State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Office of the Chairperson
Honolulu, Hawaii 96813

June 13, 2008

State of Hawaii
Board of Land and Natural Resources
Honolulu, Hawaii

REQUEST FOR APPROVAL TO HOLD STATEWIDE PUBLIC HEARINGS TO AMEND HAWAII ADMINISTRATIVE RULES, CHAPTER 13-1, SUBCHAPTERS 1 to 6, TO ADOPT HAWAII ADMINISTRATIVE RULES, CHAPTER 13-1, SUBCHAPTER 7, AND TO COMPILE HAWAII ADMINISTRATIVE RULES, CHAPTER 13-1

I. ACTION REQUESTED:

The Department of Land and Natural Resources (hereinafter "Department"), Office of the Chairperson, hereby submits a request for your approval to hold statewide public hearings in order to 1) amend Hawaii Administrative Rules (hereinafter "HAR"), Chapter 13-1, Subchapters 1 to 6, relating to Rules of Practice and Procedure, 2) adopt HAR, Chapter 13-1, Subchapter 7, relating to the Civil Resource Violations System, and 3) compile of HAR, Chapter 13-1.

See Exhibit 1, HAR, Chapter 13-1, Ramseyer Draft (05/30/2008).

II. BACKGROUND, PURPOSE AND SUBJECT MATTER:

A. Amendment of HAR, Chapter 13-1, Subchapters 1 to 6

Chapter 13-1 is a set of administrative rules relating to the administration of the Department and the practice and procedure of the Board. Its current form consists of five subchapters:

- Subchapter 1, General Provisions;
- Subchapter 2, Proceedings Before the Board;
- Subchapter 3, Rulemaking Proceedings;
- Subchapter 4, Declaratory Rulings; and
- Subchapter 5, Contested Case Proceedings.

This chapter was first adopted in 1981 (Subchapters 1 to 4) and 1982 (Subchapter 5), and subsequently amended in 1982 and 1985. Since the last amendment over 23 years ago, some of the rules have become outdated and would require updating to reflect and implement procedures more appropriate to the Board's current needs and practice and conforming to the prevailing state law.

In addition to the amendment of the current rules, the new version as proposed will also create a new Subchapter 6, Post Hearing Procedures for Hearings Conducted by Hearing Officer. This new subchapter basically codifies the current Board practice as to case record, a hearing officer's recommendation, a party's exceptions or supporting brief, and oral arguments before the Board.

The following is a highlight of significant changes in the proposed Subchapters 1 to 5:

- §13-1-5.1: Clarifying the difference between the Board's adjudicatory functions and other Board meetings;
- §13-1-8.1: Relating to the election and responsibilities of a vice-chairperson of the Board;
- §13-1-9: Relating to the protection of the attorney-client and attorney work product privileges in the release of government records;
- §13-1-11.1: Allowing a presiding officer to limit testimony at public hearings and meetings;
- §13-1-11.2: Allowing the removal of persons from proceedings;
- §§13-1-13.1 and 13.2: Clarifying methods and time allowed in the service of documents;
- §13-1-18: Specifying the participation of deputy attorney(s) general in Board proceedings including contested case hearing;
- §13-1-22: Expanding the notice requirement in a rulemaking process;
- §13-1-27: Amending the rule for petition for declaratory ruling, specifying the requirements of a petition, and further specifying the conduct of hearing on a petition for declaratory ruling;
- §13-1-28: Allowing modification and waiver of any procedure in a contested case hearing with stipulation;
- §13-1-29: Redesigning the process of requesting for a contested case hearing;
- §13-1-29.1: Providing a process to determine the entitlement to a contested case hearing;
- §13-1-30: Allowing the Department to charge a fee for the conduct of certain contested case hearings;
- §13-1-31: Regarding the requirement and process of determining the status of a person as party to a contested case;

- §13-1-31.1: Disallowing intervention in hearings of violations;
- §13-1-31.2: Specifying the requirement for notice of contested case hearing;
- §13-1-32: Clarifying the definition of "presiding officer" in the conduct of a contested case hearing;
- §13-1-32.1: Relating to the conduct of contested case hearing with only one party;
- §13-1-32.2: Providing to the Department party status in an enforcement action, and requiring the supervision by a first deputy in such an action;
- §13-1-32.3: Generally disallowing discovery;
- §13-1-32.4: Relating to records of a contested case hearing;
- §13-1-35: Specifying the burden and quantum of proof of evidence in a contested case hearing; and
- §13-1-38: Providing the filing of objections, exceptions and briefs, and presentation of oral arguments, after the conduct of contested case hearing and before the rendering of final decisions and orders.

B. Adoption of HAR, Chapter 13-1, Subchapter 7, Civil Resource Violations System

Currently, the Department has two options in handling its enforcement cases – a criminal prosecution and an administrative law proceeding. For a number of reasons, many resource violations cases are not suitable for criminal prosecution. Nor is this an efficient use of staff time and state resources.

Our current administrative law practice is to bring violation cases to a Land Board hearing, in which the Board will serve as the preliminary fact finder and decision maker. If an action is taken by the Board, the alleged violator may contest the Board's decision by requesting a contest case hearing. After the hearing, the case will go back to the Board for final decision making. Such a practice may cause an undue burden on the Board if too many enforcement cases have to be litigated through it, and deter divisions from submitting enforcement cases to the Board, especially for those minor violations.

To address this problem, the Department proposes to adopt HAR, §§13-1-51 to 72, as Title 13, Chapter 13-1, Subchapter 7, Civil Resource Violations System.

The purpose of this subchapter is to establish an administrative law system to process the Department's civil enforcement cases in a just, expeditious and cost-effective manner.

In particular, this subchapter will authorize the Department to conduct the following activities in accordance with certain guidelines prescribed by the Board:

- Issue to a person a notice of civil resource violation for an alleged violation of any state law administered by the Department;

- Assess an administrative penalty for such a violation pursuant to a guiding penalty schedule to be prescribed by the Board;

- Summon that person to answer the violation notice by choosing from three options – 1) waive contest and comply, 2) waive contest and request mitigation, and 3) contest the violation notice;

- Render a final decision through a hearing officer on a mitigation request if there is no contest; and

- Summon that person to participate in a contested case hearing conducted by a hearing officer as authorized by the Board when a violation notice or any assessment therein is contested.

Procedures of a contested case conducted pursuant to this Subchapter will be governed by Subchapter 5, Contested Case Proceedings.

C. Compilation of HAR, Chapter 13-1

Since its original adoption in 1981, the existing Chapter 13-1 has undergone an additional adoption (1982) and two amendments (1982 and 1985), but has never been compiled. Thus, the rules appear disjointed and difficult to follow. Compiling the chapter with all the subsequent amendments will provide a more comprehensive and clearer set of rules and make it easier for the public to review the department's procedures.

III. LEGAL AUTHORITY:

A. Amendment of HAR, Chapter 13-1, Subchapters 1 to 6

- §91-3, HRS, relating to amendment of administrative rules; and

- §171-6, HRS, relating to the Board's rule making power.

B. Adoption of HAR, Chapter 13-1, Subchapter 7, Civil Resource Violations System

- §91-3, HRS, relating to adoption of administrative rules.

- The Civil Natural Resource Violations Act of 2004, codified as HRS, Chapter 199D, authorizes the establishment of the CRVS.

- The following statutes further authorize the Board to set, charge and collect administrative fines, and recover administrative fees and costs for civil resource

violations: HRS, §6D-11, §§6E-11 and 11.6, §171-6(12) and (15), §171-6.4, §179D-6(b)(20), §183-5, §183D-12, §184-5.5, §187A-12.5, §195D-9, §198D-12, and §200-14.5.

- HRS, §171-6(6) and (19), and other statutes, allow the Board to take other measures and non-monetary sanctions to enforce the state law administered by the Department.

- The Board may delegate certain duties to employees of the department or specially-appointed case masters under HRS, §171-6(8) and (11).

- The Kaho'olawe Island Reserve Commission may opt to use the CRVS pursuant to HRS, §6K-8.6. The Commission on Water Resource Management may opt to use the CRVS pursuant to HRS, §174C-15.5.

C. Compilation of HAR, Chapter 13-1

- HRS, §91-5, relating to compilation and publication of administrative rules; and

- HRS, §171-6, relating to the Board's rule making power.

IV. DISCUSSION:

With the proposed amendment and adoption, staff does not anticipate substantial procedural changes in any proceedings before the Board or in the routine operation of the Board. However, subsequent action by the Board will be necessary for the implementation of Subchapter 7, Civil Resource Violations System. That may include actions to

- Review and adopt an administrative sanctions schedule;

- Review and adopt forms that will be used for the purpose of this Subchapter;

- Appoint hearing officer(s) for the conduct of contested case hearings;

- Delegate final decision making power in contested case hearings when deemed appropriate by the Board; and

- Prescribe internal procedures for the review process after contested case hearings.

Staff has been working closely with the Department of the Attorney General in drafting this proposed amendment and in the redesign of the chapter. This new version as proposed represents many hours of careful review and discussion between the two departments on a complex and comprehensive updating of this chapter.

The proposed amendment has been presented to all divisions of the Department for their review and comment. Staff also held discussion meetings with the divisions, and incorporated their comments in the current draft.

The Office of Conservation and Coastal Lands has participated in the drafting of this amendment and compilation.

The Division of Conservation and Resource Enforcement (DOCARE) has participated in the drafting of Subchapter 7, the Civil Resource Violations System, and strongly supports the adoption of this Subchapter as proposed.

A hardcopy and an electronic copy of the proposed HAR, Chapter 13-1, have been sent to the Office of Hawaiian Affairs for their comments.

V. RECOMMENDATION:

"That the Board of Land and Natural Resources

1. Approve the holding of statewide public hearings on the proposed rule amendment, adoption and compilation;

2. Authorize the Department to schedule such public hearings as expeditiously as possible following the Governor's approval to conduct public hearings; and

3. Authorize the Chairperson to appoint hearing master(s) to conduct public hearings to receive written and verbal testimony concerning the proposed rule amendment, adoption and compilation."

Respectfully submitted,

BIN C. LI
Administrative Proceedings Coordinator

APPROVED FOR SUBMITTAL:

LAURA H. THIELEN
Chairperson
Board of Land and Natural Resources

EXHIBIT LIST:

- Exhibit 1: HAR, Chapter 13-1, Ramseyer Draft (05/30/2008).

