

HAWAII¹

State Authority for Marine Protection

Summary of State Authorities

At the state level, Hawai'i has few mandates that require marine protection, but a variety of statutes that grant state agencies power to protect marine areas and species. First and foremost, the Department of Land and Natural Resources has multiple authorities to develop, manage, and enforce marine protection in Hawai'i, including marine life conservation districts, the Kaho'olawe Island Reserve, fisheries reserves and restricted areas designation, and longline fishing prohibitions. Additional DLNR authority links to local protected area management (see below). In the terrestrial environment, including coastal areas, DLNR Division of Forestry and Wildlife is authorized to develop and implement a natural area reserve system, which provides some marine protection.

	Marine Life Conservation Districts (MLCDs)	Kaho'olawe Island Reserve	Hawai'i Marine Laboratory Refuge	Natural Area Reserve System (NARS)	Fisheries Reserves & Restricted Areas	Long-Line Fishing Prohibition
Legal requirement	Allows designation of MLCDs and limits take of marine life	Statute and rule establishing Kaho'olawe Island Reserve	Protects reef around Coconut Is in Kaneohe Bay, Oahu	Allows reserves to protect & preserve unique resources	Allows restrictions for fisheries management	Prohibits long-line fishing within State waters
Citation²	HRS Chapter 190 (first MLCDs, 1967 ³)	HRS § 6K-1 – 10 (1993), HAR Chapter 13-261	HRS §188-36 (at least since 1981) ⁴ protected in 1953	HRS §§ 195-1 – 12 (1970) HAR 13-209	HRS § 188-53 (at least since 1981) ⁵	HRS § 189-2.5 (1991)
Designation authority	Department of Land and Natural Resources (DLNR)	By statute and rules	By statute	DLNR by rules	DLNR by rules	By statute
Management & enforcement authority	DLNR	Kaho'olawe Island Reserve Commission	University of Hawaii & DLNR	DLNR	DLNR	State in conjunction with the NMFS, Pacific Islands Regional Office
Jurisdiction & boundaries	All state waters	Island and submerged lands and	Reefs and bay waters surrounding	No specific boundaries identified in	Authority extends to all marine waters	All state waters

¹ This state chapter is part of a 23-state assessment of state and local authority for marine protection. It should be read in conjunction with the Executive Summary, Introduction and Methodology Chapters in order to fully understand the scope and approach. Other chapters are available at www.eli-ocean.org/mpa.

² The citation date provided is the earliest date of enactment and does not reflect subsequent amendments unless otherwise noted. The enactment date is meant to inform the reader of how long the protection authority has existed.

³ Hawaii Division of Aquatic resources, Hawai'i Marine Life Conservation District, at <http://hawaii.gov/dlnr/dar/mlcd.html>.

⁴ Unclear whether protected area was established when the statute was first passed in 1953 or it came later. The most recent amendment was 1981.

⁵ Unclear whether protected area authority granted in the original statute in 1953 or in subsequent amendments.

	Marine Life Conservation Districts (MLCDs)	Kaho`olawe Island Reserve	Hawai`i Marine Laboratory Refuge	Natural Area Reserve System (NARS)	Fisheries Reserves & Restricted Areas	Long-Line Fishing Prohibition
		waters out to two miles from shore	Moku-o-loe island	the statute		
Prohibited uses	“may” prohibit activities that disturb, degrade, or alter the marine environment, among others	All commercial uses are explicitly prohibited	Taking of aquatic life	DLNR has authority to develop rules and Reserve Commission tasked with establishing policies and criteria	DLNR has authority to develop rules related to use	Long-line fishing
Permitted uses	DLNR may prohibit uses except by permit	Native Hawaiian customary and traditional uses; and fishing activities “that are consistent with the purposes of this chapter”	University affiliates are exempt from the take prohibition and potential useby permit	By permit	May use certain fishing gears, fish during certain times, and by permit	None specified

Hawai`i’s state marine waters extend “from the upper reaches of the wash of the waves on shore seaward to the limit of the State’s police power and management authority.”⁶

Marine Life Conservation Districts (MLCDs)

Generally, Conservation District lands are administered at the state level by the Board of Land and Natural Resources (BLNR), a seven-member board under the auspices of the DLNR. One exception to this is the Special Management Areas (SMAs), which are administered by the counties (see below).

