

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING - DRAFT

May 16, 2019

Conference Room 405, 235 South Beretania Street, Leiopapa A Kamehameha Building
(State Office Tower), Honolulu, Hawaii 96813

- I. **CALL TO ORDER:** Chair Borge called the meeting to order at 10:00 a.m., with a quorum present.

MEMBERS PRESENT:

- Anthony Borge, Chair
- Robert Cundiff, Vice Chair
- Harris Nakamoto
- Mary Albitz
- William Lydgate
- James (Kimo) Lee
- Mark Ritchie

ABSENT MEMBERS:

- Garth Yamanaka
- Dr. Nancy Atmospera-Walch
- Jonathan Shick

STAFF: DBEDT
Dori Palcovich

Office of the Attorney General
Jennifer Polk-Waihee

II. APPROVAL OF APRIL 18, 2019 MINUTES

Mr. Nakamoto made a motion to accept the April 18, 2019 minutes, as amended. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

III. NEW BUSINESS – Before Public Hearing

- A. Discussion and Action on Proposed Amendments to HAR Title 11 Chapter 218, Communication Access Services for Persons who are Deaf, Hard of Hearing, and Deaf/Blind, promulgated by Department of Health (DOH)

Discussion leader Mr. Nakamoto introduced Attorney Kirby Shaw, Program and Policy Coordinator from DOH’s Disability and Communication Access Board (DCAB) who explained that he and Mr. Colin Whited, Communication Access Specialist, prepared the proposed rules which took several years to draft and include fee changes for access communication providers.

As the fee schedule has not been amended since 2011, DOH has not kept up with the current rates of sign language interpreters, who are considered the small businesses that would be affected by the rule changes. DCAB has recommended that the proposed fee schedule be removed from the rules so that the fee rates may be adjusted over time to coincide with ongoing market requirements.

During the drafting stage, about 30 committee meetings were held, consisting of Hawaii registry interpreters of the deaf, freelance interpreters, interpreter referral agencies and consumers, who provided feedback.

The new rates, which are unknown at this time, will likely reflect higher amounts. Currently, the interpreters' rates are between \$27 and \$75 per hour depending on his/her knowledge level. Once the Governor signs off on the rules the new fees will go into effect and will be immediately posted on DOH's website as a "stand-alone" reference document.

Mr. Nakamoto made a motion to move the proposed rules to public hearing. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed Amendments to HAR Title 15 Chapter 37, Solar Water Heater Variance, promulgated by Department of Business, Economic Development and Tourism (DBEDT)

Vice Chair Cundiff stated that the proposed rule amendments reflect the circuit court's final judgment involving gas-tankless instantaneous water heaters. Mr. Dean Masai, Energy Specialist at DBEDT's Energy Office, explained the history of the Mandatory Solar Water Heater Act, which was signed into law in 2008.

Effective January 1, 2010, all new homes built in Hawaii are required to have solar water heaters installed. Since then, over 7,000 variances, most from individuals, were received and processed; approximately 95% of the variances are for gas-tankless water heaters.

The existing rules for the solar water heater variances for gas-tankless water heaters require homeowners to install at least one additional gas appliance. When the law initially became effective, many environmental groups sued DBEDT for "rubber-stamping," and requested that the "intent of the law" be used, which would provide for more discretion. While the Attorney General's Office advised DBEDT to follow the law, the court's recently ruling sided with the environmental groups.

Since the court's final ruling, the Energy Office can no longer accept the gas-tankless water heater variance. In accordance with the judge's final judgment, which became effective February 5, 2019, the first change to the law is that a person applying for the solar water heater variance using the gas-tankless water heater as a variance must be the person who is ultimately paying the utility bill.

The second change to the law is that a homeowner must prove that the gas-tankless water heater will be more cost-effective than a solar water heater. As such, the variance must now include the "intent of the law." Thus, due to the new ruling, the rules as well as the variance application form must be changed. As there are four variances which a homeowner may bypass the law, the new variance application form, dated 3/20/2019, reflects these options.

A tentative date for the public hearing is scheduled for June 28, 2019. Regarding small business impact, the businesses selling gas-tankless water heaters will ultimately be impacted as the new rules will be extremely difficult to approve the gas-tankless water heater option. On the other hand, solar water heater installers and dealers may likely see a rise in business volume.

Mr. Ritchie made a motion to move the proposed rules to public hearing. Ms. Albitz seconded the motion, and the Board members unanimously agreed.

IV. OLD BUSINESS – After Public Hearing

A. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 13 Subtitle 11 Ocean Recreation and Coastal Areas, promulgated by Department of Land and Natural Resources (DLNR), as follows:

1. Part I Small Boat Harbors – Chapter 234 Fees and Charges

Ms. Meghan Statts, District Manager, and Mr. Todd Tashima, Legal Fellow, at DLNR's Division of Boating and Ocean Recreation (DOBOR), explained the history of the proposed rule changes. Beginning in October 2018, approvals were given to DOBOR to proceed with the public hearings; hearings were held in March on Oahu, Big Island, Maui, and Kauai, and informal meetings were held on Molokai and Lanai.

