HAWAII ADMINISTRATIVE RULES

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUBTITLE 12

KAHO'OLAWE ISLAND RESERVE COMMISSION

CHAPTER 261

KAHO'OLAWE ISLAND RESERVE

CHAPTER 261 KAHO'OLAWE ISLAND RESERVE

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Historical Note: Act 340, SLH 1993, established the Kaho'olawe island reserve, by adding chapter 6K to the Hawaii Revise Statutes. The legislature found that the island of Kaho'olawe is of significant cultural and historical importance to the native people of Hawaii. Chapter 6K, HRS further provides for the transfer of the island reserve to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii. Commercial uses are strictly prohibited. The reserve is to be used solely and exclusively for the preservation and practice of all rights customarily and traditionally exercised by native Hawaiians for cultural, spiritual, and subsistence purposes; preservation and protection of its archaeological, historical, and environmental resources; rehabilitation, revegetation, habitat restoration, and preservation; education; and fishing that is consistent with the purpose of the law and which takes into consideration the health and safety of the general public. The United States and its allies used the island and surrounding waters as a military target from 1941 to 1990. In recognition of the substantial amount of unexploded ordnance and hazardous materials present on the island and in the adjacent waters, institutional controls are required because of the imminent threat to public health and safety which will continue to exist until the Kaho'olawe island reserve has been cleared of unexploded ordnance and hazardous waste.

Subchapter 1 General Provisions

§13-261-1 Purpose and applicability. (a) The purpose of these rules is to manage, preserve, restore, and protect the natural and cultural resources of the reserve; to regulate activities within the reserve; and to protect public health and safety.

(b) Except as otherwise noted in these rules, these rules shall apply to all persons entering the reserve. [Eff JUL 06 2002] (Auth: HRS §§6K-1, 6K-3, 6K-4, 6K-6, 6K-7, 6K-8, 6K-8.5) (Imp: HRS §§ 6K-3, 6K-4, 6K-7, 199-7)

§13-261-2 Definitions. As used in this chapter, unless the context otherwise requires:

"Aquatic life" means any species or subspecies of mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod, invertebrate, coral, or other animal that inhabits the freshwater or marine environment and includes any part, product, egg, or offspring thereof, or freshwater or marine plants, or algae, including seeds, roots, products, and any parts thereof.

"Chairperson" means the chairperson of the Kaho'olawe Island Reserve Commission.

"Commercial activity" means any activity carried on for a profit, fee or for the exchange of goods and services including every kind of commercial enterprise, recreational activities offered for a fee, and taking or removing any aquatic life, mineral or vegetation for the purpose of sale or barter.

"Commission" means the Kaho'olawe island reserve commission.

"Department" means the department of land and natural resources.

"Executive Director" means the executive director of the Kaho'olawe island reserve commission.

"Fishing" or "to fish" means catching, taking, harvesting, or attempting to catch, take, or harvest, or to hold or confine any aquatic life. The gathering by hand or the use of a pole, line, hook, net, trap, spear, or other gear which is designed to catch, take, or harvest aquatic life, by any person who is in the water, or in a vessel on the water, or on or about the shore where aquatic life can be caught, taken, or harvested, shall be considered to be fishing.

"Kapu" is a restriction or restrictions applied to activities in the reserve, or to enter into specific areas or zones of the reserve, in keeping with native Hawaiian natural resources management practices.

"Mile" means a distance of 6,076 feet equivalent to a nautical mile.

"Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party in any agency proceeding.

"Person" means, as appropriate, individuals, partnerships, corporations, associations, or public or private organizations of any character.

"Petitioner" means the person or agency on whose behalf the petition or application is made.

"Pollutant" means any element, substance, compound, or mixture, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause illness, death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

"Public records" have the same meaning as those "government records" as is defined in section 92F, HRS, which are required to be disclosed under said chapter.

"Reserve" means the Kaho'olawe island reserve as described at section §13-261-3 of this chapter.

"Subsistence" means the use of renewable resources for direct personal consumption while staying on Kaho'olawe and not for sale.

