel with a single anchor damage incident, in an area where anchoring is not otherwise prohibited, and not more frequently than once per year; or
- (2) Accidental physical contact by an individual person.

(c) Any person found in violation of any provision of this section pursuant to a criminal prosecution shall be subject to penalty as provided under section 190-5, HRS. Any person found in violation of any provision of this section pursuant to civil or administrative action shall be subject to penalty as provided under section 187A-12.5, HRS."

[Eff 12/03/98; am 12/09/02; am]
(Auth: HRS §§189-6, 190-3) (Imp: HRS §§187A-6, 187A-12.5, 189-6, 190-1, 190-3, 190-5)

5. Section 13-95-71, Hawaii Administrative Rules, is amended to read as follows:

"§13-95-71 Live rocks. (a) Except as otherwise provided by this section or authorized by law:

[(a) It](1) Subject to subsection (b), it is unlawful for any person to take, break, or damage any live rock[, or to break or damage with crowbar, chisel, hammer, or any other implement, any rock or coral to which marine life is visibly attached or affixed];

(2) Subject to subsection (b), it is unlawful for any person to damage any live rock by any intentional or negligent activity causing the introduction of sediment, biological contaminants, or pollution into state waters; and

[(b)](3) It is unlawful for any person to sell any live rock[or coral to which marine life is visibly attached or affixed].

(b) No liability shall be imposed under subsections (a)(1), (a)(2), or (a)(3) of this section for inadvertent breakage, damage, or displacement of an aggregate area of less than one square meter of live rock bottom cover.

(c) Any person found in violation of any provision of this section pursuant to a criminal prosecution shall be subject to penalty as provided under section 190-5, HRS. Any person found in violation of any provision of this section pursuant to civil or administrative action shall be subject to penalty as provided under section 187A-12.5, HRS."

[Eff 12/03/98; am 12/09/02; am _____]
(Auth: HRS §§189-6, 190-3) (Imp: HRS §§187A-6, 187A-12.5, 189-6, 190-1, 190-3, 190-5)

6. Material, except source notes, to be repealed is bracketed. New material is underscored.

7. Additions to update source notes to reflect these amendments are not underscored.

8. These amendments to chapter 13-95, 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 the Ramseyer format, pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on _____, and filed with the Office of the Lieutenant Governor.

William J. Aila, Chairperson
Board of Land and Natural Resources

APPROVED FOR PUBLIC HEARING:

Deputy Attorney General

Final Form Draft
(Date)

Rules Amending Title 13
Hawaii Administrative Rules

(Date)

1. Section 13-95-1, Hawaii Administrative Rules, is amended by amending the definitions of "damage", "live rock", and "stony coral" to read:

"§13-95-1 Definitions. As used in this chapter, unless otherwise provided:

"Damage" means to scrape, smother, poison, or otherwise cause any physical or physiological harm to the living portion of a stony coral or live rock.

"Live rock" means any natural hard substrate to which marine life is visibly attached or affixed.

"Stony coral" means any invertebrate species belonging to the Order Scleractinia, characterized by having a hard, calcareous skeleton, that are native to the Hawaiian islands.

[Eff 12/03/98; am 12/09/02; am 12/19/02; am
] (Auth: HRS §§187A-3.5, 187A-5, 190-
3) (Imp: HRS §§187A-3.5, 187A-5, 190-3)

2. Section 13-95-1.1, Hawaii Administrative Rules, is amended to read as follows:

"13-95-1.1 Licenses, permits, and other exemptions. Notwithstanding the provisions of this chapter, the department may issue the following licenses and permits to exempt persons from the provisions of this chapter:

- (1) Licenses issued pursuant to sections 187A-3.5 or 189-6, HRS;
- (2) Permits issued pursuant to sections 187A-6, 188-23, 188-37, 188-44, 188-57, 188-68, or 190-4, HRS; and
- (3) As may be otherwise provided by law."
 [Eff 12/19/02; am _____] (Auth: HRS §§187A-3.5, 187A-6, 188-23, 188-37, 188-44, 188-45, 188-57, 188-68, 190-4) (Imp: HRS §§187A-3.5, 187A-6, 188-23, 188-37, 188-44, 188-45, 188-57, 188-68, 190-4)

3. Section 13-95-2, Hawaii Administrative Rules, is amended by adding subsections (a) and (b) to read as follows:

"§13-95-2 Penalty. (a) A person violating any section of this chapter may be subject to any applicable criminal or administrative penalties or both. 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.