Ramseyer Draft (5/30/08)

Rules Amending Title 13
Hawaii Administrative Rules
(Date)

1. Chapter 1 of Title 13, Hawaii Administrative Rules, entitled "Rules of Practice and Procedure" is amended and compiled to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUB-TITLE 1 ADMINISTRATION

CHAPTER 1

RULES OF PRACTICE AND PROCEDURE

Subchapter 1 General Provisions

§13-1-1 Purpose
§13-1-2 Definitions
§13-1-2.1 Definitions applied
§13-1-3 Office
§13-1-4 Hours
§13-1-5 Meetings
§13-1-5.1 Adjudicatory functions
§13-1-6 Quorum
§13-1-7 Authentication
§13-1-8 Chairperson
§13-1-8.1 Vice-chairperson
§13-1-9 Government records

EXHIBIT 1

Subchapter 2 Proceedings Before the Board

§13-1-10	Appearance and practice before the board
§13-1-11	Proceedings before the board
§13-1-11.1	Limiting testimony at public hearings and meetings
§13-1-11.2	Removal of persons from proceedings
§13-1-12	Filing of documents
§13-1-13	Computation of time
§13-1-13.1	Service
§13-1-13.2	Additional time after service by mail
§13-1-14	Continuances or extensions of time
§13-1-15	Amendment required or refusal of documents
§13-1-16	Retention of documents by the board
§13-1-17	Board decision
§13-1-18	Counsel for the board in contested cases
§13-1-19	Substitution of parties
§13-1-20	Consolidations

Subchapter 3 Rulemaking Procedures

§13-1-21	Initiating proceeding
§13-1-22	Notice
§13-1-23	Time and place
§13-1-24	Conduct of rulemaking hearings
§13-1-25	Emergency rulemaking
§13-1-26	Petitions for adoption, amendment, or repeal of rules

Subchapter 4 Declaratory Rulings

§13-1-27	Petitions for declaratory rulings

Subchapter 5 Contested Case Proceedings

§13-1-28	Contested case hearings

§13-1-29 Request for hearing
§13-1-29.1 Determination of entitlement to a contested case hearing
§13-1-30 Fees
§13-1-31 Parties
§13-1-32 Conduct of hearing
§13-1-32.1 Conduct of hearing with only one party
§13-1-32.2 Enforcement by department
§13-1-32.3 Discovery
§13-1-32.4 Records on file with board
§13-1-33 Procedure for witnesses
§13-1-34 Motions
§13-1-35 Evidence
§13-1-36 Prehearing conferences; exchange of exhibits; briefs
§13-1-37 Ex parte (single party) communications
§13-1-38 Decisions and orders
§13-1-39 Reconsideration
§13-1-40 (Reserved)

SUBCHAPTER 6 POST HEARING PROCEDURES FOR HEARING CONDUCTED BY HEARING OFFICER

§13-1-41 Recommendation of hearing officer
§13-1-42 Exception to the hearing officer's report and recommendations
§13-1-43 Support of hearing officer's report and recommendations
§13-1-44 Oral argument before the board
§13-1-45 Board action; exceptions
§§13-1-46 to 13-1-50 (Reserved)

Subchapter 7 Civil Resource Violations System

§13-1-51 Purpose of subchapter; statement of policy
§13-1-52 Definitions
§13-1-53 Applicability
§13-1-54 Jurisdiction
§13-1-55 Deputy director

§13-1-56 The administrator
§13-1-57 Appointment and removal of administrative hearing officers
§13-1-58 Delegation of final decision making power
§13-1-59 Representation
§13-1-60 Filing and service
§13-1-61 Issuance, service and amendment of notice of civil resource violation
§13-1-62 Notice of civil resource violation; contents
§13-1-63 Answer required; noncompliance subject to higher fine
§13-1-64 Respondent's options when answering
§13-1-65 Counter claim disallowed
§13-1-66 Default
§13-1-67 Proceedings after answer
§13-1-68 Record of contested case hearing
§13-1-69 Final decision making procedure when power delegated
§13-1-70 Administrative sanctions schedule; factors to be considered
§13-1-71 Determination of a repeat violator
§13-1-72 Enforcement and stay of a final decision

Historical Note: Chapter 1 of Title 13, Administrative Rules, is based substantially upon the Rules of Practice and Procedure before the Board of Land and Natural Resources. [Eff 7/26/62; R 6/22/81]

SUBCHAPTER 1

GENERAL PROVISIONS

§13-1-1 Purpose[.]. This chapter governs practice and procedure before the board of land and

natural resources of the State of Hawaii under chapter 91, Hawaii Revised Statutes (HRS), the public land laws of the State and such other laws as may now or [hereinafter] hereafter be administered by the board. These rules shall be construed to secure the just, speedy, and [inexpensive] cost-effective determination of every proceeding. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §91-2)

["Sec.]§13-1-2 Definitions[.]. (a) As used in this [title]chapter, unless the context requires otherwise:

"Applicant" means the applicant or petitioner who initiates a request to the board for a permit or other authorization, or for relief.

"Application" means the application or petition made to the board for a permit or other authorization, or for other relief.

"Board" means the board of land and natural resources.

"Chairperson" means the chairperson of the board of land and natural resources.

"Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.

"Department" means that department of land and natural resources.

"Government records" is defined in section 92F-3, HRS. The term shall include all rules, written statements of policy or interpretation formulated, adopted, or used by the board, all final opinions and orders, the minutes of meetings of the board and any other material required by law to be kept on file in the office of the board unless accorded confidential treatment pursuant to law.

"Party" means each person or agency named or admitted as a party[, or properly seeking and entitled as a right to be admitted as a party in any court or agency proceedings].

"Person" means as appropriate individuals,

partnerships, corporations, associations, or public or private organizations of any character other than agencies.

"Petitioner" means the person or agency on whose behalf [the] a petition or application is made.

"Presiding officer" means the person conducting the hearing which shall be the chairperson or the chairperson's designated representative.

"Proceeding" means the board's consideration of the relevant facts and applicable law[, consideration thereof,] and action [thereupon]thereon with respect to a particular subject within the board's jurisdiction, initiated by a filing or submittal or request or a board's notice or order, and shall include but not be limited to:

(1) Proceedings involving the adoption of forest reserve or watershed boundaries;

(2) Petitions for the creation of land use sub[-]zones in conservation districts;

(3) [Proceedings involving the adoption of forest, forest reserve, watershed, fish and game, water, parks, historical sits, recording and land development, use, management, disposal and acquisition rules;]Petitions or applications for the granting or declaring of any right, privilege, authority, or relief under or from any provision of law or any rule or requirement made pursuant to authority granted by law;

(4) [Petitions or applications for the granting or declaring any right, privilege, authority, or relief under or from any provision of law or of any rule or requirement made pursuant to a power granted by law;]An investigation or review instituted or requested to be instituted by the board; or

(5) [An investigation or review instituted or requested to be instituted by the board;]Proceedings involving the adoption, amendment, or repeal of any rule of the

board whether initiated by board order or notice or by petition of an interested person.

[(6) Other proceedings involving the adoption, amendment, or repeal of any rule of the board, whether initiated by board order or notice or by petition of an interested person.]

"Proposed rulemaking" includes a proposal to adopt, amend, or repeal a rule, as the case may be.

"Public hearing" means a hearing required by law in which members of the public generally may comment upon [a proposed rule or application]the subject matter of the hearing.

["Rules" means the rules of practice and procedure before the board.

"Public records" is defined in section 92-50, Hawaii Revised Statutes. The term shall include all rules, written statements of policy or interpretation formulated, adopted or used by the board, all final opinions and orders, the minutes of meetings of the board and any other material required by law to be kept on file in the office of the board unless accorded confidential treatment pursuant to statute or the rules of the board.] [Eff 6/22/81; am 9/7/82; am and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-2, 91-8, 171-6)

§13-1-2.1 Definitions applied. (a) Unless otherwise specifically stated, the terms used in the rules adopted by the board pursuant to powers granted by statute shall have the meanings given them by such statutes.

(b) A rule which defines a term without express reference defines the terms for all purposes as used both in the statute and in these rules, unless the context otherwise specifically requires.

[Eff and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-2, 91-8, 171-6)

§13-1-3 Office[.]. The principal [office] offices of the board [is] and the chairperson are at the Kalanimoku building, 1151 Punchbowl Street, Honolulu. All communications to the board shall be addressed to the board of land and natural resources, 1151 Punchbowl Street, Honolulu, Hawaii 96813, unless otherwise specifically directed. [Eff 6/22/81; am and comp] (Auth: HRS §91-2) (Imp: HRS §91-2)

§13-1-4 Hours[.]. The offices of the board and the chairperson shall be open from 7:45 a.m. to 4:30 p.m. of each day of the week except Saturday and Sundays and holidays unless otherwise provided by statute or executive order. [Eff 6/22/81; am and comp] (Auth: HRS §91-2) (Imp: HRS §§80-1, 91-2)

§13-1-5 [Sessions.]Meetings. (a) The board [meets] may meet and exercise its powers in any part of the State of Hawaii.

(b) Regular meetings of the board shall be held in Honolulu, on the second and fourth Fridays of every month; provided, however, that the board may establish another place or date for any regular meeting but shall give prior notice of the proposed changes in a newspaper of general circulation at least one week prior to the affected regular meeting.

(c) Special meetings may be convened by the chairperson of the board at any time by giving notice to each member present in the State at least five days prior to the date of the meeting; provided however that the notice shall not be required if all members present in the State agree and sign a written waiver of the notice. No final action involving disposition of public lands may be [had] done at the special meeting.

(d) All meetings of the board shall be open to the public; provided, that the board may meet, pursuant to sections 92-4 and 92-5, HRS, in executive

session, from which the public may be excluded, by a recorded voted of two-thirds of the members present. No order, ruling, contract, appointment, or decision shall be finally acted upon [at] in the executive session. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §§171-5, 92-3, 92-4)

§13-1-5.1 Adjudicatory functions. Pursuant to section 92-6, HRS, the exercise by the board of its adjudicatory functions is not a meeting within the meaning of section 92-2, HRS, and these rules. [Eff and comp] (Auth: HRS §92-6) (Imp: HRS §92-6)

§13-1-6 Quorum[.]. [Four] Unless provided otherwise by statute, four members of the board shall constitute a quorum to transact business and the concurrence of a simple majority of the members of the board shall be necessary to make any action of the board valid. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §171-5)

§13-1-7 Authentication[.]. All orders and other actions of the board shall be authenticated or signed by the chairperson or other persons authorized by the board. [Eff 6/22/81; comp] (Auth: HRS §171-6) (Imp: HRS §171-7)

§13-1-8 Chairperson[.]. (a) The chairperson shall, in addition to any other duties, have charge of the board's official records and shall be responsible for the maintenance and custody of the files and records of the board, including transcripts of testimony and exhibits, all papers and requests filed in proceedings, the minutes of all action taken by the board and all of its findings, determinations, reports, opinions, orders, rules, and approved forms.