DLNR has broad authority to establish Marine Life Conservation Districts, “and may, if it deems necessary, declare *all* waters within any county a conservation district” (emphasis added).⁷ The statute does not specifically prohibit activities. Instead, it requires DLNR to adopt rules governing take of marine species and anchoring and mooring; further, it grants DLNR authority to restrict the take of any marine life and to regulate boating, anchoring and mooring.⁸ Rules can establish open and closed seasons, limit all take or take of a subset of species, and prescribe and limit fishing methods. DLNR can prohibit activities in the absence of a permit and may revoke the permit for infractions.

Several MLCDs have been designated, including the following: Hanauma Bay, Pupukea, and Waikiki in Oahu; Keakakekua Bay, Lapakahi, Waialea Bay, the Old Kona Airport, and Waiopae Tidepools in Hawai`i (the Big Island); and Molokini Shoal, Honolu-Mokuleia Bay, and Manele-Hulopoe in Maui.

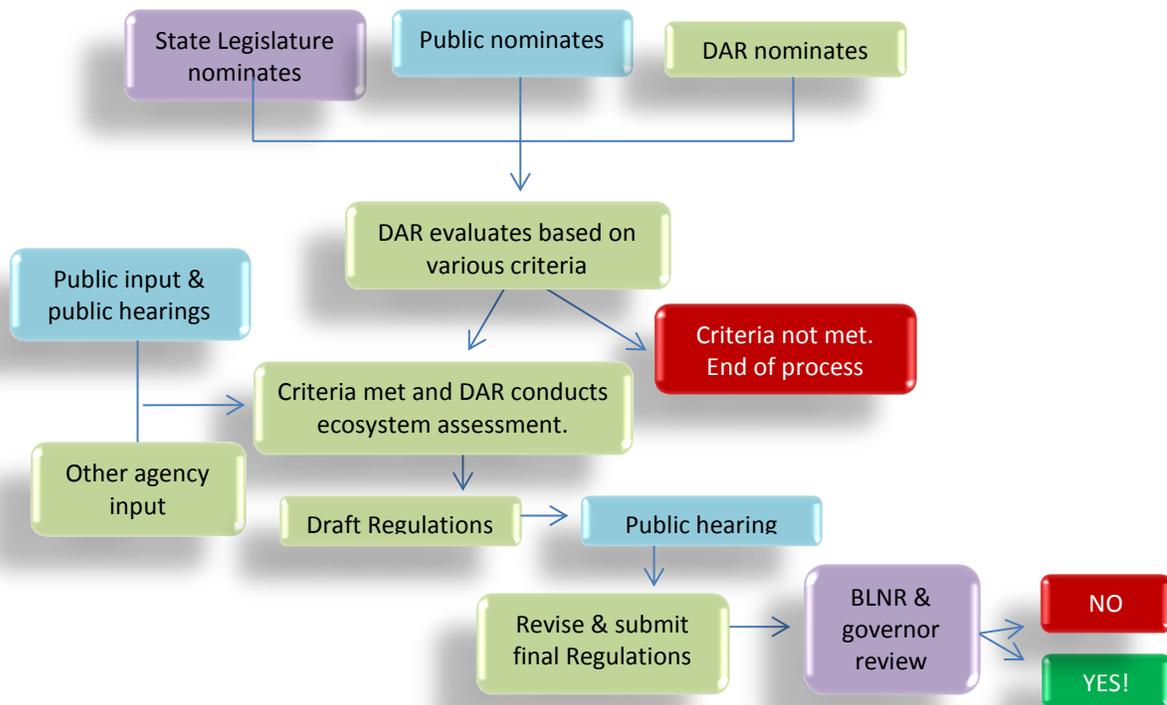
⁶ H.R.S. § 190-1.5 (1990)

