

## Small Business Regulatory Review Board

### MEETING MINUTES

July 20, 2023

### ZOOM RECORDING

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

**MEMBERS PRESENT:**

- Mary Albitz, Chair
- Robert Cundiff, Vice Chair
- Jonathan Shick, 2<sup>nd</sup> Vice Chair
- Garth Yamanaka
- James (Kimo) Lee
- Sanford Morioka
- Mark Ritchie

**ABSENT MEMBERS:**

- Dr. Nancy Atmospera-Walsh
- William Lydgate
- Tessa Gomes

**STAFF:** DBEDT

Dori Palcovich  
Jet'aime Ariola

Office of the Attorney General

Alison Kato

II. **APPROVAL OF JUNE 15, 2023 MINUTES**

Second Vice Chair Shick motioned to accept the June 15, 2023 meeting minutes, as presented. Mr. Ritchie seconded the motion and the Board unanimously agreed.

III. **OLD BUSINESS**

- A. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 11 Chapter 55, Water Pollution Control, as follows, promulgated by Department of Health (DOH)

- a. Appendix C – Discharges of Storm Water Associated with Construction Activities
- b. Appendix J – Occasional or unintentional Discharges from Recycled Water Systems
- c. Appendix L – Discharges of Circulation Water from Decorative Ponds or Tanks

Mr. Darryl Lum, Engineering Supervisor at DOH's Clean Water Branch, explained that the rule changes are for the National Pollutant Discharge Elimination System (NPDES) permits. These permits are required because the Clean Water Branch's mission is to protect the public's health for everyone who uses state waters and to protect and restore the state waters

for marine life and wildlife. The rule package includes the re-adoption of the three subject appendices - C, J, and L.

The public hearing was held on June 23, 2023 with seven people attending virtually. Prior to this, over 1,000 emails were sent announcing the day of the public hearing with the public hearing notices posted on the website and in the local newspapers.

Mr. Lum stated that the proposed rule changes would not adversely impact small businesses. Of the seven virtual attendees at the hearing, no one provided testimony; however, two sets of comments were received by the Department of Design and Construction at the City and County of Honolulu and the State Department of Transportation (SDOT); no comments were received by the general public. Mr. Lum summarized SDOT's 15 comments/suggestions relating to the subject Appendices noting that DOH agreed to amend 3 of these comments/suggestions.

Mr. Ritchie motioned to move the proposed rules to the Governor for adoption. Vice Chair Cundiff seconded the motion, and the Board members unanimously agreed.

#### **IV. NEW BUSINESS**

##### **A. Discussion and Action on Proposed New HAR Title 19 Chapter 25, Rules and Regulations Governing Shore Water Events, promulgated by Department of Parks and Recreation – City and County of Honolulu**

Upon introduction from discussion leader and Second Vice Chair Shick, Ms. Laura Thielen, Director at the City and County's Department of Parks and Recreation (DPR), explained that the reason for the proposed rules is due to the County of Honolulu's City Council passing a resolution that updates the shore water event rules for gender equity in North Shore surfing events and contests.

Simultaneously, DPR began receiving requests to limit the number of surf contests held on five beaches along the Waikiki and urban Honolulu South Shore during the summer surf season. The number of surf contests has grown to close out the breaks in these areas nearly every weekend; however, DPR does not have jurisdiction over the ocean, it only has jurisdiction over the parks. As a result, the proposed rules govern the use of the land when various events occur with general equity surfing as the one exception because there is a limited amount of water space.

Under the existing rules, most of the requirements are staying the same. However, the major changes that affect small businesses include: 1) requiring any person wanting a shore water event on the South Shore must now apply the year prior to the event; 2) changing the existing North Shore calendar so it is in-line with the surf season, and 3) establishing an after-event report for all shore water events on the North and South Shores.

Director Thielen noted that in order to improve on gender equity, DPR must increase the weight on the rankings; she then explained the existing weight system versus the proposed weight system, which is not mandatory as promoters can submit for certain events. A minor rule change involves the events calendar. Due to requests by the community to limit the

number of surf contests held on the South Shore, in addition to the number of complaints DPR received regarding the traffic when surf events are held on the North Shore, the rules establish a South Shore annual calendar while maintaining the North Shore Calendar. Director Thielen also noted that DPR formed the Shore Water Advisory Group (SWAG) in July 2021 to conduct a public process to evaluate the proposed rule changes. SWAG agreed that the South Shore was one area where there will likely be limitations on events. Thus, two events were proposed where there will be recreational surfing every other weekend.

Testifier Ms. Sabrina Brennan, who represents Surf Equity and is a co-founder of Equity in Women Surfing, and who also submitted written testimony, requested that the proposed rules be amended along with the event permit requirements to specifically prohibit gender discrimination and applying it to all professional surf competitions. She added that the point system currently in the rules is insufficient, inappropriate and not in-line with state law as it relates to civil rights.

