

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

April 26, 2013

Extension Request HA-13-03

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

REGARDING: Time Extension Request for Conservation District Use Permit (CDUP) HA-3495 Regarding Initiation and Completion of Construction of the Hawaii Oceanic Technology, Inc. Open Ocean Fish Farm

PERMITTEE: Bill Spencer, Hawaii Oceanic Technology, Inc.

LOCATION: 3 mi. west of Malae Point, North Kohala, Island of Hawaii

TMK: (3) 5-0-000:000 (submerged lands)

AREA OF USE: 247 acres (leased area)

SUBZONE: Submerged Lands / Resource

BACKGROUND:

On October 23, 2009, the Board of Land and Natural Resources (Board) approved Conservation District Use Permit (CDUP) HA-3495 for the construction of the Hawaii Oceanic Technology, Inc. (HOT) mariculture facility. The permit allowed for the placement of twelve 54-meter diameter "oceanspheres" to cultivate `ahi, or Hawaiian tuna (yellowfin, *Thunnus albacores*, and bigeye, *T. obesus*). The capacity of one sphere was estimated to be 1000 tons of `ahi per year. The oceanspheres would be capable of submerging to a set depth and maintaining their position using either an Ocean Thermal Energy Conversion (OTEC) or biofuel engine.

The original proposed deployment schedule for the facility was:

- 2010: deploy first oceansphere
- 2011: deploy two oceanspheres (total of three)
- 2012: deploy four oceanspheres (total of seven)
- 2013: deploy final five oceanspheres (total of twelve)

The permit is attached as **Appendix A**. OCCL staff would like to call the Board's attention to conditions 5, 6, and 22, which deal respectively with approving construction plans, permit deadlines, and reporting requirements.

TIME EXTENSION REQUEST:

On March 09, 2012 the Board approved a request from the permittee for a time extension on the permit conditions (ref: Extension HA-12-03). The Board adopted OCCL staff's recommendations as follows:

1. That condition 6 of CDUP HA-3495 is amended to provide that the Hawaii Oceanic Technology, Inc. will have until October 23, 2013 to initiate construction and must complete construction by October 23, 2016;
2. That all other conditions imposed by the Board under CDUP HA-3495, as amended, shall remain in effect; and
3. That no further extensions be given to initiate construction.

The permittee has now requested a second time extension on the CDUP deadlines in order to meet federal permitting requirements. Aside from the CDUP, the permittee needed to secure a Federal Consistency Review, a National Pollution Discharge and Elimination System (NPDES) permit, and an Army Corps of Engineers Section 10 permit.

The Federal Consistency Review was finished on May 12, 2011, and the NPDES permit for the facility became effective on April 30, 2012. The Section 10 permit remains.

Based upon our conversations with the permittee, OCCL understands that HOT applied for a Section 10 permit for twelve OTEC-powered oceanspheres in December 2009. In August 2010, the Army Corp suggested that the permittee amend their application to describe the process for constructing and deploying one Oceansphere. The permittee submitted an amended application to the Army Corp in September 2010 to reflect all engineering and construction steps concluding in the deployment and conduct of a complete harvest cycle with one Oceansphere.

The permittee's management plan has been approved and all steps in the Army Corps' process have been completed including consultations with NOAA Endangered Species, NOAA Critical Habitat, and Office of Hawaiian Affairs. The Corps reports that this permit is under "final legal review," but has not provided a timeline for a decision.

The permittee is requesting a two-year extension on condition 6, so that HOT will have until October 23, 2015 to initiate construction. The request is attached as **Appendix B**.

AUTHORITY FOR GRANTING TIME EXTENSIONS:

The authority for the granting of time extensions is provided in §13-5-43, Hawaii Administrative Rules (HAR), which allows for a permittee to request time extensions for the purpose of extending the period of time to comply with the conditions of a permit.

Additionally, pursuant to HAR §13-5-43 (c): *Time extensions may be granted by the board upon the second or subsequent request for a time extension on a board permit, based upon supportive documentation from the applicant*

DISCUSSION:

A time extension may be sought when a permittee is unable to initiate or complete a project within the stipulated time frame. The Board grants time extensions when a permittee demonstrates some sort of hardship or delay in initiating work on a particular project. The permittee should be able to demonstrate that the hardship or delay was not self-imposed and that a good faith effort had been made to undertake the project.