Most of the proposed changes will affect recreational boaters rather than commercial boaters. A change that specifically impacts small business is the mooring slip fees for commercial boats. This fee is set by appraised value and will be two times the mooring rate or 3% of the gross, whichever is greater. The commercial use permit fee will increase from \$200 to \$300 per month, and the launch ramp fee for commercial boaters will increase from \$75 to \$300 per month.

Although very few businesses provided testimony at the public hearings, one Maui business owner provided testimony regarding the delinquency language. DOBOR worked with the business owner to address the concerns and incorporated changes into the rules.

Chair Borge suggested that rates be increased on a smaller scale rather than in larger increments. He also commented that when the various rates are increased, small businesses look to see if the rates will benefit and improve upon the boat harbors' tangible value.

Ms. Statts explained that one of the biggest problems DOBOR has had in improving the boat harbors is that the "special fund" monies could not be used to replace and renovate the piers. Subsequently, the Budget and Finance Department interpreted the meaning of the law where capital improvement project funds must now be utilized with anything that has a lifespan of 25 years or more. As a result, DOBOR will be using "special funds" to replace the Maunalua Bay dock.

Testifier Mr. Roy Morioka, questioned whether small boat fishermen (i.e., “week-end warriors”) who do not fish for a living but have a commercial license are considered “commercial.” In response, Ms. Statts stated that the fees for the ramp are for only those people that have specific ramp permits, not for those who just use the ramp.

Ms. Albitz made a motion to send the proposed rules to the Governor for adoption. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

2. Part III Ocean Waters, Navigable Streams and Beaches – Chapter 253
Catamaran Registration Certificate, Other Registration, and Commercial Use
Permit Fees

Ms. Statts explained that the proposed amendments reflect raising the commercial use fee from \$200 to \$300 as well for housekeeping measures; Mr. Tashima added that the housekeeping measures include consolidating various definitions.

Ms. Albitz made a motion to send the proposed rules to the Governor for adoption. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on the Small Business Statement After Public Hearing and Proposed New Rules and Regulations for Kauai County Code, Section 18-5.3, Revocable Permits to Vend Within County Right of Ways, promulgated by Department of Parks and Recreation / County of Kauai

Chair Borge stated that the rules have been approved by the Kauai County Council and are in front of this Board for formality purposes. Discussion leader Mr. Lydgate summarized what had transpired since this Board reviewed the proposal prior to public hearing and noted that the Department of Parks and Recreation performed due diligence and did a good job with the outreach of the rules.

Mr. Nakamoto made a motion to accept the rules as presented. Mr. Lydgate seconded the motion, and the Board members unanimously agreed.

V. REGULATION REVIEW CARD

A. Discussion, Fact Finding and Action on Request Received through this Board’s “Regulation Review Card” for Discussing Whether or Not All Bottomfish Restricted Fishing Areas Should be Opened and/or Disestablished under HAR Title 13 Chapter 94 Bottomfish Management, promulgated by DLNR

Mr. Alton Miyasaka, who submitted the regulatory review card, is a retired DLNR employee and familiar with the rule-making process. He requested that this Board support a petition for the Board of Land and Natural Resources (BLNR) to place on its agenda the “disestablishing all bottomfish restricted areas” under HAR Chapter 13-94, Bottomfish Management.

Mr. Miyasaka's request also included a modification to HAR Section 13-94(8)(d) to require DLNR to go to public hearing to change the maps of the Bottomfish Restricted Fishing Areas (BRFAs). This is due to the negative impact on small businesses who are the "permitted" commercial fishers as the current process does require DLNR to go to public hearing when there is a change in the maps.

Mr. Miyasaka explained that instead of opening only 4 BRFAs, which is what DLNR has recently allowed, he is requesting that all 12 of the BRFAs are opened. By disestablishing the bottomfish restricted areas and opening up all BRFAs, it would allow for: 1) other fishery regulations to remain in effect; 2) no change of the stock assessment; 3) the continual monitoring of an annual catch; 4) the foreclosure of the fishery if the catch limit is reached; 5) overage of catch to be subtracted from the following year limit; and 6) BRFA's to be immediately reestablished if necessary.

The following summarizes the timeframe of Mr. Miyasaka's request to DLNR/BLNR: 1) BLNR met on January 11, 2019 and approved removing 4 of the 12 existing BRFA; 2) BLNR was purportedly prevented from discussing possible removal of all BRFA; and 3) BLNR chairperson purportedly intercepted Mr. Miyasaka's petition to BLNR to have a discussion to remove all BRFA. Prior to coming before this Board, the State's Ombudsman's Office was approached where Mr. Miyasaka was advised to contact DLNR's director for clarification as to why his request was rejected; the chairperson was unable to meet with him for clarification.

