

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Aquatic Resources
Honolulu, Hawaii 96812

August 23, 2002

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

REQUEST FOR APPROVAL TO HOLD PUBLIC HEARING TO ADOPT HAWAII
ADMINISTRATIVE RULES, CHAPTER 13-60.5, NORTHWESTERN HAWAIIAN ISLANDS
MARINE REFUGE

Submitted for your consideration and approval is a request to hold public hearings to adopt Hawaii Administrative Rules (HAR) relating to the Northwestern Hawaiian Islands Marine Refuge (Chapter 13-60.5). The rules incorporate substantial changes made pursuant to public comments received during six public hearings conducted in January 2002, and from the written public comments, to adopt a management regime for this area. Written comments were received from 43 individuals and organizations, as well as 143 form letters reflecting the comments of one organization. In addition, the Division of Aquatic Resources received, after the submittal deadline, a petition signed by 80 people. A chart summarizing the written testimony is attached, as well as summaries of testimony from each hearing. Based on the comments received, there was consensus on providing more restrictive regulations governing the Northwestern Hawaiian Islands that mirror the federal Executive Order 13178 (December 7, 2000), amended by Executive Order 13196 (January 23, 2002).

The proposed rules incorporate a substantial number of changes resulting from the comments received. Some major concerns raised in the public comments have not been incorporated. The Division of Aquatic Resources outlines the changes included and provides an explanation of those that were not.

Substantive Changes from the former draft rules

§13-60.5-1

1. Changes the designation for the Northwest Hawaiian Islands area from a fisheries management area to the more restrictive classification—a marine refuge. Comments proposed a more restrictive classification to protect the significant resources in the area. Other suggestions included a pu'uhonua or a Marine Life Conservation District. With the present activities allowed in the federal jurisdictions in the Northwestern Hawaiian Islands, the new designation as a refuge is most consistent with the current activities in the water adjacent to the State marine waters.
2. Expands the intent and purpose to reflect more restrictive policies for the refuge to mirror the intent and purpose of the federal jurisdiction in the adjacent waters. This included language that supports the policies of:
 - Long-term protection of the area;
 - Preservation, protection, and conservation consistent with the Division of Aquatic Resources enabling statute and additional language concerning the use of the best available science;
 - Permitting entry to the area consistent with causing no harm to the resources in

- coordination with the federal programs in the adjacent waters;
- Supporting, promoting, and coordinating research, assessment, and monitoring of the resources for impact or threats from activities and uses;
- Recognizing Native Hawaiian rights to enter the area for non-commercial subsistence, cultural and religious purposes as noted by the State Constitution Article XII, Section 7, and consistent with State laws; and
- Coordinating with the applicable federal agencies and other entities, as appropriate, for comprehensive conservation.

§13-60.5-4

Expands the list of prohibited activities to include vessel discharges as governed by the applicable federal and state law.

§13-60.5-5

1. Deletes the subsection (a)(3) that permitted entry for fishing activities “[a]s may be otherwise provided on that permit.”
2. Adds a section that recognizes Native Hawaiian rights to enter for non-commercial subsistence, cultural and religious purposes. This section conforms the language with the same provision in the federal reserve for the area.
3. Adds a subsection that designates restricted fisheries areas within the refuge to preserve the most fragile resources and protect the lagoons. These restricted areas include:
 - All of the State marine waters surrounding French Frigate Shoals, Pearl and Hermes Atoll, and Kure Atoll;
 - State marine waters from 0-20 fathoms around Necker Island, Gardner Pinnacles, Maro Reef, Layson Island, and Lisianski Island; and
 - All of the State marine waters from 0-10 fathoms surrounding Nihoa Island.
4. Restates the language in subsection (d) that was included in the initial draft rule circulated at the first land board hearing on this rule. This rule provides that in State waters adjacent to the federally designated reserve waters, or overlapping with the jointly administered federal wildlife refuge waters, the State will follow the more restrictive federal law of that area, unless otherwise provided by law. Commentators asked that this be restated.

§13-60.5-6

1. Authorizes additional conditions for a permit, including:
 - Requiring compliance with same requirements that apply for the adjacent federal marine waters;
 - Adding a sanction that allows the denial of an application for a permit for past permit violations, including non-compliance with a term or condition of the permit, consistent with the State law; and
 - Making it mandatory to submit catch and access reports, addressing the public’s concerns for the need for further monitoring of permitted activities in the area.
2. Includes a provision for confidentiality of the proprietary fisheries information as required by State law.

Comments not incorporated:

The public requested additional monitoring and oversight techniques. The Division of Aquatic Resources did not include specific further oversight in the permit requirements as noted below. However, this draft rule reserves the right to require vessel monitoring devices in the future.