(b) The chairperson shall also prepare for

submission by the board an annual report to the department's activities, accomplishments, and recommendations to the governor and to the legislature through the governor. [Eff 6/22/81; comp] (Auth: HRS §171-6) (Imp: HRS §§171-6, 171-7)

§13-1-8.1 Vice-chairperson. The board shall annually elect a vice-chairperson or vice-chairpersons from its members. In the absence of the chairperson, a vice-chairperson shall have the responsibilities prescribed in this chapter. [Eff and comp] (Auth: HRS §171-6) (Imp: HRS §§171-6, 171-7)

§13-1-9 [Public] Government records[.]. (a) All [public] of the board's government records shall be available for inspection in the office of the board, Honolulu, Hawaii, during established office hours unless public inspection of these records is [in violation of any state or federal] prohibited by law; provided that except where the records are open under any rule of court, the attorney general may determine which records may be withheld from public inspection when the records pertain to the preparation of the prosecution or defense of any action or proceeding to which the State is or may be a party[, or when the records do not relate to a matter in violation of law and are deemed necessary for the protection of the character or reputation of any person] or to maintain the attorney-client and attorney work product privileges.

(b) [Public] Government records printed or reproduced by the board in quantity shall be given to any person requesting the same by paying the fees established by [the board or by] law. Photocopies of [public] government records shall be made and given by the [director] chairperson to any person upon request and upon payment of the fees established by [the board or by] law. Certified copies of extracts from

[public] government records shall also be given by the [director] chairperson upon payment of the fees established by [the board or by] law.

(c) Requests for public information, for permission to inspect official records, or for copies of [public] government records shall be handled with due regard for the dispatch of other public duties. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §§91-2, 92-21, 92-51)

SUBCHAPTER 2

PROCEEDINGS BEFORE THE BOARD

§13-1-10 Appearance and practice before the board[.]. (a) A person may appear in the person's own behalf, a partner may represent the partnership, [a bona fide officer or] an officer, trustee, or authorized employee of a corporation or trust or association may represent the corporation, trust or association, and an officer or employee of an agency may represent the agency in any proceeding before the board.

(b) A person may be represented by [or with] counsel [or other duly qualified representatives] in any proceeding under these rules.

(c) A person shall not be represented in any proceeding before the board or a hearing officer except as stated in subsections (a) or (b) [of this section].

(d) When a person acting in a representative capacity appears in person or signs any document or other papers in practice before the board, the person shall show the person's authority to act in that capacity.

(e) No person who has been associated with the board as a member, officer, employee, or counsel shall be permitted at any time to appear before the board in behalf of or to [represent] present in any manner, any party in connection with any proceeding or matter

which the person handled or passed upon while associated in any capacity with the board.

(f) No person who has been associated with the board as a member, officer, employee, or counsel [thereof], shall be permitted to appear before the board in behalf of, or to represent in any manner, any person in connection with any proceeding or matter which was pending before the board at the time of the person's association with the board unless the person shall first have obtained the written consent of the board upon a verified showing that the person did not give personal consideration to the matter or proceeding which the consent is sought or gain particular knowledge of the facts thereof during the person's association with the board. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §91-2)

§13-1-11 Proceedings before the board[.]. (a) The board may on its own motion or on petition or application of any interested person or persons or [an] any agency of the state or county government [hold]conduct proceedings as necessary [from time to time] for the purpose of obtaining information necessary or helpful in [the determination of its policies, the] carrying out [of] its duties [or] including the formulation of its rules.

(b) For the purposes permitted by law, the board may subpoena witnesses and require the production of evidence.

(c) The board shall follow procedures that, in its opinion, best serve the purposes of the proceedings, unless specifically prescribed in these rules or chapter 91, HRS.

(d) [Any] Unless it would be contrary to statutory requirements to do so, any rule in this chapter may be suspended or waived by the board or the presiding officer to prevent undue hardship in any particular instance.

(e) Proceedings shall be commenced by order of the board upon its own motion, or by the filing of a petition or application the processing of which necessitates a statutory hearing. [Eff 6/22/81; am and comp] (Auth: HRS §171-6)

(Imp: HRS §§91-2, 92-16)

§13-1-11.1 Limiting testimony at public hearings and meetings. Interested persons shall have an opportunity to submit written and oral data, views, or arguments on agenda items in board meetings and on the subject matter specified in notices of public hearings. The presiding officer shall confine oral testimony to the agenda items in board meetings. Oral testimony at public hearings shall be confined to the matters for which the hearing has been called. In order to allow persons to have an equal amount of time to testify, the presiding officer may limit the amount of time for testimony per individual or per issue. [Eff and comp] (Auth: HRS §171-6) (Imp: HRS §§91-2, 92-16)

§13-1-11.2 Removal of persons from proceedings. The presiding officer may remove any person who willfully disrupts a proceeding. [Eff and comp] (Auth: HRS §171-6) (Imp: HRS §§91-2, 92-16)

§13-1-12 Filing of documents[.]. (a) All pleadings, applications, submittals, petitions, reports, maps, exceptions, briefs, memoranda, and other papers required to be filed with the board in any proceeding shall be filed with the office of the chairperson. These papers may be sent by mail or hand-carried to the chairperson's office in Honolulu, Hawaii within the time limit, if any, for filing. The date on which the papers are actually received by the office of the chairperson shall be deemed to be the date of filing.

(b) All papers shall be written, typewritten or printed and signed in ink by the party signing the same or the party's duly authorized agent or attorney. The signature shall be legible. The signature of the person signing the document constitutes a certification that the person has read the document, that to the best of that person's knowledge, information, and belief every statement contained in

the document is true and no statements are misleading; and that the document is not interposed for delay.

(c) Unless otherwise specifically provided by a [particular] rule or order of the board, an original and [three copies] one copy of all papers shall be filed. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §91-2)

§13-1-13 Computation of time[.]. Computation of time shall be as established by section 1-29, HRS. [Eff 6/22/81; comp] (Auth: HRS §171-6) (Imp: HRS §§1-29, 91-2)

§13-1-13.1 Service. (a) Service of documents may be by mail, personal delivery, or facsimile transmission. When a person is represented by an attorney, service shall be made upon the attorney.

(b) Service by mail is complete upon mailing. Service by facsimile transmission is complete upon receipt of the entire document by the intended receiver between the hours of 7:45 a.m. and 4:30 p.m. on a business day. Service by facsimile transmission that occurs after 4:30 p.m. or not on a business day shall be deemed to have occurred on the next business day.

(c) Service by facsimile transmission shall be confirmed by a certificate of service which declares that service was accomplished by facsimile transmission to a specific phone number, on a specific date, at a specific time. [Eff and comp] (Auth: HRS §171-6) (Imp: HRS §91-2)

§13-1-13.2 Additional time after service by mail. Whenever a person has the right or is required to do some act within a prescribed period after the service of a document upon the person and the document is served by mail, two days shall be added to the prescribed period. [Eff and comp] (Auth: HRS §171-6) (Imp: HRS §91-2)

§13-1-14 Continuances or extensions of time[.]. Whenever a person or agency has a right or its required to take action within the period prescribed or allowed by these rules, by notice given thereunder or by an order, the board or its chairperson may, for good cause [and if permitted], unless prohibited by law:

(1) Before the expiration of the prescribed period, with or without notice, extend the period; or

(2) Upon application, permit the act to be done after the expiration of a specified period.

[Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §91-2)

§13-1-15 Amendment required or refusal of documents[.]. If any document filed with the board is not in substantial conformity with rules of the board as to [the contents thereof, or which] its contents, or is otherwise insufficient, the board may refuse to accept the document, or may require its amendment. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §91-2)

§13-1-16 Retention of documents by the board[.]. All documents filed with or presented to the board may be retained in the files of the board. The board may permit the withdrawal of original documents upon submission of properly authenticated copies to replace the documents. [Eff 6/22/81; comp] (Auth: HRS §171-6) (Imp: HRS §§91-2, 171-7)

§13-1-17 Board decision[.]. All final orders, opinions, or rulings entered by the board in a proceeding and rules and written policies promulgated by the board shall be served upon the parties or persons participating in the proceeding by regular

mail or personal delivery by the board and may be released for general publication. Copies of the published materials shall be available for public inspection in the offices of the board or may be obtained upon request and upon payment of charges, if any. [Eff 6/22/81; comp] (Auth: HRS §171-6) (Imp: HRS §91-20)

§13-1-18 Counsel for the board in contested cases[.]. [The attorney general, as counsel for the board, shall be a party to all proceedings governed by these rules. The attorney general or representative of the attorney general shall be designated as "Counsel for the Board," and shall be served with copies of all papers, pleading, maps and documents and other papers as are all other parties to the same proceeding.] A deputy attorney general, as assigned by the department of the attorney general, will serve as counsel to the board during its proceedings. In contested cases concerning alleged violations of law, there will be at least two deputy attorneys general assigned by and from different divisions of the department of the attorney general, one to represent the department of land and natural resources in enforcement of the law and one to serve as counsel for the board. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §§28-4, 91-2)

§13-1-19 Substitution of parties[.]. Upon motion and for good cause shown, the board may order substitution of parties; provided that in case of death of a party, substitution may be ordered without the filing of a motion. [Eff 6/22/81; comp] (Auth: HRS §171-6) (Imp: HRS §91-2)

§13-1-20 Consolidations[.]. The board, upon its own initiation or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve

substantially the same parties or issues which are the same or closely related, if it finds that the consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. [Eff 6/22/81; comp] (Auth: HRS §171-6) (Imp: HRS §91-2)

SUBCHAPTER 3

RULEMAKING PROCEEDINGS

§13-1-21 Initiating proceedings[.]. Pursuant to the petition, or upon its own initiative, when the board proposes to issue, amend, or repeal a rule, a public hearing shall be held as provided by law. [Eff 6/22/81; comp] (Auth: HRS §171-6) (Imp: HRS §§91-3, 91-6)

§13-1-22 Notice[.]. (a) Notice of proposed rule-making shall be published at least once in a newspaper of general circulation in the State and in each [County] county affected by the proposed rule. All notices shall be issued at least [twenty] thirty days prior to the date set for public hearing.

(b) A notice of the proposed [issuance] adoption, amendment, or repeal of the rule shall include:

[(1) A statement of the date, time, and place where the public hearing shall be held;

(2) Reference to the authority under which the issuance, amendment, or repeal of a rule is proposed;

(3) A statement of the substance of the proposed rulemaking; and

(4) In the case of a proposal to establish, change, or review forest reserve or watershed boundaries, in addition to the foregoing, a statement of the time and place where maps showing the proposed or existing

boundaries within the county may be inspected prior to the public hearing.]