⁷ H.R.S. § 190-2 (1961)

⁸ H.R.S. §§190-3, -4.5

The process for establishing an MLCD is not specified by the statute but has been spelled out by the DLNR Division of Aquatic Resources (DAR) (Figure 1).⁹ In brief, the State Legislature, the public, or DAR may recommend MLCD status. Once a site is recommended, DAR evaluates the MLCD based on criteria that include “public accessibility, marine life and future potential values, safety from a public usage standpoint, compatibility with adjoining area usage, and minimal environmental or ecological changes from the undisturbed natural state.”¹⁰ Areas must have clearly defined boundaries for purposes of compliance and enforcement, and be of a suitable size to restore fish populations but not so vast as to unfairly deny fishermen access to resources. If these criteria are met, DAR conducts an ecosystem assessment and receives input from the public and agencies, including public meetings. Regulations are drafted, a public hearing is held, and final approval is sought from the Board of Natural Resources and the governor.

Figure 1. Process to Achieve MLCD



Kaho`olawe Island Reserve

Created by statute in 1993, the Kaho`olawe Island Reserve includes the entire island plus the surrounding seabed and water column out to two miles from the shoreline.¹¹ This Reserve is protected in perpetuity for the purpose of preservation of Native Hawaiian customs, tradition, and subsistence; preservation and protection of the environment and historical resources; restoration; and education. Commercial uses are prohibited. However, the statute does authorize DLNR to develop fisheries regulations that are consistent with the law. It is managed by DLNR and the Kaho`olawe Island Reserve

⁹ Hawaii Division of Aquatic resources, Hawai`i Marine Life Conservation District, at <http://hawaii.gov/dlnr/dar/mlcd.html>.

¹⁰ NOAA, Hawaii: Highlighted MMAs: Marine Life Conservation Districts, at http://marineprotectedareas.noaa.gov/helpful_resources/states/hawaii_pr.html

¹¹ HRS §§ 6K-1 – 10 (1993)

Commission, which includes seven representatives from county government, Native Hawaiian organizations, and others.

While the statute is inherently limited in that it focuses on the protection of a single place without room for expansion, there may be opportunities to support management of the Reserve, including permissible uses of the reserve, through participation on the Kaho`olawe Island Reserve Commission. The Commission is tasked with establishing policies related to permissible uses, among other things.

Hawai`i Marine Laboratory Refuge

The Hawai`i Marine Laboratory Refuge is a small scientific reserve surrounding the University of Hawai`i marine station on Oahu.¹² It includes the waters and reefs surrounding the marine station from the high-water mark to twenty-five feet beyond the outer edge of the reef. The statute designating the reserve prohibits all take of marine life except by affiliates of the University and subject to DLNR permit. The refuge will remain in existence “only as long as the regents of the University of Hawai`i maintain” the laboratory.

Natural Area Reserve System

The DLNR Division of Forestry and Wildlife (DOFAW) manages Hawai`i’s Natural Area Reserve System (NARS). NARS were established to protect and preserve Hawai`i’s unique natural resources “both for the enjoyment of future generations, and to provide base lines against which changes which are made in the environments of Hawai`i can be measured.”¹³ The statute identifies marine plants and animals as part of the unique natural resources Hawai`i contains, and calls for setting aside “additional areas of land and shoreline suitable for preservation.” It is unclear from the statute how far any one reserve might extend into the marine environment.

There are nineteen reserves that protect more than 109,000 acres. The NARS with ocean and coastal environments include: Manuka and Pu`u O `Umi on the Big Island; `Ahihi-Kina`u on Maui; Ka`ena Point on O`ahu; and Hono O Na Pali on Kaua`i.