"Take" means to fish or hunt for, catch, kill, harvest, gather, capture, pursue, harass, harm or cause to harass or harm, or collect or hold in one's possession any wildlife or aquatic life.

"Traditional and customary rights and practices" means those rights and practices that are consistent with the Hawaii State Constitution, Hawaii Revised Statutes, and Hawaii case law.

"Trolling" means fishing by dragging artificial surface lures or live bait on the surface behind a vessel that is under way at sufficient speed to produce a wake.

"Vessel" means all description of watercraft used or capable of being used as a means of transportation on or in the water.

"Wildlife" means any non-domesticated, non-human animal, whether reared in captivity or not and includes any part product, egg, or offspring thereof, except aquatic life as defined in this section.

[Eff JUL 06 2002] (Auth: HRS §§6K-1, 6K-2, 6K-3, 6K-5, 6K-6) (Imp: §§6K-3, 6K-4, 6K-7, 199-7)

§13-261-3 Boundary of the Reserve. (a) The reserve means the entire island of Kaho'olawe and those waters and submerged lands seaward of the shoreline of Kaho'olawe island to a distance of approximately two miles as shown on Exhibit "1", dated March 28, 2002, which is located at the end of this subchapter and made part of this chapter. The boundary of the reserve is described as follows: beginning at the initial point 20°38.05'N, 156°33.40'W; then by straight line to the point 20°36.95'N, 156°31.55'W; then by straight line to the point 20°33.55'N, 156°30.30'W; then by straight line to the point 20°31.60'N, 156°29.85'W; then by straight line to the point 20°29.10'N, 156°31.50'W; then by straight line to the point 20°28.75'N, 156°37.15'W; then by straight line to the point 20°28.20'N, 156°41.10'W; then by straight line to the point 20°30.60'N, 156°43.80'W; then by straight line to the point 20°32.05'N, 156°43.95'W; then by straight line to the point 20°34.90'N, 156°41.80'W; then by straight line to the point 20°35.80'N, 156°39.60'W; and then by straight line to the point 20°38.05'N, 156°35.40'W, then to the initial point 20°38.05'N, 156°33.40'W.

(b) The waters and submerged lands of the reserve are divided into Zone A and Zone B. Zone A encompasses the waters and submerged lands of the reserve between the shoreline and a point where the depth of the water is equal to 30 fathoms in depth within the boundary of the reserve. Zone B encompasses the waters of the reserve that are deeper than 30 fathoms in depth, and the submerged lands

beneath such waters from the point where the 30 fathoms depth begins and proceeding out to the boundary of the reserve. [Eff JUL 06 2002] (Auth: HR §§6K-1, 6K-2, 6K-6, 199-1, 199-7) (Imp: §§6K-3, 6K-4, 6K-7, 199-7)

§13-261-4 Severability. These rules are declared to be severable and, if any portion of the application thereof to any person or property is held invalid for any reason, the validity of the remainder of these rules or the application of the remainder to other persons or property shall not be affected. [Eff JUL 06 2002] (Auth: HRS §6K1-10) (Imp: §§6K-3, 6K-4, 6K-7, 199-7)

§13-261-5 Penalties. (a) Any person violating the rules in this chapter shall be punished as provided in sections 6K-8 and 6K8.5, Hawaii Revised Statutes.

(b) Each day of each violation shall be deemed a separate offense.

(c) Each specimen of aquatic life, terrestrial life, mineral, archeological artifact, or other naturally occurring object removed or taken from the reserve shall be deemed a separate offense.