(1) A statement of the topic of the proposed rule adoption, amendment, or repeal or a general description of the subjects involved;

(2) A statement that a copy of the proposed rule to be adopted, the proposed amendment, or the rule proposed to be repealed will be mailed to any interested person who requests a copy, pays the required fee and postage, if any, together with a description of where and how the request may be made;

(3) A statement of when, where, and during what times the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed my be reviewed in person;

(4) The date, time, and place where the public hearing will be held and where interested persons may be heard on the proposed rule adoption, amendment, or repeal; and

(5) In the case of a proposal to establish, change or review forest reserve or watershed boundaries, in addition to the foregoing, a statement of the time and place where maps showing the proposed or existing boundaries within the county may be inspected prior to the public hearing.

(c) In any rulemaking proceeding [where] when the board deems it warranted, a further notice of proposed rulemaking may be issued by publication thereof in a newspaper of general circulation in the State. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §§91-3, 91-6)

§13-1-23 Time and place[.]. Each hearing shall be held at the time and place set in the notice of hearing, but may at that time and place be continued by the presiding officer from day to day or adjourn to a later date or to a different place without notice

other than the announcement thereof at the hearing. [Where the proposed rulemaking affects only one county, the public hearing shall be held in that county.] [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §§91-3, 92-16)

§13-1-24 Conduct of rulemaking hearing[.]. (a) Each hearing shall be presided over by the chairperson of the board or its designated representative. The hearing shall be conducted in such a way as to afford to interested persons a reasonable opportunity to be heard on [matters relevant to the issues involved and to obtain a clear and orderly record] the proposed rulemaking. The presiding officer shall have authority to administer oaths or affirmations, if appropriate, and to take all other actions necessary to the orderly conduct of the hearing.

(b) At the commencement of the hearing, the presiding officer shall read the pertinent portions of the notice of the hearing and shall then outline briefly the procedure to be followed. [Evidence] Testimony shall then be received with respect to the matters specified in the notice of hearing in the order the presiding officer shall prescribe.

(c) All interested persons shall be given reasonable opportunity to offer [evidence] testimony which may consist of data, views, or arguments with respect to the matters specified in the notice of hearing. Every [witness] person testifying may, when appropriate and at the discretion of the presiding officer before proceeding to testify, be sworn, and may be required thereafter to state the witness', name, address, and whom the witness represents at the hearing, and give any other information respecting the witness' appearance as the presiding officer may request. It is not necessary that persons testifying be sworn, but the presiding officer may, if he or she deems it to be necessary, place persons testifying under oath. The presiding officer shall confine the [evidence] testimony to the [questions before the hearing but shall not apply the technical rules of

evidence] proposed rulemaking. Every [witness] person testifying shall be subject to questioning by the presiding officer or by any other representative of the board[, but cross-examination by private persons shall not be permitted except if the presiding officer expressly permits it].

(d) All interested persons or agencies of the State or its political subdivisions shall be afforded an opportunity to submit data, views, or arguments which are relevant to the issues. In addition, or in lieu thereof, interested persons or agencies may also file with the board within [fifteen] ten calendar days following the close of public hearing a written protest or other comments or recommendations in support of or in opposition to the proposed rulemaking. Persons designated by the presiding officer shall be furnished with copies of any written protest or other comments or recommendations, and they shall be afforded a reasonable time within which to file their comments in reply to the original [protest] protests, comments, or recommendations. Written [protest] protests, comments or recommendations or replies thereto shall not be accepted unless an original and [ten copies (or lesser number of copies as may be specifically agreed to by the presiding officer)] one copy are filed. The period for filing written [protest] protests, comments, or recommendations may be extended by the presiding officer for good cause.

[(f)](e) Unless otherwise specifically ordered by the board or the presiding officer, testimony given at the hearing need not be reported verbatim. All supporting written statements, maps, charts, tabulations, or similar data offered [in evidence] at the hearing, and which are deemed by the presiding officer to be [authentic and] relevant, shall be received [in evidence] and made part of the record.

[(g)](f) At the close of the final public hearing, the board shall announce the date when its decision shall be announced, or the board may, if it so desires, make the decision at the public hearing. The board shall consider all relevant comments and

[material] materials of record before taking final action in a rulemaking proceeding. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §§91-3, 92-16)

§13-1-25 Emergency rulemaking[.]. [Notwithstanding the foregoing rules, if] If the board finds that an imminent peril to public health, safety, or morals requires adoption, amendment, or repeal of a rule upon less than [twenty] thirty days' notice of hearing, and states in writing its reason for the finding, it may proceed without prior notice or hearing or upon an abbreviated notice and hearing to adopt an emergency rule to be effective for a period not longer than 120 days without renewal. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §91-3)

§13-1-26 Petitions for adoption, amendment, or repeal of rules[.]. (a) Any interested person [or any agency of the state or county government] may petition the board for the [issuance,] adoption, amendment, [modification,] or repeal of any rule [which is designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice requirements of the board].

(b) Petitions for proposed rulemaking shall set forth the text of any proposed rule or amendment desired or specifying the rule the repeal of which is desired and stating concisely the nature of the petitioner's interest in the subject matter and the reasons for seeking the [issuance,] adoption, amendment, [modification,] or repeal of the rule and shall include any facts, views, arguments, and data deemed relevant by petitioner. The board may require the petitioner to [adequately and properly] notify persons or governmental agencies known to be interested in the proposed rulemaking of the existence of the filed petitions. No request for the issuance, amendment, [modification,] or repeal of a rule which

does not conform to the requirements set forth above shall be considered by the board.

(c) Petitions for proposed rulemaking shall become matters of public record upon filing. The board shall within thirty days following the filing of the petition either deny the petition in writing or initiate public rulemaking procedures. No public hearing, oral argument, or other form of proceedings need be held[, but if] on the petition. If the board determines that the petition discloses sufficient reasons in support of the relief requested to justify the institution of public rulemaking proceedings, the procedures to be followed shall be as set forth in section 91-3, HRS, §13-1-21 and §13-1-22. [Where] When the board determines that the petition does not disclose sufficient reasons to justify the institution of public rulemaking procedures, or where the petition for rulemaking fails in any material respect to comply with the requirements of these rules, the petitioner shall be [so] notified [together with] and given the grounds for the denial. The provisions of this section shall not operate to prevent the board, on its own motion, from acting on any matter disclosed in any petition. [Eff 6/22/81; am and comp] (Auth: HRS §171-6) (Imp: HRS §§91-6, 92-16).

SUBCHAPTER 4

DECLARATORY RULINGS

§13-1-27 Petition for declaratory ruling. [(a) On petition of an interested person, the board may issue a declaratory order regarding the applicability of any statutory provision or of any rule or order of the board. Petitions for the issuance thereof shall state clearly and concisely the controversy or uncertainty, shall cite the statutory authority involved, shall include a complete statement of the facts and the reasons or grounds prompting the petition, together with full disclosure of

petitioner's interest and shall conform to the requirements of §13-1-12.

(b) The board, upon receipt of the petition, may require the petitioner to file additional data or a memorandum of legal authorities in support of the position taken by the petitioner.

(c) The board may, without notice or hearing, dismiss a petition for declaratory ruling which fails in any material respect to comply with the requirements of this section.

(d) After review of the information filed pursuant to this section the board may order a hearing on the petition. Any petitioner or interested party who requests a hearing on the petition shall set forth in writing the reasons why the information filed will not permit a fair and expeditious disposition of the petition. If the request for hearing is dependent upon factual assertion, affidavits establishing those facts shall accompany the request. In the event a hearing is ordered by the board, §§91-9 through 91-13, Hawaii Revised Statutes, shall govern the proceeding.

(e) Notwithstanding the other provisions of this section, the board may, on its own motion or upon request but without notice or hearing, issue a declaratory order to terminate a controversy or to remove uncertainty.] (a) On the petition of an interested person, the board may issue a declaratory order regarding the applicability of any statutory provision or of any rule or order of the board.

(b) The petition shall contain the following:

(1) The name, address, and telephone number of the petitioner;

(2) A statement of the nature of the petitioner's interest, including reason's for submission of the petition;

(3) A designation of the specific provision, rule, or order in question;

(4) A clear and concise statement of the position or contention of the petitioner;

(5) A memorandum of authorities, containing a full discussion of the reasons, including legal authorities, in support of such

position or contention; and

(6) The signature of each petitioner.

(c) Any petition which does not conform to the foregoing requirements may be rejected.

(d) The board may order the petitioner to give notice of the petition to designated persons and the public or may itself provide such notice.

(e) In its discretion, the board may permit interested persons to intervene in proceedings for declaratory orders when it finds that such participation will assist the board in its consideration of the matter.

(f) The board may, for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the board may so refuse where:

(1) The question is speculative or purely hypothetical and does not involve existing facts or facts which can reasonably be expected to exist in the near future;

(2) The petitioner's interest is not of the type which would give the petitioner standing to maintain an action if such petitioner were to seek judicial relief;

(3) The issuance of the declaratory order may adversely affect the interests of the board or any of its officers or employees in litigation which is pending or may reasonably be expected to arise; or

(4) The matter is not within the jurisdiction of the board.

(g) The board shall consider each petition submitted and, within a reasonable time after the submission thereof, either deny the petition in writing, stating its reason for such denial, or issue a declaratory order of the matters contained in the petition.

(h) Hearing:

(1) Although in the usual course of processing a petition for a declaratory ruling no formal hearing shall be granted to the petitioner, the board may, in its discretion, order such

proceeding set down for hearing.

(2) Any petitioner or person admitted as an intervenor who desires a hearing on a petition for declaratory ruling shall set forth in detail in a written request the reasons why the matters alleged in the petition, together with supporting affidavits or other written evidence and briefs or memoranda or legal authorities, will not permit the fair and expeditious disposition of the petition and, to the extent that such request for hearing is dependent upon factual assertion, shall accompany such request by affidavit establishing such factors.

(i) If the board orders a hearing it may require the petitioner to give notice of the hearing to designated persons or to the public or may itself provide such notice. In the event a hearing is ordered by the board, §§91-9 through 91-13, HRS, shall govern the proceeding.

(j) An order disposing of a petition shall be applicable only to the factual situation alleged in the petition or set forth in the order. The order shall not be applicable to different factual situations or where additional facts not considered in the order exist. Such order shall have the same force and effect as other orders issued by the board.

(k) Notwithstanding the other provisions of this section, the board may, on its own motion or upon request but without notice or hearing, issue a declaratory order to terminate a controversy or to remove uncertainty. [Eff 6/22/81; am 9/7/82; am and comp] (Auth: HRS §171-6) (Imp: HRS §§91-8, 92-16)

SUBCHAPTER 5

CONTESTED CASE PROCEEDINGS

§13-1-28 Contested case hearings[.]. (a) When required by law, the board shall hold a contested case hearing upon it own motion or on the written petition of any government agency or any interested person. [who is properly admitted as a party pursuant to section 13-1-31. Unless specifically prescribed in this chapter or by chapter 91, Hawaii Revised Statutes, the board may adopt procedures that in its opinion will best serve the purposes of the hearings. Where a public hearing is required by law, it shall be held prior to the contested case hearing.

