

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

December 12, 2008

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

REQUEST FOR FINAL APPROVAL TO ADOPT CHAPTER 13-1, SUBCHAPTER 7, HAR,
RELATING TO THE CIVIL RESOURCE VIOLATIONS SYSTEM,
AND TO AMEND AND COMPILE CHAPTER 13-1, HAR,
RELATING TO PRACTICE AND PROCEDURE OF THE DEPARTMENT

I. ACTION REQUESTED

The Department of Land and Natural Resources (hereinafter the "Department" or "DLNR"), Office of the Chairperson, hereby submits a request for your final approval to: 1) adopt Chapter 13-1, Subchapter 7, Hawaii Administrative Rules (hereinafter "HAR"), relating to the Civil Resource Violations System; 2) amend other subchapters of Chapter 13-1, HAR, relating to practice and procedure of the Department and proceedings before the Board of Land and Natural Resources (hereinafter the "Board"); and 3) compile the whole Chapter 13-1, HAR.

The proposed amendment of this chapter has undergone further review and certain changes following public informational meetings and hearings held by the Department. The newest version has been approved as to form by the Department of the Attorney General, and is now submitted for your action and attached hereto as Exhibit 1: Chapter 13-1, HAR, Ramseyer Draft (12/12/2008).

II. THE SUBJECT MATTER

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.

The essence of this proposed amendment is to add a Subchapter 7 to Chapter 13-1, HAR, and establish the Civil Resource Violations System (CRVS), which is authorized under the Civil Natural Resource Violations Act of 2004, codified as Chapter 199D, Hawaii Revised Statutes (HRS). The goal of this system is to strengthen and streamline DLNR's enforcement actions by

creating an administrative law system that will process the Department's violation cases in a just, expeditious and cost-effective manner, to the benefit of the parties involved in the Department's enforcement proceedings and the protection of the state's natural and cultural resources.

To achieve this goal, the Department proposes to adopt §§13-1-51 to 72, HAR, as Chapter 13-1, Subchapter 7, Civil Resource Violations System. 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 a violation of any state law administered by the Department;
- Summon that person to answer the violation notice by choosing from three options: 1) waive contest of the violation and comply with the notice; 2) waive contest and request mitigation of the proposed penalty; or 3) contest the violation notice; and
- Assess an administrative penalty for such a violation pursuant to a guiding penalty schedule to be prescribed by the Board.

The Department's Administrative Proceedings Office will be responsible for coordinating with the Department's divisions and attached agencies to process all of the civil enforcement cases initiated under this Subchapter. If a violation notice is properly contested, the case may be submitted to the Board for disposition, or be assigned to a departmental hearing officer for the conduct of a contested case hearing. Procedures of a contested case will be governed by Subchapter 5 of Chapter 13-1, HAR, Contested Case Proceedings. The post-hearing process will be governed by Subchapter 6, Post Hearing Procedures for Hearings Conducted by Hearing Officer, unless final decision making authority has been delegated to the Chairperson or the hearing officer in which case the post-hearing process is specified in §13-1-69, HAR.

The Department also proposes to amend and recompile the currently existing subchapters of Chapter 13-1, HAR. 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 require updating to reflect and implement procedures more appropriate to the Board's current needs and practice and conforming to the prevailing state law.

III. THE RULEMAKING PROCESS

A. Preliminary Proceedings

The Department submitted its initial proposal to the Board on June 13, 2008 with a draft amendment of Chapter 13-1, HAR, and received the Board's authorization to hold public hearings subject to approval by the Governor. The Board also required the Department to hold public informational meetings to better inform the public, to engage in discussion with the community and resource users, and to address their concerns and questions.

Following authorization from the Board, the Department obtained initial approval from the Department of the Attorney General to hold public hearings on these proposed rules. The proposal was then submitted to the Governor, the Department of Budget and Finance, the Department of Business, Economic Development and Tourism, and the Small Business Regulatory Review Board (SBRRB).

Staff held a meeting with the lead reviewer of the SBRRB before formally presenting the proposed rules at its July 16, 2008 meeting. The SBRRB unanimously recommended that the amended rules proceed to public hearings, and that a draft of the penalty schedule be open for public discussion with the public and made available to the SBRRB before being adopted by the Board. See Exhibit 2: Approval Letter of the Small Business Regulatory Review Board.

The Governor approved the holding of public hearings on August, 2008. See Exhibit 3: Memorandum to the Governor and Approval of the Governor to Conduct Public Hearings.

B. Public Informational Meetings

Pursuant to the order of the Board, the Department held two rounds of public informational meetings on all major islands of the state. The first round of seven meetings was conducted in July, with a follow-up meeting in August in Hilo. 114 people attended the first round of statewide public informational meetings, including 36 DLNR employees. An additional 13 people attended the follow-up Hilo meeting. The second round of eight meetings was conducted in conjunction with the public hearings in October 2008. 108 people attended the second round of public informational meetings and hearings, including 21 DLNR employees.

C. Public Hearings

A series of eight public hearings were held in October 2008 on all major islands of the state. Legal notice of the public hearings was published by the Department in the Sunday, August 31, 2008 editions of the Honolulu Advertiser and the Star-Bulletin. See Exhibit 4: Public Hearing Notice. Notices were also published by DLNR in the following newspapers: the Maui News, the Kauai Garden Island, the Hawaii Tribune-Herald, the West Hawaii Today, the Lanai Times and the Molokai Dispatch. Related public service announcements were made by various media throughout the state, including newspapers, and radio and television channels.

A generic script used by the officers for the public hearings is attached hereto as Exhibit 5. Oral testimony received from the public at these hearings was transcribed and is attached hereto as Exhibit 6: Consolidated Record of Verbal Testimonies. Written testimony received by the Department is attached hereto under Exhibit 7: Written Testimonies.

In total, the Department received testimony from 38 individuals and entities (25 oral and 16 written, 3 testifiers tendered both). Among these testifiers, 8 were in support of the proposed rules, 5 offered conditional support, and none voiced direct opposition. Other testifiers did not take any position in regards to the proposed rules in general, but either suggested modifications to certain provisions of the proposed rules or raised concerns and reservations. Among the parties presenting testimony were the Native Hawaiian Legal Corporation (no indication of

support or opposition), the Nature Conservancy of Hawaii (support), and the Office of Hawaiian Affairs (conditional support).

All major news media of the state ran reports on the proposed rules, the CRVS, and the meetings and hearings; many of them did that more than one time. On July 25, 2008, the Honolulu Advertiser published an editorial expressing support of the CRVS. See Exhibit 8: Honolulu Advertiser Editorial on the CRVS.

All CRVS-related questions collected from the public informational meetings and hearings are reproduced in Exhibit 9. Selected major questions and concerns on the proposed rules are discussed in Section IV below.

D. Post-Hearing Reviews and Revisions

After receiving and reviewing public comments and testimony, staff held a series of internal discussions and meetings with the Department of the Attorney General to arrive at the final draft of the proposed rules. This newest Ramseyer version has undergone certain changes and incorporated several suggestions that the Department received from the public.

The following are notable revisions from the previous version that was submitted to the Board in its June 13, 2008 meeting and used in subsequent public hearings:

1. §13-1-11.2: Language is added to allow the presiding officer to order the removal of a disruptive person from a proceeding, in addition to only “remove”. This is for clarification purpose only.
2. §13-1-12: A Subsection (d) is added to allow the filing of certain documents through an Internet-based portal or other electronic filing procedures if sanctioned by the Board. The idea is to simplify procedures, lower costs to the public and improve staff efficiency in the Department’s routine business transactions, e.g., filing for a permit or license application or renewal, a contested case hearing, or an answer to a violation notice. This method will also allow outside parties to make online payments in these transactions. This option was suggested to the Department in public testimony and discussed in the public informational meetings.
3. §13-1-30: In response to public testimony, DLNR now recommends to eliminate the \$500 contested case fee charge as proposed in the previous draft while retaining the \$100 filing fee. In the same section, the rule also makes clear that a request for a contested case hearing can be filed either with the filing fee or a request for waiver of the fee. This is necessary so that people will not be required to pay the fee upfront to meet the filing deadline and wait for a refund upon the granting of a fee waiver request.
4. §13-1-54: Language is added to recognize that some permits and licenses are issued by the Board, in addition to those issued by the Department.

5. §13-1-58: Subsection (b) is revised to require the final decision maker to receive and review a hearing officer's recommendation before making a final decision. Previous draft did not require the "review".
6. §13-1-61: Paragraph (c)(1) is expanded to allow service on a respondent's agent. Paragraph (c)(3) is added to specify the method of serving the violation notice upon a corporate or non-corporate entity. Service upon a corporate entity had not been addressed in the original draft. This revision is to clarify a specific situation under Paragraph (c)(1), and does not expand its scope in any way.
7. §13-1-62: The words "in writing" under Paragraph (9) and "written" under Paragraph (11) are deleted to allow electronic filing.
8. §13-1-63: Subsection (a) has been modified to allow electronic filing. In addition, in response to public testimony, Subsection (c) is added to allow the CRVS administrator to extend the period for filing answers for good cause shown.
9. §13-1-64: For the purpose of consistence in language, the word "citation" is changed to "notice".
10. §13-1-65: For the purpose of consistence in language, the word "citation" is changed to "notice".
11. §13-1-66: Subsection (a) is revised to clarify that a respondent's failure to answer a violation notice within 21 days of service will be deemed a waiver of the right to contest the violation and will be grounds for the Board to find the respondent in default. The only purpose is to provide clarity to the originally proposed rules. Paragraph (a)(2) is modified to qualify that a default penalty shall not exceed that has been provided in the violation notice. The previous version allowed the imposition of penalty allowed by law. This language is vague.
12. §13-1-67: For the purpose of consistence, the word "citation" is changed to "notice" or "violation notice", "sustain, modify or deny" to "adopt, modify or reverse".
13. §13-1-68: This rule was revised to allow the use of video recording along with the audio method that has been provided in the previous draft. As more and more hearings are conducted through video teleconferencing, especially in cases with inter-island parties, this option may be preferred by parties. The use of a video record was brought up in the meetings and hearings held on the neighbor islands.
14. §13-1-70: Modification is made to clarify the meaning of "department". The new version replaces it with the administrator, divisions and DOCARE officers.
15. §13-1-71: Based on public testimony, the Department proposes to delete Subsection (b) in the original proposal. The original language would preclude the Department from recording a civil resource violation against a respondent if the respondent's answer to a

notice of civil resource violation waives contest. The Department agrees that it is important to retain the full record of a person's history of violations and enforcement actions. Doing so will allow the Department to effectively address those abusive repeat offenses.

