

Marine Reserve Initiatives in Hawaii 1999-2007



Legislative History of Marine Protected Areas, right-to-fish fight

A PFC White Paper

The Pacific Fisheries Coalition (PFC), with support from the PEW Charitable Trusts, the Harold K. L. Castle Foundation, and the Marisla Foundation represents a unique collaboration between conservationists and fishermen who find common ground in their desire to promote the conservation and responsible use of living marine resources in Hawai`i and the Central and Western Pacific.

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We are running out of fish, at least wild-caught fish. Such headlines, and the need for "sustainable" fishing, continue to show up in the media. But is "sustainable" fishing even possible? Thirty years ago fisheries managers were taught that "surplus" production could be safely harvested and that all they needed to do was determine what the surplus was. Now we are coming to the realization that surplus production is probably a myth. Food chains and ecosystems evolved to utilize any "surplus". If a significant amount of biomass is taken out of an ecosystem and it is not replenished, the system changes, and so does the abundance of fish and their prey species, which depend on that ecosystem.

There is new evidence that fishing by coastal communities began altering marine ecosystems thousands of years ago. Why? Because in evolutionary terms humans are not a component of marine ecosystems. Humanoids evolved in terrestrial ecosystems and although omnivores, fed most often low on the food chain, eating seeds, fruit, insects, and other herbivores. Birds and mammals that are part of marine ecosystems recycle the biomass they consume and on occasion humans have also done so. A good example is traditional Hawaiian fishponds whose stewards fed the herbivores taro and yams and provided opai habitat in the ponds as kaukau for the omnivores.

Of course native Hawaiians also fished in the sea, but the absence of monofilament nets, SCUBA, lights, and fishfinders meant that there were still natural refuges where large fecund females could hide. Native Hawaiians also used the ocean as their refrigerator. That is no longer the case, and if we are going to continue to take wild fish from the sea we are going to have to limit what we take, put an equivalent amount of biomass back, and establish marine reserves as insurance for the future.

Prior to 1999 the Hawaii Legislature managed state fisheries by statute. It was a poor way to manage since fisheries management is a 12-month job, the legislature is in session only a few months of the year and politics tended to dictate minimum sizes and seasons. Minimum sizes tended to reflect the size of a plate, not the size of first reproduction, and every year the amount of fish harvested from state waters continued to decrease..

The Department of Land & Natural Resources (DLNR) through its Division of Aquatic Resources (DAR) is mandated by statute to manage and administer state aquatic life and resources (HRS 187A-2(1); establish, manage, and regulate public fishing areas, artificial reefs, fish aggregating devices, marine life conservation districts, shoreline fishery management areas, refuges, and other areas (HRS 187A-2(3); and gather and compile information and statistics concerning aquatic resources (HRS 187A-2(5). However, prior to 1999 it lacked statutory authority to enact many of the

rules needed to carry out those mandates. In addition DAR's budget was so inadequate (48th in the nation) that it had turned over management of state waters in the Northwestern Hawaiian Islands (NWHI) to the Western Pacific Regional Fishery Management Council (WESPAC). All this changed in 1999.

In 1999 two House bills (HB 34, HB 1181) and one Senate bill (SB1091) were introduced that would allow the DAR to adopt the administrative rules needed to insure that minimum sizes, bag limits, seasons, and regulation of fishing gear would focus on resource restoration. These bills and similar bills introduced in the past were opposed by some fishermen who preferred not to be regulated and who had discovered that management measures proposed by the Legislature through the bill-making process could usually be blocked by phone call campaigns targeting key committee chairs. SB1091 did pass and became Act 85, Session Laws of Hawaii 1999. In 2002 the Legislature passed a bill (HB 2536) that lifted the sunset clause in Act 85 and it became permanent.

The DLNR administrative rule process, while not perfect, allows for much more public input than does the legislative process. Hawaii's Administrative Procedures Act mandates that DAR shall give at least 30 days notice for a public hearing and notice must be published statewide in whatever form can most appropriately distribute the notice (HRS 91-3(a)(1)); affords all interested persons the opportunity to submit data, views or arguments, orally or in writing and requires the agency to fully consider all submissions as well as providing a statement of the reasons for its decision (HRS 91-3(a)(2)); subjects any rule to the approval of the governor (HRS 91-3(c)); allows the validity of the adoption of any rule on the ground of non compliance with statutory procedural requirements to be challenged up to three years from the date of adoption (HRS 91-3(e)); allows any interested person to petition the agency to request the adoption, amendment, or repeal of any rule and requires the agency to respond in writing within 30 days stating its reasons for denial or its intent to initiate rule-making proceedings (HRS 91-6); and permits any interested person to

obtain a judicial declaration as to the validity of an agency rule-making action in circuit court (HRS 91-7).

Utilizing the rule-making process DAR has increased minimum sizes to more nearly approximate size-at-first-reproduction, protected spawning seasons of certain species, set aside some fish replenishment areas, and restricted destructive fishing gear such as set net gillnets. In 2000 DLNR also began the process of taking back control of state waters in the NWHI. However the anti regulatory group has not given up trying to get the Legislature back into the fisheries management business. Conversely community groups have not given up opposing this effort and supporting legislation that would allow more community-based management and more protection for large, reproductively-valuable female fish through the creation of permanently-protected fish replenishment areas.

