

## A BRIEF OVERVIEW OF HAWAII LAW AND POLICY ON RENEWABLE ENERGY AND AGRICULTURE

Douglas A. Codiga, Esq.  
Schlack Ito LLLC  
dcodiga@schlackito.com

The purpose of this article is to provide a brief overview of Hawaii state law and policy concerning renewable energy and agriculture, with a focus on the development of renewable energy projects on agricultural lands. A comprehensive discussion of the detailed aspects of various laws and policies governing renewable energy and agriculture is beyond the scope of this article. Instead, selected statutes are surveyed to provide an introductory overview of the important legal developments and critical issues shaping the ongoing and dynamic interaction between renewable energy and agriculture in Hawaii.

### Renewable Energy Facilities on Agricultural Lands

Key statutory provisions reflect an increasing accommodation of renewable energy facilities on agricultural lands, driven in part by Hawaii clean energy statutory mandates and policy objectives. Under section 205-2, Hawaii Revised Statutes, four major land use districts are established in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. Haw. Rev. Stat. § 205-2(a). Under section 205-2(d), agricultural districts shall include:

. . .

- (4) Wind generated energy production for public, private, and commercial use;
- (5) Biofuel production, as described in section 205-4.5(a)(16), for public, private, and commercial use;
- (6) Solar energy facilities; provided that:
  - (A) This paragraph shall apply only to land with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class B, C, D, or E; and
  - (B) Solar energy facilities placed within land with soil classified as overall productivity rating class B or C shall not occupy more than ten per cent of the acreage of the parcel, or twenty acres of land, whichever is lesser;
- (7) Bona fide agricultural services and uses that support the agricultural activities of the fee or leasehold owner of the

property and accessory to any of the above activities, regardless of whether conducted on the same premises as the agricultural activities to which they are accessory, including farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, photovoltaic, biogas, and other small-scale renewable energy systems producing energy solely for use in the agricultural activities of the fee or leasehold owner of the property, agricultural-energy facilities as defined in section 205-4.5(a)(17), vehicle and equipment storage areas, and plantation community subdivisions as defined in section 205-4.5(a)(12);

(8) Wind machines and wind farms;

. . .

(14) Geothermal resources exploration and geothermal resources development, as defined under section 182-1[.]

*Id.* (emphasis added).

Consistent with the foregoing, under section 205-4.5, “Permissible uses within the agricultural district,” subsection (a), within the agricultural district all lands with soil classified by the Land Study Bureau’s detailed land classification as overall (master) productivity rating class A or B shall be restricted to the following permitted uses:

(1) Cultivation of crops, including crops for bioenergy, flowers, vegetables, foliage, fruits, forage, and timber;

. . .

(10) Buildings and uses, including mills, storage, and processing facilities, maintenance facilities, photovoltaic, biogas, and other small-scale renewable energy systems producing energy solely for use in the agricultural activities of the fee or leasehold owner of the property, and vehicle and equipment storage areas that are normally considered directly accessory to the above-mentioned uses and are permitted under section 205-2(d);

. . .

(15) Wind energy facilities, including the appurtenances associated with the production and transmission of wind generated energy; provided that the wind energy facilities and

appurtenances are compatible with agriculture uses and cause minimal adverse impact on agricultural land;

(16) Biofuel processing facilities, including the appurtenances associated with the production and refining of biofuels that is normally considered directly accessory and secondary to the growing of the energy feedstock; provided that biofuel processing facilities and appurtenances do not adversely impact agricultural land and other agricultural uses in the vicinity.

For the purposes of this paragraph:

“Appurtenances” means operational infrastructure of the appropriate type and scale for economic commercial storage and distribution, and other similar handling of feedstock, fuels, and other products of biofuel processing facilities.