A “vessel monitoring device” (VMS) can be placed aboard a vessel to track its location. Presently, the United States Coast Guard, in concert with the National Marine Fisheries Service, is the only agency in Hawaii that possesses this technology. As a developing technology, VMS presently remains limited in its ability to track fisheries activities. Currently, no system can correlate water depth with both latitude and longitude, a correlation required to track fisheries activities in the area. Furthermore, VMS is expensive. At the present time, the State lacks the capacity, funds, and staff to use VMS. As a side note, the Executive Order, establishing the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, outlines in the Reserve Operation Plan the level of the enforcement and surveillance, stating that the reserve may:

...use vessel monitoring systems for any vessel entering or transiting the Reserve, if warranted. To this end, the Secretary [of the Department of Interior] ...shall evaluate the need for the establishment of vessel monitoring systems and, if warranted shall initiate the steps necessary to have the appropriate... agencies...adopt a vessel monitoring system....

Executive Order No. 13178, (December 7, 2002), Section 5(b)(10).

§13-60.5-

Includes language in the rules authorizing the State to use new technologies for enforcement and surveillance in the future, similar to the language in the federal Executive Order.

“Dockside inspection” to ensure that the actual catch matches the log entries was the second monitoring technique recommended in comments. The department employs more than adequate safeguards to address this concern. As part of its duties, the Division of Aquatic Resource (DAR) staff regularly inspects the logbooks of fisheries vessels to compare actual landings with sales. Furthermore, the Division of Conservation and Resources Enforcement (DOCARE) also inspects vessels as part of its duties in response to a reported violation or in the event the vessel has been identified as a possible cause for concern, such as atypical landings and sales figures. To increase the present level of inspection, DOCARE would need considerably more staff and funds.

Commentators also recommended including an “independent panel of reviewers” to review permit applications. Based on level of public review required in the rules and competence of the staff that will review applications, this additional review process is both unnecessary and excessive. As proposed these rules will also require coordination with federal agencies with joint or adjacent authority, establishing an independent panel of reviewers seemed unwarranted. Land Board approval or approval by its authorized representative also provides additional means for public input.

The rules require each permit application to be subject to a 30-day public review and advisory comment period. Furthermore, all permit applications will be posted on the Division of Aquatic Resources website for the entire comment period. At the end of the 30 days, DAR will use the advisory public comments in its review of an application.

The application review process will involve both DAR and its federal partners in the adjacent reserve and wildlife refuge. This process uses the competency of both DAR staff, and the staff from federal partners. The combined expertise of staff from DAR and its federal partners provides

added assurance that there is more than adequate review by experts in the permit assessment and approval process.

“Insurance coverage” to cover damage and salvage costs for fishing gear or grounded vessels was suggested. The Division of Aquatic Resources does not have the authority in its enabling statute to request this condition. The Division of Boating and Recreation holds this responsibility. Additionally, this requirement could be costly and most of the recent vessel groundings were by vessels transiting through the region and not fishing in these waters.

While the previous proposed FMA regulations specified closures of all State waters at French Frigate Shoals based on the fact that this area hosts the largest population of Hawaiian monk seals and about 90% of all Hawaiian green sea turtle nesting sites, recommendations from the Marine Mammal Commission and the public, requested additional closures at Pearl and Hermes and Kure Atolls due to the importance of these areas as breeding grounds for the monk seals. An assessment of commercial fishing activity revealed that 3 vessels or less have been fishing this area since early 2000 and that there have been no reported landings from these islands since that time. While recreational trolling activity was occurring until recently at Kure Atoll, originating from the charter fishing operations at Midway, this activity has been shut down for the past 6 months. The Division therefore concluded that no impacts to fishing would occur from closures of these waters at this time.

The Division further assessed the fishing activity in both the Mau Zone and Ho‘omalau Zone to determine the effects of closures. In the Mau Zone, commercial bottomfishing does occur in depths less than 20 fathoms, especially around Nihoa and Necker Islands. However, the fishing at Necker mainly occurs outside of state waters. To ensure access to important fishing grounds at Nihoa, closures are only proposed from 0-10 fathoms. In the Ho‘omalau Zone, most bottomfishing activity occurs in depths of water 40 fathoms or greater, which are well outside of State boundaries. Therefore closures of all lagoon/atoll waters to depths of 20 fathoms does not appear to have a significant impact on the fishery.

Currently, less than 12 commercial bottomfishing vessels enter the waters of the Northwestern Hawaiian Islands. Keeping with the federal policy, the level of allowed entry for extraction will remain at its present level. Thus, DAR will permit entry for fisheries use in the area only for those vessels currently using it. Other activities permitted for entry into the area, such as native Hawaiian use, scientific purpose, or non-extractive visits, will be conditioned to ensure de minimus impact on the resources in the area.