According to NARS regulations, it is illegal to remove, injure, or kill plant or animal life except game in a reserve; operate motorized vehicles except as otherwise permitted; or to engage in any commercial activity without a special-use permit.¹⁴ In some instances fishing is prohibited.¹⁵

DLNR has authority to expand the natural area reserve system by designating state-owned lands (subject to governor approval) or acquiring new lands through gift, grant or purchase including conservation easements, and by eminent domain.¹⁶ The Natural Area Reserves System Commission has the powers and duties to establish criteria for determining areas suitable for the reserves system, to conduct studies, make recommendations to the governor and DLNR, establish policies and criteria related to reserve management, and advise the governor and DLNR on issues related to the reserve system.¹⁷

¹² HRS §188-36. It is unclear when the reserve was established but the most recent amendments were in 1981.

¹³ HRS § 195-1

¹⁴ 13 Hawaii Administrative Rules §13-209-4

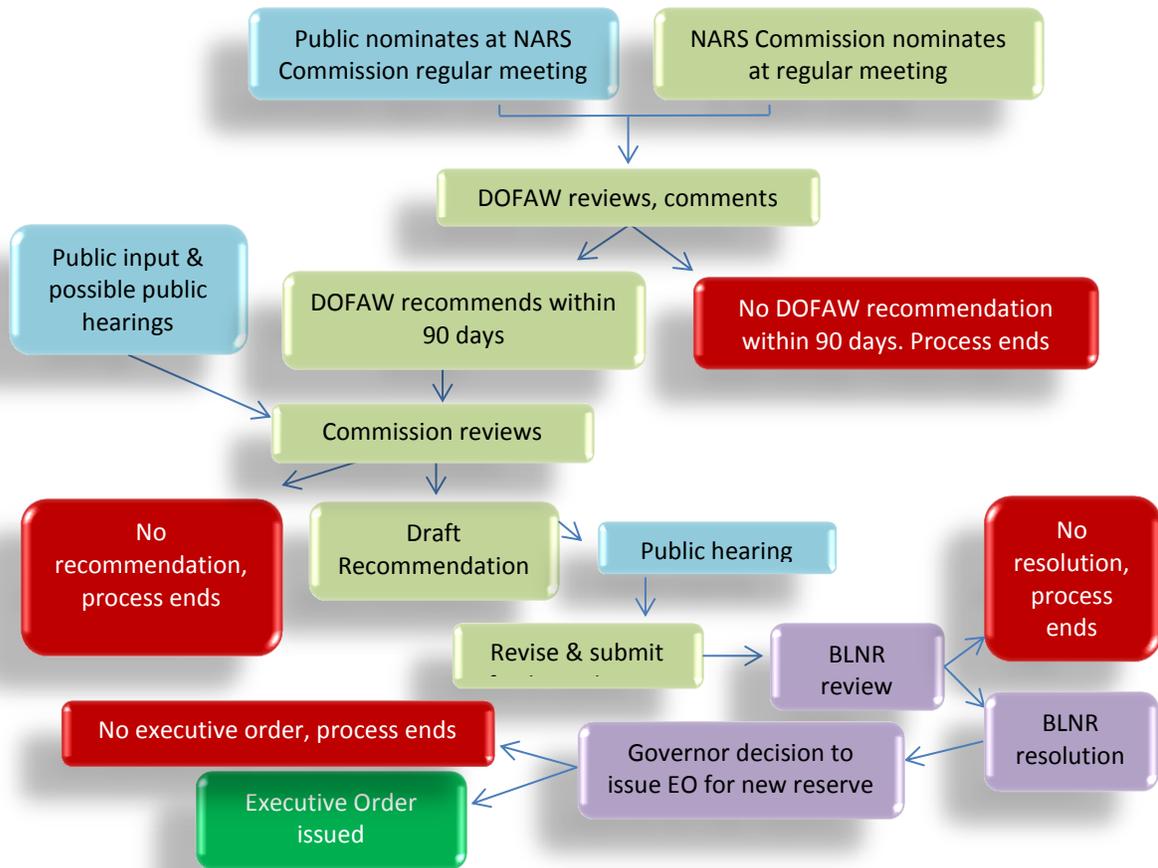
¹⁵ §13-209-4(14).