OCCL notes that major projects often experience delays in securing other federal and state permits after a CDUP has been issued, and has been supportive of extension requests when the permittee can show that they have been diligent in pursuing the necessary permits.

OCCL maintains regular contact with all the holders of mariculture CDUPs, including HOT. We believe that the permittee in this case has been active in pursuing the other permits since CDUP HA-3495 has issued, that the types of delays experienced by HOT are unfortunately common, and we are thus also supportive of this current request.

As stated above, during the first extension request the Board adopted OCCL's recommendation that *no further extensions be given to initiate construction*. Upon reflection, OCCL feels that this recommendation was made in haste. The Board has not put this restriction on other requests for first time extensions, and there is no discussion in the staff report or the Board minutes that disclose why this was done. **OCCL recommends that the Board negate this condition.**

There was opposition from Food and Water Watch to the permittee's first request for an extension in March 1012. The primary argument was that the current Section 10 application differs from plans approved with CDUP HA-3495. OCCL notes that, pursuant to condition 5, our office will need to approve the construction plans prior to any deployment. At that time we will be able to determine if the plans are consistent with CDUP HA-3495. If not, the permittee is aware that it might be necessary to apply for a modification to the CDUP.

We have attached the Board minutes from that meeting as **Appendix C**.

OCCL also notes that we have been working with other mariculture facilities to standardize the management plans and reporting requirements. Once HOT has secured the last of their permits we will be working with them on revising their management plan so that it is consistent with current guidelines.

RECOMMENDATION:

That the Board of Land and Natural Resources approve Hawaiian Oceanic Technology Inc.'s request for an extension of the deadlines of CDUP HA-3495 for a mariculture facility offshore of Malae Point, North Kohala, Hawai'i, TMK: (3) 5-0-000:000, subject to the following conditions:

1. That the Board negate Condition 3 of Extension HA-12-03 that stated that no further extensions be given on the construction deadlines;
2. That condition 6 of CDUP HA-3495 is amended to provide that the Hawaii Oceanic Technology, Inc. will have until October 23, 2015 to initiate construction and must complete construction by October 23, 2018;
3. That all other conditions imposed by the Board under CDUP HA-3495, as amended, shall remain in effect.

Respectfully submitted,



Michael Cain
Office of Conservation and Coastal Lands

Approved for submittal:



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

LINDA LINGLE
GOVERNOR OF HAWAII



2009 DEC -2 A 7 54

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAOLOAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

Office of Conservation and Coastal Lands
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

Bill Spencer
CEO/President
Hawaii Oceanic Technology, Inc.
425 South St., Suite 2902
Honolulu, HI 96813

OCT 27 2009

Dear Mr. Spencer:

Subject: Approval of Conservation District use Application HA-3495 for an Open Ocean Fish Farm (12 Oceanspheres, covering a 247 acre area of sea) located 2.6 Nautical Miles/3 Miles Due West of Malae Point, North Kohala, Island of Hawaii (coordinates at 20°05'40.00" N 155°55'40.00" W), by Hawaii Oceanic Technology, Inc.

This is to inform you that on October 23, 2009 the Board of Land and Natural Resources APPROVED your Conservation District Use Application and Management Plan for an open ocean fish farm located within the given coordinates offshore off Malae Point, Hawaii, subject to the following terms and conditions:

1. The applicant shall comply with all applicable statutes, ordinances, rules, and regulations of the federal, state, and county governments, and applicable parts of Chapter 13-5, Hawaii Administrative Rules;
2. The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim, or demand for property damage, personal injury, and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors, and agents under this permit or relating to or connected with the granting of this permit;
3. The applicant shall obtain appropriate authorization from the Department for the use of state lands;
4. The applicant shall comply with all applicable Department of Health administrative rules;

