

State of Hawai‘i
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Aquatic Resources
Honolulu, Hawai‘i 96813

November 14, 2014

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

**REQUEST FOR APPROVAL OF GUIDANCE FOR PREPARATION OF
COMMUNITY-BASED SUBSISTENCE FISHING AREA PROPOSALS UNDER
HAWAII REVISED STATUTES §188-22.6**

For your consideration and approval is recommended guidance for communities to use in preparing “Community Based Subsistence Fishing Area” (“CBSFA”) proposals under Haw. Rev. Stat. §188-22.6 for later submission to the Board of Land and Natural Resources (“BLNR”).

HISTORY OF CBSFA LEGISLATION AND IMPLEMENTATION

Haw. Rev. Stat. §188-22.6 authorizes the Department of Land and Natural Resources (“DLNR”) to designate CBSFAs to protect and reaffirm fishing practices traditionally and customarily carried out for purposes of Native Hawaiian subsistence, culture and religion. Under Haw. Rev. Stat. §188-22.6 communities may submit proposals for CBSFA designation to the DLNR for consideration (See Exhibit I).

Since the adoption of Haw. Rev. Stat. §188-22.6 in 1994, a number of communities have expressed strong interest in creating CBSFAs. The Department approved its first CBSFA rules October 24, 2014 when the BLNR unanimously approved proposed rules for Hā`ena CBSFA, which received specific legislative designation in 2006 under Haw. Rev. Stat. §188-22.9 (see Exhibit II).

To effectively engage with communities seeking CBSFA designation and fulfill our mandate under the CBSFA statute, the Division of Aquatic Resources (“DAR”) proposes the following guidance to help communities prepare CBSFA proposals. DAR staff developed this guidance in consultation with DLNR staff, Native Hawaiian rights law experts, communities, as well as agency, academic, and NGO partners.

RECOMMENDATION:

To support the implementation of Haw. Rev. Stat. §188-22.6, DAR recommends that the Board APPROVE the attached Guidance for Preparation of CBSFA Proposals under Haw. Rev. Stat. §188-22.6.

Respectfully submitted,



Division of Aquatic Resources

APPROVED FOR SUBMITTAL



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

Attachments:

1. Guidance for Preparation of CBSFA Proposals under Hawaii Revised Statutes §188-22.6.
2. Exhibit I: CBSFA Statute [§188-22.6] "Designation of community-based subsistence fishing area."
3. Exhibit II: Hā'ena CBSFA Statute [§188-22.9] "Hā'ena community-based subsistence fishing area; restrictions; regulations."
4. Exhibit III: Community-Based Subsistence Fishing Area (CBSFA) Designation Standard Operating Procedures (SOP) Summary.

**Guidance for Preparation of Community-Based Subsistence Fishing Area
Proposals under Hawaii Revised Statutes §188-22.6**

INTRODUCTION

Pursuant to Haw. Rev. Stat. §188-22.6, the Department of Land and Natural Resources (“DLNR”) may designate community-based subsistence fishing areas (“CBSFAs”) and carry out fishery management strategies for such areas through the adoption of Hawaii Administrative Rules (“HAR”) for the purpose of protecting and reaffirming fishing practices customarily and traditionally exercised for purposes of Native Hawaiian subsistence, culture, and religion.

The following guidance is proposed to inform communities in developing CBSFA proposals:

I. DEPARTMENTAL COMMUNICATION AND INTER-DIVISIONAL COOPERATION

- a. The Division of Aquatic Resources (“DAR”) is the lead division in the designation of CBSFAs and the main point of contact for community organizations or groups pursuing CBSFA designation.
- b. Other DLNR divisions cooperate with DAR in designating CBSFAs and adopting rules to reaffirm and protect traditional and customary fishing practices carried out for Native Hawaiian subsistence, culture and religion.
- c. Where rules falling under different divisional jurisdictions need to be coordinated, the divisions may pursue administrative rulemaking concurrently.
- d. Communities should communicate early and frequently with DAR to develop their CBSFA proposal using DLNR standard operating procedures for CBSFA designation (See Exhibit III). DAR will engage with communities who follow CBSFA standard operating procedures as capacity permits.
- e. Community groups or organizations may request that DAR provide information or suggestions to support marine stewardship efforts at any time.