¹⁶ HRS § 195-4

¹⁷ HRS § 195-7

Figure 2 shows the process for NARS designation. The process allows for public nomination of protected areas and public engagement throughout the process. However, the process can be halted at four different decision points—first when DOFAW reviews a nomination, then when the NARS Commission reviews the nomination combined with DOFAW recommendations, then when the Board of Land and Natural Resources reviews the recommendation, and finally when the governor determines whether or not to issue an executive order.

Figure 2. Process to Achieve Natural Area Reserves¹⁸



Fisheries Reserves and Protected Areas

DLNR has authority to establish fishery reserves and restricted areas, including the broad authority to “establish, maintain, manage, and operate freshwater or marine fishing reserves, refuges, and public fishing areas.”¹⁹ This provision has been used to establish fishery management areas in state waters. Examples of protected areas include the Waikiki-Diamond Head Shoreline Fisheries Management Area (FMA) that is closed to fishing in odd-numbered years. When it is open to fishing in even-numbered years, a variety of restrictions applying, including, for example no spear-fishing from 6 pm to 6 am.²⁰

¹⁸ Figure developed based on ten steps identified by DLNR. DLNR, *Process for NARS Designation*, at <http://hawaii.gov/dlnr/dofaw/nars/process-for-nars-designation-1>.

¹⁹ HRS §188-53

²⁰ For a map of protected areas, see <http://hawaii.gov/dlnr/dar/images/MPAmapl2.jpg>

Hawai`i also has passed a variety of statutory provisions that protect specific areas from certain fishing activities, including, for example, the following protected areas on O`ahu:

- Heeia Kea Wharf—waters surrounding the wharf are protected with limits on take and method of take.²¹
- Waialua Bay (Haleiwa Harbor) waters are protected with limits on take and method of take.²²
- Honolulu Harbor prohibits take of fish by draw, drag or seine net but allows some bait fishing.²³
- Ewa Limu Management Area prohibition on harvest of limu from the shore to 150 feet seaward without a permit.²⁴

Other Authority: Longline Fishing Prohibition

According to HRS §189-2.5, longline fishing is prohibited in all of Hawai`i’s marine waters. The prohibition also incorporates the rules of the National Marine Fisheries Service, which regulates federal fisheries in the waters surrounding Hawai`i. This example is one of several provisions that create protection for certain species in Hawai`i’s marine environment.

Evaluation of State Authorities²⁵

FACTORS	Marine Life Conservation Districts	Kaho`olawe Island Reserve	Marine Laboratory Refuge	Natural Area Reserve System	Fisheries Reserves & Restricted Areas
Legal Regime	★★★★ Regulatory	★★★★ Regulatory	★★★★ Regulatory	★★★★ Regulatory	★★★★ Regulatory
Ocean Jurisdiction	★★★★ All marine waters	★★★★ Subset of marine waters	★★★★ Subset of marine waters	★ Beach, tidal	★★★★ All state waters
Durability	★★ Indeterminate	★★★★ In perpetuity	★★ As long as lab exists	★★ Indeterminate	★★ Indeterminate
Consistency	★★★★ Authorizes year-round protection	★★★★ Mandates year-round protection	★★★★ Mandates year-round protection	★★★★ Authorizes year-round protection	★★★★ Authorizes year-round protection
Habitat	★★★★ Habitat protection goal	★★★★ Habitat protection goal	★★★★ Habitat protection goal	★★★★ Habitat protection goal	★★ Byproduct is habitat protection
Sector	★★★★ Authorizes multi-sector protection	★★★★ Mandates multi-sector protection	★★★★ Mandates multi-sector protection	★★★★ Authorizes multi-sector protection	★ Authorizes single-sector protection
Enforcement	★★★★ Specifies authority to revoke permits for infractions	★★★★ Grants DLNR authority to enforce chapter & arrest offenders or issue citations	No MPA-specific enforcement	★★★★ Grants DLNR authority to enforce chapter & arrest offenders or issue citations	★★★★ Specifies authority to revoke permits for infractions
Extent (Scope)	★★★★ Multi-site, potential	★ Single-site, no expansion	★ Single-site, no expansion	★★★★ Multi-site, potential	★★★★ Multi-site, potential