(d) Any costs to correct damages resulting from a violation of these rules shall be assessed and collected pursuant to sections 6K-8 and 6K-8.5, HRS. [Eff JUL 06 2002] (Auth: HRS §§6K-1, 6K-6, 6K-8, 6K-8.5, 199-1, 199-7) (Imp: §§6K-3, 6K-4, 6K-7, 199-7)

§13-261-6 reserved

§13-261-7 reserved

§13-261-8 reserved

§13-261-9 reserved

Subchapter 2 Provisions for entrance into the reserve

§13-261-10 Entrance into the reserve. No person or vessel shall enter or attempt to enter into or remain within the reserve unless such person or vessel: (a) Is specifically authorized to do so by the commission or its authorized representative as provided in section 13-261-11; or,

(b) Is specifically authorized to do so through a written agreement approved by the commission; or,

(c) Is trolling in zone B, in compliance with section 13-361-13(b)(3); or,

(d) Must enter the reserve to prevent probable loss of vessel or human life, provided that:

(1) Prior to entering the reserve and at reasonable intervals thereafter, such person shall make every reasonable effort to notify the commission staff or the United States Coast Guard that loss of vessel or human life is probable;

(2) All fishing gear shall be stowed immediately upon entering the reserve; and

(3) Such person shall vacate the reserve immediately after the threat of probable loss of vessel or human life has passed.

[Eff JUL 06 2002 (Auth: HRS §§6K-1, 6K-3, 6K-4, 6K-6, 6K-7, 199-1, 199-7) (Imp: §§6K-3, 6K-4, 6K-7, 199-7)

§13-261-11 Procedure for the authorization of entrance into and activity within the reserve. (a) Any person required by this chapter to obtain commission authorization to enter into or conduct activity within the reserve shall apply for such authorization by making written application to the commission. The forms for such application may be obtained from the commission office. The application shall include:

(1) The applicant's name, address and telephone number;

(2) The dates and locations of the requested entrance;

(3) A description of the purposes of and activities associated with the entrance;

(4) The number and names of persons who will participate in the requested entrance; and

(5) A safety and logistics plan addressing transportation to and from the island, and safety protocols while in the reserve.

(6) A signed liability release waiver acknowledging and accepting full risk and responsibility for exposure to all natural and manmade hazards within the reserve including the potential presence of and contact with unexploded ordnance and other hazardous debris.

(7) Information pertinent to the basis of the applicant's claim to exercise traditional and customary rights if such rights are claimed.

(b) Entrance into and activities within the reserve requested by applicants seeking to exercise traditional and customary rights and practices compatible with the law, shall be approved or disapproved by the commission after review and consultation with cultural practitioners.

(c) Entrance into the reserve for activities that are part of a commission-approved program, may be approved administratively by the executive director after making a determination that the proposed activities conform with the allowable activities described in §13-261-13;

(d) Entrance into the reserve for activities that are not part of a commission-approved program, or are proposed by persons other than commission staff, or are determined by the executive director to necessitate commission review, shall be submitted to the commission for authorization and approval;

(e) Prior to approving or disapproving any application, the commission shall determine whether the entrance and activities proposed by the

application conform to the allowable activities described in §13-261-13. A decision on the application shall be made at a public meeting of the commission within ninety days of receipt of a completed and accepted application.

(f) The commission or the executive director may attach conditions to the approval of an application in order to ensure that the entrance and activities associated therewith conform to the permitted activities described in §13-261-13 and chapter 6K, Hawaii Revised Statutes, and are protective or restorative of any natural or cultural resource, and are protective of public health and safety. Violation of any such condition shall be deemed a violation of this chapter, and may also result in a loss of approval for entrance into the reserve and denial of future approval to enter into and conduct activities within the reserve. [Eff JUL 06 2002] (Auth: HRS §§6K-3, 6K-4, 6K-6, 6K-7, 199-1, 199-7) (Imp: §§6K-3, 6K-4, 6K-7, 199-7)

§13-261-12 Notice of danger. All persons entering the reserve should be aware of the many hazards in the reserve, including unexploded ordnance, and rough and dangerous terrain and waters. The commission does not assume any responsibility for loss of or damage to property or for injury to or death of persons within the reserve. [Eff JUL 06 2002] (Auth: HRS §6K-1, 6K-3, 6K-6, 6K-7) (Imp: §§6K-3, 6K-4, 6K-7, 199-7)

Subchapter 3 Activities within the reserve

§13-261-13 Activities within the reserve. (a) No person shall conduct any activity within the reserve unless such person is authorized to be within the reserve in accordance with section 13-261-10;

(b) No person shall conduct any activity within the reserve, unless:

(1) The commission first finds, consistent with chapter 6K, that such activity is:

(A) An activity which is for the preservation and practice of all rights customarily and traditionally exercised by native Hawaiians for cultural, spiritual, and subsistence purposes; or

(B) An activity which is for the protection, preservation or restoration of the natural of cultural resources of the reserve; or

(C) An activity which is for rehabilitation, revegetation and habitat restoration and preservation; or

(D) An activity which is educational and which relates to native Hawaiian cultural practices or to the natural or cultural resources of the reserve; or

(E) A fishing activity which is consistent with this section; or

(F) An activity which is for the clearance or removal of unexploded ordnance and environmental restoration; or,

(2) Such activity is conducted through the provisions of the Consent Decree set forth in Aluli vs. Brown (1980), so long as said Consent Decree remains in effect, and is consistent with subsection (1) above; or

(2) Such activity consists of trolling in Zone B of the reserve on two weekends per month as scheduled by the executive director and noticed by publication in the Local Notice to Mariners issued by the Commander Fourteenth Coast Guard District (OAN), provided that any vessels trolling shall first register with the commission and shall submit catch reports to the commission. The frequency, time, manner, and place of such trolling may be further regulated by the commission pursuant to section 13-261-13(c); or

(4) Such activity is a traditional and customary right or practice as approved under section 13-261-11(b); and

(5) Based upon the information provided by the applicant, such activity is deemed to be reasonably safe for the purpose proposed.

(c) The time, manner, and place of all activities within the reserve as described in this section shall be subject to the establishment of intermittent kapu in order to protect and restore the natural and cultural resources of the reserve, and to protect public safety. Violation of a kapu established under this section shall be deemed a violation of this chapter. Any such kapu shall be established by formal action of the commission at a noticed public meeting after completion of the following process:

(1) Determination of Need. In determining that a kapu is needed, the commission shall first find that restrictions are necessary as indicated by an assessment of the population status and biological health of culturally or ecologically significant species or ecosystems or by the observed or anticipated presence of a public safety hazard. Any such determination by the commission shall also include the location, activities, and species to be addressed by the kapu, and the anticipated beginning and ending dates of the kapu. A report including the findings of the determination shall be kept on file at the office of the commission and shall be available for inspection and copying by the public.

(2) Public Comment Period. After making a determination of need, by formal action at a noticed public meeting, the commission shall publish a notice of said determination in a newspaper of statewide circulation. The notice shall include the date of the next public meeting of the commission when the commission intends to

establish the kapu. The commission shall consider any public comments, received within twenty days following the published notice, before taking action to establish the kapu.

(3) Establishment of a Kapu. After twenty days following the published notice of the determination of need, and after considering comments by the public, the commission may establish a kapu by formal action at a noticed public meeting. Any such kapu shall be only for the safeguard of natural or cultural resources, or public safety. The kapu shall take effect twenty-four hours after the action of the commission and shall be available for inspection and copying by the public.

(4) Any kapu established by the commission shall be limited to the following:

(A) Equipment restrictions or regulations when such equipment is deemed by the commission to negatively or excessively impact present or future subsistence fishing or harvesting of aquatic life and populations, or culturally or ecologically significant species or ecosystems;

(B) Area closures when public access or activities within a specific portion of the reserve is deemed by the commission to create a public safety hazard, or to negatively or excessively impact present or future subsistence fishing or harvesting of aquatic life and populations, or culturally or ecologically significant species or ecosystems;

(C) Species-take restrictions when the taking of such species is deemed by the commission to negatively or

excessively impact present or future subsistence fishing or harvesting of aquatic life and populations, or culturally or ecologically significant species or ecosystems;

(D) Seasonal restrictions or regulations when seasonal reproductive, migration, or overall life cycles of culturally or ecologically significant species are deemed by the commission to be negatively or excessively impacted by over fishing, collecting, or harvesting during a specific biological season.