In addition, minor corrections and improvements in format and language were made in the following sections: §13-1-7, §13-1-8, §13-1-9, §13-1-10, §13-1-11, §13-1-11.1, §13-1-14, §13-1-21, §13-1-22, §13-1-24, §13-1-27, §13-1-28, §13-1-31, §13-1-31.1, §13-1-32, §13-1-35, §13-1-39, §13-1-43, §13-1-52, §13-1-53, §13-1-54, §13-1-58, §13-1-61, §13-1-66, §13-1-69, and §13-1-70. No changes to any substantive content or meaning were made in any of these revisions.

The current draft attached hereto as Exhibit 1 has incorporated all the revisions as mentioned above. Staff has determined that all these revisions from the previous version are minor, non-substantive changes, and require no further public hearings. The Department of the Attorney General supports this determination, and has conducted review of this newest Ramseyer version and given preliminary approval for adoption.

IV. DISCUSSION OF PUBLIC COMMENTS RECEIVED

Staff has compiled a list of issues, suggestions and public comments that have been raised in the public informational meetings, hearings and written testimonies. See Exhibit 8. All of these issues, suggestions and comments have been considered by staff in the revision process, many of them incorporated in the newest proposal. The following are material legal issues that warrant further discussion:

Issue 1: (§13-1-2) OHA suggested that the definition of "proceedings" should retain the original language "[p]roceedings 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".

Discussion: DLNR believes this part has been included in Paragraph (5), which is a broader definition. It defines a proceeding as "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".

Issue 2: (§13-1-5.1) Why is an adjudicatory function not a meeting? Does this follow the Sunshine Law? Does it violate the requirements under §92-6(b), HRS.

Discussion: The suggested rule change is consistent with the relevant statutes. An adjudicatory function is governed by Chapter 91, HRS, rather than Chapter 92, HRS. §92-6(b), HRS, applies only to the State Land Use Commission. All other state boards and regulatory commissions fall under §92-6(a), HRS. §92-6(b), HRS, is not applicable to the Board of Land and Natural Resources.

Issue 3: (§13-1-9) Should DLNR retain the part of this rule that allows the withholding of government records 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"?

Discussion: No. This provision is deemed incompatible with the Uniform Information Practices Act (UIPA), as modified and adopted by the state under Chapter 92F, HRS. It does not fall into any of the statutory exceptions provided therein. That said, some of the government records may fall into the privacy exception under the UIPA, and may be withheld from disclosure. In any event, the UIPA should govern this field and afford sufficient protection to parties involved in DLNR's proceedings.

Issue 4: (§13-1-9) Should this rule authorize the Chairperson to determine whether a record may be withheld from public inspection? The contention is that the attorney-client privilege belongs to the client, not the attorney. The current proposal designates the Attorney General to make the decision.

Discussion: Any attorney-client privilege belongs to the State rather than a department. The Attorney General represents the State. The State has the authority to delegate this authority to the Attorney General. This rule allows such a delegation.

Issue 5: (§13-1-11.1) OHA proposed that this section be modified to take into account educationally- and physically- challenged persons, and to permit and provide the usage of the Hawaiian language in the Department's public meetings and hearings.

Discussion: DLNR intends to follow the law in providing reasonable accommodations to persons with special needs, and has always tried its best in doing so in the past. The American Disabilities Act and other relevant state and federal legislations should govern the Department's practice in this field, therefore additional departmental rules are not necessary. The rule as stated does not prevent the use of the Hawaiian language in DLNR's public meetings and hearings.

Issue 6: (§13-1-11.1) Is this rule the best way to limit the amount of time each individual should be allocated for giving testimony at a public hearing? Should a limitation be set per agenda item, per person or per issue? Another question is whether a testifier can offer testimony on another subject not on the agenda.

Discussion: Chapter 92, HRS, allows the Board to limit testimony to only those items that are on the agenda for a particular meeting. Restricting testimony only to agenda items will allow the Board to run its meetings in a fair, efficient and timely manner. For this same reason, it may be desirable in a particular situation for the Board's presiding officer to limit the testimony of all people submitting testimony or all people submitting testimony on a particular agenda item. The Board wants to accommodate all members of the public wishing to provide testimony, but it also must be able to run its meetings efficiently to be able to complete all of its business. This rule allows the Board to limit testimony in order to accomplish all purposes. It is more important to enable the presiding officer to set limitations for the purpose of fairness and efficiency than to prescribe everything in the rules.

Issue 7: (§13-1-11.2) Should the rules provide some definition as to what would constitute a disruption of a meeting when a disruptive person can be removed from a DLNR proceeding?

Discussion: DLNR believes that this question should be left to the officer who presides over the proceeding and that it should be decided on a case-by-case basis. Removal of any person for disruptive behavior will not amount to suppression of the right to speech. A person is still entitled to participation and giving testimony in a proper manner. The prohibition is on the behavior, not the speech or its contents. The intent of this rule is to allow the presiding officer to conduct orderly meetings that provide the opportunity for all attendees to provide testimony.

Issue 8: (§13-1-15) Is there a constitutionality problem if the Department's rule provides that the Board may refuse to accept a document or require its amendment if its contents do not meet certain standards?

Discussion: There are certain requirements for certain types of documents, most notably, contested case hearing (CCH) petitions. The rule requires these certain documents to conform to the requirements because the Board or the Department needs to know what the basis for a party's claims is. The requirements for CCH petitions are things like nature of the petitioner's interest, relief being requested, how the requester's participation will serve the public interest, etc. These are essential elements that the Board or the Department needs know in order to determine if they have jurisdiction in a particular matter or whether the petitioner has standing. It does not violate free speech by requiring that people specify what they are claiming and the basis for their claims so that the Board or Department can take further action.

Issue 9: (§13-1-22) Should a notice of public hearing be published only one time? Should it be two times, with at least one statewide, and another in each of the counties where the proposed rules will have any effect? Should additional notice be provided to any trade associations whose members may be affected?

Discussion: This rule as proposed is consistent with §91-3, HRS.

Issue 10: (§13-1-23) OHA proposed that DLNR retain the language in this section that provided "[w]here the proposed rulemaking affects only one county, the public hearing shall be held in that county".

Discussion: DLNR believes that this original language is vague and may not work to benefit the public and the neighbor island communities as OHA claims. The Board and the Department should take a case-by-case approach to decide where the public hearing should be held.

Issue 11: (§13-1-27(d) and (i)) Do these two provisions unfairly shift the burden to the petitioner in requiring the petitioner to notify the potentially-interested parties of the declaratory proceeding?

Discussion: In most of the proceedings before the Board, the Department should bear the burden of notice, not the outside parties involved. However, in a hearing for a declaratory ruling, the petitioner may be in a unique and better position to do so than the Department, or the petitioner may have failed to notify necessary parties to the action. The proposed rule will authorize the Board to balance different factors, e.g., costs, timeliness, possession and availability of information, and efficiency, in assigning the notice burden to an appropriate party or parties.

Notably, this rule does not automatically shift the burden to a party requesting a declaratory ruling. It only provides a possibility for such a measure.

Issue 12: (§13-1-29 and 29.1) The possibility of denying a request or petition for a contested case without a hearing violates the due process requirement.

Discussion: This statement does not correctly summarize the rule. The rule is not intended to allow the Board to rule on the issues raised in a petition for a contested case without a hearing. This rule addresses the Board's determination as to whether it has jurisdiction over the issues raised or whether the petitioner has standing to participate in a contested case. If the answer to either of these questions is no, then the petitioner is not entitled to a contested case and due process has not be violated. If the answers to both questions are yes, then a contested case is required to be held and the petitioner will be given due process.

Issue 13: (§13-1-31.1) Contention that barring any person other than the alleged violators from enforcement proceedings violates due process requirement and unduly obstructs the advocacy of public interest, public access to governmental processes, and the protection of resources in the public trust.

Discussion: An enforcement proceeding is held for the sole purpose of determining whether a violation of a statute or an administrative rule has occurred. Under DLNR's statutes and rules, the State has the exclusive authority to enforce its laws and rules. A private party, other than the party being charged with a violation, has no property interest separate interest from the State's that would mandate its participation in this process.

Issue 14: (§13-1-32.2) Why would this proposed rule require a first deputy of the Department to perform or supervise its enforcement activities?

Discussion: The purpose of this rule is to avoid potential conflicts in the scope of duties and responsibilities of the Chairperson. Since the Chairperson may be called to preside over the administrative proceedings, the Department's enforcement activities should be performed or supervised by another person.