²¹ HRS §188-36

²² HRS §188-35

²³ HRS §188-34

²⁴ HRS §188-22.8

²⁵ For an explanation of the evaluation matrix and criteria, please see the Introduction and Methodology Chapters.

FACTORS	Marine Life Conservation Districts	Kaho`olawe Island Reserve	Marine Laboratory Refuge	Natural Area Reserve System	Fisheries Reserves & Restricted Areas
	expansion			expansion	expansion
Process for designation or expansion	★★★★★ Petition for development or expansion of protected area	★★ No MPA-specific public process	★★ No MPA-specific public process	★★★★★ Petition for development or expansion of protected area	★★ No MPA-specific public process

Overall, the broadest legal protection mechanisms come from the Marine Life Conservation District and Natural Area Reserve System statutes, and of those two the MLCD authority is specifically designed for marine protection exclusively.

While the Kaho`olawe Island Reserve and Hawai`i Marine Laboratory Refuge provisions have strong protection authorities, these statutes are single-site authorities with no mechanism for expansion. While extremely valuable for marine protection, such authorities provided limited opportunities for advocates to expand a system of marine protection. In contrast, while the protection may not be as explicit, the MLCD and NARS provisions have processes that enable citizen petition for expansion of the system.

Local Authority for Marine Protection

Summary of Local Authority

Hawai`i counties and certain localities have some marine protection authority, which can be divided into three legal frameworks. First, the State of Hawai`i authorizes establishment of subsistence fishing areas that support local Native Hawaiian culture, tradition, and subsistence. Second, the state has created a specific legal framework for West Hawai`i that establishes something of a co-management system between the state and the aquarium-fish and dive community on the Big Island. Third, county jurisdiction includes archipelagic waters and neighboring islets, though it is unclear how this authority is applied. Fourth, counties have the authority to designate shoreline environment as special management areas and to establish heightened permitting requirements in those areas.

	Subsistence Fishing Areas	West Hawai`i Fishery Management Area	Miloli`i Subsistence Fishing Area	Ha`ena Subsistence Fishing Area	Special Management Areas (SMAs)
Legal requirement	Statutory authority to designate subsistence fishing areas; areas established by rule	Statutory designation of area and mandate to develop plan; areas established by rule	Statutory designation of area (under statute in Column 1)	Statutory designation of area (under statute in Column 1)	Statutory mandate to designate SMA and follow statutory guidelines for management
Citation	HRS § 188-22.6 (1994)	HRS §188F-2 – 4 (1998)	HRS § 188-22.7 (2005)	HRS § 188-22.9 (2006)	HRS § 205A-21 – (1979)

Designation authority	DLNR	DLNR	By statute	By statute	County
Management and enforcement authority	DLNR	DLNR	DLNR	DLNR	County
Jurisdiction & boundaries	Established by rules	“west coast of Hawaii Island, from Ka Lae, Kau ... to Upolu Point, North Kohala,” excluding the commercial harbor	Established by rules	Specified in statute including the shoreline of the Ha`ena district and extending one mile from shore	“land extending inland from shoreline...,” of which the boundaries are determined by county
Prohibited uses	Established by rules	Aquarium fishing (in 35% of area); no fishing in reserve areas; some areas must prohibit gill nets	Established by rules	Establishment of no-harvest zones within fishing area. Potential heightened regulation of some commercial activities	No specific prohibitions (permitting guidelines); No development in SMA without a permit
Permitted uses	Purpose is to protect Native Hawaiian subsistence fishing practices	None specified	Purpose is to protect Native Hawaiian subsistence fishing practices	Purpose is to protect Native Hawaiian subsistence fishing practices	None specified

Subsistence Fishing Areas

DLNR has authority to designate community-based subsistence fishing areas for Native Hawaiian subsistence, culture, and religion.²⁶ Only two subsistence fishing areas have been designated to date, with both being authorized by a separate statute (see next). It is unclear from the legal language of the statute what kind of heightened protection may be developed under this management tool.