5. Before proceeding with any work authorized by the Department or the Board, the applicant shall submit four copies of the construction plans and specifications to the chairperson or his authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three of the copies will be returned to the applicant. Plan approval by the chairperson does not constitute approval required from other agencies;
6. Any work or construction to be done shall be initiated within two years of the approval of such use, in accordance with construction plans that have been signed by the chairperson, and, unless otherwise authorized, shall be completed within five years of the approval of such use. The applicant shall notify the department in writing when construction activity is initiated and when it is completed;
7. All representations relative to mitigation set forth in the accepted environmental impact statement for the proposed use are incorporated as conditions of the permit;
8. The applicant understands and agrees that the permit does not convey any vested rights or exclusive privilege;
9. In issuing the permit, the Department and Board have relied on the information and data, which the applicant has provided in connection with the permit application. If, subsequent to the issuance of the permit such information and data prove to be false, incomplete, or inaccurate, this permit may be modified, suspended, or revoked, in whole or in part, and the department may, in addition, institute appropriate legal proceedings;
10. Where any interference, nuisance, or harm may be caused, or hazard established by the use, the applicant shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;
11. The offshore fish farm shall operate submerged at least 60 feet (20 meters) below the ocean surface, but may be raised for repair, transport or other maintenance, unless otherwise approved by the Department;
12. The use of feeds containing supplemental hormones or antibodies shall not be allowed. Proposed feeds shall be provided to the Department with the pre-approval of the Department of Agriculture, for Departmental review and approval;
13. Yellowfin tuna and bigeye tuna are the only species approved;
14. Signs or other markings of the site shall be regulated by site plan approval;
15. Buoys, signs or other markings shall be provided on the ocean surface to clearly mark the location of the oceanspheres;
16. The applicant shall forward details of all monitoring efforts to the Office of Conservation and Coastal Lands (OCCL), to the Division of Aquatic Resources, Kona Branch, and

shall forward water quality results to the Department of Health, two weeks after receipt of the results;

17. The OCCL shall be immediately notified of the failure of the oceansphere system, major fish escapes, disease outbreak, theft or vandalism, or other unusual events;
18. The applicant shall periodically sample ocean-farmed fish, and when necessary, fish in the area of the farm, and examine the sampled fish for parasites or other disease. Unless the Chairperson specifies other methods of sampling and analysis, sampling shall occur not less than once per year. Sampling shall be conducted by a qualified third party entity at the expense of the applicant the result shall be provided to the appropriate agency for review and analysis;
19. The applicant shall submit all research, data, results or other publications, papers or reports concerning the fish farm and its surrounding environment to the OCCL, and to the Kona Branch of the Division of Aquatic Resources, and shall use objective, third party experts to collect water quality samples and marine mammal data. The applicant shall place copies of all Federal or State-mandated environmental quality reports at local repositories, such as the DLNR, Division of Aquatic Resources Kona Office, so that local residents may review the data. The applicant shall provide reasonable access to Federal, State and County officials for monitoring and oversight purposes;
20. The applicant need not submit information related to farm operations which is not necessary to evaluate the quality of the environment at the submerged fish farm and surrounding areas;
21. When submitting information to the Department, copies of all information shall be supplied to both the Office of Conservation and Coastal Lands and Division of Aquatic Resources, Kona Branch Office;
22. After the deployment of the first three oceanspheres, the applicant shall brief the Board of Land and Natural Resources on the performance of the project. The applicant shall obtain the approval of the Board before deploying additional cages;
23. The applicant shall monitor the condition of the submerged fish farm on a daily basis;
24. The applicant shall implement mitigative measures approved by the Chairperson to alleviate environmental or use concerns, when the need is apparent or when required by the Chairperson. Such mitigative measures may include the partial or complete removal of the fish farm facility;
25. The oceanspheres and accessory structures shall be removed at the conclusion of the use;
26. Any nets or other debris that foul on the cages or other part of the farm facility shall be disposed of as required by federal, state and city and county regulations and shall not be set free in the marine environment;