Issue 15: (§13-1-32.3) Should the rules disallow automatic discovery as proposed?

Discussion: Not providing for discovery as a matter of course in a contested case allows the Board to provide an expedited administrative process without undue delay or excessive costs. This also reflects the current practice of DLNR's contested cases. Currently, discovery is allowed by agreement of the parties and upon order of the Board or a hearing officer.

Issue 16: (§13-1-67(b)) In a CRVS case where a respondent's answer requests for mitigation, should the hearing officer make the final decision without allowing the respondent the opportunity to ask for a review by the Board, or even a judicial review?

Discussion: In waiving the right to contest the violation but requesting mitigation, a respondent is making an informed decision and choosing to waive any right the respondent might have to

further review, either by the Board or a court. If the respondent is not satisfied with waiving those rights, the respondent has the choice to contest the violation instead and to preserve the right to ask for administrative and judicial review. The respondent may also file a motion for reconsideration under §13-1-39 if it believes that the result of a decision is a mistake, or there is new information, or there is substantial injustice.

Issue 17: (§13-1-70) Should the administrative sanctions schedule be incorporated into the administrative rules?

Discussion: The schedule will take a longer time to formulate than the current rules. The Department intends to phase in different divisions and categories of cases over the time. The Department expects that a comprehensive sanctions schedule will be completed in a series of actions. This process will also allow the Board to closely examine the schedule submitted for approval by the Department, and the public to provide opinions and input on individual sections and penalty levels.

Issue 18: (§13-1-71) Will this rule give more lenience to repeat offenders than necessary and appropriate? Should violators be allowed to cleanse their records by just paying the fines?

Discussion: The Department proposes to delete section (b). Testimony was received that people did not like the idea of repeat offenders being allowed to continue to simply admit to the offense and paying the fine without any additional repercussions. By deleting section (b), the Department will not be barred from considering parties as repeat offenders even when they choose the option to not contest the violation notice and to simply pay the associated fine.

Issue 19: Is there a standard to determine whether a violation is a criminal or civil? Who will make that determination?

Discussion: Currently DLNR makes the determination as to whether a violation will be pursued criminally or civilly on a case-by-case basis, depending on the specific facts in the case. The determination process involves several parties, including the county prosecutors, the DOCARE officers, and the division whose law has been violated. The Department will continue this current practice. One of the purposes of the CRVS system is to allow the Department to have better control over the enforcement of its laws and more options in pursuing its enforcement cases.

Issue 20: Should the rules mandate CRVS hearings to be held on neighbor islands for violations incurred there?

Discussion: The Department does have statewide jurisdiction and may hold hearings anywhere in the state. The normal practice is to hold hearings on the islands where violations occurred, and DLNR intend to continue this practice. But there may be exceptions to that practice. The Department prefers to leave the question of appropriate venue to the Board and/or the hearing officer to select the most desirable venue. In alternative, the parties to a case may by stipulation choose one or multiple sites or use teleconferencing techniques for the proceedings in the case.

Issue 21: Demand by OHA and others that the rules explicitly provide an exemption, immunity or affirmative defense for people exercising their Native Hawaiian gathering rights and engaging in other traditional and customary practices.

Discussion: The Department intends to comply with the law and protect people's constitutional rights to customary and traditional practices. As much of this body of the law is developed through case law, DLNR will review the assertions on a case-by-case basis. Procedurally, the CRVS contested case procedure does provide an easy and fair process for people to advocate their gathering rights and assert rights and exercise before the Department.

Issue 22: Recommendation by OHA and others that the Board appoint hearing officers with certain qualifications and training, e.g., the understanding and knowledge of certain local communities, experience, history of temperament and impartial judgments, or the Hawaiian language, history, rights and cultures.

Discussion: DLNR does not agree that any of these should be a legal requirement for serving as a hearing officer of the Department. While they may be desirable qualifications, there may be other factors or a combination of factors that the Board should consider in appointing a hearing officer. Singling out one or some qualifications is not conducive to the process of hiring the right person.

Issue 23: OHA claims they should receive a portion (20%) of the fines and monies to be collected through the CRVS as relating to the Public Land Trust.

Discussion: §10-3, HRS, provides that a portion of the Public Land Trust shall be paid to OHA. That same provision goes on to state that the Public Land Trust, for purposes of that chapter, shall be comprised of "proceeds and income from the sale, lease, or other disposition" of the ceded lands and lands held by the federal government at the time of annexation which were to be returned to the state. Based on this definition, any fines collected as part of the CRVS system are not part of the Public Land Trust. The Department therefore proposes to decline OHA's request.

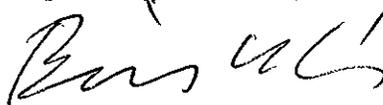
In conclusion, staff is of the opinion that the newest version of the proposed rules has adequately addressed all the pivotal legal issues, and is ready for adoption.

V. STAFF RECOMMENDATION

"That the Board of Land and Natural Resources

1. Grant approval to adopt Chapter 13-1, Subchapter 7, HAR, relating to the Civil Resource Violations System, and amend and compile Chapter 13-1, HAR, relating to Practice and Procedure of the Department, as attached in Exhibit 1; and
2. Authorize the Chairperson to sign for adoption the proposed administrative rules, to submit to the Governor for approval, and to submit to the Office of the Lieutenant Governor for filing."

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 (12/12/2008)
- Exhibit 2: Approval Letter of the Small Business Regulatory Review Board
- Exhibit 3: Memorandum to the Governor and Approval of the Governor to Conduct Public Hearings
- Exhibit 4: Public Hearing Notice
- Exhibit 5: Generic Script Used for Public Hearings
- Exhibit 6: Consolidated Record of Verbal Testimonies
- Exhibit 7: Written Testimonies (In the order of date of receipt)
 - Exhibit 7A: David Kimo Frankel , Staff Attorney
Native Hawaiian Legal Corporation
 - Exhibit 7B: Carl Imperato, President
Hanalei-Ha'ena Community Association

- Exhibit 7C: Dennis Niles, Esq.
Paul Johnson Park & Niles, A Law Corporation
- Exhibit 7D: Gretchen Grove
- Exhibit 7E: Rene Siracusa, President, Malama O Puna
- Exhibit 7F: Daniel S. Wong
- Exhibit 7G: Toni Marie Davis
- Exhibit 7H: Clyde W. Nāmu'o, Administrator
Office of Hawaiian Affairs
- Exhibit 7I: Lynn P. McCrory, President
Pahio Development, Inc.
- Exhibit 7J: Jacob K. Barros, Jr.
- Exhibit 7K: Charles Lipps, Jr.
- Exhibit 7L: Glenn S. Shiroma
- Exhibit 7M: The Nature Conservancy of Hawaii
- Exhibit 7N: Susan T. O'Donnell
Aloha Wedding Planners, Inc.
- Exhibit 7O: Dianna K. Shitanishi, CPCE, CMP
Hawaii Weddings and Events
- Exhibit 7P: Sarah Chang
Sarah Chang LLC, dba Wanna Hula?
- Exhibit 8: Honolulu Advertiser Editorial on the CRVS
- Exhibit 9: Related Questions Collected from Public Meetings and Hearings

Ramseyer Draft (12/12/08)

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

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 Proceedings

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

Subchapter 4
Declaratory Rulings

§13-1-27	Petition for declaratory ruling
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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	Filing Fee
§13-1-31	Parties
§13-1-31.1	Hearings of violations
§13-1-31.2	Notice of hearing
§13-1-32	Conduct of hearing
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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] government records of the board 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, 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 agenda items in board proceedings. 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 or order the removal of 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.

(d) The board may develop and authorize the use of Internet-based or other electronic filing procedures. Once developed, the board may authorize the use of such Internet-based or other electronic filing procedures for the filing of documents. [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 is 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 petition, or upon its own motion, when] When the board proposes to [issue] adopt, amend, or repeal a rule, whether acting upon a petition or its own motion, 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 a 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 may 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, 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[s.]. (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[s.].

[(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 reasons 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 on 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 its own motion or on [the] a 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.] Filing fee. 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 or a request for waiver of this fee. The chairperson may waive the filing 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 therefor 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 hearing.

(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 matters 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[s]; 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; R] (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; R] (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 not 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
(Imp: HRS §§91-2, 91-11)] (Auth: HRS §171-6)

§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 authorized by the board to conduct a contested case hearing or examine a mitigation request 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 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 prosecution 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 prosecution 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 board or the department or any attached agencies, may be adjudicated through the civil resource violations system of the department pursuant to this

subchapter. [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 and reviewing the hearing officer's recommendation following a CRVS contested case hearing, and may

- (1) Adopt, modify or reverse the hearing officer's recommendation and issue the final 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 Notice of civil resource violation; issuance, service and amendment. (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) By personal service on the respondent, with or without the respondent's signature acknowledging the service;
- (2) By certified mail, return receipt requested, to the respondent's last known address;
- (3) If the respondent is a domestic or foreign corporation or a partnership or other unincorporated association, by delivering a copy of the violation notice to an officer, a managing or general agent or partner, or to any other agent or partner authorized by appointment or by law to receive service of process; or
- (4) Where a civil 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.

(d) 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 a 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 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 notice;
- (8) Date of the issuance of the notice;
- (9) A statement that all citations made and sanctions assessed by the department in the notice are final unless contested 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 request for mitigation without contesting the notice shall be examined and decided by a hearing officer without holding any hearing, 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, within twenty-one days of the service of the violation notice, answer the notice by a method indicated in 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.