“Biofuel processing facility” means a facility that produces liquid or gaseous fuels from organic sources such as biomass crops, agricultural residues, and oil crops, including palm, canola, soybean, and waste cooking oils; grease; food wastes; and animal residues and wastes that can be used to generate energy;

(17) Agricultural-energy facilities, including appurtenances necessary for an agricultural-energy enterprise; provided that the primary activity of the agricultural-energy enterprise is agricultural activity. To be considered the primary activity of an agricultural-energy enterprise, the total acreage devoted to agricultural activity shall be not less than ninety per cent of the total acreage of the agricultural-energy enterprise. The agricultural-energy facility shall be limited to lands owned, leased, licensed, or operated by the entity conducting the agricultural activity.

As used in this paragraph:

“Agricultural activity” means any activity described in paragraphs (1) to (3) of this subsection.

“Agricultural-energy enterprise” means an enterprise that integrally incorporates an agricultural activity with an agricultural-energy facility.

“Agricultural-energy facility” means a facility that generates, stores, or distributes renewable energy as defined in section 269-

91 or renewable fuel including electrical or thermal energy or liquid or gaseous fuels from products of agricultural activities from agricultural lands located in the State.

“Appurtenances” means operational infrastructure of the appropriate type and scale for the economic commercial generation, storage, distribution, and other similar handling of energy, including equipment, feedstock, fuels, and other products of agricultural-energy facilities;

. . .

(20) Solar energy facilities that do not occupy more than ten per cent of the acreage of the parcel, or twenty acres of land, whichever is lesser; provided that this use shall not be permitted on lands with soil classified by the land study bureau’s detailed land classification as overall (master) productivity rating class A;  
or

(21) Geothermal resources exploration and geothermal resources development, as defined under section 182-1.

*Id.* (emphasis added).

### **Exemption from Subdivision Requirements for Renewable Energy Facilities on Agricultural Lands**

As a further example of the accommodation of renewable energy facilities on agricultural lands, under chapter 201N, Hawaii Revised Statutes, “Renewable Energy Siting Process,” section 201N-14, “Exemption from subdivision requirements,” subsection (a), notwithstanding any other law or ordinance to the contrary, lands within the agricultural state land use district may be leased and easements may be created and granted over such lands “for the purpose of developing and financing a renewable energy project or accessing a renewable energy project that is a permitted use in the district,” even if the leased land or easement area has not been subdivided as a separate subdivided lot or easement. *Id.*

More specifically, and consistent with the foregoing, under subsection (b) of this statutory provision the following may be performed without complying with subdivision requirements: “(1) All or a portion of a legal lot may be leased as a site for a renewable energy project or access to the project; (2) Easements or other possessory interests, whether exclusive or nonexclusive, may be granted to use all or a portion of the legal lot as a renewable energy project site or access to the project; (3) Maps, leases, licenses, grants of easements, or other instruments providing for the right to use all or a portion of a legal lot as delineated on a map for a renewable energy project site or access to the project may be recorded; and (4)

Mortgages and other security interests may be granted with respect to any lease or easement created pursuant to this section, and the holders of such mortgages or other security interests may foreclose upon the lease or easement covered and otherwise enforce the terms of the mortgage and security documents, subject to compliance with applicable laws other than subdivision requirements.” *Id.*

### **Preferential Rates for Renewable Energy on Agricultural Lands**

The Hawaii Legislature has also authorized preferential energy payment rates for the sale of electrical energy on agricultural lands to public utilities. Under section 269-27.3, Hawaii Revised Statutes, “Preferential renewable energy rates; agricultural activities,” it shall be state policy to promote “the long-term viability of agriculture by establishing mechanisms that provide for preferential rates” for the purchase of renewable energy produced “in conjunction with agricultural activities.” *Id.* The State of Hawaii Public Utilities Commission is authorized to establish “preferential rates for the purchase of renewable energy produced in conjunction with agricultural activities” upon request and proof that the renewable energy is produced in conjunction with agricultural activities. *Id.*

### **Renewable Energy in Private Agricultural Parks**

The State of Hawaii Department of Agriculture (“Department”) has established an Agricultural Park Program under which participants may generate renewable energy, subject to various restrictions. Under section 169-1, Hawaii Revised Statutes, “Private agricultural parks,” the owners of one or more contiguous parcels, including public lands, within the agricultural district may establish a private agricultural park. In registering the private agricultural park agreement with the Department, the owners shall describe the “types of agricultural activities and products being produced or to be produced by each party, including non-agricultural by-products that may include renewable sources of energy for the production of electrical energy[.]” *Id.* at § 169-1(3) (emphasis added).

