

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

November 14, 2014

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

DENIAL OF “WRITTEN REQUEST/PETITION FOR CONTESTED CASE HEARING
PURSUANT TO CHAPTER 91 OF THE HAWAII REVISED STATUTES AND SECTIONS
13-1-28 THROUGH 13-1-29 OF THE HAWAII ADMINISTRATIVE RULES”
BY MAKANI CHRISTENSEN AND MICHAEL SUR
REGARDING “ADOPTION OF PROPOSED CHAPTER 13-60.8 OF HAWAII
ADMINISTRATIVE RULES —
HA‘ENA COMMUNITY-BASED SUBSISTENCE FISHING AREA, KAUA‘I”

SUMMARY

The petitioners, Makani Christensen and Michael Sur, requested a contested case hearing concerning the adoption of Hawaii Administrative Rules (HAR) chapter 13-60.8, Hā‘ena Community-Based Subsistence Fishing Area, Kaua‘i (“Hā‘ena CBSFA”), by the Board on October 24, 2014, Item F-1. We recommend that the Board deny the petition for the reasons set forth below.

BACKGROUND

On October 24, 2014, under agenda item F-1, the Board approved the staff recommendation to adopt Hawaii Administrative Rules (HAR) chapter 13-60.8 to establish aquatic resource regulations for the Hā‘ena Community-Based Subsistence Fishing Area on Kaua‘i pending the disposition of the request for a contested case that occurred during testimony on the item.

During the meeting, and prior to the Board’s decision to adopt the new rules, Makani Christensen made an oral request for a contested case hearing. Michael Sur also gave oral testimony on item F-1, but did not make an oral request for a contested case hearing nor refer to a written request during the board meeting.

The Chairperson notified Mr. Christensen that a request for a contested case also requires the submission of a written petition filed within 10 days of the meeting. Mr. Christensen replied that he had already submitted the written petition to the Chairperson’s office. He then provided copies of a written petition to the Chairperson and Board members. See **Exhibit 1**. In confirming whether Chairperson’s office was given a written petition for filing, it was learned

that while a request to time-stamp a document had been made, no written petition had been submitted to the office for filing. The petition submitted by Mr. Christensen at the board meeting was not time-stamped.

The petition submitted at the board meeting challenges the provisions of the Hā'ena CBSFA rules, specifically (paraphrasing as follows):

- that the prohibited activities under HAR section 13-60.8-5 are an unjust and unfair deprivation of petitioners' continued use as claimed through their relative;
- that the proposed plans in the Hā'ena CBSFA are arbitrary and capricious as not based on any data, scientific or otherwise;
- that petitioners' practices, which livelihood feeds their families, are beneficial in removing invasive species in the area;
- that petitioners' equal protection rights and due process rights are being deprived by the restriction on petitioners' use;
- that only a select few are benefited and no compelling state interest is served, nor any showing of cultural and traditional practices which should limit the use to area residents.

The petition was signed by Makani Christensen and Michael Sur, in a capacity indicated as "Representative of Fishermen."

A petition for a contested case regarding the rulemaking public hearing for the Hā'ena CBSFA rules from Paul Christensen (aka Makani Christensen) was also addressed by the Board in agenda item F-6 on October 24, 2014. The Board followed Division of Aquatic Resources (DAR)'s staff recommendations to deny that request.

For this latest request for a contested case hearing received at the public meeting on October 24, 2014, we requested the immediate assistance and review of the written petition for a contested case by the Department of the Attorney General. Final approval of the Hā'ena CBSFA rules is pending this disposition.

DISCUSSION

Without reaching the merits of the petitioners' claims, it is clear that the petitioners have not complied with the Department's procedures in requesting a contested case, and have not shown that a contested case hearing is either an administrative remedy provided or required according to Hawaii Revised Statutes (HRS) chapter 91.

Under the Department's Rules of Practice and Procedure, HAR section 13-1-29(a), a person

... must both request a contested case and petition the board to hold a contested case hearing. An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting ... [and] must also file (or mail a postmarked) written petition ... no later than ten calendar

days after the close of the board meeting ... For good cause, the time for making the oral or written request ... may be waived. [emphasis added]

No request for waiver was received from petitioners.

The written request must indicate how the requestor fits the criteria to be a party (e.g., the person has a property interest in the land or can demonstrate that they will be so directly and immediately affected by the requested action that their interest is clearly distinguishable from that of the general public). HAR §13-1-31. A determination of parties under HAR section 13-1-31 is subject to judicial review under HRS section 91-14.