(c) For good cause shown, the administrator may extend the period allowed for answering a violation notice. [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 notice of civil resource violation, and comply with all the monetary and non-monetary sanctions assessed therein;
- (2) Waive any contest to the notice of civil resource violation, but request mitigation of sanctions based on written justifications; or
- (3) Contest the notice of civil resource violation. [Eff _____]
(Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-65 Counter claim disallowed. Any counterclaim by a respondent against the state, the department, or the officer or official who has issued the violation notice shall be disallowed in an administrative proceeding conducted by the board or a hearing officer. [Eff _____] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

§13-1-66 Default. (a) When a respondent fails to answer a violation notice within twenty-one days of the violation notice or such further period granted by the administrator, 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 respondent shall be deemed to have waived the right to contest the violation notice, and 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 for the violation not to exceed those that have been assessed in the violation notice; 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 violation notice and has complied with all sanctions assessed, the administrator shall record a satisfaction of the violation notice and conclude the case.

(b) An answer waiving contest but requesting mitigation shall be adjudicated in accordance with the following procedure:

- (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 Adopt, modify or reverse 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 is timely filed and contests the violation notice, the administrator

shall assign the case to a hearing officer who shall proceed to the conduct of a CRVS contested case hearing pursuant to subchapter 5 of this chapter, except as otherwise provided herein. [Eff

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

§13-1-68 Record of contested case hearing.

(a) The administrator shall retain an audio, video or stenographic record of all proceedings in a CRVS contested case for a period of not less than two years after the case is concluded.

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

(c) Any party to a proceeding conducted under this subchapter may rely upon the audio or video 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 or video 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) Notwithstanding provisions in subchapter 6, the procedure provided in this section shall apply when the final decision power is delegated

to the chairperson or a hearing officer pursuant to section 13-1-58 of this subchapter.

(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 a 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, a separate ruling on each shall be incorporated in the decision rendered by the chairperson or hearing officer.

(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.

(b) The administrator, divisions, and conservation and resource enforcement officers shall

use the administrative sanctions schedule when issuing a notice of civil resource violation.

(c) The board or its delegates shall set a sanction for a civil resource violation after consideration of the administrative sanctions schedule and 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 or its delegates, 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 perpetrating 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) Extent 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 to mitigate or avoid any damages or injuries resulting from or threatened by the violation;
- (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.

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. [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 AS TO FORM:

Deputy Attorney General

42317



**DEPARTMENT OF BUSINESS,
ECONOMIC DEVELOPMENT & TOURISM**

LINDA LINGLE
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DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

July 22, 2008

COPY

To: The Honorable Linda Lingle
Governor of Hawaii

From: Theodore E. Liu *ML*

Subject: REVIEW OF HAWAII ADMINISTRATIVE RULES
Department of Land and Natural Resources (DLNR)
Governor's Referral: 08:071123

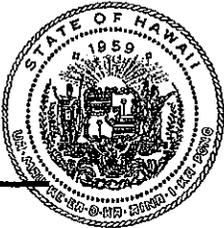
We have reviewed the DLNR request for public hearing on the amendments to HAR Chapter 13-1, entitled "Rules of Practice and Procedure." The purpose of the amendments will implement DLNR's current strategic action plan that entails the Civil Resource Violations System (CRVS) as well as modifications throughout the rules that will update and clarify existing procedures.

CRVS is expected to allow alleged violators to go through a simple process and help change the community's mindset toward the use and protection of DLNR's resources. Specifically, CRVS will authorize DLNR to issue a citation for an alleged civil resources violation, assess an administrative penalty pursuant to a penalty schedule to be prescribed by the Land Board, summon the respondent to answer the citation and participate in a contested case hearing conducted by a board-appointed hearings officer.

The Small Business Regulatory Review Board reviewed the amendments and recommended that they proceed to public hearing. The Review Board also recommended that a draft of the fine schedule in regards to the enforcement of the rules be made available at the public hearing. DBEDT concurs with these recommendations.

c: Laura Thielen, Chairperson, BLNR

62301



LINGA LINGLE
GOVERNOR
THEODORE E. LEE
DIRECTOR
MARK K. ANDERSON
DEPUTY DIRECTOR

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM

SMALL BUSINESS REGULATORY REVIEW BOARD
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DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

COVER SHEET

July 18, 2008

To: Laura H. Thielen, Chairperson
Department of Land and Natural Resources
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Phone no. (808) 587-0400 Fax no. (808) 587-0390

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Total no. of pages 2 pages Including cover sheet

MESSAGE:

The attached memo of HAR Chapter 13-1 "Rules of Practice and Procedure" is attached for your information on behalf of the Small Business Regulatory Review Board.

*Alicia Cinense, Office Assistant
Research and Economic Analysis Division
Phone no.: 586-2466
Fax no.: 586-8449
Email: aaniya@dbedt.hawaii.gov*



SMALL BUSINESS REGULATORY REVIEW BOARD

Department of Business, Economic Development & Tourism
No. 1 Capitol District Bldg., 250 South Hotel St. 4th Fl., Honolulu, Hawaii 96813
Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804

Tel 808 586-2594
Fax 808 586-8449

MEMORANDUM

Linda Lingle
Governor

Theodore E. Liu
Director, DBEDT

Mark K. Anderson
Deputy Director, DBEDT

Members

Lynne Woods
Chairperson
Maui

Sharon L. Pang
Vice Chairperson
Oahu

Michael Yee
2nd Vice Chairperson
Oahu

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Kauai

Charles Au
Oahu

Richard Schnitzler
Hawaii

Bruce Bucky
Oahu

David S. De Luz, Jr.
Hawaii

TO: Ms. Laura Thielen, Chairperson
Board of Land and Natural Resources

FROM: Ms. Lynne Woods, Chairperson *Lynne Woods*
Small Business Regulatory Review Board

DATE: July 18, 2008

SUBJECT: HAR Chapter 13-1 "Rules of Practice and Procedure"

This memorandum is in response to the Department of Land and Natural Resources' (DLNR's) proposed amendments to HAR Chapter 13-1, entitled "Rules of Practice and Procedure."

As you are aware, the Small Business Regulatory Review Board (Review Board) provides recommendations to State and County agencies on proposed rules and proposed rule amendments, pursuant to Chapter 201M, HRS, and the Governor's Administrative Directive No. 99-02.

Please be advised that the Review Board reviewed the proposed rules at its July 16, 2008, board meeting and heard from Mr. Bin Li, Administrative Proceedings Coordinator, at DLNR. Upon review and discussion, the Board unanimously recommended that the amended rules proceed to public hearing. It was also recommended that a draft of the penalty schedule be made available at the public hearing with a copy mailed to this Board.

The Review Board thanks you for keeping them apprised of the regulatory changes in your department.

cc: The Honorable Linda Lingle
Bin C. Li, Administrative Proceedings Coordinator, DLNR
Michael Yee, Review Board Second Vice Chair and Discussion Leader

LINDA LINGLE
GOVERNOR OF HAWAII



08:071123



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

MEMORANDUM

July 7, 2008

TO: THE HONORABLE LINDA LINGLE
Governor of Hawaii

FROM: LAURA H. THIELEN
Chairperson, Board of Land and Natural Resources

SUBJECT: Request for Approval to Conduct Statewide Public Hearings to Amend Chapter 13-1, HAR, Related to DLNR Enforcement Activities

We herewith request your approval to allow the Department of Land and Natural Resources (DLNR) to conduct statewide public hearings to amend Hawaii Administrative Rules, Chapter 13-1, Rules of Practice and Procedure, pertaining to DLNR's enforcement activities. A copy of the draft amendment is attached hereto for your review.

On June 13, 2008, the Board of Land and Natural Resources approved to hold statewide public hearings for this proposed amendment, subject to your further approval. DLNR will also hold public informational meetings before the formal hearings for the purpose to inform people of DLNR's new enforcement action plan and engage stakeholders and communities in discussions with DLNR.

As indicated in the signature page, the draft presented to you has been reviewed and given preliminary approval by the Department of the Attorney General.

The following is provided for your review pursuant to Administrative Directive No. 99-2:

1. **Exact changes to be made and the reasons for the changes.**

This amendment is an important part of DLNR's new strategic action plan. The goal is to strengthen and streamline DLNR's enforcement actions by creating a Civil Resource Violations System that is just, expeditious and cost-effective, to the benefit of resources protection, the general public, and alleged violators of the State's resource laws.

Currently, the Department has three options in handling its enforcement cases – criminal court prosecution, civil enforcement in court, and administrative proceeding before the Land Board. For a number of reasons, many resource violations cases are not suitable for criminal prosecution or civil court enforcement. A court process is usually a prolonged and cumbersome process that requires a defendant to be arraigned in court.

In addition, a criminal prosecution for minor resource violations is often seen as overly harsh for those alleged violations that appear to be relatively minor in nature. For that reason, people are more likely to fight the judicial process rather than just pay a fine and move forward, and judges are hesitant in convicting a defendant for some minor offenses.

More, judges and prosecutors often have little knowledge as to our resource law and do not have a fine schedule for these violations. As such, the Judiciary and county prosecutors have repeatedly expressed that these violation cases should be better disposed of through administrative proceedings.

Our current practice of administrative proceeding is for our divisions to bring enforcement 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 contested 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. It is also a cumbersome process for the parties involved as they would have to appear before the Land Board and then to a contested case hearing to defend themselves particularly. It could be even more difficult for those alleged violators from the neighbor islands – they would have to come over to Honolulu to attend the Land Board meetings or hire a Honolulu attorney.

