

Small Business Regulatory Review Board

MEETING MINUTES

November 17, 2022

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

MEMBERS PRESENT:

- Mary Albitz, Vice Chair
- Jonathan Shick, 2nd Vice Chair
- Garth Yamanaka
- James (Kimo) Lee
- Taryn Rodighiero
- Sanford Morioka
- Tessa Gomes
- Mark Ritchie

ABSENT MEMBERS:

- Robert Cundiff, Chair
- Dr. Nancy Atmospera-Walsh
- William Lydgate

STAFF: DBEDT

Dori Palcovich
Jet'aime Ariola

Office of the Attorney General

Alison Kato

II. APPROVAL OF October 20, 2022 MINUTES

Mr. Yamanaka motioned to accept the October 20, 2022 meeting minutes, as presented. Mr. Lee seconded the motion, and the Board members unanimously agreed.

III. NEW BUSINESS – Before Public Hearing

- A. Discussion and Action on Proposed New HAR Title 13 Chapters 230 and 256, General Provisions; Ocean Recreation Management Rules and Areas, promulgated by Department of Land and Natural Resources (DLNR)

Discussion leader, Ms. Rodighiero, stated that the proposed rules are for manta ray permitting, regulations, and fees in the West Hawaii area. She introduced Administrator Mr. Edward Underwood from DLNR’s Division of Boating and Ocean Recreation (DOBOR) who explained that the amendments began in 2014 with a concurrent resolution created by the Legislature. Subsequently, DOBOR conducted eight years of outreach and have tried to address the various issues that were brought to DOBOR’s attention.

On October 27, 2022, the Board of Land and Natural Resources (BLNR) approved the proposed rules to move forward. While the rules will have a definite negative impact on small businesses, DOBOR has attempted to be fair in terms of limiting and regulating commercial permits. As such, DOBOR is working closely with House Representative David Tarnas, Chair of the Water & Land Committee, to allow for issuing commercial permits to those businesses

that have been in business the longest. Once these permits are issued, if a permit comes back to the state, it would subsequently be issued by public auction.

In response to an inquiry as to whether an environmental study was performed, Mr. Underwood responded that an assessment was done with regards to moorings. Thirteen moorings will be installed, one will be designated for recreational use and the other 12 exclusively for commercial use of various sizes. If one of the 12 commercial moorings is not being used, it can then be used for recreational. The maximum number of vessels going out will be reduced to 60.

Two shifts will be conducted throughout the night for two hours per shift with the businesses choosing where they want to go during the shifts. This was created to keep as many businesses operating as possible within a twelve-hour window. There will be no more rafting or “live” boating, and only one boat per mooring. In regard to what impact, if any, live boating may have on the manta rays, it was noted that DLNR’s Aquatic Resource Division does not have a concern with the light impacting the manta rays. Mr. Underwood noted that outrigger canoes are not separate from a vessel, even if non-motorized, as a vessel is defined as anything that can be used in the water as a means of transportation.

In regard to outreach efforts to the community, Mr. Underwood stated that throughout the eight years of promulgating the rules, 120 emails were sent to the impacted businesses with an open solicitation for comments from the community; all received comments were taken into consideration.

Mr. Yamanaka mentioned that during official public hearings, back-and-forth discussions and conversations are restricted as comments only from the public and the community are allowed. Mr. Underwood stated that after the public hearing, DLNR would then have the authority to take, or not take, any recommendations made and then finalize the rules for adoption. However, Mr. Yamanaka voiced his concern that there is still much conversation needed with the stakeholders and that going to public hearing right now would be premature; Ms. Rodighiero concurred.

In regard to Vice Chair Albitz’ s concerns about safety within the manta ray area and how DOBOR addressed these concerns, Mr. Underwood replied that the safety concerns relate to the sheer number of people in the water because there are so many. However, there have been no reports received by DOBOR regarding accidents although DOBOR would generally not receive these because accident reports go directly to the Coast Guard if one occurred to a certified vessel. He added that “carrying capacities” are very difficult to calculate for various reasons. If the bill changing the way permits are distributed passes, it will most likely not take effect until after July 1, 2023.

In addition to receiving written testimonies, the following summarizes testimony received during the meeting:

Ms. Manu Powers, co-owner with her husband of Sea Quest Hawaii, Ltd., are in opposition to what they consider to be irrelevant, unnecessary, and at times dangerous draft rules that would decimate the Island of Hawaii’s economy and beyond. The major concerns are safety, the perception of overcrowding, regulation and enforcement, and economic impact. Ms.

Powers believes that if these rules were to take effect, they would have to lay off seventy-five percent of Sea Quest's workforce.