Testifier Mr. Roy Morioka, Board Member and Chair of Commercial, Traditional and Bottomfishing Fishing, concurred with Mr. Miyasaka's concerns and stated that nearly half of the commercial fishers in Oahu are impacted. He believed there is no need for additional closures of BRFAs and requested that this Board support the opening and disestablishing of all BRFAs for the following reasons: 1) there is already an established science-based management; 2) there are various socio-economic impacts; and 3) there are safety-at-sea reasons.

Deputy Attorney General Polk-Waihee explained that Mr. Miyasaka's request was not specifically identified under this Board's Petition statute, Section 201M-6, HRS, so it cannot be treated as such. Therefore, the request before this Board comes under the Board's general powers for review of existing administrative rules, Section 201M-5, HRS, for a rule change or legislation.

Ms. Albitz made a motion to go into executive session at 11:48 a.m.; Mr. Ritchie seconded the motion, and the Board members unanimously agreed. The motion was passed under Section 92-5(a)(4), to consult with the Board's attorney concerning the Board's powers, duties, immunities, privileges and liabilities as it relates to discussing HAR Chapter 13-94, Bottomfish Management. The executive session ended at 12:01 p.m.

Testifier Mr. Ed Watamura, Council member of WPRFMC (Western Pacific Regional Fishery Management Council) stated that WPRFMC's executive director has written letters to DLNR's Director requesting that all the BRFA's be open and disestablished on behalf of the federal government.

Vice Chair Cundiff explained that in reading the administrative rules, it gives DLNR/BLNR the ability to interpret and create restrictions in the law, and while there are restrictions to this Board's purview, the members may send a letter to DLNR suggesting that it consider doing a periodic review of the rules. Mr. Lydgate added that this Board has no authority to ask DLNR to critique or implement these rules differently.

The suggested periodic review would be specifically for Section 13-94(8)(d), Bottomfish restricted fishing areas, and for "Exhibit A: Bottomfish Restricted Fishing Areas (BRFAs) 4-8-2010." DLNR may also be approached by addressing the rule itself and how it could be modified to be less burdensome on small business. However, even though from this Board's perspective the rules lack a periodic review, DLNR cannot be forced to bring the rules to BLNR or for public review. It was added that there is nothing in the rules stating that DLNR review or remove the restriction and it was recommended that the testifiers continue their plight with the Ombudsman's Office.

Vice Chair Cundiff made a motion for this Board to send a letter to DLNR/BLNR suggesting that a periodic review be performed for HAR Section 13-94(8)(d), Bottomfish restricted fishing areas and for the conservation areas under "Exhibit A: Bottomfish Restricted Fishing Areas (BRFAs) 4-8-2010" to determine how the restrictions may be less burdensome on small business. Mr. Nakamoto seconded the motion, and the Board unanimously agreed.

VI. LEGISLATIVE MATTERS

A. Update on Senate Bill 1348 SD1 HD1 CD1, Relating to the Small Business Regulatory Review Board

Chair Borge reminded the members that this bill removed "ordinances" from the statute and made a few other minor changes. The bill, however, did not include operating funds for the Board; the funds are to cover neighbor island travel expenses as well as the website development and maintenance.

It was announced that the legislative request from DAGS' State Procurement Office for funds allocated for the creation of the State's "Small Business Office" was not approved during the legislative session and as a result this project has been put on hold.

VII. 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

a. Meetings with Board Members and State Department Directors

Mr. Nakamoto met with the Department of Human Services Director Pankaj Bahanot; the meeting went very well.

Chair Borge encouraged the members to contact the directors for a "meet and greet" to let the agencies know what the Board is about.

b. Hawaii Small Business Fair at Leeward Community College on May 4, 2019

Mr. Ritchie believed that this bi-annual small business fair went well; about 200 people attended, with 20 to 25 classes and 35 exhibitors. This Board's brochures were distributed at DBEDT's table. About half of the people attending the fair are interested in becoming a business and the other half are interested in expanding an existing business.

c. Maui Small Business Conference at Maui Arts & Cultural Center on May 8 and 9, 2019

Ms. Albitz noted that this annual small business conference had excellent speakers; DBEDT staff met a few small business owners who are very interested in becoming Board members; she will follow-up with those individuals. The turnout this year was 160 versus 200 last year.

d. Review of "Discussion Leader Assignments" for State and County Agencies' Administrative Rule Review

This agenda item was deferred until next month. Also, next month's agenda will have the elections for chair, vice chair, and second vice chair.

VIII. NEXT MEETING – The next meeting is scheduled on Thursday, June 20, 2019 in Conference Room 405, 235 South Beretania Street, Leiopapa A Kamehameha Building (State Office Tower), Honolulu, Hawaii at 10:00 a.m.

IX. ADJOURNMENT – Mr. Nakamoto made a motion to adjourn the meeting and Mr. Ritchie seconded the motion; the meeting adjourned at 12:27 p.m.