To address these problems, the Department proposes to adopt HAR, §§13-1-51 to 72, as Title 13, Chapter 13-1, Subchapter 7, Civil Resource Violations System. This system is authorized under the Civil Natural Resource Violations Act of 2004, codified as Chapter 199D, HRS. Incidentally, the Department also proposes to amend its existing subchapters under Chapter 13-1, HAR, to reflect and implement procedures more appropriate to the Land Board's current needs and conforming to the prevailing state law.

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

- Issue to a person a citation for an alleged civil resource violation;
- Assess an administrative penalty for such a violation pursuant to a penalty schedule to be prescribed by the Board; and
- Summon that person to answer the citation by choosing from three options – 1) waive contest and comply, 2) waive contest and request mitigation, and 3) contest the citation.

This system will operate in a manner similar to the Judicial Traffic Violations Bureau, where alleged violators can either contest their cases or just pay an easy fine and be let go. This administrative law enforcement process is adopted by other State agencies such as DOH, DOA and DCCA, and by many other jurisdictions and federal agencies such as EPA and NOAA.

Due process rights are always preserved in this process. If an alleged violator chooses to contest his/her case, the case will go to a contested case hearing to be conducted by a Board appointed hearing officer. After the hearing officer renders a decision or recommendation, the contestant is allowed to file exceptions and briefs to the Land Board. At that point, the Land Board will review the case and allow oral arguments by the parties if so requested. Eventually, if any party is not satisfied with the Land Board's final decision, under state law, it may file the case with a state circuit court with jurisdiction for judicial review. The right to appeal from the circuit court judgment is also provided in state statutes.

2. **Manner in which the proposed adoption of the rules would affect the operation or programs of the Department.**

With the proposed amendment and adoption, we do not anticipate substantial changes in any proceedings or routine operation of the Land Board or the Department. If there is any, we expect that our divisions will be more active in enforcement activities, including violation investigation and participation in enforcement case processing.

3. **Expected final result by instituting the proposed adoption of the rule.**

These rules will establish a department-wide, standard enforcement policy that will consolidate all the divisions in their administrative proceedings. They will lead to better cooperation between divisions and DOCARE and encourage our divisions to actively participate in enforcement, will reduce the undue burden on the Land Board for acting as a primary fact finder in enforcement cases, and will speed up the process as a result.

These rules will also enable the Department to process most of its resource violation cases through an administrative law system that is just, easy and fair. DLNR will have another important tool in protecting the State's natural and cultural resources. The public will see more thorough, efficient and even-handed enforcement actions by DLNR. Alleged violators may walk away from their plight by paying a simple fine without going through a criminal prosecution that may inflict more severe harms on people.

4. **Program and financial impact on the State upon the adoption.**

This amendment should have no impacts on our existing departmental programs, and require no additional funding for the present biennium or beyond. Any financial impacts on the State should be positive with revenues from the fine money. We envision that fines collected in this civil penalty system will be used in four areas:

- To pay for restoration/remedy costs or support conservation programs,
- To fund education, public awareness and outreach programs,
- To support DOCARE's enforcement efforts, and
- To reimburse certain operating costs of the CRVS.

5. Impacts on the public, on economic growth and the economy of the State.

Since our goal is to impose reasonably small fines to encourage people to change their behavior toward our resources, any long or short term impacts on the public, economic growth or the State's economy should be minimal.

6. Other alternatives explored in attempting to resolve the problem.

The current draft rules are the result of numerous discussions that considered many factors and possible alternatives. As discussed before, we believe that this civil resource violations system is the best alternative to our current practices – the criminal court process and administrative process before the Land Board.

7. Determination as to whether the proposed rules will affect small business.

This topic is discussed in the Small Business Impact Statement attached hereto.

Accordingly, we request for your approval to conduct statewide public hearings on the proposed amendment after giving due public notice according to Chapter 91, HRS. We appreciate your review of these rules. For inquiries, please contact Mr. Bin C. Li, DLNR Administrative Proceedings Coordinator, at 587-1496 or bin.c.li@hawaii.gov.

###

APPROVED / DISAPPROVED



LINDA LINGLE
Governor of Hawaii

8/8/08

Date

Attachment

Cc: Director, Budget and Finance
Director, State Office of Planning
Director, Department of Business, Economic Development and Tourism

LINDA LINGLE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA H. THIELEN
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LAND
STATE PARKS

Public Hearing Notice

**For the Proposed Amendment of Hawaii Administrative Rules
Related to DLNR's Practice and Procedure and to the Civil Resource Violations System**

Pursuant to §91-3, Hawaii Revised Statutes, the Department of Land and Natural Resources (DLNR) will hold statewide public hearings for the proposed amendment of Chapter 13-1, Hawaii Administrative Rules (HAR), Rules of Practice and Procedure. This proposed amendment would establish a Civil Resource Violations System to be managed by DLNR and amend certain rules governing the administration of DLNR and proceedings before the Board of Land and Natural Resources.

In conjunction with the public hearings, DLNR will also hold public informational meetings to present and discuss the proposed rules and answer related questions. The public meetings and hearings are scheduled as follows:

Maui:

Thursday, October 2, 2008; Maui Waena Intermediate School, 795 Onehee Avenue, Kahului, Hawaii 96732. Informational meeting starts at 5:30 p.m., hearing at 6:30 p.m.

Kauai:

Tuesday, October 7, 2008; Chiefess Kamakahalei Middle School, 4431 Nuhou Street, Lihue, Hawaii 96766. Informational meeting starts at 5:30 p.m., hearing at 6:30 p.m.

Oahu (First of two meetings/hearings):

Thursday, October 9, 2008; Mililani High school, 95-1200 Meheula Parkway, Mililani, Hawaii 96789. Informational meeting starts at 5:30 p.m., hearing at 6:30 p.m.

Lanai:

Tuesday, October 14, 2008; Lanai School Cafeteria, Fraser Avenue, Lanai City, Hawaii 96753. Informational meeting starts at 3:30 p.m., hearing at 4:30 p.m.

Kona, Hawaii:

Monday, October 20, 2008; Kahakai Elementary School, 76-147 Royal Poinciana Drive, Kailua-Kona, Hawaii 96740. Informational meeting starts at 5:30 p.m., hearing at 6:30 p.m.

Hilo, Hawaii:

Thursday, October 23, 2008; Hawaii County Aupuni Center, Conference Room, 101 Pauahi Street, Hilo, Hawaii 96720. Informational meeting starts at 5:30 p.m., hearing at 6:30 p.m.

Oahu (Second of two meetings/hearings):

Tuesday, October 28, 2008; Stevenson Middle School, 1202 Prospect Street, Honolulu, Hawaii 96822. Informational meeting starts at 5:30 p.m., hearing at 6:30 p.m.

Molokai:

Thursday, October 30, 2008; Kulana Oiwi, DHHL Office Conference Room, 660 Maunaloa Highway, Kaunakakai, Hawaii 96748. Informational meeting starts at 3:30 p.m., hearing at 4:30 p.m.

All interested parties are urged to attend one or more of the public hearings to present relevant information and individual opinion for DLNR to consider. Any person unable to attend or wishing to present additional comments may send written testimony by Thursday, October 30, 2008, to DLNR, Administrative Proceedings Office, 1151 Punchbowl Street, Room 130, Honolulu, Hawaii 96813, or to DLNR.CO.APO@hawaii.gov.

Any person requiring a special accommodation (e.g., assistance of a sign language interpreter) for attending the public meetings or hearings shall file a request with DLNR at the addresses in the preceding paragraph, or by calling 587-1496 (voice or TDD) in Honolulu. Such a request will need to be received by DLNR at least 72 hours before the hearing is scheduled to start.

The current rules and the proposed amendment may be downloaded for review at DLNR's website (<http://hawaii.gov/dlnr/>) or be reviewed in person at the afore-mentioned office address during DLNR's normal business hours. For additional information or a hard copy of the proposed amendment, contact DLNR at the above-mentioned addresses or telephone number.

APPROVED.


for LAURA H. THIELEN, Chairperson
Board of Land and Natural Resources 

Public Hearing
For the Proposed Amendment of Chapter 13-1, HAR, Relating to DLNR's
Practice and Procedure and to the Civil Resource Violations System

Hearing Location: _____

Hearing Date: _____

I. Introduction

A. Opening

1. This is a Public Hearing conducted by the Department of Land and Natural Resources (DLNR).

It is now _____ P.M. and this Public Hearing is called to order.

2. Introduction of Public Hearing Officers. We will conduct this hearing.
3. This is a formal Public Hearing on the proposed amendment of Hawaii Administrative Rules Chapter 13-1, Relating to DLNR's practice and procedure and to the Civil Resource Violations System (or CRVS).
4. The CRVS is authorized under the Civil Natural Resource Violations Act of 2004, codified as Chapter 199D, HRS. The goal is to strengthen and streamline DLNR's enforcement actions by creating an administrative law process that is just, expeditious and cost-effective, to the benefit of resources protection, the general public, and parties to the violation proceedings. This system will be adopted under Chapter 13-1, HAR, as Subchapter 7.
5. Incidentally, the Department also proposes to amend its existing subchapters under Chapter 13-1, HAR, to reflect and implement procedures more appropriate to the Land Board's current needs and conforming to the prevailing state law.

B. Purpose

1. The purpose of this hearing is to provide the public the opportunity to provide comments in the form of oral and written testimony on these proposed administrative rules of the Department relating to the practice and procedure governing the administration of DLNR and proceedings before the Board of Land and Natural Resources.
2. I hope that all of you have signed in. If you have not, please do so. We have to make a complete record of all persons attending this hearing.
3. There is also a separate sheet to sign in for those wishing to present testimony on the proposed rule changes.
4. When it is time to testify, I will call the names in the order that they are listed on the testimony sign-in sheet.