27. The applicant shall work with NOAA and DAR to develop and implement a marine mammal plan in coordination with, and subject to the approval of the Division of Aquatic Resources. The program will ensure to the maximum practicable extent that all close approaches and direct physical interactions of marine protected species with the project's structure(s) are recorded, described and reported to state and federal marine protected species agencies in an effective and timely manner. Direct physical interactions will include, but not be limited to collision, entanglement, grazing, or any other direct physical contact between any part of the structure (cages, mooring lines, buoys, etc.) and any marine protected species (all species of cetaceans and sea turtles.). The protocol will describe conditions and criteria related to adverse impacts on marine protected species that would trigger associated mandatory modification of project activity. The criteria and conditions will include, but not be limited to direct physical contact between marine protected species and any part of the structure. Associated mandatory project activity modifications will range from increased monitoring to immediate project shut-down and removal of the entire structure, depending on the severity of the impact(s);
28. The Board of Land and Natural Resources may revoke the permit if the Department determines that there is an adverse impact to marine mammals and/or the marine environment;
29. Dead fish shall not be disposed of in the surrounding waters but shall be removed from the site and disposed of at a County approved site;
30. The applicant shall work with the Department to revise the Management Plan to be consistent with any conditions imposed by the Board of Land and Natural Resources herein, and shall further develop a emergency response contingency plan to be part of the Management Plan in anticipation of any oceansphere system failures and/or unanticipated oceansphere movements. The Board of Land and Natural Resources herein delegates to the Chairperson the responsibility to approve amendments to the Management Plan which shall be fully developed and approved by the Chairperson prior to the deployment of the first oceansphere;
31. Regarding the OTEC system engine the following shall apply:
 - a. The activity/use shall not adversely affect a Federally listed threatened or endangered species or a species proposed for such designation, or destroy or adversely modify its designated critical habitat;
 - b. The activity/use shall not substantially disrupt the movement of those species of aquatic life indigenous to the area, including those species, which normally migrate through the area;
 - c. When the Chairperson is notified by the applicant(s) or the public that an individual activity deviates from the scope of the activity/uses, or activities are adversely affecting fish or wildlife resources or their harvest, the Chairperson will direct the applicant(s) to undertake corrective measures to address the condition affecting these resources. The applicant(s) must suspend or modify the activity to the extent necessary to mitigate or eliminate the adverse effect; and

Bill Spencer, HOT, Inc.
October 26, 2009

- d. When the Chairperson is notified by the U.S. Fish and Wildlife Service, the National Marine Fisheries Service or the State Department of Land and Natural Resources that an individual activity/use or activities conducted under the CDUA is adversely affecting fish or wildlife resources or the their harvest, the Chairperson will direct the applicant(s) to undertake corrective measures to address the condition affecting these resources. The applicant(s) must suspend or modify the activity to the extent necessary to mitigate or eliminate the adverse effect.

32. Failure to comply with any of these conditions shall render the permit void; and

33. Other terms and conditions as prescribed by the Chairperson.

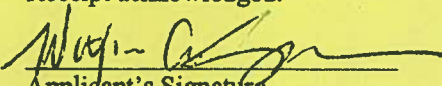
Please acknowledge receipt of this approval with the above noted conditions, in the space provided below. Please sign two copies. Retain one and return the other within thirty (30) days.

Should you have any questions on any of these conditions, please feel free to contact me at 587-0381.

Sincerely,


Sam Lemmo, Administrator
Office of Conservation and Coastal Lands

Receipt acknowledged:


Applicant's Signature

Date 11-26-2009

- c: Board Members
Hawaii District Land Agent
DAR (Kona)
DOBOR (Kona)
DOH/OHA/DOT
DOA (Aquaculture Development Program)
NOAA
USACE

me

Hawaii Oceanic Technology, Inc.
425 South St., #3102
Honolulu, Hawaii 96813
808-225-3579

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

March 27, 2013

Sam Lemmo, Administrator
Office of Conservation and Coastal Lands
Post Office Box 621
Honolulu, Hawaii 96809

RE: CDUP HA-3495

Dear Mr. Lemmo:

On March 9, 2012, the BLNR approved CDUP HA-3495 an extension to condition No. 6 of the CDUP approval granted to Hawaii Oceanic Technology, Inc. to October 23, 2013.

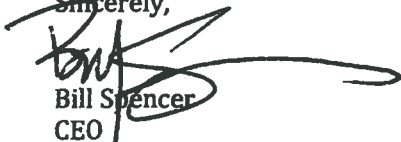
I am requesting further extension to Condition No. 6 until October 2015 due to the fact that our Army Corp of Engineers Section 10 permit (applied for December 2009 and amended September 2010) has not yet been granted. The Army Corp cannot provide a specific date as to when the permit will be granted and I am told by Army Corp that some applicants have been waiting as long as six years for their permit. Consequentially we have not been able to start any work at our lease site and have no control over when the permit will be granted or when construction can begin.

