

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

February 26, 2019

Conference Room 436, 250 South Hotel Street, Honolulu, Hawaii 96813

- I. **CALL TO ORDER:** Chair Borge called the meeting to order at 10:03 a.m., with a quorum present.

MEMBERS PRESENT:

- Anthony Borge, Chair
- Robert Cundiff, Vice Chair
- Garth Yamanaka, Second Vice Chair
- Harris Nakamoto
- Mary Albitz
- William Lydgate
- Carl Nagasako

ABSENT MEMBERS:

- Nancy Atmospera-Walch

STAFF: DBEDT

Dori Palcovich
Jet'aime Alcos

Office of the Attorney General

Margaret Ahn

- II. **INTRODUCTION OF MR. MICHAEL McCARTNEY, DIRECTOR, DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM (DBEDT)**

Chair Borge introduced Mr. Michael McCartney, DBEDT's newly appointed director. Director McCartney stated that he looks forward to working with this Board and appreciates the work this Board does. Chair Borge, in turn, expressed appreciation for the support provided to this Board by DBEDT.

- III. **APPROVAL OF JANUARY 17, 2019 MINUTES**

Vice Chair Cundiff made a motion to accept the January 17, 2019 minutes, as amended. Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

- IV. **REGULATION REVIEW CARD**

- A. Discussion and Fact Finding on Request Received through this Board's Regulation Review Card for Proposed New Rules and Regulations for "Crafting Safe and Sustainable, Commercial Manta Ray Viewing Procedures for Manta Ray Snorkel and Dive Sites" under Department of Land and Natural Resources' (DLNR's) Division of Boating and Ocean Recreations (DOBOR)

- a. Draft Hawaii Administrative Rules, Title 13 Subtitle 11 Ocean and Coastal Areas, Part 1 Small Business Facilities and Provisions Generally Applicable to All State Navigable Water, Chapter 230 General Provisions, promulgated by DLNR

Chair Borge explained that the draft rules are for discussion and fact-finding purposes and relate to concerns raised by Mr. Keller Laros of Mana Pacific Research Foundation, via regulation review card, and from testimony received by Mr. Iko Balanga and Ms. Holly Crane, owners of Anelakai Adventures, regarding the creation of the rules for commercial manta ray viewing procedures.

Program Specialist Mr. Cliff Inn and Legal Fellow Mr. Todd Teshima from DLNR's DOBOR, updated the members on the status of the draft rules, which are currently with the Attorney General's (AG's) Office. Once DOBOR receives the rules back from the AG's, they will be reviewed by the Board of Land and Natural Resources (BLNR). After that, the rules will come before this Board and then go out for public hearings.

Chair Borge stated that one concern posed by Mr. Laros was the permitting process. Mr. Teshima responded that there are currently 51 commercial permits in the Big Island and the rules do not limit or require specific permits as they are "general" commercial permits; however, he also noted that no other permits are being issued.

Thirteen buoys are being considered for installation at each site with one buoy dedicated for recreational-use at all times. The buoys are part of C.I.P. (capital improvement projects) where authorization for their installation is required from the State Legislature. The rules were drafted with the assumption that the buoys are already installed, but they are not; therefore, they must be installed before the rules are enforced. However, because it is anticipated that the Legislature will likely be unable to provide for the C.I.P. funds this session, DLNR will move forward next year with either a funding request or use other funds currently available.

It was mentioned that House Bill 1460 authorizes funds from the Boating Special Fund to be used for any day-use mooring buoy system in the State. The Boating Special Fund is only for repair and maintenance on existing buoys without legislative authorization. DOBOR needs to reinstall existing buoys because new buoys being considered for installation must be designed a certain way due to redundancy and to meet certain standards.

Chair Borge explained that there is an overall business-need for reviewing the limitation on the permittees due to the limited natural resources and landscaping where the manta rays congregate; there is also a need to put forth the qualifications and specifications for granting permits. Mr. Inn added that there appear to be three concerns to address: 1) the timeframe to create and formalize the rules; 2) opportunity for growth; and 3) natural resources; all of which are currently being reviewed. If the Legislature provides the required funding, the estimated timeframe for completion of the rules is late-2019 to early 2020.

Ms. Albitz questioned whether attrition of the permits will occur as it relates to Section 13-256-26 (e) (1) (iii), which states that ongoing records showing continuous manta ray viewing operations is not required if an operator has initially obtained a permit. In response,

Mr. Teshima believed the reason this section was written was that once an operator qualifies for a permit, he/she would not then be required to continue to qualify; it was not intended for a permittee to “sit on a permit” as operators are still required to submit the required documentation such as gross receipts, tax information, etc., to renew his/her permit.

Mr. Iko Balanga and Ms. Holly Crane, owners of Anelakai Adventures in Kailua-Kona, Hawaii, provided testimony by supporting the “intent” of the rules for the safety of manta rays, but oppose the negative impacts on the safety and accessibility of ocean guests and on the invasiveness of the manta rays. Anelakai is the only company of the 50+ operating companies that has a self-contained, non-motorized light board.