RECOMMENDATION:

“That the Board approve the holding of public hearings for the adoption to HAR, Chapter 13-60.5, Northwestern Hawaiian Islands Marine Refuge.”

Respectfully submitted,

WILLIAM S. DEVICK, Administrator
Division of Aquatic Resources

APPROVED FOR SUBMITTAL:

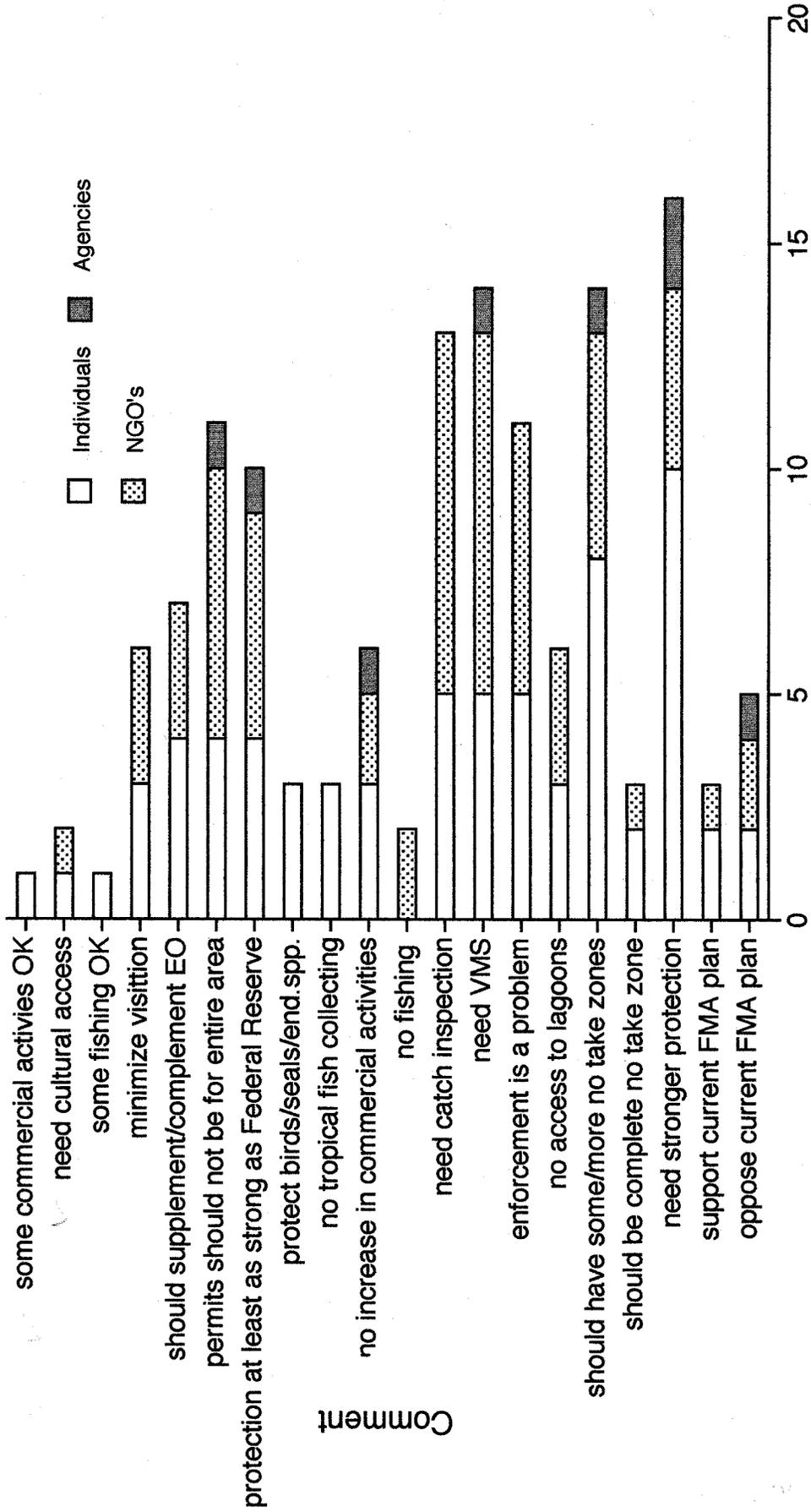
GILBERT S. COLOMA-AGARAN, Chairperson

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Attached: Chapter 13-60.5 **(8/10/02)**
Summary of FMA Oral Testimony
Summary Chart of FMA Written Testimony

NWHI FMA Written Testimony
(not including 143 form letters)



Number of letters expressing concern