Ms. Holly Crane and Iko Balanga, co-founders of Anelakai Adventures, a tour company based in Keauhou Bay that has the only non-powered vessels (i.e., canoes), provided this Board testimony back in 2018 in support of DLNR creating administrative rules for the safety of the manta rays. However, while they are in support of the intent of the proposed draft rules, they are opposed to the negative impacts regarding the safety and accessibility of ocean guests of all physical abilities, the invasiveness upon the manta rays, and the strong potential inability of their small, local business providing safe, respectful Hawaiian ocean cultural experiences to people of all levels of ocean knowledge and capabilities.

Ms. Joanie May and Mr. Bryan Balanga, husband and wife co-owners of JBB Enterprises, Inc. dba Hawaiian Coastline Adventures in Kahaluu-Keauhou, explained that their boating tour company, which started in 2013 and consists of one vessel only with one permit, is their sole livelihood. Their biggest concern is safety; putting down moorings will not make it safer. Mr. Balanga has been a captain for the past 25 years and although the rules include moorings, there is no consideration or discussion about the ocean "current" discussed in the rules, which regularly changes. They questioned whether only manta rays are included in the seven miles of water described in the rules or does it also include snorkelers and fishers.

Mr. Tait Heitz and Mr. Paul D'Angelo, Vice President & General Manager and Director of Operations, respectively, of Big Island Divers asked this Board to reject the proposed rules. Big Island Divers was established in 1984, has a 4,400 square foot retail store, operates four US Coast Guard inspected vessels, and is the largest dive operations on the Big Island. Manta ray scuba diving and manta ray snorkeling represent the majority of their business; depending on the season, they employ 40 to 48 employees.

The reason for asking this Board to reject this proposal is because the rules do not solve any of the alleged problems. Instead, they will have a detrimental impact on small business, the Kona community, and revenue for the state. As the rules entail an unclear understanding of safety and potential overcrowding, suggestions by Messrs. Heitz and D'Angelo included creating new manta ray zones and adding more campfires and moorings.

In regard to whether DOBOR previously heard the testimonies brought forth today, it was noted that although meetings were attended by the testifiers and testimonies were submitted, participating in an actual "rule-making process" was not extended to the stakeholders nor did back-and-forth discussions about the rules occur. Some of the businesses received notice of the meetings a day before the scheduled meetings, which is essentially too late for many of these ongoing businesses to attend or contribute.

Mr. Dane Knezek, General Manager of Aquatic Life Divers, a dive and snorkel business in Kona, is opposed to the rules as he believes a balance is needed allowing for recreational access, cultural practices, business maneuverability, and effective resource management to co-exist within a supportively governed community.

He stated that the major problems of the manta ray sites are safety, user conflict, and environmental impact. All of these problems are exacerbated by overcrowding, which is a

direct result of DLNR's own action around 2010 to open up unlimited commercial permitting. Further, approving rules that attack the ability of businesses to operate is not an ethical way to fix the problems.

Ms. Heidi Guth principal of Kai Ho'oulu, LLC, and board treasurer of Ohana Wa'a, a non-profit organization representing all of the voyaging community of Hawaii, was before this Board to stand on her written testimony. She requested that DOBOR consult Ohana Wa'a with regards to definitions of "canoe" especially as it is referenced in Hawaii and possibly Polynesia. She further requested that DOBOR table any definition changes of canoe until a more educated and culturally-informed definition can be formulated with proper consultation; Ohana Wa'a is willing to participate in continued future discussions.

Ms. Roberta Anderson, representative of Hang Loose Boat Tours in Kailua-Kona, referred to the safety issues in the rules and stated that if ongoing safety issues are a legitimate concern, it is important to keep the dialogue open between DOBOR and the business owners. With regards to changing specific times for boats to leave the dock, all the boat owners have worked very closely to stagger their time in and out so that there is no overcrowding, and it will be a safer experience for the manta rays as well as the guests. Further, reducing the number of boats would be absolutely devastating to the Big Island, and attaching to moorings would be a very unsafe course to take especially for the snorkelers.

In terms of what number might be needed to "cap" the number of tours going out, it was suggested by Ms. Anderson that because there are no safety concerns to date, perhaps any new tours can be stopped "now" in order to assess the situation until it is necessary to begin reducing the number of tours; other testifiers at the meeting concurred.

Mr. Jonathan Droggie, a licensed Coast Guard Captain, representing Hawaiian Island and Ocean Tours in Kailua-Kona, explained that safety training occurs with all the businesses testifying today. He agreed that the door should be closed "now" regarding the cap on tours. He believes that the rules are extremely over-reaching and unfair and asked that the Board reject the proposed rules as written so the stakeholders and DLNR can work together to create rules that are more in line with the business' sentiments.

Mr. Tom Young, representing both Hawaii Oceanic and Coral Reef Snorkel Adventures, stated that that this is a "high-stakes" rule proposal. There is currently an estimated \$100 million in annual revenue across the manta ray industry and these rules as written will cut that number by about fifty percent with a corresponding reduction in jobs.