(b) The contested case hearing shall be held after any public hearing which by law is required to be held on the same subject matter.

(c) Any procedure in a contested case may be modified or waived by stipulation of the parties.

[Eff 9/7/82; am and comp] (Auth: HRS §§91-2, 91-9, 171-6) (Imp: HRS §91-9)

§13-1-29 Request for hearing[.]. (a) [A hearing on a contested matter may be requested by the board on its own motion or upon the written petition of any government agency or any interested person who then properly qualifies to be admitted as a party. An oral or written request for a contested case hearing must be made by the close of the public hearing (if one is required) or the board meeting at which the matter is scheduled for disposition (if no public hearing is required). In either situation, the person or agency requesting the contested case hearing must file (or mail and postmark) a written petition with the board not later than ten days after the close of the public hearing or the board meeting, whichever is applicable. The time for making an oral or written request and submitting a written petition may be waived by the board.] On its own motion, the board may hold a contested case hearing. Others must both request a contested case and petition the board to hold a contested case hearing. An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting

at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. For good cause, the time for making the oral or written request or submitting a written petition or both may be waived.

(b) [A petition requesting] Except as otherwise provided in section 13-1-31.1, the formal written petition for a contested case hearing shall contain concise statements of:

(1) [The legal authority under which the proceeding, hearing or actions is to be held or made;] The nature and extent of the requestor's interest that may be affected by board action on the subject matter that entitles the requestor to participate in a contested case;

(2) [The petitioner's interest that may be affected;] The disagreement, if any, the requestor has with an application before the board;

(3) [The disagreement, denial, or grievance which is being contested by the petitioner;] The relief the requestor seeks or to which the requestor deems itself entitled;

(4) [The basic facts and issues raised] How the requestor's participation would serve the public interest; and

(5) [The relief to which the party or petitioner seeks or deems itself entitled] Any other information that may assist the board in determining whether the requestor meets the criteria to be a party pursuant to section 13-1-31. [Eff 9/7/82; am and comp] (Auth: HRS §91-2) (Imp: HRS §91-9)

§13-1-29.1 Determination of entitlement to a

contested case hearing. The board without a hearing may deny a request or petition or both for a contested case when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board or when it is clear as a matter of law that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding. [Eff and comp] (Auth: HRS §91-2) (Imp: HRS §91-9)

§13-1-30 [Notice of hearing. After a determination is made that a contested case hearing is required, the written notice of hearing shall be served on parties in accordance with section 91-9.5, Hawaii Revised Statutes, and shall be served on all persons at least fifteen days before the hearing date. Further, the notice shall be published as provided by law but not less than once in a newspaper of general circulation within the State and within the county provided that matters of internal management shall not be subject to the publication requirement.] Fees. When an application involves a conservation district use permit (including a request for a permit, modification of a permit, violation of a permit, or revocation of a permit), the request for a contested case hearing shall be accompanied with a $100.00 nonrefundable filing fee and a $500.00 contested case fee to partially cover the administrative costs of the contested case proceedings. The contested case fee shall be refunded in full if the requestor is not admitted as a party under §13-1-31. The chairperson may waive the filing fee or contested case fee for any person upon a showing of financial hardship. [Eff 9/7/82; am and comp] (Auth: HRS §§91-2, 183C-3) (Imp: HRS §§91-2, 183-3)

§13-1-31 Parties[.]. (a) [The following persons or agencies shall be admitted as a party] Except as otherwise provided in section 13-1-31.1, parties to a contested case shall be determined within

a reasonable time following the ten-day period following the board meeting, the presiding officer shall notify all persons and agencies, including the applicant or alleged violator, as the case may be, who timely petitioned for the contested case hearing of the date and time for a hearing to determine whether any or all of the persons and agencies seeking to participate in the contested case hearing are entitled to be parties in the contested case. Such notice shall also set the time for filing any objections to the admission of any requestor as a party to the contested case. Without a hearing, an applicant or an alleged violator shall be a party.

(b) The following persons or agencies shall be admitted as parties:

[(1) The petitioner shall be a party.]

[(2)](1) All government agencies whose jurisdiction includes the land in question [may] shall be admitted as parties upon timely application.

[(3)](2) All persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the [proposed change] requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.

[(4)](c) Other persons who can show substantial interest in the matter may [apply to be a party] be admitted as parties. The [presiding officer or the] board may approve [the application only if the applicant's] such requests if it finds that the requestor's participation will substantially assist the board in its decision making.[

(b)] The [presiding officer or the] board [as provided by law] may deny any [application] request to be a party when it appears that:

(1) The position of the [applicant for participation] requestor is substantially

the same as the position of a party already admitted to the proceedings; and

(2) The admission of additional parties will not add substantially new relevant information or the addition will [render] make the proceedings inefficient and unmanageable.

[(c)](d) All persons with similar interests seeking to be admitted as parties shall be considered at the same time so far as possible.

[(d) Where a contested case hearing has been scheduled, any other interested person who qualifies to be a party under subsection (a) may apply to participate, in accordance with this subchapter, by filing a written application with the board not later than ten days before the scheduled contested case hearing or at an earlier date as established by the Board. Except for good cause shown, late filings shall not be permitted.

(e) The application to become a party shall contain the following:

(1) The nature of applicant's statutory or other right.

(2) The tax map key number or the applicant's property as well as the petitioner's property. The nature and extent of applicant's interest.

(3) The effect of any decision in the proceeding on applicant's interest.

(4) The difference in the effect of the proposed action on the applicant's interest and the effects of the proposed action on the general public.

(f) If relevant, the application shall also address:

(1) Other means available whereby applicant's interest may be protected.

(2) The extent the applicant's interest may be represented by existing parties.

(3) The extent the applicant's interest in the proceedings differs from that of the other parties.

(4) The extent the applicant's participation can

assist in development of a complete record.

(5) The extent the applicant's participation will broaden the issue or delay the proceedings.

(6) How the applicant's intervention would serve the public interest.

(7) Any other information the board may add or delete.

(g) If any party opposes another person's application to be a party, the party may file objections for the record no later than ten days prior to the hearing.

(h) All applications to be a party shall be acted upon as soon as practicable and shall be decided not later than the commencement of the contested case hearing.

(i) A person whose petition to be admitted as a party has been denied may appeal that denial to the circuit court pursuant to section 91-14, Hawaii Revised Statutes.]

(e) If any party opposes another person's request to be a party, the party may file objections within the time set forth by the presiding officer.

(f) The hearing to determine parties to the contested case may be conducted by the board or the presiding officer, or by a hearing officer appointed by the board. At such hearing, evidence and argument shall be limited to matters necessary to determine whether the requestor shall be admitted as a party. Only a party objecting to a requestor's admission as a party shall have the opportunity to cross-examine a requestor or the requestor's witness; provided, however, that the board or presiding officer or hearing officer may cross-examine any witness at such hearing. The hearing to determine parties may be waived upon concurrence of the applicant and all requestors.

(g) If the hearing to determine parties to the contested case was not conducted by the board, and the person who conducted such hearing recommends that any agency or person requesting to be a party should not be allowed to participate in the contested case, such

recommendation and the reasons therefore shall be immediately submitted to the board in writing. The requestor whose request is recommended for denial shall have the opportunity to file objections to the recommendation. Such recommendation shall be acted upon by the board as soon as practicable and shall be decided, by written order, not later than the commencement of the contested case hearing.

(h) A person whose request to be admitted as a party has been denied by the board may appeal that denial to the circuit court pursuant to section 91-14, HRS. [Eff 9/7/82; am 11/1/85; am and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-9, 91-9.5)

§13-1-31.1 Hearings of violations. Notwithstanding the provisions of section 13-1-29(b) and section 13-1-31 when a violation is alleged for which an administrative remedy is provided and with respect to which the alleged violator is entitled to a contested case hearing, a contested case shall be held upon the petition of the alleged violator, provided that the petition is made in accordance with the provisions of section 13-1-29(a). No person or government agency other than the department and alleged violator shall be admitted as parties in such proceedings. [Eff and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-9)

§13-1-31.2 Notice of hearing. After a determination is made that a contested case hearing is required and the parties have been determined, a written notice of hearing shall be served on parties by registered or certified mail in accordance with section 91-9.5(a), HRS, and shall be served on all persons or agencies admitted as a party at their last recorded addresses at least fifteen days before the hearing date. If notice by publication is permitted under section 91-9.5(b), it shall be published at least once in each of two successive weeks in a

newspaper of general circulation. The last published notice shall appear at least fifteen calendar days prior to the hearing date. [Eff and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-9, 91-9.5)

§13-1-32 Conduct of hearing[.]. (a) Contested case hearings shall be conducted in accordance with this subchapter, and chapter 91, HRS.

(b) The board may conduct the hearing or, the board in its discretion may delegate the conduct of the contested case hearing to a hearing officer, in which case the chairperson shall select such hearing officer. As used in this section and in sections 13-1-33, 13-1-34, 13-1-35, 13-1-36, and 13-1-39, unless the context clearly indicates otherwise, the term "presiding officer" shall mean the presiding officer as defined in section 13-1-2 when the hearing is conducted by the board, but shall mean the hearing officer when the conduct of the hearing has been delegated to a hearing officer.

(c) The presiding officer shall have the power to give notice of the hearing, administer oaths, compel attendance of witnesses and the production of documentary evidence, examine witnesses, certify to official acts, issue subpoenas, rule on offers of proof, receive relevant evidence, hold conferences before and during hearings, rule on objections or motions, fix times for submitting documents, briefs, and dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing. [The] If the hearing is conducted by the board, the board members may examine and cross-examine witnesses.

[(c) The chairperson of the board shall be the presiding officer. However, the chairperson may designate another board member, an appointed representative or a master to be presiding officer unless prohibited bylaw.

(d) The board may conduct the hearing or, unless

otherwise prohibited by law, the board in its discretion may designate a hearing officer or master to conduct contested case haring.

(e)](d) The presiding officer shall provide that a verbatim record of the evidence presented at any hearing is taken unless waived by all the parties. Any party may obtain a certified transcript of the proceedings upon payment of the fee established by law for a copy of the transcript.

[(f)](e) In hearings on applications, petitions, complaints, and violations, the applicant, petitioner, [or] complainant or in the case of violations the department shall make the first opening statement and the last closing argument unless the board directs otherwise. Other parties shall be heard in such order as the presiding officer directs. [After all parties close their case, the department may make its recommendations, if any.]