C. Present staff and others

1. At this time, I would like to introduce other staff members of Department:
_____.
2. Recognize any legislators or other notable persons present.

II. Background

- A. These proposed rules are the result of meetings and discussions with stakeholders in the area of civil enforcement of resource violations.
- B. Approvals to conduct this public hearing have been obtained by the Department from the Board of Land and Natural Resources on June 13, 2008, and from Governor Linda Lingle on August 8, 2008.
- C. Copies of the proposed administrative rules are available for inspection at the table near the entrance.
- D. During this hearing we will record your opinions on this proposal.

III. Notice of public hearing

- A. The Legal Notice of this public hearing was published in the Sunday, August 31, 2008 issues of the Honolulu Star Bulletin and the Honolulu Advertiser.

IV. Hearing procedures

- A. This hearing will be conducted as follows:
 1. We will summarize the proposed changes to the administrative rules.
 2. Then we will call on those who have signed up to testify in the order as they are listed on the sign in sheet.
 3. Everyone will have a fair opportunity to voice their opinion for the department to consider. We will hear from everyone who has signed up on the list. If you intend to testify but have not signed up yet, again I urge you to do it now.
 4. We are using an audio recording device to record this hearing. So when your name is called, please come to the front and speak to the microphone. State your name for the record before giving your testimony. If you represent an organization, also state the name of the organization.
 5. Please keep your testimony brief and on the subject in order to allow all those who came today the opportunity to testify. We may limit the time for each testifier if necessary.

6. After those who signed up have presented their testimonies, I will ask if anyone else wishes to testify. If you have additional comments to give after the first round, you may also request for another chance to do so.
7. Please remember that there may be differing opinions. Everyone should respect the opinions of all testifiers and understand that this hearing is not an opportunity for accusations or rebuttals.
8. If you have a question, please direct it to us, and we will find the most appropriate person to answer. Please do not direct your questions or comments to anyone else.
9. Please remain quiet until you are given the floor to testify. Do not interrupt the person who is giving testimony.

V. Rule Explanation

Now we will give a summary explanation of the proposed amendment to Chapter 13-1, HAR.

- A. The following is a summary of significant changes in the proposed Subchapters 1 to 5:
- §13-1-5.1 clarifies the difference between the Board’s adjudicatory functions and other Board meetings;
 - §13-1-8.1 is relating to the election and responsibilities of a vice-chairperson of the Board;
 - §13-1-9 is relating to the protection of the attorney-client privilege and attorney work product privilege in the release of government records;
 - §13-1-11.1 allows a presiding officer to limit testimony at public hearings and meetings;
 - §13-1-11.2 allows the removal of persons from proceedings;
 - §§13-1-13.1 and 13.2 clarify methods and time allowed in the service of documents;
 - §13-1-18 specifies the participation of deputy attorney(s) general in Board proceedings including contested case hearing;
 - §13-1-22 expands the notice requirement in a rulemaking process;

- §13-1-27 amends the rule for petition for declaratory ruling by specifying the requirements of a petition and further specifying the conduct of hearing on a petition for declaratory ruling;
 - §13-1-28 allows modification and waiver of any procedure in a contested case hearing with stipulation;
 - §13-1-29 redesigns the process of requesting for a contested case hearing;
 - §13-1-29.1 provides a process to determine the entitlement to a contested case hearing;
 - §13-1-30 allows the Department to charge a fee for the conduct of certain contested case hearings;
 - §13-1-31 is relating to the requirement and process of determining a person's status as party to a contested case;
 - §13-1-31.1 disallows intervention in hearings of violations;
 - §13-1-31.2 specifies the requirement for notice of contested case hearing;
 - §13-1-32 clarifies the definition of "presiding officer" in the conduct of a contested case hearing;
 - §13-1-32.1 is relating to the conduct of contested case hearing with only one party involved;
 - §13-1-32.2 provides to the Department party status in an enforcement action, and requires the supervision by a first deputy in such an action;
 - §13-1-32.3 disallows discovery in general;
 - §13-1-32.4 is relating to records of a contested case hearing;
 - §13-1-35 specifies the burden and quantum of proof of evidence in a contested case hearing; and
 - §13-1-38 provides 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. The proposed rules 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 briefs, and oral arguments before the Board.

- C. Currently, the Department has two options in handling its enforcement cases – criminal prosecution and 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 request a contested 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 these problems, the Department proposes to adopt HAR, §§13-1-51 to 72, as 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:

1. Issue to a person a notice of civil resource violation for an alleged violation of any state law administered by the Department;
2. Assess an administrative penalty for such a violation pursuant to a guiding penalty schedule to be prescribed by the Board;
3. 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;
4. Render a final decision through a hearing officer on a mitigation request if there is no contest; and
5. Summon that person to participate in a contested case hearing conducted by a hearing officer when a violation notice or any assessment therein is contested.

Procedures of a contested case will be governed by Subchapter 5 of Chapter 13-1, Contested Case Proceedings.

VI. Testimonies

- A. As I call your name, please come forward to the microphone, and state your name for the record and begin your testimony. ...
- B. Are there others who wish to testify?
- C. Written testimony: Persons unable to attend today or wishing to present additional comments, may mail written testimony to us by November 5, 2008 to the following address:
Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, HI 96813
Or Email to: DLNR.CO.APO@hawaii.gov

You don't need to write down this contact information as it is printed in the handout we distributed before this hearing. It's on the first slide.

VII. Decision-making procedure on the proposals:

- A. Based on the testimony presented today and at other hearing sites, and written testimony sent to the Department, the Department will submit its findings and recommendations to the Board of Land and Natural Resources.
- B. If approved by the Board, the Department of the Attorney General will conduct a final legal review. If approved, the proposed rules will be given to the Governor for her final approval.
- C. Should the Governor grant approval, certified copies will be filed with the Lt. Governor's office, and after 10 days, it becomes effective as law of the State of Hawaii.
- D. Are there any questions regarding this process? If not, this will be the end of our hearing today.

VIII. Adjournment

- A. On behalf of the Board of Land and Natural Resources and the Department of Land and Natural Resources, we thank you for attending this public hearing. This public hearing is now adjourned.

Time: _____ P.M.
- B. Thank you for taking time out from your evening to attend this hearing. Drive safely when leaving. Good night, everybody!

Department of Land and Natural Resources
Public Hearings for the Amendment of Chapter 13-1, HAR,
Relating to DLNR's Practice and Procedure and to the Civil Resource Violations System

October 2 – 30, 2008

CONSOLIDATED RECORD OF VERBAL TESTIMONY

Hearing Officers: Bin C. Li, Alton Miyasaka

Total attendance: 108 (Including 21 DLNR staff)

10/02/2008, Kahului, Maui (Attendance – 12):

Ms. Antoinette (Toni) Marie Davis – Activities & Attractions Association of Hawaii
(Also submitted written testimony):

Aloha Chairperson Thielen and Members. Thank you for the opportunity to submit testimony regarding draft rules to be authorized as Subchapter 7, under Chapter 13-1, to establish a Civil Resource Violation System. My name is Toni Marie Davis. I'm the executive director of the statewide Activities & Attractions Association of Hawaii (A3H). We've 186 members statewide. A3H is a not for profit, trade association owned by the members. One of my roles in this position is to ensure member's interests and concerns are expressed to all levels of government.

Underneath this profession, I'm a Makawao mom with three children, two dogs, a mortgage and a member of the endangered Maui middle-class. I would never compromise my integrity, or the quality of life for my children or future generations to speak up on something I didn't in my heart and mind believe was true.

I debated coming here this evening the paper made this sound like a no-brainer: Less involved violations being reduced to "civil" from "criminal". Less cost to the DLNR, easier to correct bad behavior and ticket people. After reading it, I wonder about the intent. Is this to create a more efficient process for citations or is it meant to provide a more capable process, in order to accommodate increased citations.

Using a plumbing analogy, relate the number of citations to the amount of water and the structure as the pipe. Efficiency is the water flow rate through the pipes. Is this change to enlarge the pipe because the flow is too slow and inefficient OR is there a plan to turn up the water and larger pipes are necessary?

I went to the DLNR web site seeking clarity, here I found, "this is to strengthen DLNR's enforcement of violations" and also "support more rigorous enforcement." This would suggest there is a plan to turn up the water.

Tourism states rich in natural resources, like Hawaii, face challenges related to overuse, user conflicts and degradation. In Hawaii, these challenges are magnified by the high percentage of

rare endemic species and increased susceptibility to invasive species. It's a tough job, one that must balance environmental protection with users.

Balance is the key to managing our public resources responsibly. I will be the first to agree that scofflaw – those disrespectful of the law are a root cause of problems. Rigorous enforcement is the answer. Scofflaws come in various packages.

It would be wrong to perceive all government employees as “on the take” and “corrupt”. As with government employees, not all tourism related activities are disrespectful to natural resources.

In my experience they are just the opposite. These guided tours are supervised; rules are recited to guests and followed. There is an opportunity to teach and educate respect for the environment and culture. These operators also watch over and protect our natural resources while assisting customers and non-customers. Obviously, a demand exists for these activities. Tourism is our number one economic engine. Visitors in an unorganized, unsupervised capacity cause an increased conflict, detriment and safety hazard. Too often these legal small businesses are perceived as the dark side.