Testifier Mr. Alan Lennard suggested the rules specifically define both internal and external diversity. Ms. Betty Depolito testified that she has been working on the “equity” issue for 20 to 30 years. However, the current draft rules do not address this issue very well; the point system is not working, as it stands, and it needs to be changed. Also, she believes that the draft rules are favoring a few people because of the grandfathering provision which is unfair and likely illegal. She would like to have the rules re-addressed before they go out to public hearing. Testifier, Ms. Carol Philips commented that women mostly make up the small businesses/entrepreneurs that compete.

Mr. Ritchie reminded the Board and attendees that while the members are interested in human and civil rights, its purview is to review small business impact of the administrative rules. For example, are there female promoters owning small businesses that are being disadvantaged or impacted. Ms. Brennan interjected that many of the subject surf organizers are small businesses.

Mr. Yamanaka commented that specific definitions seem to be lacking in the proposed rule amendments. Testifier Ms. Depolito, who thanked DPR for the hard work that has been made promulgating these rules, replied that the process needs to be reflected in the rules to change “equity” by having an equal amount of competition with men and women competing.

Executive Director Thielen explained that under the existing rules, there cannot be two big wave events because there can only be one with no overlapping. Because of the concerns over this provision, the two big wave competitions will be allowed along with overlapping, holding periods, and other equitable/diversity requirements not originally allowed. During the discussion, it was agreed that wording in section 19-25-13(k)(4) be amended to include “or.”

Testifier Ms. Carol Philips confirmed that most of the women that compete are small business owners/sole proprietors. Limiting the opportunities being offered affects their businesses and the ability to earn a living economically and causes a financial disadvantage to their businesses. Thus, gender equity is very important to these rules.

Director Thielen replied that the promulgation of the rules has been going on for about two years with much outreach and discussion of the proposal with community input. She recognizes that the proposed rules will not make 100% of the stakeholders happy, but she believes DPR has found the right balance and an improvement from the existing rules and also provides better clarity.

In regard to the small businesses operating in every event except surf quotas, there is zero impact as indicated by Director Thielen. For events outside of the North or South Shores, there is also zero impact. However, there is minor impact for the small businesses operating surf meets on the North Shore. For example: 1) it changes the calendar from the calendar year to the surf calendar, which is likely to be a positive impact; and 2) it improves the clarity as to how the applications are ranked. Additionally, a neutral change affecting small businesses is that now DPR is requiring an “after” event report; another change is that every applicant/application will be ranked.

Second Vice Chair Shick motioned to move the proposed rules to public hearing with the caveat that prudent outreach is performed with the impacted stakeholders. Mr. Yamanaka seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed Amendments to HAR Title 12 Chapter 46, Civil Rights Commission, promulgated by Department of Labor and Industrial (DLIR) Relations Civil Rights Commission

Ms. Robin Wurtzel, Chief Council at DLIR’s attached enforcement agency, Civil Rights Commission, explained that the Commission receives complaints primarily for alleged discrimination, public accommodations, and employment practices. Most of the Commission’s rules affect small business as it relates to employment issues.

A majority of the proposed changes to the rules are non-substantive in nature with the exception of two problematic definitions, employment and harassment. In regard to employment, which applies to this Board, the small businesses employing one or more persons must comply with non-discrimination statutes and rules in regard to the proposed changes of the definition of employment, which is defined by case law (*Santiago*).

The proposed definition is also in contrast to the definition of “independent contractor” and is consistent with similar rules enforced by DLIR such as in the Unemployment rules. Ms. Wurtzel believes this proposal is easier for small businesses to understand.

Vice Chair Cundiff commented that he would be interested in getting clarification from the Chamber of Commerce, due to its interaction and support of small businesses, for its reasoning to suggest a longer definition to “employment.” He is also interested in understanding what ways the Commission’s proposed definition would impact small business. Ms. Wurtzel responded that previously the Chamber of Commerce met in-person with the Commission and addressed every proposed amendment. She will keep in mind the Chamber’s concerns with the employment definition throughout rule review process.

Mr. Ritchie motioned to move the proposed rules to public hearing. Second Vice Chair Shick seconded the motion, and the Board members unanimously agreed.

C. Discussion and Action on Proposed Amendments to HAR Title 16 Chapter 39, Securities, promulgated by Department of Commerce and Consumer Affairs (DCCA)

Discussion leader Mr. Lee did not perceive the proposed rule changes to have a significant small business impact. Mr. Keola Fong, Securities Enforcement Attorney at DCCA's Commissioner of Securities of the State of Hawaii, explained that the only small businesses that will be required to comply with the rule proposal are those that are owned by or employ an individual registered or required to be registered with the Commissioner as investment adviser representatives in Hawaii.

While he believes that the rule's impact will be relatively low, any adverse effects will include an additional registration requirement, mandatory continuing education courses, and an individual's related time and costs to maintain his/her registration as an investment adviser representative in Hawaii.

While some of the courses offered by NASAA (North American Securities Administrators Association) are free, a small business' direct costs would include \$36.00 per year for annual reporting fees and the actual cost of the specific course selected by the investment adviser representative to satisfy the mandatory continuing education requirement. However, it was noted that the numerous benefits that will flow to Hawaii investors by the adoption of this newly proposed rule would significantly outweigh the time and costs associated with the additional registration requirement for investment advisor representatives.