[(g)](f) Where a party is represented by more than one counsel or representative, they may allocate witnesses between them but only one of the counsel or representative shall be permitted to cross-examine a witness or [to] state any objections or [to] make closing arguments.

[(h)](g) Each party shall have the right to conduct such cross-examinations of [the] witnesses as may be required for a full and true disclosure of the relevant facts and shall have the right to submit rebuttal evidence, subject to limitations by the presiding officer.

[(i)](h) To avoid unnecessary or repetitive evidence, the presiding officer may limit the number of witnesses, the extent of direct or cross-examination or the time for testimony upon a particular issue[, subject to law]. [Eff 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-9, 92-16)

[(j) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default]. [Eff 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-9)]

§13-1-32.1 Conduct of hearing with only one party. Where the applicant is the sole party in the contested case, the board or the hearing officer, as the case may be, shall consider and give appropriate weight to the records on file with the board directly relating to the application, including, but not limited to, staff submittals to the board, if any; provided, however, that the staff shall not be made parties to the contested case nor be compelled to give testimony on any documents within the file unless the board or the hearing officer deems it necessary to a just disposition of the case. [Eff and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-2, 91-9, 171-6)

§13-1-32.2 Enforcement by department. In contested cases involving alleged violations of law, to the extent necessary, the department shall be treated as a party for the purpose of establishing the agency's case and staff members may be called as witnesses. The department's activities in relation to the enforcement action shall be performed or supervised by a first deputy to the chairperson. [Eff and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-9)

§13-1-32.3 Discovery. Depositions of witnesses and interrogatories shall not be allowed except upon agreement of the parties. The presiding officer may require parties to file and serve upon all other parties written witness statements and exhibits and to establish a schedule for such filings. [Eff and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-2, 91-9, 171-6)

§13-1-32.4 Records on file with board. Records directly relating to the application that are on file

with the board, including, but not limited to, the record of the public hearing (if held), shall be a part of the record of the contested case; provided, however, that any party may object, in the manner provided in section 13-1-35, to any part of such record. [Eff and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-2, 91-9, 171-6)

§13-1-33 Procedure for witnesses[.]. (a) Witnesses may be subpoenaed as set forth below:

(1) Requests for the issuance of subpoenas, requiring the attendance of a witness for the purpose of taking oral testimony before the board shall be in writing, and shall state the reasons why the testimony of the witness is believed to be material and relevant to the issues involved. Only parties or a board member may request the issuance of a subpoena.

(2) Requests for the issuance of subpoenas for the production of documents or records shall be in writing, shall specify the particular document or record, or part thereof, desired to be produced; and shall state the reasons why the production thereof is believed to be material and relevant to the issues involved. Only parties or a board member may requests the issuance of a subpoena duces tecum.

(b) Subpoenas may be issued by the presiding officer. No subpoena shall be issued unless the party requesting the subpoena has complied with this section giving the name and address of the desired witness and tendering the proper witness and mileage fees. Signed and sealed blank subpoenas shall not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall state at whose request the subpoena is issued. Requests for subpoenas shall be filed not later than three business days before the scheduled hearing.

(c) Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State of Hawaii and such fees and mileage shall be paid by the party at whose request the witness appears. [Eff 9/7/82; am and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §92-16)

§13-1-34 Motions[.]. (a) All motions other than those made during a hearing shall be made in writing [to the board], shall state the relief sought, and shall be accompanied by an affidavit, or declaration, or memorandum setting forth the grounds upon which they are based. The presiding officer shall set the time for filing all motions and opposing [memorandum] memoranda, if any.

(b) [The moving party shall serve a copy] Copies of all motions, affidavits, declarations, and memoranda shall be served on all other parties to the hearing within the time set by the presiding officer. [at least forty-eight hours prior to the hearing on the motion and shall file with the board the original with proof of service.] The original shall be filed with the board with certificate of service.

(c) [A memorandum in opposition or a counter affidavit shall be served on all parties not later than twenty-four hours prior to the hearing. The original and proof of service shall be filed with the board.

(d)] Failure to serve or file an affidavit, declaration, or [a] memorandum in opposition to a motion or failure to appear at the hearing on the motion, if held, shall be deemed a waiver of objection to the granting or denial of the motion. [Eff 9/7/82; am and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-7)

§13-1-35 Evidence[.]. (a) The presiding officer may exercise discretion in the admission or rejection of evidence and the exclusion of immaterial,

irrelevant, or unduly repetitious evidence as provided by law with a view of doing substantial justice.

(b) The presiding officer shall rule on the admissibility of all evidence. The rulings may be reviewed by the board in determining the matter on its merits.

(c) When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

(d) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained, or the submission of the evidence itself.

(e) With the approval of the presiding officer, a witness may read testimony into the record on direct examination. Before any prepared testimony is read, unless excused by the presiding officer, the witness shall deliver copies thereof to the presiding officer and all counsel parties. Admissibility shall be subject to the rules governing oral testimony. If the presiding officer deems that substantial saving in time will result, a copy of the prepared testimony may be received in evidence without reading, provided that copies thereof shall have been served upon all parties and the presiding officer five days before the hearing or if such prior service is waived, to permit proper cross examination of the witnesses on matters contained in the prepared testimony.

(f) If relevant and material matter is offered in evidence in a document containing other matters, the party offering it shall designate specifically the matter so offered. If the other matter in the document would burden the record, at the discretion of the presiding officer, the relevant and material matter may be read into the record or copies of it received as an exhibit. Other parties shall be afforded opportunity at the time to examine the document, and to offer in evidence other portions believed material and relevant.

(g) Exhibits shall be prepared as follows:

(1) Documents, pleadings, correspondence and

other exhibits shall be legible and must be prepared on paper [either 8-1/2x13 inches or] 8-1/2 x 11 inches in size. Charts and other oversized exhibits must be bound or folded to the respective approximate size, where practical. Wherever practicable, sheets of each exhibit shall be numbered and data and other figures shall be set forth in tabular form.

(2) When exhibits are offered in evidence, the original and [eight copies] one copy, unless otherwise waived by the board, shall be furnished to the presiding officer for the board's use with adequate copies for review by other parties, unless the copies have been previously furnished or the presiding officer directs otherwise.

(h) If any matter contained in a document on file as a [public] government record with the department is offered in evidence, unless directed otherwise by the presiding officer, the document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of the document are specifically identified and otherwise competent, relevant, and material. If testimony is proceedings other than the one being heard is offered in evidence, a copy shall be presented as an exhibit, unless otherwise ordered by the presiding officer.

(i) Official notice may be taken of such maters as may be judicially noticed by the courts of the State of Hawaii. Official notice may also be taken of generally recognized technical or scientific facts within the specialized knowledge of the board when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

(j) At the hearing, the presiding officer may require the production of further evidence upon any issue. Upon agreement of the parties, the presiding officer may authorize the filing of specific documentary evidence as a part of the record within a

fixed time.

(k) The party initiating the proceeding and, in the case of proceedings on alleged violations of law, the department, shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The quantum of proof shall be a preponderance of the evidence. [Eff 9/7/82; am and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-9, 91-10)

§13-1-36 Prehearing conference; exchange of exhibits; briefs[.]. (a) The presiding officer may hold or cause to be held pre-hearing conferences with the parties for the purpose of formulating or simplifying the issues, [arranging for the exchange of proposed exhibits or proposed] written testimony, setting of schedules, exchanging names of witnesses, limitation of number of witnesses, and such other matters as may expedite orderly conduct and disposition of the proceeding as permitted by law.

(b) The presiding officer may request briefs setting forth the issues, facts and legal arguments upon which the parties intend to rely and the presiding officer may fix the conditions and time for the filing of briefs and the number of pages. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. [Eff 9/7/82; am and comp] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-9)

[§13-1-37 Correction of transcript. Motions to correct the transcript shall be made within five days after receipt of the transcript and shall be acted upon by the presiding officer. [Eff 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-10)

§13-1-38 Disqualification. No board member shall sit in any proceeding in which the member has

any pecuniary or business interest involved in the proceeding or who is related within the first degree by blood or marriage to any party to the proceeding. If, after declaring any pecuniary interest or consanguinity to the parties, the parties do not oppose the member from sitting in a proceeding, the record shall note clearly the waiver by the parties. [Eff 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§84-14, 91-13, 171-4)]

§13-1-[39]37 Ex parte (single party) communications[.]. (a) No party or person petitioning to be a party in a contested case, nor the party's or such person's to a proceeding before the board nor their employees, representatives or agents shall make an unauthorized ex parte communication either oral or written concerning the contested case to the presiding officer or any member of the board who will be a participant in the decision-making process.

(b) The following classes of ex parte communications are permitted:

(1) Those which relate solely to matters which a board member is authorized by the board to dispose of on ex parte basis.

(2) Requests for information with respect to the procedural status of a proceeding.

(3) Those which all parties to the proceeding agree or which the board has formally ruled may be made on an ex parte basis.

[4) Those with representatives of any news media on matters intended to inform the general public] [Eff 9/7/82; am and ren] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-13)

§13-1-[40]38 Decisions and orders[.]. (a) [A proceeding shall be deemed submitted for decision by the board after] After all [the taking of] evidence has been taken, the parties may submit, within the time set by the presiding officer, a proposed decision

and order which shall include [the filing of briefs, the consideration of motions, and the presentation of oral argument as may have been permitted or prescribed by the presiding officer. Where a hearing officer has conducted the hearing, the hearing officer shall file a report with the evidence, or a summary thereof, as well as] proposed findings of facts and conclusions of law [which the board may adopt, reject or modify]. A party to the proceedings may submit a proposed decision and order which shall include proposed findings of fact and conclusions of law. The proposals shall be filed with the board and mailed to each party to the proceeding not later than ten days after the transcript is prepared and available, unless the presiding officer shall otherwise prescribe.

(b) Within the time established by law, if any, or within a reasonable time after the [hearing,] parties have had an opportunity to file objections and exceptions, if applicable, to file briefs and to present oral argument as may have been permitted, the board shall render its findings of fact, conclusions of law and decision and order approving the [proposal] application, denying the [proposal] application, or modifying the [proposal] application by imposing conditions. The vote of each member shall be recorded. Upon agreement by the parties, [the examination and proposed decision] the provisions [under] of section 91-11, HRS, concerning the examination of evidence and proposed decision, may be waived pursuant to section 91-9(d), HRS.

(c) Every decision and order adverse to a party to the proceeding, rendered by the board in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the board shall incorporate in its decision a ruling upon the proposed findings so presented.