(5) Temporary Emergency Kapu. In the event of an immediate and urgent threat to the natural or cultural resources of the reserve, or of immediate threat of danger to human life, the commission may enact a temporary emergency kapu not to exceed sixty days. An emergency kapu shall be effected by action of the commission or its executive director. A notice of the emergency kapu shall be published in a newspaper of statewide circulation and shall include the locations, activities, and species addressed by the emergency kapu and the termination date of the kapu. Findings to support the need for the emergency kapu shall be available for inspection and copying by the public.

(d) Except for commission management operations, traditional and customary rights and practices authorized by the commission, and trolling as allowed in this chapter, any aquatic or other life, or natural or cultural object taken within the reserve, shall not be removed from the reserve. [Eff.] (Auth: HRS §6K-1, 6K-3, 6K-4, 6K-6, 6K-7, 199-1, 199-3, 199-7) JUL 06 200?

§13-261-14 <u>Prohibited activities</u>. (a) Commercial activity is prohibited in the reserve.

(b) Except as authorized by the commission or its authorized representative, activities not provided for in §13-261-13 shall be prohibited, including, but not limited to, the following activities:

(1) To take, disturb, injure, kill, alter or deface, or possess any form of plant or wildlife or aquatic life;
(2) To remove, damage, or disturb any natural feature or natural resource;
(3) To remove, damage, or disturb any historic or prehistoric objects, artifacts, or remains or parts thereof;
(4) To alter, deface, or destroy, rock, or other geological feature, or specimen; or
(5) To possess or use or discharge any firearm, bow and arrow, spear gun or any other weapon, trap, snare, poison, or any device designed to take, capture, or kill wildlife on or into the reserve;
(6) To possess any explosives or fireworks;
(7) To start or maintain a fire;
(8) To enter into any area posted with a sign warning of danger or a kapu, or a notice of restricted entry;
(9) To remove, damage, or disturb any notice, sign, marker, fence, or structure;
(10) To remove or attempt to remove, from the reserve any aquatic life or wildlife, archeological artifact, mineral, including soil, sand, pebbles, shells or other naturally-occurring object or resource;
(11) To introduce or keep any animals, including but not limited to cats, dogs, birds, mice or other domestic pet, or wild or untamed animals within the reserve;
(12) To introduce any form of plant;
(13) To have or possess any fishing gear or device, including, but not limited to, any hook-and-line, rod, reel, spear, trap, net, crowbar, or other device, or noxious chemical that may be used for the taking or

altering of any aquatic life, geological feature or specimen, the possession of which shall be considered prima facie evidence of a violation of this rule. [Eff JUL 06 2002] (Auth: HRS §§6K-1, 6K-3, 6K-4, 6K-6, 6K-7, 199-1, 199-3, 199-7) (Imp: §§6K-3, 6K-4, 6K-7, 199-7)