(b) For the purpose of calculating the administrative penalties for violations of this chapter, if a fine per specimen may be applicable, fines per specimen may be imposed on the following basis:

- (1) For finfish, each individual;
- (2) For invertebrates, not including stony corals or live rock, each individual;
- (3) For solitary (having a single polyp) stony corals, each individual;
- (4) For colonial stony corals:
 - (A) Each damaged head or colony less than one square meter in surface area; or
 - (B) For a colony greater than one square meter in surface area, each square meter of colony surface area and any fraction remaining constituting an additional specimen;

- (5) For live rocks, each individual; but if the violation involves greater than one square meter of bottom area, on the basis of each square meter of bottom area." [Eff 12/03/98; am] (Auth: HRS §§187A-5, 187A-12.5, 187A-13, 188-53, 188-70, 189-4) (Imp: HRS §§187A-5, 187A-12.5, 188-53, 188-70, 189-4)

4. Section 13-95-70, Hawaii Administrative Rules, is amended to read as follows:

"§13-95-70 Stony corals. (a) Except as otherwise provided in this section or authorized by law:

(1) Subject to subsection (b), It is unlawful for any person to take, break, or damage any stony coral, except as provided in sections 171-58.5 and 205A-44, HRS;

(2) It is unlawful for any person to damage any stony coral by any intentional or negligent activity causing the introduction of sediment, biological contaminants, or pollution into state waters;

(3) It is unlawful for any person to sell any stony coral; except that stony coral rubble pieces or fragments imported for the manufacture and sale of coral jewelry, or dead stony coral obtained through legal dredging operations in Hawaii for agricultural or other industrial uses, may be sold.

(b) No liability shall be imposed under subsections (a)(1) of this section for inadvertent breakage, damage, or displacement of an aggregate area of less than one half square meter of coral if caused by:

- (1) A vessel with a single anchor damage incident, in an area where anchoring is not otherwise prohibited, and not more frequently than once per year; or
- (2) Accidental physical contact by an individual person.

(c) Any person found in violation of any provision of this section pursuant to a criminal

prosecution shall be subject to penalty as provided under section 190-5, HRS. Any person found in violation of any provision of this section pursuant to civil or administrative action shall be subject to penalty as provided under section 187A-12.5, HRS." [Eff 12/03/98; am 12/09/02; am] (Auth: HRS §§189-6, 190-3) (Imp: HRS §§187A-6, 187A-12.5, 189-6, 190-1, 190-3, 190-5)

5. Section 13-95-71, Hawaii Administrative Rules, is amended to read as follows:

"§13-95-71 Live rocks. (a) Except as otherwise provided by this section or authorized by law:

(1) Subject to subsection (b), it is unlawful for any person to take, break, or damage any live rock;

(2) Subject to subsection (b), it is unlawful for any person to damage any live rock by any intentional or negligent activity causing the introduction of sediment, biological contaminants, or pollution into state waters; and

(3) It is unlawful for any person to sell any live rock.

(b) No liability shall be imposed under subsections (a)(1), (a)(2), or (a)(3) of this section for inadvertent breakage, damage, or displacement of an aggregate area of less than one square meter of live rock bottom cover.

(c) Any person found in violation of any provision of this section pursuant to a criminal prosecution shall be subject to penalty as provided under section 190-5, HRS. Any person found in violation of any provision of this section pursuant to civil or administrative action shall be subject to penalty as provided under section 187A-12.5, HRS."

[Eff 12/03/98; am 12/09/02; am] (Auth: HRS §§189-6, 190-3) (Imp: HRS §§187A-6, 187A-12.5, 189-6, 190-1, 190-3, 190-5)

6. These amendments to chapter 13-95, 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, which were adopted on _____, and filed with the Office of the Lieutenant Governor.

William J. Aila, Chairperson
Board of Land and Natural Resources

APPROVED FOR PUBLIC HEARING:

Deputy Attorney General