(d) Decisions and orders shall be served by mailing certified copies thereof to [the parties] each party at the party's address of record. When service is not accomplished by mail, it may be affected by

personal delivery of a certified copy. When a party to [an application proceeding] a contested case has appeared by a representative or by counsel, service upon the representative or counsel shall be deemed to be service upon the party. [Eff 9/7/82; am and ren] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-12)

§13-1-[41]39 Reconsideration[.]. (a) Upon a motion of a party, the board may reconsider a decision it has made on the merits only if the [moving] party can show that:

(1) New information not previously available would affect the result; or

(2) [That a] A substantial injustice would occur.

(b) In either case, a motion for reconsideration shall be made not later than five business days after the decision or (ii) no less than fourteen days prior to any deadline established by law for the disposition of the subject matter, whichever is earlier. [Eff 9/7/82; am and ren] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-11, 91-12)

[§13-1-42 Appeals. Parties to proceedings who are aggrieved by the decision of the board may obtain judicial review thereof in the manner set forth in section 91-14, Hawaii Revised Statutes, provided that the court may also reverse or modify a finding of the board if such finding appears to be contrary to the clear preponderance of the evidence. [Eff 9/7/82; R] (Auth: HRS §§91-2, 91-14) (Imp: HRS §§91-14, 91-15)]

SUBCHAPTER 6

POST HEARING PROCEDURES FOR HEARING CONDUCTED BY HEARING OFFICER

§13-1-41 Recommendation of hearing officer. (a) Upon completion of taking of evidence, the hearing officer may ask the parties to submit a document entitled "proposed findings of fact, conclusions of law, and decision and order." Proposed decision and orders submitted shall be served upon each party to the proceedings and an opportunity given to each party to comment thereon. If requested, and upon receipt of the proposed decision and orders and any comments from the parties, the hearing officer shall prepare a report setting forth proposed findings of fact, conclusions of law, and the reasons therefore, and a recommended order, and shall present the report of the proceeding to the board.

(b) The record shall include the petition, notice of hearing motions, rulings, orders, transcript of the hearing, stipulations, documentary evidence, proposed findings, or other documents submitted by the parties, objections to the conduct of the hearing, the report of the hearing officer, and all other matters placed in evidence.

(c) The hearing officer shall cause a copy of the report to be served upon all parties to the proceedings. [Eff] (Auth: HRS §171-6) (Imp: HRS §§91-2, 91-11, 92-16, 171-6)

§13-1-42 Exception to the hearing officer's report and recommendations. (a) Except as otherwise ordered by the chairperson, within twenty-one calendar days after service of the report and recommendations by the hearing officer, a party may file with the board, exceptions to the report together with a brief in support of such exceptions. Such party shall serve copies of exceptions and briefs upon each party to the proceeding.

(b) The exceptions shall:

(1) Set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken;

(2) Identify that part of the hearing officer's

report and recommended order to which objections are made; and

(3) State all the grounds for exceptions to a ruling, finding, conclusion, or recommendation. The grounds not cited or specifically urged are waived. [Eff] (Auth: HRS §171-6) (Imp: HRS §§91-2, 91-11)

§13-1-43 Support of hearing officer's report and recommendations. (a) Except as otherwise ordered by the chairperson, within twenty-one days after service of the exceptions to the hearings officer's report, any party may file with the board a brief in response to the exceptions. Such party shall serve copies of the brief upon each party to the proceeding.

(b) The brief shall;

(1) Answer specifically the points of procedure, fact, law, or policy to which exceptions were taken; and

(2) State the facts and reasons why the report and recommendation should be affirmed. [Eff] (Auth: HRS §171-6) (Imp: HRS §§91-2, 91-11)

§13-1-44 Oral argument before the board. (a) Any party shall be afforded an opportunity to present oral arguments to the board.

(b) The board may direct oral argument on its own motion.

(c) Responding arguments will be allowed. [Eff] (Auth: HRS §171-6) (Imp: HRS §91-10, 91-11)

§13-1-45 Board action; exceptions. (a) In the event no statement of exceptions is filed, the board may proceed to reverse, modify, or adopt the recommendations of the hearing officer.

(b) Upon the filing of the exceptions and briefs

together with the briefs in support, the board may:

(1) Render its decision upon the record;

(2) If oral argument has been held, the board may render its decision after oral argument;

(3) Reopen the docket and take further evidence; or

(4) Make such other disposition of the case that is necessary under the circumstances. [Eff] (Auth: HRS §171-6) (Imp: HRS §§91-2, 92-16, 171-6)

SUBCHAPTER 7

CIVIL RESOURCE VIOLATIONS SYSTEM

§13-1-51 Purpose of subchapter; statement of policy. This subchapter shall govern the department's practice and procedure relating to the administrative proceedings of civil resource violations of state law and to the assessment of administrative sanctions for such violations. This subchapter shall effectuate and carry out the purposes and policies of chapter 199D, HRS, and shall be construed and interpreted in the manner most favorable to the promotion of justice, expeditious processing and cost-effective resolution in every case involved. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-52 Definitions. As used in this subchapter, unless otherwise provided:

"Administrative hearing officer" or "hearing officer" means an individual to whom the board has given authorization to conduct contested case hearings and examination of mitigation requests pursuant to this subchapter.

"Administrator" means the individual who is responsible for the administration of the civil resource violations system.

"Civil resource violation" means any violation of state laws administered by the department, including statutes, administrative rules, and permit and license terms and conditions, for which an administrative penalty has been prescribed by law.

"Civil resource violations system" or "CRVS" means a system of administrative law proceedings as authorized and prescribed under chapter §199D, HRS, and further prescribed in this subchapter, for the purpose of processing civil resource violations.

"Conservation and resource enforcement officer" or "officer" means an individual employed with the division of conservation and resource enforcement of the department whose primary duty is the enforcement of title 12, chapters 6D, 6E, and 6K, HRS, and the rules adopted thereunder within the areas under the jurisdiction of the department.

"Notice of civil resource violation" or "violation notice" is a document issued by the department to a respondent as a notification of a civil resource violation and a citation against the respondent for having committed the violation.

"Respondent" means a person who is charged with having committed a civil resource violation. [Eff] (Auth: HRS §199D-1) (Imp: HRS §§92-3, 199-3, 199-4, 199D-1)

§13-1-53 Applicability. (a) This subchapter is applicable to all divisions, offices and attached agencies of the department, except as otherwise provided by law, where a notice of civil resource violation has been issued pursuant to chapter 199D, Hawaii Revised Statutes and this subchapter.

(b) Any criminal action against a person shall not preclude the state from imposing administrative sanctions pursuant to this subchapter against the same person for any civil resource violation committed in the same course of conduct.

(c) Any administrative proceeding against a person under this subchapter shall not preclude the state from pursuing a separate criminal action against

the same person for a criminal offense committed in the same course of conduct.

(d) For any proceedings instituted under this subchapter against violations of chapter 6K, HRS, or any rules adopted thereunder, the Kaho'olawe island reserve commission shall act whenever the board is responsible and authorized to act, and the chairperson of the Kaho'olawe island reserve commission shall act whenever the chairperson of the department is responsible and authorized to act.

(e) For any proceedings instituted under this subchapter against violations of chapter 174C, HRS, or any rules adopted thereunder, the commission on water resource management shall act whenever the board is responsible and authorized to act, and the chairperson of the commission on water resource management shall act whenever the chairperson of the department is responsible and authorized to act. [Eff] (Auth: HRS §§6K-8.6, 174C-15.5, 199D-1, 199D-2) (Imp: HRS §§6K-8.6, 174C-15.5, 199D-1, 199D-2)

§13-1-54 Jurisdiction. Any violation of state law administered by the department for which an administrative sanction or penalty has been prescribed, including statutes, administrative rules, and permit and license terms and conditions imposed by the department or any attached agencies, may be adjudicated through the civil resource violations system of the department pursuant to this subchapter, except as otherwise provided by law. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-55 Deputy director. Whenever delegated by the chairperson, a deputy director of the department may act on behalf of the chairperson for the purpose of discharging a duty under this subchapter. When acting on behalf of the chairperson for this purpose, a deputy director of the department shall carry the

full responsibility and authorization that the board has given to the chairperson. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-56 The administrator. The chairperson shall appoint an administrator to manage the civil resource violations system of the department under this subchapter. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-57 Appointment and removal of administrative hearing officers. Administrative hearing officers serving under this subchapter shall be nominated by the chairperson and appointed by the board at its meetings for a term of up to two years and may be removed with or without cause in the same manner or by expiration of appointment. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-58 Delegation of final decision making power. (a) The board may delegate to the chairperson or an administrative hearing officer the power to render the final decision in a CRVS contested case.

(b) Whenever the final decision making power is delegated to the chairperson, the chairperson shall only render the final decision after receiving the hearing officer's recommendation after a CRVS contested case hearing, and may

(1) Affirm the hearing officer's recommendation or issue their own decision;

(2) Remand the case to the hearing officer to hold further hearings for the purpose of receiving more evidence; or

(3) Refer the case to the board for disposition.

(c) The administrator shall inform all parties of any delegation of final decision making power at the earliest opportunity but not later than the start of the taking of evidence. [Eff]

(Auth: HRS §§171-6, 199D-1) (Imp: HRS §199D-1)

§13-1-59 Representation. Representation in any proceedings conducted under this subchapter shall be governed by section 13-1-10 of this chapter. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-60 Filing and service. (a) All documents subject to filing under this subchapter shall be filed with the administrator. All filings shall comply with section 13-1-12 of this chapter.

(b) Service of documents shall comply with section 13-1-13.1 of this chapter. [Eff] (Auth: HRS §199D-1) (Imp: HRS §§199D-1, 489E-7)

§13-1-61 Issuance, service and amendment of notice of civil resource violation. (a) The administrator or a conservation and resource enforcement officer shall have the power to issue a civil citation to any person who is charged with having committed a civil resource violation.

(b) The administrator or a conservation and resource enforcement officer shall have the power to summon such person cited pursuant to subsection (a) above to answer to the violation notice and any citation contained therein, and to submit to administrative proceedings conducted pursuant to this subchapter.

(c) Service of the violation notice may be conducted by any employee of the department or anyone authorized by the administrator, and may be effectuated by one of the following methods:

(1) Personal service on the respondent, with or without the respondent's signature acknowledging the service; or

(2) Mailing by certified mail, return receipt requested, to the respondent's last known

address, provided that a return receipt or its electronic mail format is received by the administrator.

(d) Where a resource violation involves an unattended vehicle or vessel, service may be conducted by a conservation and resource enforcement officer who shall conspicuously affix the violation notice to the vehicle or vessel for the registered owner to receive and answer.