II. INFORMATION NECESSARY TO ADVANCE A CBSFA PROPOSAL

Community groups interested in pursuing CBSFA designation should be prepared to do the following to advance their CBSFA proposal:

- a. Provide a list of members of the community group developing the CBSFA proposal that includes individuals who traditionally and customarily gather and/or cultivate marine resources for Native Hawaiian subsistence, culture or religion within the proposed designation area.
- b. Demonstrate the proposing community group’s stewardship of the environment or natural resources within the proposed designation area.

- c. Identify the traditional and customary fishing practices proposed for protection and provide evidence to verify custom¹. Evidence of custom may include, but is not limited to, relevant and material expert or kama‘āina testimony and affidavits describing the history and traditional practices of Native Hawaiians living in the geographic area, archival documents, and historical mo‘olelo/narratives or reports².
- d. Provide the best available information on the following characteristics of the proposed designation area:
 - i. Status and ecology of species or habitat important to traditional fishing practices exercised for Native Hawaiian subsistence, culture and religion.
 - ii. The importance and historical and current extent of traditional and customary gathering and use of marine resources for Native Hawaiian subsistence, culture and religion.
 - iii. The fishery and other non-fishing uses of the area’s marine waters including for recreation and navigation.
 - iv. Impacts of human uses on the species and/or habitats important to traditional and customary fishing practices.
 - v. Human uses interfering with the exercise of traditional and customary fishing practices.
 - vi. Failures of existing marine resource regulations in sustaining aquatic resources or preventing damage to marine habitat important to Native Hawaiian subsistence, culture and religion.
- e. Explain how the proposed area, activities and regulatory recommendations will support community-based Native Hawaiian subsistence, cultural and religious needs³.

III. BASIS FOR JUSTIFYING REGULATORY RECOMMENDATIONS

- a. The following considerations^{4,5} may be used as a basis for justifying regulatory recommendations in a CBSFA proposal^{4,5}:

¹ See in re Hawai‘i State Constitution Article XII §7; Hawaii Revised Statutes §1-1; Hawaii Revised Statutes §7-1; *Kalipi v. Hawaiian Trust Co* (1982); *Pele Defense Fund v. Paty* (1992); *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission* (1995); *Kelly v. 1250 Oceanside Partners, No. 00-1-0192K*, slip op. at 10-11 (Haw. 3d Cir. Ct. Oct. 21, 2002).

² Evidence for Substantiating Traditional and Customary Practice: *Palama v. Sheehan*, 50 Haw. 298, 440 P.2d 95 (1968); *Ashford*, 50 Haw. at 316, 440 P.2d at 77 (1968); *State v. Hanapi*, 89 Hawai‘i 177, 970 P.2d 485 (1998).

³ HRS §188-22.6

⁴ Public Trust Doctrine: Hawai‘i Admission Act of 1959 Section 5(f), Public Law 86-3, 73 Stat. 4; Hawai‘i State Constitution Article XI §1 and §6, Hawai‘i State Constitution Article XII §4.

⁵ Obligation to Protect Traditional and Customary Practices:

- Hawai‘i State Constitution Article XII §7 The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. [Add Const Con 1978 and election Nov 7, 1978]
- Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission (1995) holding that Native Hawaiians have rights distinguishable from the public when reasonably exercised to support subsistence, culture and religion, and must be protected by the State to the extent feasible; and
- Water Use Permit Applications (Waiāhole), 94 Hawai‘i 97, 9 P.3d 409 (2000) holding that domestic uses and the exercise of Native Hawaiian traditional and customary practices are public trust purposes but private commercial uses are not.

- i. *The Natural or Cultural Resource* - In the context of the public trust resources, the highest management priority is the conservation of the natural or cultural resource. Regulatory recommendations may be proposed to limit or prohibit uses or activities that are conducted in ways that unduly damage the natural or cultural resource.
 - ii. *Traditional and Customary Practices* - Traditional and customary practices exercised for purposes of Native Hawaiian subsistence, culture and religion are public purposes that are afforded protection under the public trust doctrine. Regulatory recommendations may be proposed based on their ability to protect and reaffirm traditional and customary practices exercised for Native Hawaiian subsistence, culture or religion.
 - iii. *General Public Use* - Public uses or activities that can be done without unduly damaging the resource are also public purposes that are afforded protection under the public trust doctrine. Regulatory recommendations should strive to protect public uses or activities that are conducted in ways that do not unduly damage the natural or cultural resource or impede traditional and customary fishing practices from being exercised.
 - iv. *Commercial Activities*⁶ - Although commercial activities may produce important public benefits, such private interests are not afforded protection under the public trust doctrine. Regulatory recommendations proposed to limit or prohibit commercial activities may be justified when commercial activities impinge on the natural and cultural resources, use by the general public, or impede the exercise of traditional and customary practices for Native Hawaiian subsistence, culture and religion.
- b. Regulatory recommendations may be justified using the best available information based not only on scientifically proven facts, but also relevant and material kama'āina testimony⁷, future predictions, generalized assumptions, and policy judgments that also protect the resource wherever feasible⁸.