All of our permits have been granted with the exception of the Army Corp Section 10 permit.

Therefore, I respectfully request that the Chair kindly authorize an extension to condition No. 6 until October 2015.

Thank you very much for your kind attention to this request.

Sincerely,



Bill Spencer
CEO

Hawaii Oceanic Technology, Inc.

**MINUTES FOR THE
MEETING OF THE
BOARD OF LAND OF NATURAL RESOURCES**

DATE: FRIDAY, MARCH 9, 2012
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

Chairperson William Aila called the meeting of the Board of Land and Natural Resources to order at 9:12 a.m. The following were in attendance:

MEMBERS

William Aila, Jr.
David Goode
Jerry Edlao

Ron Agor
Dr. Sam Gon
Rob Pacheco

STAFF

Russell Tsuji/LAND
Paul Conry/DOFAW

Sam Lemmo/OCCL
Scott Fretz/DOFAW

OTHER

Colin Lau, Deputy Attorney General
Alethea Rebman, D-7
Jeremy Kwock, M-1
Suzanne Shriner, K-1
Reggie David, C-1

Ivan Lui-Kwan, D-7
Don Kitaoka, D-7
Bill Spencer, K-1
Michael Lee, K-1

{NOTE: Language for deletion is [bracketed], new/added is underlined.}

Item A-1 January 27, 2012 Minutes

Unanimously approved as submitted (Pacheco, Gon)

Item A-2 February 10, 2012 Minutes

Board members Pacheco and Gon recused from Item A-2. The Board members had the February 10, 2012 minutes before them, but there wasn't enough for quorum. Item deferred.

Deferred

Item D-7 Quitclaim of State's Interests, if Any, in Kalia Road to the City and County of Honolulu, Waikiki, Honolulu, Oahu, Tax Map Key: (1) 2-6-008:adjacent to 001.

Written testimony from Alethea Rebman was distributed to the Board members.

Russell Tsuji representing Land Division presented item D-7 and referred to the map where there was an Attorney General opinion written indicating that the State DLNR has no jurisdiction over roads except if the County needs a deed in order for it to sell as a remnant then that would be the sole exception. The State can issue a quit claim deed which is what is before the Board.

Ivan Lui-Kwan representing the Hilton Hawaiian Village said he had nothing to add.

Alethea Rebman, a resident representing other residents in the area testified that this transfer is not for road use and suggested an environmental assessment for public transparency. Member Pacheco inquired what constitutes a change in use. Ms. Rebman said Hilton Hawaiian Village is going to build 2 new towers and will take that corner for their bus turnaround. It will not be a public road which is a change in use.

Board member Goode asked her under 343 what triggers requiring an environmental assessment. Ms. Rebman said the State is transferring this land in the special district which requires an environmental assessment. Member Goode asked whether she could cite a specific section in 343, but Ms. Rebman couldn't because she just got this notice yesterday and didn't get to research it. She understands there is a 10 day appeal period and hopefully that won't have to be advised.

Member Goode said that the State is quit claiming everything it has to the City. The City will sell the parcel and has rules, regulations and ordinances on how to dispose of the property and asked how the city will do that. It was Ms. Rebman's understanding that they are going to give it to the Hilton.

Mr. Tsuji explained that staff is transferring it as a road and the exception is because of that Statute if the County were to sell what may be laid out in a map as a remnant then the State can quitclaim their interest to the County to proceed with the transaction. Member Pacheco noted that we've done this before.

Ivan Lui-Kwan representing Hilton testified first that the County will give the property to Hilton which is a significant consideration involved in the transaction. Second thing is as indicated in staff's submittal, this is based on Act 288 where the property is owned by the City and County of Honolulu and in this case when a request is made by the City and County or the State a transfer will be made. In fact, the purpose of Act 288 envisions that the County would sell it to

somebody else for use other than a road and that is the reason for the transfer. That is the underlying purpose of Act 288 which is the authority being used for this transfer.

Don Kitaoka, Deputy Corporation Counsel with the City and County of Honolulu said he agreed with what Mr. Lui-Kwan had stated in that Act 288 and what is known as Resolution 93-287 from the City both contemplated this kind of situation where there is a government road and the City wants to dispose of it and the State will quitclaim this interest to the Counties for that purpose. This falls within the intent of both of those laws – Act 288 and Resolution 93-287.