(e) In any pending case, the department may amend a violation notice at any time prior to the filing of the respondent's answer to the original notice. [Eff] (Auth: HRS §199D-1) (Imp: HRS §§91-9, 91-9.5, 199D-1)

§13-1-62 Notice of civil resource violation; contents. A notice of civil resource violation shall include, at a minimum, the following:

(1) The respondent's name and current address if available;
(2) A statement that the notice is being issued pursuant to chapter 199D, HRS.
(3) A citation of the specific resource violation, including a brief statement of the facts for which the notice is issued and underlying citation to the law that has been violated;
(4) An assessment of all the administrative sanctions upon the respondent and the governing legal authorities;
(5) A statement of the options provided in section 13-1-64 herein for answering the notice and the procedures necessary to exercise the options;
(6) A summons to the respondent to whom the notice is issued to answer the notice within twenty one days of the service of the notice;
(7) Name and signature of the officer or official who issues the citation;
(8) Date of the citation;

(9) A statement that all citations and sanctions made by the department in the notice are final unless contested in writing by the respondent within twenty one days of service of the violation notice;

(10) A statement that failure to timely answer the violation notice and comply with all sanctions assessed by the department may result in the entry of a default decision for the department and additional penalty as specified in the violation notice for the past due compliance;

(11) A statement that a written request for mitigation without contesting the citation shall be examined by a hearing officer without the need to hold any hearing or have the attendance of any parties or their representatives or any witness, and that the hearing officer's decision shall be final and shall not be subject to any administrative or judicial review thereafter;

(12) A statement that any administrative action against the respondent for any civil resource violation shall not preclude the state from pursuing a separate criminal prosecution in a court of law for an offense committed in the same course of conduct; and

(13) A space for the respondent's statement and signature. [Eff]

(Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-63 Answer required; noncompliance subject to higher fine. (a) A respondent who receives a violation notice shall answer the notice in writing which shall be filed with the administrator within twenty-one days of the service of the violation notice.

(b) The department may assess a higher administrative fine for a civil resource violation if the violation notice is not answered or any sanctions

assessed therein are not complied with by the end of the twenty-one day period or as otherwise required by the department, provided that proper notice of the higher fine has been given pursuant to sections 13-1-61 and 62 herein, and that the total administrative fine shall not exceed the maximum amount allowed by law. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-64 Respondent's options when answering. In an answer to a notice of civil resource violation, the respondent shall choose from one of the following options:

(1) Waive any contest to the citation of the civil resource violation, and comply with all the monetary and non-monetary sanctions assessed therein;

(2) Waive any contest to the citation of the civil resource violation, but request a mitigation of sanctions based on written justifications; or

(3) Contest the citation of the civil resource violation. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-65 Counter claim disallowed. Any counterclaim against the state, the department, or the citation issuing officer or official by a respondent shall be disallowed in an administrative hearing conducted by the board or a hearing officer on civil resource violations. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-66 Default. (a) When a party fails to answer a violation notice, or fails to attend a board hearing or a contested case hearing after proper service of notice, or otherwise fails to defend against a citation of civil resource violation, the

board or a hearing officer shall enter the respondent's default, and may

(1) Enter a finding of a violation;

(2) Impose any sanctions allowed by law for the violation; and

(3) Enter a decision by default, which shall be final.

(b) For good cause shown, the board or a hearing officer may set aside an entry of default or a default decision. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-67 Proceedings after answer. (a) When a respondent in an answer waives contest to the citation in the violation notice and has complied with all sanctions assessed, the administrator shall record a satisfaction of citation and conclude the case.

(b) When a respondent in an answer waives contest but requests mitigation of sanctions, the following steps shall be taken in disposing of the case:

(1) The administrator shall serve a copy of respondent's answer to the department within ten days of the receipt of respondent's answer.

(2) Upon the receipt of respondent's answer, the department shall have twenty days to file its statement of position, if any, and serve it upon all parties.

(3) The administrator shall assign a hearing officer to examine the mitigating circumstances and decide on the mitigation request.

(4) The hearing officer shall, at a time not later than thirty days after the filing of the department's statement of position or after the twenty-day period allowed for such filing, whichever is earlier, examine and decide on the mitigation request.

(5) The hearing officer shall make a decision without the holding of any hearing or the

attendance of any parties or their representatives or any witness, and may rely on the evidence in the record in rendering the decision.

(6) The hearing officer's decision shall include findings of fact and conclusions of law as to the mitigating circumstances, and may sustain, modify, or deny any sanctions contained in the violation notice.

(7) The administrator shall, within ten days of the hearing officer's decision, serve upon respondent a certified copy of the decision.

(8) A hearing officer's decision on a mitigation request shall be final. No further administrative or judicial review shall be allowed.

(9) When all sanctions imposed by the hearing officer have been complied with, the administrator shall record a satisfaction of decision and conclude the case.

(c) When a respondent's answer contests any citation in the violation notice and requests a contested case hearing, the administrator shall assign the case to a hearing officer who shall proceed to the conduct of a CRVS contested case hearing as provided in subchapter 5 of this chapter, except as provided herein. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-68 Record of contested case hearing. (a) For every contested case processed under this subchapter, the administrator shall, by means of an electronic recording device, maintain an audio record of all proceedings in a CRVS contested case for a period not less than two years after the case is concluded.

(b) Any party may obtain a certified copy of the audio record upon a payment of $10 per copy.

(c) Any party to a proceeding conducted under this subchapter may rely upon the audio record in producing a transcript of the proceeding or any part

thereof. Unless the transcription is performed and attested by a stenographer certified by the administrator, a transcript produced from the audio record shall be deemed unofficial and shall not be considered as part of the record. A citation of an unofficial transcript in a subsequent proceeding conducted under this chapter shall be admissible, subject to any challenges by other parties and the authentication by the administrator.

(d) A hearing officer may grant a motion for stenographic recording of a proceeding conducted under this subchapter, provided that the cost shall be borne by the proposing party or allocated among parties by the hearing officer, and a deposit of $200 for the stenographer's service shall be tendered to the administrator at the time when the motion is granted. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-69 Final decision making procedure when power delegated. (a) When the chairperson or a hearing officer is delegated with the power to make the final decision in a CRVS contested case, subchapter 6 shall not apply. Instead, the procedure provided in this section shall apply.

(b) After all evidence has been taken, the parties may submit, within the time set by the chairperson or hearing officer, a proposed decision and order which shall include proposed findings of fact and conclusions of law.

(c) Within the time established by law, if any, or within a reasonable time after the parties have had an opportunity to file objections, if applicable, to file briefs and to present oral argument as may have been permitted, the chairperson or hearing officer shall render its findings of fact, conclusions of law, and decision and order.

(d) Every decision and order adverse to a party to the proceeding, rendered by the chairperson or hearing officer, shall be in writing or stated in the record and shall be accompanied by separate findings

of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the chairperson or hearing officer shall incorporate into its decision a ruling upon the proposed findings so presented.

(e) Decisions and orders shall be served by mailing certified copies thereof to each party at the party's address of record or by personal delivery of a certified copy. When a party to a contested case has appeared by a representative or by counsel, service upon the representative or counsel shall be deemed to be service upon the party. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-70 Administrative sanctions schedule; factors to be considered. (a) For the purposes of providing guidance in the assessment of administrative sanctions and promoting consistency within the department, there shall be adopted by the Board an administrative sanctions schedule. The department shall use this administrative sanctions schedule when assessing a sanction for an alleged civil resource violation pursuant to sections 13-1-62 and 63 herein.

(b) The board or its delegates shall set a sanction in accordance with the administrative sanctions schedule and in consideration of the following factors:

(1) Value of the natural or cultural resource that is damaged or the subject of a theft, which may be measured by the market value of the resource damaged or taken and any other factor deemed appropriate by the board, such as the loss of the resource to its natural habitat and environment and the cost of restoration or replacement;

(2) Damages to the state in its facilities and services, including the present value of any accrued past damages and defined future damages;

(3) Costs for the state to remedy any damages, restore any resources, repair any

facilities, replace any assets, or recover any losses;

(4) Costs for the state to enforce against, investigate and monitor the violation and its damages;

(5) Fees and costs for the state to prosecute or process the violation in any legal or administrative proceedings, including attorneys' fees and costs;

(6) Level of damages to the public for whom the state holds a public trust of the resource involved;

(7) Pecuniary gains that have been realized or may be potentially realized by the respondent from an unauthorized commercial activity;

(8) Concurrent civil resource violations when perpetuating the underlying violation;

(9) Concurrent violations of any federal laws or state laws other than those administered by the department;

(10) Level of the respondent's culpable intent as compared to the state's responsibility in proper signage, other actual or constructive notice, enforcement, and promotion of public awareness and education;

(11) Repetition and duration of resource violations of the same or similar type in the respondent's history;

(12) Level of the respondent's cooperation with authorities and compliance with inquiries, requests, orders, protocols, or warnings that may have been conveyed to the respondent through written or verbal notification from the department;

(13) Voluntary actions taken by the respondent in mitigating any damages already inflicted or averting any imminent damages;

(14) The respondent's capability and resources in providing any redress and restitution;

(15) The respondent's willingness to voluntarily comply with all the sanctions assessed in

the notice of civil resource violation for any specific violation; and

(16) Any other factors that may be identified as constructive for the fair assessment of administrative sanctions. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-71 Determination of a repeat violator. (a) For the purpose of assessing administrative fines and other sanctions on a civil resource violation, a prior criminal or administrative citation shall not subject the same person to being determined as a repeat violator unless a final judgment or administrative decision on the prior citation has been entered by a judge, the board, the chairperson or a hearing officer with a finding and conclusion of a violation of a state law administered by the department.

(b) Consistent with subsection (a), there shall be no civil resource violation recorded against a respondent if the respondent's answer to a notice of civil resource violation waives contest under section 13-1-64 herein. [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-72 Enforcement and stay of a final decision. (a) Unless otherwise stated in a final decision, all administrative fines, other monetary assessments and non-monetary sanctions shall be due within thirty days of the service of the final decision imposing such fines and sanctions.

(b) Unless otherwise decided by the board, upon request filed by a party, the chairperson may stay enforcement of a final decision pending a judicial review of the case. The chairperson's decision as to the request for stay is final.

(c) The department is authorized to take any legal action to collect any overdue monetary sanctions or enforce any overdue non-monetary sanctions imposed

in an administrative proceeding under this subchapter, or may refer the case to the attorney general for such an action." [Eff] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

2. Material, except source notes, to be repealed is bracketed. New material is underscored. Additions to update source notes to reflect new amendments are not underscored.

3. Sections 13-1-41 to 13-1-72 are proposed under two new subchapters - Subchapters 6 and 7, and therefore not underscored in this Ramseyer draft pursuant to §00-6-8, Hawaii Administrative Rules.

4. These amendments to and compilation of chapter 13-1, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on _____, and filed with the Office of the Lieutenant Governor.

_____
LAURA H. THIELEN
Chairperson
Board of Land and Natural Resources

APPROVED FOR PUBLIC HEARING:

_____
Deputy Attorney General