In 2002 the Coral Reef Protection Act (HB 2831) was introduced in the Legislature that would have established a network of pu`uhonua (refuges). It mandated protection for 20-25% of essential fish habitat based on the recommendations of the American Association for the Advancement of Science made in February 2001. Dr. Alan Friedlander testified that despite the fact that no-take marine refuges and areas under community-based management have proven to be successful fisheries management strategies, less than 1% of the coastal areas in Hawaii are managed in this way. Dr. Charles Birkeland, citing data from the Coral Reef Assessment and Monitoring Program at the University of Hawaii, testified that the number, size, overall weight and reproductive output of fishes is greater in no-take reserves in Hawaii compared to other areas around the state that are open to fishing. Linda Paul, Executive Director for Aquatics for the Hawaii Audubon Society, testified that Hawaii's marine resources need the same tools, the same protections that Hawaii's terrestrial resources have been given through the Natural Areas Reserves Systems (NARS). The bill passed through the House and over to the Senate before being stopped by a committee chair responding to pressure from the anti regulatory group. A House Concurrent Resolution (HCR 52) requesting DLNR to identify areas

that should be designated marine life conservation districts or fishery management areas due to overfishing and habitat degradation did pass and Chair Ezra Kanoho noted in the committee report: "Your committee further finds that although there are a variety of fish refuges, it should significantly be expanded to allow fish populations to recover."

During the Summer of 2002 the House convened a group of stakeholders and asked them to draft a bill that all of them could support. Fishermen were invited to participate but early on stopped coming to meetings. The group's draft bill, the Hawaii Marine Reserve Network Act (HB1407, SB 1497), was introduced in 2003. The bill provided for a statewide marine reserve network encompassing 20% of the State's coastal waters by 2010. It also mandated that local communities would determine where to position reserves and that each island would have its own individual fishery management area, to be overseen by an advisory committee of representatives of each stakeholder group and each community affected. Even though the bill granted more power to fishermen to make their own decisions about their own local fisheries, this bill was also defeated by the anti-regulatory group who spread the rumor that the whole shoreline was going to be closed to fishing.

In 2004 HB 2056 was introduced that provided for a framework for community-based marine management. The bill authorized DLNR to designate community-based marine co-management areas that would allow traditional and customary practices, essential scientific monitoring and research, and ecologically sustainable activities. DLNR was directed to encourage substantive involvement of communities in resource management decisions through the creation of stakeholder advisory councils and to prepare and adopt community-based management plans. The bill passed out of the subject matter committee, but the Judiciary Committee chair failed to set it for a hearing after being blitzed with phone calls from fishermen who had not even read the bill complaining that the bill's backers were trying to shut down all fishing in Hawaii.

In 2005 three house bills were introduced: HB 131, the Hawaii Marine Managed Areas System Act; HB 170, the community-based marine co-management bill from 2004; and HB 399/ SB 78, the Hawaii Marine Reserves Network Act, the stakeholder-produced bill from 2003. HB 131 set up a phased community-based planning process for establishing marine managed areas, incorporating elements of the bills from 2003 and 2004, and set up a pilot project on Kauai to test the process. It made it through two committees this time before a deluge of phone calls from misinformed fishermen convinced the chair of the Finance Committee not to set it for a hearing.

In 2006 HB 2881, an Hawaiianized version of the 2004 New Jersey Freedom to Fish Act showed up. According to the chair of the Water, Land Use & Ocean Resources Committee it came from WESPAC. For years WESPAC has been convening Fishers Forums held in conjunction with their meetings where free buffet dinners are served and door prizes are provided. Fishermen attending these events have been encouraged by WESPAC to oppose state and federal efforts to create and implement marine protected areas (MPAs). HB 2881 would have prevented DLNR from prohibiting or limiting any areas open to public fishing until a "peer-reviewed, scientific analysis clearly demonstrates a correlation between fishing and a specific conservation problem and that less severe conservation measures, ... will not adequately provide for conservation and management of the affected stocks of targeted fish." Had such a bill been in effect in September 2005, it would have prevented Governor Lingle from establishing the State's NWHI Marine Refuge. The bill did not make it out of committee, although its backers tried unsuccessfully to get its language inserted in the text of another bill a month later.

In 2007 the right-to-fish bill showed up again in HB 1848, a product of WESPAC's "puwalu" meetings. HB 1848 would have prevented de facto the State from managing its aquatic resources by creating huge and expensive scientific data requirements for fishery managers to satisfy before they could prohibit or limit fishing in any way in state waters. It would also

have created a "fishery policy task force" dominated by specifically-named Oahu harvester groups. Also introduced was HB 1578, which would have severely restricted the adoption and implementation of the state's new lay gillet regulations, which went into effect in 2007. HB 1578 did not pass out of the House. Ultimately HB 1848 was amended by the Senate to fund community-based marine management initiatives and create a community-based marine resource management advisory committee to advise the state on near-shore resource management and fisheries rules. Different versions of the bill were passed by the House and Senate and it died in conference committee.

In 2000, Executive Order 13158 on Marine Protected Areas directed the National Oceanic and Atmospheric Administration and the Department of the Interior to develop a framework for a national system of marine protected areas. Both the U.S. Commission on Ocean Policy and the American Association for the Advancement of Science have determined that marine protected areas are the best approach for addressing ecosystem goals. In essence they are insurance for the future. They have been proven effective in restoring many depleted stocks by permanently protecting large fecund female fish and they are relatively easy to enforce compared to other fishery management methods. They are also important for other purposes not directly related to fishing such as biodiversity and habitat conservation. Given WESPACs promotion of its Archipelagic Ecosystem Management Plans, and the pro marine protected areas policy of the federal government, it is odd that WESPAC, a federally-funded advisory body, continues to campaign against the establishment of marine protected areas in state waters.