⁶ See definition of Commercial Activity in DLNR Policy for Commercial Activities on State Owned and Managed Lands and Waters (1/30/1998): The collection by a party or their agent of any fee, charge, or other compensation for utilizing the marine waters or related resources shall make the activity commercial. Not for profit status of any group or organization under Internal Revenue or Postal Laws or regulations does not in itself determine whether an event or activity arranged or managed by such a group or organization is noncommercial. Not for profit groups that charge only a nominal fee for administrative costs that utilize a resource or public facility at a frequency and/or magnitude that does not significantly contribute to the degradation of the facility and/or resource will be considered non-commercial.

⁷ See in re Ashford, 50 Haw. at 316, 440 P.2d at 77 (1968) holding that kama'āina witnesses may be used in land disputes; and Diamond and Blair v. Craig Dobbin and Wagner Engineering Services, Inc. and BLNR (2014) holding that kama'āina testimony was sufficient historical evidence of the upper reaches of the wash of waves for establishing a certified shoreline.

⁸ See in re Water Use Permit Applications (Waiāhole), 94 Hawai'i 97, 9 P.3d 409 (2000) holding that a) lack of full scientific certainty is not a basis for postponing the adoption of management measures to prevent the degradation of public trust resources, and b) that where scientific evidence is preliminary and not yet conclusive it is prudent to adopt the "precautionary principle" to protect the resource in which decisions are made based not only on scientifically proven facts, future predictions, generalized assumptions, and policy judgments that also protect the resource.

Exhibit I**CBSFA Statute****[§188-22.6] Designation of community-based subsistence fishing area.**

- (a) The department of land and natural resources may designate community-based subsistence fishing areas and carry out fishery management strategies for such areas, through administrative rules adopted pursuant to chapter 91, for the purpose of reaffirming and protecting fishing practices customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion.
- (b) Proposals may be submitted to the department of land and natural resources for the department's consideration. The proposal shall include:
- 1) The name of the organization or group submitting the proposal;
 - 2) The charter of the organization or group;
 - 3) A list of the members of the organization or group;
 - 4) A description of the location and boundaries of the marine waters and submerged lands proposed for designation;
 - 5) Justification for the proposed designation including the extent to which the proposed activities in the fishing area may interfere with the use of the marine waters for navigation, fishing, and public recreation; and
 - 6) A management plan containing a description of the specific activities to be conducted in the fishing area, evaluation and monitoring processes, methods of funding and enforcement, and other information necessary to advance the proposal.

Proposals shall meet community-based subsistence needs and judicious fishery conservation and management practices.

- (c) For the purposes of this section:
- 1) "Native Hawaiian" means any descendant of the races inhabiting the Hawaiian Islands prior to 1778; and
 - 2) "Subsistence" means the customary and traditional native Hawaiian uses of renewable ocean resources for direct personal or family consumption or sharing. [L 1994, c 271, §1]

Exhibit II**Hā'ena CBSFA Statute****[§188-22.9] Hā'ena community-based subsistence fishing area; restrictions; regulations.**