Although it is clear that petitioners may represent themselves, they have not indicated any basis or capacity to allow them to represent an unnamed constituency of fishermen. HRS section 91-1 defines a “**contested case**” as

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

In the context of a rulemaking action, no legal rights, duties, or privileges of specific parties are determined or required to be determined. Rulemaking is considered a quasi-legislative function (*i.e.*, rules apply generally to unspecified parties) rather than a quasi-judicial determination (*i.e.*, an adjudication of a specific party’s rights). Thus, a person is generally not entitled to a contested case hearing to challenge a rulemaking decision by the Board.

In the quasi-legislative setting of final approval of proposed rules by the Board, neither petitioner can show that their interest in ocean resources is clearly distinguishable from that of the general public.

HAR section 13-1-29.1 (Determination of entitlement to a contested case hearing) provides:

The board without a hearing may deny a request or petition or both for a contested case when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board or when it is clear as a matter of law that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding.

CONCLUSION

Based on the foregoing, and upon consultation with the Department of the Attorney General, DAR recommends denial of the petition on the basis that petitioners are not entitled to a contested case hearing by statute, rule, or due process.

RECOMMENDATIONS:

1. That the Board deny the “Written Request/Petition for Contested Case Hearing Pursuant to Chapter 91 of the Hawaii Revised Statutes and Sections 13-1-28 through 13-1-29 of the Hawaii Administrative Rules” by Makani Christensen and Michael Sur Regarding “Adoption of Proposed Chapter 13-60.8 of Hawaii Administrative Rules—Ha’ena Community-Based Subsistence Fishing Area, Kaua’i.”
2. That upon the denial of the above request for a contested case hearing, the Hā’ena Community-Based Subsistence Fishing Area rules under HAR chapter 13-60.8 be allowed to be processed pursuant to the approval made on October 24, 2014.

Respectfully submitted,



Division of Aquatic Resources

APPROVED FOR SUBMITTAL:



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

Exhibit 1

TO: William Aila, Chair
Board of Land and Natural Resources, State of Hawaii

FROM: Makani Christensen
Michael Sur
Representative of Fishermen

SUBJECT: Written Request/Petition for Contested Case Hearing
Pursuant to Chapter 91 of the Hawaii Revised Statutes and
Sections 13-1-28 through 13-1-29 of the Hawaii Administrative
Rules

Adoption of Proposed Chapter 13-60.8 of Hawaii Administrative
Rules—Ha'ena Community-Based Subsistence Fishing Area,
Kaua'i

Dear Chair Aila and Members of the Board of Land and Natural Resources:

On October 3, 2014, we attended the previous public hearing on the proposed adoption of Chapter 13-60.8-Ha'ena Community-Based Subsistence Fishing Area, Kaua'i and provided testimony. We spoke individually with many of Ha'ena Kupuna who we have known for years. All of the kupuna, who we spoke with, were in agreement that they wanted us to continue to take the species of fish such as Roi, Taape, Mu, and Toau. Our request/petition for a contested case hearing is incorporated herein, except for certain amendments that are set forth herein. Given what appears to be the indifference by the Board of Land and Natural Resources and the Department of Land and Natural Resources to our concerns and the issues that we raised in earlier testimony, and with all due respect to the kupuna at Ha'ena, unfortunately, it leaves us with no choice but to request from and petition this Board for a contested case hearing.

We are challenging the provisions involving prohibited activities under section 13-60.8-5 as it pertains to our use in which our relative has engaged since the 1960's and in which we continue to have engaged since the 1980's. We believe the proposed Chapter 13-60.8 would be an unjust and unfair deprivation of our continued use; that the Board's and Department's proposed plans in the Ha'ena Community-Based Subsistence Fishing Area are arbitrary and capricious and are also not based on any data, scientific or otherwise; that our continued practice and intended use is actually beneficial in addressing invasive species in the area and that we are being deprived of part of our livelihood and the ability to feed our families; that we are unaware of anyone else who has fished the Ha'ena-Wainiha area with scuba at 50 feet to 120 feet deep and we are unaware of anyone would know the area and the flow and volume of fish activity like us and our kupuna and, in fact, we are unaware of anyone who has consistently fished the area

Chair William Aila
Board of Land and Natural Resources
Written Request/Petition for Contested Case Hearing
Page -2-

since the 1960's; and that our equal protection rights and due process rights are being deprived by the Board and the Department by restricting our use, while allowing the use to benefit a selected few, with no compelling state interest or otherwise that can be shown, and with no showing of continued cultural and traditional practices that limits the use to those who are residents of the area for both the proposed uses and the limitations in the area that were in existence in 1894 and have continued through the present—including the extent of the covered zone areas in the proposed Chapter—to justify the establishment of the provisions set forth in this Chapter.

Respectfully submitted,



Makani Christensen
Michael Sur
Representative of Fishermen