To initiate the designation process, the law calls upon interested organizations or groups to submit proposals to DLNR for consideration.²⁷ Proposals must include information about the organization, a description of the proposed location and boundaries, justification for designation, and a management plan. Beyond the proposal submission requirements, the pathway to achieve a subsistence fishing area is not spelled out in the statute.

West Hawai`i Regional Fishery Management Area

Under Hawai`i Revised Statutes §188F, DLNR was tasked with establishing the West Hawai`i Regional Fishery Management Area on the west coast of the Big Island. The statute required that at least thirty percent of the area be designated as “fish replenishment areas” that prohibit aquarium fish collection. However, other types of fishing are permitted in the replenishment areas. To this end, the statute calls for a subset of these areas to be designated as “fish reserves” where no fishing of reef fish is allowed.²⁸

²⁶ HRS § 188-22.6

²⁷ HRS § 188-22.6(b).

²⁸ HRS § 188F-4(3) (1998).

While no process for expansion or adaptation is specified in the statute, it lists as one purpose of the area designation to “[p]rovide for substantive involvement of the community in resource management decisions for this area through facilitated dialogues with community residents and resource users.”²⁹ In practice, the West Hawai‘i Fishery Council is one community group that works with DLNR to cooperatively manage these resources.

Miloli‘i Subsistence Fishing Area

HRS § 188-22.7 designates the Miloli‘i fisheries management area as a subsistence fishing area in accordance with HRS § 188-22.6. As such, it calls upon DLNR to adopt management strategies that ensure the long-term sustainability of marine populations and encourage scientific study of subsistence fishing management. No other provisions provide additional detail about what is actually protected or how management is achieved. Hawaii Administrative Rules would be needed to provide those details.

Ha`ena Subsistence Fishing Area

The Ha`ena Subsistence Fishing Area provision identifies the jurisdictional boundaries of the area and calls for the following activities to be regulated: commercial activities, commercial fishing, aquarium fishing, gill-net fishing, spear-fishing on SCUBA, and any other activity deemed appropriate.³⁰ As with the Miloli‘i Subsistence Fishing Area, DLNR is to consult with the inhabitants of the region and other interested parties to establish rules related to regulated activities, customary and traditional fishing practices, a management plan including permitted activities, evaluation and monitoring, harvest limits, creation of no-harvest zones, and a process for expansion of the fishing areas to include other ahupua`a.³¹

Land Use Planning & Special Management Areas

Hawai‘i Revised Statute § 46-4 grants Hawai‘i counties the power to zone lands within their jurisdiction. Zoning must be accomplished in the context of a long-range, comprehensive general plan. Each General Plan addresses in different ways erosion control, polluted runoff, and other issues directly related to marine ecosystem health in areas not designated Conservation District lands.

The State of Hawai‘i is divided into four counties based on the major populated islands, including Oahu, Maui, Hawai‘i (the Big Island), and Kauai. Under HRS § 4-1, counties are further subdivided into districts. For example, the County of Hawai‘i has nine districts. Districts are defined to include archipelagic waters and smaller adjacent islands.³² ELI’s research identified one case that speaks to a county and district’s jurisdictional limits in the ocean. In one case, the district, and therefore city, had jurisdiction to enforce violations of a local ordinance in shallow waters close to an Oahu beach where a defendant failed to control a dangerous dog that attacked people in shallow water.³³

Hawai‘i grants zoning power to counties, including authority to create ordinances related to “areas bordering natural watercourses, channels, and streams,” “areas in which particular uses may be subjected to special restrictions,” and “[o]ther regulations the boards or city council find necessary and

²⁹ HRS § 188F-3 (1998)

³⁰ HRS § 188-22.9 (2006)

³¹ An ahupua`a is traditional land use system, wherein the Hawaiians managed watersheds and resources from the top of the mountain to the sea. See e.g., Dieter Mueller-Dombois, *The Hawaiian Ahupua`a Land Use System: Its Biological Resource Zones and the Challenge for Silviculture Restoration*, 3 BULLETIN IN CULTURAL & ENVIRONMENTAL STUDIES 23 (2007).