Since NASAA implemented the proposed requirements back in 2020, ten states have adopted these practices; two are in the process, with Hawaii being the thirteenth state subject to these educational course requirements.

Several stakeholders were contacted to obtain preliminary feedback. Aside from one individual, who expressed his disagreement with the proposal but did not indicate whether he owned or worked for a small business nor did he provide any recommendations or suggestions, all of the stakeholders were in support of the proposal.

Vice Chair Cundiff motioned to move the proposed rules to public hearing. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

D. Discussion and Action on Proposed New HAR Title 13 Chapter 60.11, Kipahulu Community-Based Subsistence Fishing Area, Maui, promulgated by Department of Land and Natural Resources (DLNR)

Discussion leader and Second Vice Chair Shick stated that DLNR's proposal appears very straight-forward and has an overall minor impact. Mr. David Sakoda, Fisheries Program Manager at DLNR's Division of Aquatic Resources (DAR), explained that this is a new rule to establish a marine-managed fishing area in Kipahulu, located in eastern Maui and is about 2.6 square miles of ocean area. DAR is not quite sure what all the potential impacts would be

to small businesses but opted to bring the rule to this Board for its input as a precautional measure.

Mr. Bryan Ishida, DAR Biologist, provided the members with a presentation on the potential impacts the proposed Kipahulu community-based subsistence fishing area would have on commercial fishing. Small businesses directly impacted would be commercial fishers who currently fish within the boundaries of the proposed Kipahulu Community-Based Subsistence Fishing Area (CBSFA). The rule package includes a collection of proposed restrictions: 1) bag limits that relate to the number of fish that can be caught per day, 2) size limits, 3) restrictions on the take of akule, 4) temporal restrictions, 5) area restrictions, and 6) gear restrictions.

The most restrictive of these is the take of akule, which essentially eliminates akule fishing in that area as the restrictions on bag limits are 10 fish per day, prohibitions on bag letting which relates to gear restrictions, and the elimination of night spear fishing which will decrease commercial activity drastically. The fishing will occur from the shore to 2 nautical miles but it is difficult to determine the actual fishing activity through the reported commercial fishing data. Offshore fisheries in the area, which include pelagic and deep bottom fish species, may see little impact from the proposed CBSFA.

Mr. Ishida explained that the rules were designed to achieve the specific conservation goals of the Kipahulu community residents that provided input to DAR. As such, the rules are the result of extensive community scoping efforts with incorporated feedback from small businesses, i.e., commercial fishers, commercial tours, etc.; the final product is intended to reduce the rule's business impact while ensuring the rules' efficacy.

In response to Mr. Yamanaka's inquiry into what positive economic results would come from the proposed CBSFA, Mr. Sakoda and Mr. Ishida responded that some small businesses may benefit from protecting the resources in addition to allowing other businesses to continue to sustain. Overall, there will be better rules to sustain resources for the general good of Hawaii and general good of its residents and visitors. It will also help with populating various fishes depending on the areas involved regarding the environment and the specific circumstances.

Mr. Yamanaka added that there is a positive impact with these rules regarding the whole process where the affected communities can offer educational benefits to the younger generation and an opportunity to learn, thereby, providing future job opportunities.

Mr. Yamanaka motioned to move the proposed rules to public hearing. Second Vice Chair Shick seconded the motion, and the Board members unanimously agreed.

## **V. ADMINISTRATIVE MATTERS**

### **A. Update on the Board's Upcoming Advocacy Activities and Programs in accordance with the Board's Powers under Section 201M-5, Hawaii Revised Statutes (HRS)**

#### **1. Discussion and Action on Proposed Changes to Section 201M-5 (a) Small business regulatory review board; powers, HRS**

Vice Chair Cundiff explained that several small businesses approached this Board at the end of the legislative session requesting that the members review and provide testimony on House Bill 1090 Relating to Ocean Recreation Commercial Permits, which was purportedly causing financial impact on the business' operations.

In order to clarify the intent of the Board's authority to provide testimony on legislative bills regarding small business, and to prevent any potential conflicts with the Board's ability to provide testimony such testimony, Deputy Attorney General Kato offered two options for the members to review that would statutorily clarify the Board's legislative purview.

One option is a general comment for the Board to review legislation affecting small business. The other option has to do with requests from small businesses to provide testimony.

Mr. Ritchie motioned to have the two proposed bill options that were provided by Deputy Attorney General Kato drafted for discussion and action at the next board meeting. Vice Chair Cundiff seconded the motion, and the Board members unanimously agreed.

2. Presentations to Industry Associations

Deferred.

3. Staffs Small Business Outreach

Deferred.

4. Director Letters and Meetings with State Agencies and Counties

Deferred.

**VI. NEXT MEETING** - Thursday, August 17, 2023 at 10:00 a.m., in conference room 405 at Leiopapa A Kamehameha Building – State Office Tower – 235 S. Beretania Street, Honolulu, HI 96813.

**VII. ADJOURNMENT** – The meeting adjourned at 12:57 p.m.