Concern was conveyed with Anelakai’s perceived inability to continue as a small, local business providing safe Hawaiian ocean cultural experiences to the people on the company’s tours largely due to the company utilizing double-hulled, six-man 24-foot canoes. The draft rules, as written, are impractical and unsafe for guests especially those who cannot otherwise view the mantas because of physical or mental challenges thereby excluding their protected class under the American Disabilities Act and Hawaii and Federal civil Rights laws.

An additional concern is the exclusion of a safe, business model that provides a paddling canoe as a light board as well as back-up safety mechanisms for other businesses. Mr. Balanga does not agree that it would be safer to moor the company’s canoes and swim the guests away from its natural security toward a “campfire.”

Mr. Balanga and Ms. Crane requested this Board urge DOBOR to work with their company to amend and clarify the rules to allow the company to continue providing unique services to protect manta rays and guests. Also requested was that an option in the rules be created to allow DLNR discretion to require qualified, proven double-hulled paddling canoes as light boards within the viewing zone established at Kaukalaelae Point and/or within a separate zone inside Keauhou Bay. Currently, the rules as written will require Anelakai Adventures to “tie off,” and put a guide and light board in the water.

Chair Borge thanked Mr. Balanga and Ms. Crane for attending the meeting today. As DOBOR is still refining the rules, additional changes and suggestions may be made until the rule proposal is submitted to BLNR. He suggested that specific concerns discussed today be put into writing, including the commercial limitation on capacity; he will also encourage all stakeholders to continue to provide input to DOBOR.

Second Vice Chair Yamanaka made a motion to send a letter to Mr. Keller Laros of Mana Pacific Research Foundation thanking him for his recent inquiry and outlining the discussion that transpired at today’s Board meeting. Ms. Albitz seconded the motion, and the Board members unanimously agreed.

V. LEGISLATIVE MATTERS

- A. Discussion on House Bill 539, Related to the Small Business Regulatory Review Board – Appropriation for staffing, commissioner inter-island travel, and other related operating expenses associated with the Small Business Regulatory Review Board under the Department of Business, Economic Development and Tourism

This bill was heard and deferred. A subsequent House Bill 1563 HD1 shows the Board may receive “so much as may be necessary for fiscal year 2019 to 2020 and fiscal year 2020 to 2021.” Although no amount is mentioned, the Board needs \$12,000+ at a minimum for funding the website.

Mr. Nagasako confirmed that \$5,000 was allocated to the Board in fiscal 2018 and he acknowledged that there are extra funds for the Board in fiscal 2019 to fund the website.

Chair Borge noted that there is also Senate Bill 989 that proposes \$10,000 for the Board. He encouraged individual testimonies from the Board members on the various bills that relate to this Board.

- B. Discussion and Action on Senate Bill 1348 Relating to the Small Business Regulatory Review Board – Clarifies the intent of the small business regulatory review board’s powers when reviewing state and county administrative rules that impact small business by changing “ordinance” to “rules” when making recommendations to the county council or the mayor for appropriate action

Chair Borge reminded the members that Senate Bill 1348, which makes minor changes by clarifying the Board’s purview, was heard last year and did not pass. This year, Senator Karl Rhoads introduced the bill, which is moving along. Ms. Palcovich attended the bill’s hearing this morning; it passed with amendments. She will follow-up with the members as to the specific amendments that were made after the Committee Report is filed.

- C. Discussion and Action on Governor’s Message 559, Submitting for Consideration of the Gubernatorial Nomination of Mr. Jonathan Shick to the Small Business Regulatory Review Board for a term to expire June 30, 2022

Mr. Nakamoto made a motion for the Board to support the gubernatorial nomination of Mr. Jonathan Shick to the Small Business Regulatory Review Board. Second Vice Chair Yamanaka seconded the motion, and the Board members unanimously agreed.

VI. ADMINISTRATIVE MATTERS

- A. Update on the Board’s Upcoming Advocacy Activities and Programs in Accordance with the Board’s Powers under Section 201M-5, HRS:

- 1. Discussion and Action on sending Correspondence to State Department Directors to Introduce Board Members Assigned as “Discussion Leaders” when Reviewing Hawaii Administrative Rules for the State Departments

Mr. Nakamoto made a motion to submit “introduction letters” from the Board to the newly appointed and re-appointed State directors. Vice Chair Cundiff seconded the motion, and the Board members unanimously agreed.

The members welcomed the Board’s newly-hired Office Assistant, Ms. Jet’aime Alcos.

- VII. NEXT MEETING** – The next meeting is scheduled for Thursday, March 21, 2019, in Conference Room 405, 235 South Beretania Street, Leiopapa A Kamehameha Building (State Office Tower), Honolulu, Hawaii at 10:00 a.m.
- VIII. ADJOURNMENT** – Chair Borge made a motion to adjourn the meeting and Ms. Albitz seconded the motion; the meeting adjourned at 11:43 a.m.