- (a) There is designated the Hā'ena community-based subsistence fishing area on the northwestern coast of Kauai, which shall consist of all state waters and submerged lands bounded by:
- 1) The shoreline of the Hā'ena district;
 - 2) A line that follows an imaginary extension of the boundary between Hā'ena state park and Na Pali state park that extends seaward for one mile from the shoreline;
 - 3) An irregular line one mile offshore that is parallel to the contours of the shoreline; and
 - 4) A line that follows an imaginary extension of the boundary between Hā'ena and Wainiha, as specified in the tax map of the county of Kauai, that extends seaward for one mile from the shoreline.
- (b) In addition to the provisions of this chapter, the following uses or activities shall be regulated in the Hā'ena community-based subsistence fishing area:
- 1) Any activities with a commercial purpose, as defined in section 187A-1;
 - 2) The issuance of any commercial marine license, as defined in section 187A-1;
 - 3) The issuance of any aquarium fish permits, pursuant to section 188-31;
 - 4) Fishing with the use of gill nets;
 - 5) Fishing with self-contained underwater breathing apparatus and spears; and
 - 6) Any other use or activity that the department of land and natural resources, in consultation with the inhabitants of the ahupua'a of Hā'ena and other interested parties, deems appropriate.
- (c) The department of land and natural resources, as soon as practical, shall consult with as broad a base as possible, group of inhabitants of the ahupua'a of Hā'ena and other interested parties to establish rules for the Hā'ena community-based subsistence fishing area, to include but not be limited to:
- 1) A determination of fishing practices that are customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion in the fishing area;
 - 2) A management plan recognizing existing marine activities permitted by the department of land and natural resources and containing a description of specific activities to be conducted in the fishing area, including evaluation and monitoring processes and methods of funding and enforcement;
 - 3) Limits on the harvest of aquatic life, as those terms are defined in section 187A-1, in the fishing area;
 - 4) The establishment of no harvesting zones within the fishing area without depriving ahupua'a inhabitants of access to traditional sources of subsistence; and
 - 5) A process for the expansion of the fishing area to include other ahupua'a.

The department of land and natural resources shall adopt rules pursuant to chapter 91 necessary for the purpose of this section. [L 2006, c 241, §3]

Exhibit III

Community-Based Subsistence Fishing Area Designation Standard Operating Procedures (SOP) Summary

- 1) **Community Engagement** (ongoing throughout designation process):
 - Community Group Responsibilities: identify individuals and groups to engage and discuss community engagement plans with DAR. Keep records of community engagement efforts for submission to DAR. Invite DLNR to attend public community discussions.
 - DLNR Responsibilities: DAR evaluates community engagement efforts and provides recommendations to ensure due process. DAR updates other divisions on the community engagement efforts when relevant to their jurisdictions.
- 2) **Management Tool Selection**:
 - Community Group Responsibilities: evaluate the appropriateness of a CBSFA and send a letter of inquiry to DAR outlining the group's interest in this type of designation.
 - DLNR Responsibilities: provide information that helps communities evaluate the appropriateness of a CBSFA and respond to community letters of inquiry.
- 3) **Pre-Proposal Preparation and Review**:
 - Community Group Responsibilities: prepare and submit a pre-proposal to DAR outlining the appropriateness of a CBSFA designation and invite DAR for a site visit.
 - DLNR Responsibilities: DAR convenes a review team to evaluate the community's pre-proposal and confirm the appropriateness of a CBSFA designation. DAR participates in site visit.
- 4) **Management Plan and Rule Package Development**:
 - Community Group Responsibilities: develop a management plan in consultation with DLNR and submit it to DAR. Build community support for regulatory recommendations.
 - DLNR Responsibilities: DAR coordinates DLNR's input on community management plans and regulatory recommendations. DAR adapts community regulatory recommendations into a Ramseyer format rule package in line with federal, state, and departmental laws and policies.
- 5) **Formal CBSFA Proposal Review**:
 - Community Group Responsibilities: present regulatory recommendations at a public discussion forum attended by DAR. Continue community consultations to build support for regulatory recommendations as necessary.
 - DLNR Responsibilities: DAR reviews full proposal and attends a public discussion forum at the community location. DAR may suggest rule package amendments after hearing public comments and will coordinate review of finalized rule package by Division Administrators, the DLNR Chair and the Attorney General.
- 6) **Chapter 91 Rule Making**
 - Community Group Responsibilities: provide input on the small business impact statement and testimony at public hearings.
 - DLNR Responsibilities: DAR prepares small business impact statement and facilitates rule package progress through Chapter 91 administrative rule making.
- 7) **Implementation, Monitoring and Assessment** (post rule-adoption)
 - Community Group Responsibilities: implement non-regulatory elements of management plan including outreach and monitoring as agreed upon in planning process.
 - DLNR Responsibilities: implement rules and support implementation of non-regulatory management plan components including outreach, monitoring and enforcement as agreed upon in planning process.