These are the people providing the experience, the adventure, the excursions – They create the stories, picture and videos that the visitors take back home. They are a huge reason our visitor industry is so successful. Tourism is an incredible economic sustainable gift to any community. It's a look but don't take lucrative industry. According to HTA, reports reflect most residents embrace and understand this. There exists a loud minority that just doesn't get this. It concerns me because I've seen this loud minority without our government at various levels. This perception is why I am here. Please address this perception, ensure that your enforcement staff “get it” prior to turning up the water. Thank you, again.

Ms. Joyclynn Costa:

My name is Joyclynn Costa. I come to represent a family that has been in Hawaii since the 1400's. When I hear about people enjoying our shores, and I sit with my father here, who no longer can go to the shore, I find an imbalance there. My question to this whole procedure is, if you're going to be basing this on administrative rules, and from what I can read in your literature, is because our judges are just too busy. Is there some kind of jurisdictional trespass? Have we now deemed you judge and jury? The separation of powers isn't separate because the judges are too busy, or understaffed, we can just create something that you would like to do. I find it hypocritical since you are trying to enforce law. I'd like to know where the rule of law is that gives you this authority to change your hat to be a judge without being a judge? If we examine the laws of this land today in Hawaii, it comes from the Hawaii Revised Statutes. The key word is “revised.” And it's revised from the Kingdom Law. And I just learned this past week that 60% of the HRS is specifically based on Kingdom law. In fact, DLNR is fashioned from the Kingdom. What are you actually protecting? And of whom are you actually protecting? And under what rule do you protect us, if that's who you're protecting? It's not clear, the water's muddy. It looks like it's not convenient so we're just going to make it convenient for us. In one instance you call it violations but not quite criminal so we'll just call it under administrative rules. There is no rule of law. How can you fully enforce something that is not lawful? I'd like to

know what the intent is in this entire hearing, if there's no rule of law? In the newspaper today, the United States Supreme Court, is going to hear the appeals that Mark Mennit(?) has filed. But until then, this State is under an injunction. It will be based on the claims that the host culture, the Hawaiians, make. That ruling still holds until the United States Supreme Court can come up with a decision. And within that document is Judge Moon's opinion, the State themselves, not the plaintiffs, not the judge, but the defendant, the State of Hawaii, stated that if the injunction is put on the State, it bars their officers from exercising their governmental powers over the lands and waters.

(Hearing Officer Miyasaka: Please let me interrupt you for one moment. If you would like us to discuss your questions, we can do that after the hearing. We cannot discuss them during the hearing.)

Joyclynn Costa: My concern in this entire document is you're wanting to push an administrative rule and make it law and I'd like to know where the rule of law is.

(Hearing Officer Miyasaka: If you have any specific comments on the rules themselves, we can discuss those, but the questions on the rule of law should be discussed after the hearing.)

Joyclynn Costa: You're making it seem like just because the court system is not staffed or not able to enforce whatever violations you may want to enforce upon the people, then we'll just change hats. I don't see anything about PASH in here or where we, as the host culture, are protected, because I believe that's part of your jobs. I'd like to see more of our rights protected, under your rules, as well as, the rules of law. The host culture has inherent rights that were given to us by people way before you came. Thank you.

Mr. Bobby Baker:

My name is Bobby Baker and I've been teaching diving on Maui for 33 years. Our experience has been that sometimes, the DLNR are very, very, very aggressive. What kind of forum do we have to complain about these particular individuals? It's not many, most are great. They feel that because they're with DLNR, they can do anything. When I say aggressive, I mean confrontational. Is there anything in these rules that allows us to address problems that we find when we have to go into a confrontational situation? Thank you.

Mr. James Kaiho:

I like to live my culture. And when I lived my culture as a little boy, I learned to sew net. That's my culture. But I go to jail because I cannot lay my net. I have a problem with law. Johnny Law put me in jail for doing my culture. I asked the courts and DLNR, do you understand Hawaiian law? They said no. Could I come back to DLNR and ask them now to explain, what is my culture? I went to jail because I was cleaning a ditch that was supplying water to a taro patch. But yet, Johnny Law came and took me because I was criminally trespassing. If by chance, the law knows about my culture, I don't think they would put me in jail. Can I ask you to tell the higher ups and the police department, that whatever I do in an awai, I looking for help. I don't want a lawyer, I want someone that knows Hawaiian law. Thank you.

Mr. Doug Corbin:

My name is Doug Corbin. I'm a SCUBA diving instructor, been in the business for 25 years now. I can appreciate the fact that you want to streamline the process, but after hearing testimonies, especially from this lady right here, I think there may be some serious defects in what you're trying to do. It sounds like it needs to be looked at closely. Thank you.

Joyclynn Costa:

My name is Joyclynn Costa. I'd like to request from Laura Thielen, DLNR office, the Governor, the Lt. Governor, and the Attorney General to provide discovery about how they come about this authority to make this administrative rule a law when there is a permanent injunction on the State of Hawaii. I want to make it an official, on the record, request.

10/07/2008, Lihue, Kauai (Attendance – 6):

Mr. Carl Imparato – Hanalei to Haena Community Association
(Also submitted written testimony):

The Hanalei to Haena Community Association would like to take this opportunity to reiterate its strong support for the DLNR's efforts to increase the effectiveness of the state's natural resource protection laws.

Two months have passed since we provided our formal comments on the DLNR's proposal (on July 29, 2008). During that period we have endured another summer of illegal commercial tour boating operations and illegal commercial activities at Hanalei's beaches and parks. So if the proposed civil penalty system will result in a more effective system for prosecuting offenses, then we urge its prompt implementation.

The introductory language of HB 3178 refers to "intentional violation of and blatant disregard for state natural resource laws." It states that "[e]xisting civil penalties for violations are nominal and do not appear to deter such behavior effectively." These are understatements.

We would like to re-emphasize that there are three important realities to which an effective Civil Resource Violations System must be tailored:

1. The violations system must recognize that many violators are willfully violating the natural resource laws and will persistently continue to violate those laws as long as it is economically advantageous to do so. Some 30 years of experience on the north shore indicates that we are not dealing with misinformed individuals who are acting in good faith; we are dealing with operator of very profitable businesses to which legality means little.
2. As much as we would like to see a round-the-clock DLNR presence on the north shore, it is unlikely that there will ever be enough DLNR enforcement agents to consistently and

effectively enforce against the abuses that take place from Hanalei all the way through the Na Pali coast.

3. The public must be given a role in ensuring that effective enforcement takes place. The public must be able to instigate enforcement. And the public must be able to ensure that enforcement actions are not biased in favor of those who profit from breaking the rules.

Our July 29 testimony offered six recommendations, which are summarized below:

1. Given the attitudes of the violators and the lucrateness of violating the law, consistent and diligent enforcement is critical. It is essential that enough enforcement officers are available. In addition to DLNR staff, other state and county personnel – including Kauai Police Department, County park Rangers, and lifeguards – and appropriately trained and deputized citizens or groups as well, should be empowered to issue citations for violations.
2. The final rules should include a mechanism that enables and encourages citizens to protect our natural resources by initiating complaints. The enforcement system could be made even more effective by paying monetary awards – i.e., a share of the penalties – to citizens who provide information or services leading to convictions or civil penalties for violations.
3. Repeat offenders should not be given the option of simply waiving contest to a citation and paying the fine. And “repeat violator” status should be considered an admission of guilt and should be recorded against a person who waives contest, just as is done for speeding tickets.
4. Hearing officer’s proposed decisions should be subject to appeal by the public, to ensure that the system is not undermined by complacent or corrupt hearings officers.
5. The monetary fines under the proposed system need to be large enough – considerably higher than the gains that would potentially be realized from the unauthorized commercial activities.
6. The proposed rules must ensure that the proposed Civil Resource Violations System does not weaken any existing regulations or penalties and will not result in any increases in time for abatement of violations. Repeat offenders shouldn’t be able to pay the fine again and again for 10 months before it brings them up to the next level of fines.

We hope that, once the changes are made to address the concerns outlined above, the proposed CRV System will be promptly implemented and diligently enforced.

Mr. Tom Godbey:

My name is Tom Godbey. I’m very glad that DLNR is taking these steps to enforce preservation of our environment and I think payment of restitution is a step in the right direction. Also, restoration should be included, such that if somebody goes into a forest and harvests a tree that they’re not supposed to, pays a fines, they can’t just continue to do that. They’re going to have to restore the damage that they did. I think there should be a set limit of what is a minor case and a major or important case. For example, in today’s Honolulu Advertiser, there was an article about a couple of cases where people were removing rocks from a beach on Maui and take them to

Honolulu for various purposes and are going to be fined about \$3,000 each. I think that rather than keeping those rocks, they should be replaced where they're supposed to be.

10/09/2008, Mililani, Oahu (At Mililani High School, attendance – 12):

Ms. Cynthia K.L. Rezendes:

Thank you very much for the opportunity to present my testimony on these modifications to Chapter 13-1.

The first comment I have is on section 13-1-11.2 Removal of persons from proceedings. You should probably have some definition for what is a disruption of a meeting. If there was a whole bunch of people just holding up signs, may not be disruptive but may not be cause to remove those people vs. someone who is orally or verbally disruptive or in some other fashion. This provision is overly broad and will be difficult for people to understand and allow them to express their opinions depending on the presiding officer. Are they going to be capricious and just throw people out because their signs are disruptive?

The next section is 13-1-13.2 regarding additional time after service by mail. If sent by mail it's supposed to be postmarked by a specific date. You're only allowing for an additional two days for the receipt of that mail. I don't know that two days is sufficient time given the mail service. Sometimes it takes two days or more for my mail in Waianae from Honolulu. You might want to consider something a bit more lenient.