An inquiry was made by Member Goode whether the County is giving it away and per Mr. Kitaoka they are not giving it away. Member Goode asked whether the City has ordinances that say if you are going to sell or rent a piece of property then it has to be offered to all the adjoining owners or if there is a bid process. What is it? Mr. Kitaoka said that there is a procedure for disposal of City and County lands. They will follow all those ordinances in making this disposition.

Member Goode asked whether he knew if the underlying zoning for that parcel is different from the Hilton. Mr. Kitaoka said it was Kalia Road before, but the way it was developed they took this parcel out of Kalia Road. He didn't know the exact zoning, but it would be consistent with what the entire Kalia Road was from where it turns at Ala Moana. Mr. Lui-Kwan pointed out as indicated in staff's submittal it is resort mixed use as far as zoning which is the same as the Hilton.

Unanimously approved as submitted (Goode, Pacheco)

Item M-1 Approval in Principle for Acquisition of Privately Owned Lands for Educational Purposes at Honouliuli, Ewa, City and County of Honolulu, Island of Oahu; Tax Map Key: (1) 9-1-016:158.

Jeremy Kwock representing Hawaii Department of Education (DOE) briefed the Board on item M-1.

Unanimously approved as submitted (Goode, Gon)

Item K-1 Time Extension Proposal for the Initiation of Construction of the Hawaii Oceanic Technology, Inc. Open Ocean Fish Farm under Conservation District Use Permit (CDUP) HA-3495 located Offshore of Malae Point, North Kohala, Island of Hawaii, TMK: (3) Submerged Lands

About 427 written testimonies were submitted and distributed to the Board. The majority was a form letter where the names were changed.

Sam Lemmo representing Office of Conservation and Coastal Lands (OCCL) conveyed some background on item K-1. One of the conditions was initiation within 2 years (October 23, 2011) and completion within 5 years (October 23, 2014), but staff received a letter from Hawaii Oceanic Technology, Inc. (HOT) seeking a 2 year extension where initiation would be October

23, 2013 and completion by October 23, 2016. The request was received 3 months after the initiation deadline expired. But, OCCL has a provision for a 1 year grace period in lieu of automatic termination provided they come in within 1 year after the expiration deadline. The Board may grant them an extension as quoted in the rule on page 2, item (d). HOT is in the process of getting their Army Corp permit and other permits. Staff doesn't see any reason not to issue the extension as it is a routine process where people seek extensions of initiations of deadlines. He noted that staff received around 400 letters in opposition to the extension. The letters are somewhat similar, some are identical with some variations to the letters complaining that the project has changed or the project is going to have this impact or that impact and there were a number of objections. Staff recommends approval of the extension.

It was pointed out by Member Pacheco that in the form letters people said that HOT self imposed these delays. We have these all the time which are part of the CDUP process and asked if this falls into that same category? Mr. Lemmo acknowledged that he doesn't see this any different from a lot of the cases staff reviews. Especially, major projects like these that tend to go longer than initially anticipated. He doesn't see why you would self impose or constrain your own project. They (HOT) seem to be attempting to procure the approvals needed to move forward.

Member Pacheco asked with the CDUP, if there are substantial changes what would trigger bringing it back to the Board or the applicant during the process. Mr. Lemmo said first the applicant has not approached their office indicating there was a change and he doesn't know of any changes. He has heard there has been changes made that the Army Corp permit HOT filed has some nuances that are different from what we had approved, but Mr. Lemmo continually told the applicant that if you are making changes to your project come talk to us as early as possible so we can determine whether or not the changes warrant any further Departmental or Board discretionary review. A lot of times people make plan modifications that staff can accommodate if they are routine or minor. There are limitations of the design of the project as you get more engineering specs or more information necessary, things can be changed. They come in with 30% of the plan that's a conceptual engineering plan. Once they come in with 100% of the plan the situation might be slightly different. If there are materials changes or the project is completely different or put in a different location or different in nature then yes they can talk about bringing it back for possible further review.

Member Edlao asked whether the applicant is obligated to notify staff of any changes they make. Mr. Lemmo said it doesn't matter because we have to approve the construction plans and he explained what that involves, but he has told the applicant that if they think they are going to be different don't walk in the door with plans and expect us to sign it.