From a safety perspective, manta ray tours have been running for more than twenty years, and there have been very few safety incidences in spite of a perception that manta ray tours are unsafe. There is clearly no data to support the idea that manta ray viewing zones are unsafe. Overall, the proposed rules as written will result in catastrophic consequences.

Second Vice Chair Shick pointed out that the businesses testifying today have a vested interest in making sure that the industry and the businesses remain successful. If safety, overcrowding, and destruction of manta ray habitat and the environment become a problem, it sorely affects all the businesses. Therefore, it is important that the rules govern in a positive way and that it is essential for DOBOR and the stakeholders to take time to sit down

and go through each of the points discussed today to ensure that the final draft rules are the best for everyone.

Mr. Underwood reiterated that these rules have been worked on for the past eight years and every draft was provided to the stakeholders for input with all updates placed on DOBOR's website. Because the rules have gone through an extensive process up to this point, he does not know how much more change to the draft rules will occur. He added that DOBOR stopped issuing manta ray permits prior to the COVID pandemic, and suggested that all the businesses attending the meeting today submit their changes to DOBOR.

In response to Mr. Ritchie's inquiry if there is another way to engage with the concerned businesses, such as a half day for input to revise the proposed rules so the final result will work for everyone, Mr. Underwood responded that DOBOR already utilized RCUH (Research Corporation of the University of Hawaii), which assisted with outreach meetings on the Island of Hawaii. The rules were amended several times over the years, were posted on the website, and were sent to the Deputy AG's office for revisions and approval.

Further, because BLNR and the Deputy Attorney General approved the rules as written, DOBOR cannot change them; however, he added that there is still a long process ahead. Mr. Ritchie expressed that he is hesitant to recommend sending the rules to public hearing because there are still several issues and concerns with the stakeholders that haven't been resolved. Thus, since this Board looks at impact on small business, it would be best to try to have DOBOR and the stakeholders on the same page before the rules go to public hearing.

Mr. Yamanaka added that this type of arrangement has worked in the past for other agencies. Although it is apparent that right from the start there was a strong disconnect, now that DOBOR and the businesses seem to be more on the same page, it should be communicated exactly what the concerns are and what changes are needed. Suggesting changes at a formal public hearing does not allow for back-and-forth discussions and sharing in dialogue. Second Vice Chair Shick reiterated that another stakeholder meeting needs to be held to discuss the "open" concerns that are on the table and for DOBOR to come back before this Board with any changes.

Mr. Yamanaka motioned to defer a final recommendation of the rule proposal due to the rules' overall financial impact upon the small businesses in order for DLNR/DOBOR and the stakeholders to meet prior to the public hearing to discuss the detrimental impacts and negative concerns addressed by the affected businesses. Second Vice Chair Shick 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 the Proposed Amendments to HAR Title 13 Chapter 256-152 Kahaluu Bay Ocean Waters, promulgated DLNR

Discussion leader, Ms. Rodighiero, asked Mr. Underwood to describe the after public hearing rules; he stated that these rules relate to DLNR limiting the number of activities at Kahaluu Bay, primarily the surf schools. Subsequently to DLNR coming before this board both before

and after public hearing, a technical error had occurred whereby the administrative rules were adopted without the map. As such, DLNR had to go back out to public hearing so that the map would be part of the rules; the proposal therefore includes the corresponding map.

Mr. Lee motioned to forward the proposal to the Governor for adoption. Mr. Yamanaka seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on the Small Business Statement After Public Hearing and the Proposed Amendments to HAR Title 13 Chapter 251, Subchapters 1, 2, 3, and 7, Commercial Activities on State Ocean Waters, Navigable Streams and Beaches promulgated by DLNR

Discussion leader, Ms. Rodighiero, stated that some of the rules are being repealed to satisfy the small business community. Mr. Underwood confirmed and explained that for years the rules mandated that, in order to engage in surfing instructions and canoe rides on Waikiki and Kaanapali Beaches, DLNR was required to service the operators.

However, it was the belief of the surfing community that DLNR should not be servicing the operators. Instead, the businesses should service their own employees and determine how long the employees need to be trained before they engage in canoe rides and surfing instructions. Therefore, it was decided that this section of the rules be repealed so that the conditions be developed by the operators/business owners, not DLNR, and placed into the operating permits.

Mr. Lee motioned to forward the proposed amendments to the Governor for adoption. Ms. Rodighiero 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

Vice Chair Albitz stated that Mr. Yamanaka's second term on this Board and Ms. Rodighiero's and Mr. Morioka's first terms are expiring June 30, 2023. Should members be interested in staying on, they must re-register with the Governor's Boards and Commissions Office; Mr. Yamanaka could potentially stay on as a holdover.

VI. NEXT MEETING - Thursday, December 8, 2022 at 10:00 a.m.

VII. ADJOURNMENT – Mr. Lee made a motion to adjourn the meeting and Mr. Yamanaka seconded the motion; the meeting adjourned at 11:46 a.m.