The statute places certain limits on the generation and use of renewable energy. Under section 169-2, Hawaii Revised Statutes, “Activities permitted in private agricultural park,” within a private agricultural park one or more of the parties may engage in the “generation of electrical energy from fossil fuel or renewable energy sources, including the use of falling water, biomass, wind, and solar energy.” The energy may be “produced, sold, transmitted, and consumed by any other party of the private agricultural park agreement; provided that the electrical energy generated is used for agricultural purposes including but not limited to the pumping of agricultural water, cooling, air conditioning, or agricultural processing; provided further that the electrical energy generated is used within the established boundaries of the private agricultural park; and provided further that the transmission and distribution system is solely owned by a party of the private agricultural park agreement[.]”

## Agricultural Loans for Renewable Energy

Under chapter 155, Hawaii Revised Statutes, “Agricultural Loans,” section 155-4, “Powers and duties of the department,” the Department shall have certain powers with regard to loans to farmers. Section 155-1 defines “Farm sustainable project” as projects that “improve the operation’s viability but are not directly tied to farm crop production. Projects may include but are not limited to photovoltaic energy, hydroelectric power, wind power generation, methane generation, food safety, product traceability, biodiesel production, and ethanol production.” *Id.* (emphasis added).

As noted on the Department’s “Alternative Energy Loan Program” web page, in 2008 legislation was adopted to “establish a new loan program to help full-time farmers, ranchers, and aquaculturalists to reduce dependence on fossil fuel by producing renewable energy through sources such as photovoltaic, hydroelectric, wind, methane, biodiesel, and ethanol. The act also allows for loans for food safety projects to ensure a safe food supply for Hawaii’s people. The maximum loan amount is \$1,500,000 or 85 percent of the project cost, whichever is less. Funds can be used for infrastructure, equipment, land improvement and operating costs associated with the project. The program offers favorable interest rates with a maximum loan term of 40 years. *Id.*<sup>1</sup>

Related to the foregoing, in September 2013 the U.S. Department of Agriculture’s Natural Resources Conservation Service announced that the Pacific Gateway Center in Honolulu has been awarded \$180,922 for a project entitled “Sustainable Solar for Beginning Farmers with Limited Resources.” Pacific Gateway, in collaboration with Solar Wave, will design and build an affordable solar-powered refrigeration container system designed to assist disadvantaged farmers lacking effective refrigeration systems on site due to high up-front costs solar energy systems. The systems will provide lighting for predawn access and power for a drip irrigation monitoring systems. *Id.*<sup>2</sup>

## Biomass and Energy Feedstock Program

Finally, pursuant to section 141-9, Hawaii Revised Statutes, “Energy feedstock program,” the Department has established an energy feedstock program that shall monitor actions and activities “relating to the production of energy feedstock, and promote and support worthwhile energy feedstock production activities in the State[.]” *Id.* at § 141-10(a). The program is also intended to serve as an information clearinghouse for energy feedstock production activities, address “biological and technical problems involved in raising selected species with commercial energy generating potential,” seek federal funding, and develop and expand the energy feedstock production industry. *Id.*

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<sup>1</sup> Available at <http://hdoa.hawaii.gov/agl/alternative-energy-loan-program/>

<sup>2</sup> Available at <http://hdoa.hawaii.gov/blog/main/pacific-gateway-center-awarded-181000-for-solar-project/>