Member Gon inquired to address the objections that we've received, the time and process in which to object is when the actual plans are received and that is the chance for the Board to review those plans. At this point, it is merely an extension of deadlines for initiation. Mr. Lemmo said that's correct.

Member Goode made a query on why the extension request came in 3 months late. Mr. Lemmo said to ask the applicant. But, staff has been in contact with all the aquaculture entities making site visits to existing fish farms and getting assessments of the situation. Staff meets quarterly

with the Open Ocean Farm Working Group, Department of Agriculture (DOA) and the State veterinarian people.

Bill Spencer representing Hawaii Oceanic Technology, Inc. (HOT) testified that the request for extension was late because there are so many permit conditions that he missed that particular deadline. He spoke to staff at the end of November and they were kind enough to remind him that conditions exist that some of the staff he wanted to talk to were out of town and had to wait until January 3, 2012 to send in the formal request after speaking to staff.

Member Agor said he was excited about this project and there is opposition and asked Mr. Spencer to stay in line with what the Board approved. Mr. Spencer said absolutely. As Sam had said it has been several years since the original environmental impact statement (EIS), new information comes to light, initial engineering work and the Army Corp process was initiated within a month of them receiving their lease commitment. We were requested by Army Corp to reapply for a different scope and that re-application process started the process again and there was a staff change. We decided to articulate the engineering path we were taking up to our first ocean sphere. There are details there that need to be taken to actual build and test one of these things. We consider ourselves compliant with all the conditions required and continue to be in touch with staff. We will also continue to keep staff in touch with the community where they had several meetings since they last met (with the Board). A majority of the community support what they are doing.

Suzanne Shriner from the Big Island representing Food and Water Watch testified that they have 2500 members and that 1700 people in the Kohala area signed a petition against this project that there is considerable community resistance. They want to see this extension rejected and asked to defer this issue until a Land Board meeting can be held on the Big Island and more stakeholders can testify in front of you. They feel that the delays are self imposed because of the continued change to the project scope referring to the Army Corp permit asking HOT to re-submit their permit and their failure to meet deadlines. There are engineering changes as you grow a project out of this size, but what HOT is talking about doing is returning to a standard net pen type enclosure where the project was originally designed as an ocean sphere. That is not what they are talking about coming in, they are talking about a 16 month phase of a standard net pen which according to their EIS if they did they would be required to submit a new environmental review under the EIS for that. She compared this to being a homeowner submitting different plans to a planning board. Ms. Shriner reiterated the change that this project be put on hold until they have a better idea of what they are proceeding with. They think the CDUA process has been disregarded by the way the plans have changed over time.

Member Pacheco asked whether she was aware that what is before the Board is not addressing the plan's process and that will be coming forward from our process today. It's a standard thing that we process CDUPs and give extensions. Ms. Shriner said she understands that. Mr. Lemmo's office had conversations with her about the change in plans.

Michael Kumukauoha Lee testified that he is a Native Hawaiian cultural practitioner in limu medicine and coral medicine and related he is recognized by the First Circuit Court, Federal Court and cited other cases. He opposed this permit because the currents could get up to 20

miles an hour in that area where you could lose a sphere. Mr. Lee related as Hawaiian cultural practitioners their work is not monetarily based, but based on cycles of nature, how to increase abundance without collapsing the cycles with checks and balances in place. Going into fisheries is a good idea, a sound idea. It would bring jobs, bring revenue, but the way you are doing it is a bad science fair project. What is at risk is the health of our fisheries. There is 30 years of documentation of how these nets are a failure worldwide. The people who live there are opposed to this.

Mr. Lee gave Chair Aila a copy of a document and Mr. Lee related as a practitioner in this case he submitted on July 6, 2010 to the U.S. Army Corp. of Engineers, Regulatory Branch and this was certified and came back to him. As a cultural practitioner in the 106 process he put in all his objections and he never received any comments back which opens the door for a law suit because the Army Corp. of Engineers did not follow Federal law. If this is ever approved either KAHEA or Food and Water Watch as someone who has foundation of eminent risk of his practice there recognized in the Federal Court case already for this area, there will be a law suit. Mr. Lee highly pushed that this be deferred because you're going against the people who live there. You already have a Native cultural practitioner recognized in another case at Federal Court and the process set up in the 106 has not been followed. Mr. Spencer and all the people who invested in this are decent people and they need a return on their investment. Mr. Lee has come up with the strategies where we can have the protections and they could have those filtered systems that wouldn't collapse. You could have commerce and trade, but these things he put in are not being paid attention to and that is sad because you are missing an opportunity. We have 2300 years of experience of what is in the guts of these pelagic fishes and what they really eat. Not just the investors who know nothing about the sea. Not listening to us will have a major affect on the fishery which is a Hawaii cultural resource and public trust resource. If you don't listen to us the consequences are going to be dire and we will be back.