³² Hawai‘i Revised Statute § 4-3.

³³ 120 H. 486 (App.), 210 P.3d 9

proper to permit and encourage the orderly development of land resources within their jurisdictions,” among other things.³⁴ There is no specific ocean zoning power mentioned in this provision.

One land-use designation of particular significance to Hawai`i’s marine ecosystem is “special management areas” (SMAs), which are specifically designed to protect coastal areas within Conservation District lands. This legislation requires the counties to institute SMA permitting processes that regulate developments along the coast in ways that minimizes adverse environmental and ecological impacts and ensures consistency with the State’s CZM policies and requirements and that County’s General Plan.³⁵ Through their SMA permitting processes, the counties assess and regulate development proposals in compliance with coastal zone management objectives and SMA guidelines set forth by the state in the coastal zone management law.

The statute also lists specific impacts that are to be minimized by the county authority implementing the permitting process, such as filling of wetlands or developments that would adversely affect water quality. As the SMAs are independently implemented in each county, the boundaries of the areas vary from one hundred yards to several miles inland from the shoreline.³⁶

³⁴ Hawai`i Revised Statute § 46-4(a).

³⁵ HRS § 205A-22 (2007).

³⁶ HAW. CZM PROGRAM, COASTAL ZONE MGMT, A PARTICIPANT’S GUIDE TO THE SPECIAL MANAGEMENT AREA (SMA) PERMIT PROCESS IN THE STATE OF HAWAII (2006).

Evaluation of Local Authorities

FACTORS	Subsistence Fishing Areas	West Hawai'i Fishery Management Area	Miloli'i Subsistence Fishing Area	Ha`ena Subsistence Fishing Area	Special Management Areas (SMAs)
Legal Regime	★★★★ Regulatory	★★★★★ Regulatory	★★★★★ Regulatory	★★★★★ Regulatory	★★★★ Planning/Regulatory
Ocean Jurisdiction	★★★★ Subset of marine waters	★★★★ Subset of marine waters	★★★★★ Subset of marine waters	★★★★★ Subset of marine waters	★ Beach, tidal
Durability	★★ Indeterminate	★★ Indeterminate	★★ Indeterminate	★★★★★ Requires process for expansion	★★ Indeterminate
Consistency	★★ Indeterminate	★★★★★ Mandates year-round protection	★★ Indeterminate	★★★★★ Mandates year-round protection	★★ Indeterminate
Habitat	★★ Target = culture, tradition, subsistence—byproduct is habitat protection	★★★★★ Target = protection habitat & species	★★ Target = culture, tradition, subsistence—byproduct is habitat protection	★★ Target = culture, tradition, subsistence—byproduct is habitat protection	★★★★★ Target = protection of coastal zone
Sector	Managed	★★ Mandate single-sector	Managed	★★ Mandate single-sector	★★★★★ Mandate multi-sector
Enforcement	★ No MPA-specific enforcement	★ No MPA-specific enforcement	★ No MPA-specific enforcement	★ No MPA-specific enforcement	★ No MPA-specific enforcement
Extent (scope)	★★★★ Multi-site with expansion possible	★ Single MPA, no expansion mechanism	★ Single MPA, no expansion mechanism	★★★★ Single site, expansion possible	★★★★★ Multi-site with expansion possible
Process for expansion	★★★★ Petition for development or expansion of protected area	Petition or internal review	Petition or internal review	★★★★ Rules must include process for expansion	No MPA-specific public process