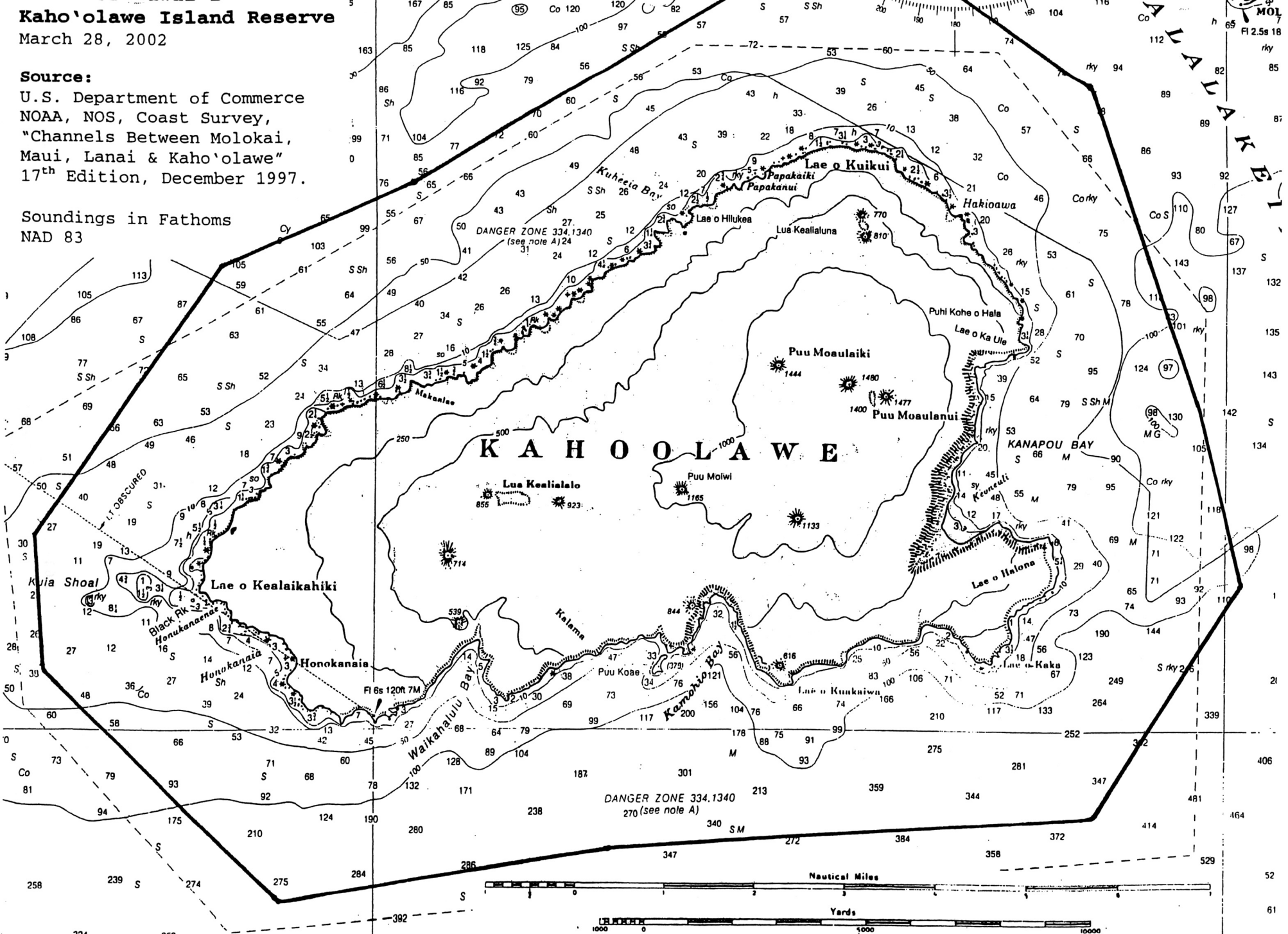
(14) To violate a kapu established under section 13-261-13(c).

§13-261-15 Littering and polluting. Except as approved by the commission, no person shall: place, throw, deposit, or discharge, or cause to be placed, thrown, deposited, or discharged in the reserve any solid, semi-solid, liquid, or gaseous material, including but not limited to litter, pollutants, sewage, petroleum products or solid waste. [Eff JUL 06 2002] (Auth: HRS §§6K-1, 6K-3, 6K-4, 6K-6, 6K-7, 199-1, 199-3, 199-7) (Imp: §§6K-3, 6K-4, 6K-7, 199-7)

Kaho'olawe Island Reserve
March 28, 2002

Source:
U.S. Department of Commerce
NOAA, NOS, Coast Survey,
"Channels Between Molokai,
Maui, Lanai & Kaho'olawe"
17th Edition, December 1997.

Soundings in Fathoms
NAD 83



DEPARTMENT OF LAND AND NATURAL RESOURCES

Chapter 13-261, Hawaii Administrative Rules, on the Summary Page dated March 28, 2002 was adopted on March 15, 2002, following a public hearing held on December 17, 2001, after public notice was given in the Maui News on November 15, 2001.

The adoption of Chapter 13-261 shall take effect 10 days after filing with the Office of the Lieutenant Governor.

Colette Y. Machado

COLETTE Y. MACHADO, Chairperson
Kaho'olawe Island Reserve Commission

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State of Hawaii

Dated: 6/25/02

JUN 26 2002

Filed

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LIEUTENANT GOVERNOR'S OFFICE