Chair Aila asked from a cultural practitioner perspective, how a cage in the ocean prevents you from doing traditional customary practices. Mr. Lee explained we don't put one species when we do our loko i'a (fish pond). We have a tier of multi-faceted food set-ups that are there. Multi types of fish that clean and take out the disease like kaku (barracuda) that take out the diseased fish. You have specially breed fish for this genetically engineered to grow fast resistant to disease. When you have a lot of fishes in the loko i'a we have several protection resources that they put in place. Little groups of seaweed that are medicine for the fish, they put hau trees around it that are medicine (the flower and the leaf), the cleaner wrasp, the shrimp and all kinds of tiers to protect and they have different types of fish in there that also protect. Mr. Lee related the Kona Blue case where a cage got lose and damaged the reef that they use for medicine. They don't go out 3 miles to get this. They know what Kanaloa moon will bring it to us at the beach and when to harvest it. There is no insurance here to protect us of any spheres crashing into something and destroying what we utilize. It is a whole tier effect of a wider issue.

Member Pacheco made a motion to approve as submitted. Member Edlao seconded it.

Member Gon said there are opportunities as this develops to hear more about the details of these things and at this point he was willing to move forward with the extension.

All voted in favor.

Unanimously approved as submitted (Pacheco, Edlao)

Item C-1 Request for Approval of Incidental Take License and Habitat Conservation Plan for Kaua'i Lagoons Resort, on the Island of Kaua'i, Hawai'i

Paul Conry, Administrator for the Division of Forestry and Wildlife (DOFAW) introduced Scott Fretz, the Wildlife Program Manager who is processing the HCP (Habitat Conservation Plan). Mr. Conry gave some background on item C-1 before turning it over to Mr. Fretz who reported that the HCP is to cover nene, water birds and sea birds on the resort. The activities covered are resort operations and construction and it's a low level of take for all of those. The mitigation is to do predator control on site.

Member Goode made an inquiry on what initiated the HCP process and Mr. Fretz said probably there are so many birds there. A bird was injured by a vehicle during construction. The birds have been increasing where the potential for take will increase.

Member Gon asked whether there was some mitigative behavior as a result. Mr. Fretz acknowledged that and said that the HCP requires all of the employees to follow protocols so they are not injuring birds.

Member Goode wondered because of one injury there was a need for the HCP. Mr. Fretz said the HCP was requested by the applicant and they could speak to that. It is a voluntary thing where they come to staff to apply. There were more discussions about this where Mr. Fretz said what you are getting at is will this cause more birds to come there and affect their neighbors. Member Goode said or more HCPs to come. Mr. Fretz said that this is part of the operation to move birds off of the property because they are a threat to aviation safety that this resort lays between the 2 runways. While this HCP was getting done staff got a directive from the Governor to move the birds off the property for public safety which they are doing. There will be fewer and fewer birds in the long run.

Member Gon asked don't the birds return. Mr. Fretz said staff just started and it's rare for a nene to fly between islands, but it has happened. Staff tried moving the birds to Koke'e, but the birds do return and it's too hard to make them stay at Koke'e. The only way to solve the problem is to take them off island.

There was an inquiry about habitat modification by Member Gon, but Mr. Fretz said that will be down the road and connected to the removal of the nene because they want to restore nesting sites and discourage nene from nesting on the site. The habitat is really productive for the water birds and nene right now and doing the predator control with the birds they have there they have a good production of birds.

Member Gon asked whether the nene was the only aviation concern or other birds as well. Mr. Fretz acknowledged that is the main concern depending on who you ask. The aviation people will tell you any bird is a threat, but during discussions with them the consensus was to focus on