I didn't want to get into commenting the earlier sections to get into the new subchapter. I will be submitting written comments.

Section 13-1-54 jurisdiction. The provision including permits is of interest to me because at this point in time, the DLNR is going through a temporary, experimental permit process in Keaweula regarding fishing regulations because that is a closed park on the Waianae side of the Kaena State Park system, there is a permit system right now as an experimental temporary process. You might want to differentiate between adopted permits and temporary/experimental permits so that the people don't get all nervous that they're violating the permit rules that are out there at that point in time.

Section 13-1-61(d) unattended vehicle, conspicuously affixing. I would hope that there is some way to affix the citation on the vehicle so that it can't be ripped off by someone who is just being nasty or due to weather conditions (wind, rain) that the person that that citation is intended for doesn't get it. If not, they're caught up in a system they don't even know they're caught up in.

Section 13-1-63 answer required. A definition of "service" needs to be listed. If place in the mail, the date of service is the date of receipt of that mail because you're going to send it certified. If it's served when it's handed to the individual, that's when the clock starts. Need to more clearly define when that clock starts. It shouldn't be the date on the letter because that's always "hit or miss" depending on the mail service. Need to define when the response time starts.

Section 13-1-64 respondent's options and sanctions therein. Can non-monetary sanctions be placed on a notice of violation by a DOCARE officer in the field or will there be a process for citation where things are questionable where that citation will be dealt with before service to the violator? I don't know how a DOCARE officer in the field can quantify what that means. All they can do is go off of your penalty schedule.

Section 13-1-71(b) records if waive contest. I don't know how anyone can be a repeat offender if they constantly waive contest and pay the fines. If there is no record, what evidence do you have that they are a repeat offender?

The penalty schedule can either be by rules or by the department. I would hope that the penalty schedule that's going to be developed will be by rules so the public will have an opportunity to present their feelings and beliefs on that. Instead of it being developed internally and just presented.

If the citation is not going to be handed immediately to the individual, and if it's going to be taken back into the department, how long will the department take before making sure that violation is out there? I would hope that somebody's that caught by a DOCARE officer shouldn't have to wait one or two years for the department to come back and say "here's what your fine is" for something that happened a while back. There needs to be within the department a process with time limits when the department can settle the violation.

Many people are not aware of the many rules of the department. Is there a "warning system" for first time violators? Not everybody knows all the regulations.

10/14/2008, Lanai City, Lanai (Attendance – 8):

No verbal testimony collected.

10/20/2008, Kailua-Kona, Big Island (Attendance – 8):

No verbal testimony collected.

10/23/2008, Hilo, Big Island (Attendance – 21):

Mr. Glenn Shiroma (Also submitted written testimony):

My name is Glenn Shiroma. I'm in opposition to these rules. I'm not going to read the whole thing (written testimony as follows). I support the intent of what you're doing. I strong oppose how this is being done. My main concern is the lack of the necessity of putting this out in a public informational meeting. In fact, this went to the Land Board only to hold public hearings. The Land Board told you folks to hold public informational meetings. My testimony also incorporates the problem with the Division of Boating and Ocean Recreation. They didn't bother to hold public informational meetings.

The Division of Forestry and Wildlife made changes to the public game bird hunting season without going through public hearings.

I believe that it's important that whenever a rule change is proposed, the department should be required to hold public informational meetings in addition to the hearings.

(Mr. Shiroma proceeds to reading his written testimony into the record.)

I fully support the INTENT of the DLNR to amend the Hawaii Administrative Rules regarding Civil Resource Violations. However, I strongly OPPOSE the exclusion of a public informational meeting as part of the rule change process, thereby preventing the stakeholders an opportunity to better understand and ask questions on the proposed rule changes.

Please note the following examples:

Division of Boating and Ocean Recreation news release dated December 13, 2007 to hold only a "public hearing" on proposed changes to parking rules at state boat harbors.

Division of Boating and Ocean Recreation did not hold any public informational meeting on the island of Hawaii and the public hearing was held in Waimea. The above submittal demonstrates the lack of concern for the stakeholders to participate in the rule making process.

The Intermediate Court of Appeals ruling in the case of Tanaka vs. Department of Land and Natural Resources dated December 31, 2007. The ruling just demonstrates the total disregard of the Department of Land and Natural Resources in making rule changes without due process, by not holding a public hearing.

Department of Land and Natural Resources submittal to the Land Board of Natural Resources dated June 13, 2008, recommendation for "Approve holding of statewide public hearings on the proposed rule amendment, adoption and compilation; Authorize the Department to schedule such public hearings as expeditiously as possible following the Governor's approval to conduct public hearings." The above submittal demonstrates the lack of concern for the stakeholders to participate in the rule making process.

Division of Forestry and Wildlife news release dated October 17, 2008 states "Due to a December 31, 2007 appellate court ruling, game bird stamps and fees are waived, and only a hunting license is required for all game bird hunting on public and private lands." This above new release is a disgrace admission of the Department of Land and Natural Resources failure to involve stakeholders in the rule making process.

As the above examples have demonstrated, "public informational meetings" needs to be included as part of the amendments to the Hawaii Administrative Rules for Civil Resource Violations.

Thank you for the opportunity to testify on this subject matter.

Mr. Woody Vaspra:

I am Woody Hanalei Vaspra representing Kanaka Council Moku o Keawe. In reviewing this process, I think I mentioned that it must address prevention through its educational process to prevent the first time offender. Why should we wait until something happens? The resources of these islands are at a very critical state, both on the water and land, and especially the cultural resources. These islands only have so much resources. We must prevent the first time offender. The fines also have to be set high enough to prevent the repeat offender, especially developers. They have enough funds put aside to pay such fines. If a developer willfully destroys a sacred site, they should be barred from the island. Our cultural resources are being taxed, disappearing, especially during the grading process. They don't check for archeological sites because they want that land. When developing the penalty schedule you should use the people resources, Kanaka maoli, because each island has a different environment. It needs to be addressed on each island. When I came back to Hawaii, after leaving for a while, and seeing what was going on, it left me with a heavy heart. Thank you.

Mr. James Weller:

My name is James Weller. Member Kamehameha Canoe Club, Big Island Bird Hunters Association, Pig Hunters of Hawaii, avid fisherman, ocean lover, surfer, canoe paddler. Born and raised on this island. I am kanaka maoli and conservation enforcement officer. Where will the money generated from fines go? Fines generated from this island should be used on this island. If it's a hunting fine, it should be used for hunting education and awareness. If it's a state parks fine, it should be used for park education and awareness. Soon, Superferry will be coming to this island and we will have more people coming to this island.

Who will decide which cases will go to the Land Board? Will the officer have a choice whether the case will go to the Land Board? Or will the Chair decide?

With the amount of cases coming to the Board, their duties will increase. Who's going to choose if the Land Board hears the case or some other group?

Who asked for this change? Was it from DOCARE, DLNR as a whole, the criminal process system?

When we go to court, many of our cases are taken lightly. But I take it seriously. When we develop fines, it needs to be stiff fines. If a person with a lot of money comes to this island to make money by taking our resources, a slap on the hand won't work. If they can make \$40,000 from Koa logs, then a \$10,000 fine is nothing.

Who will see that the violator responds when a civil order is given to them? Is DOCARE going to be tasked with recovering fines?

Who's going to set the fine amounts? Will it be different from person to person? I want to know if I cite Joe Kanaka for taking 100 pounds of opihi, is Joe Japanese, Joe Filipino, going to get the same fine? I hope it will be set without regard to what race you are, who you know, creed, whatever. It should be one set fine. The public should be involved in setting these fines. We want to see higher fines.

If we currently have misdemeanor penalties, it should be kept a misdemeanor penalty. It should be the officer's decision.

Who's going to decide on where and when the hearings will be set? If the violation is on this island and the next hearing is five months from now, will he have to wait for five months or is there a process where he can take care of it sooner? If evidence is involved, DOCARE and the Division will need to store that evidence until the hearing.

What will be classified as "major" and "minor" cases? Any case involving resources should be "major."

I would like to see the officer have a choice on whether to have the case heard civil or criminal or both. The only civil cases we have is through OCCL.

It was mentioned that fish catch reports should be civil. By the time fish catch reports come to us, the Division of Aquatic Resources has already contacted the person several times so they know they need to be compliant. We try to get them to submit the reports first. It sounds like the officers cite them right away but that's not always true. Our main goal is compliance. We try to use education to inform the people of the regulations. I go to fairs and classrooms, and if the money can be used to educate, that's going to help me.

The department needs to address the Hawaiian gathering rights and the kanaka maoli. It needs to be addressed so the officer can enforce the laws justly. Thank you.

Mr. Hanalei Fergestrom:

Aloha mae. My name is Hanalei Fergestrom. I'm with the Temple of Lono and spokesperson for Na Kupuna Moku Keawe. It was mentioned earlier that standing was no longer necessary, anyone could contest a case. We are talking about adopting administrative rules of the department when clearly many of the rules you're adopting are not in this document, such as the penalty schedule. I believe when you say adopted, that's a premature statement. I think it should be much clearer what constitutes a violation and what doesn't. This needs to be clarified. There needs to be a provision for native Hawaiian gathering rights as it was created in PASH or exceptions to that. It's important that we understand that language and continue that.

I imagine that certain permits can be issued to people to go out and gather or take. A lot of these permitted organizations get to go into areas that we as practitioners or normal people don't get to go because we are not part of a permitting system. I think that needs to be looked at and somehow balanced.

It looks like this is an expansion of police force/powers by the DLNR. And I'm very concerned that they've adopted judicial powers to somehow set up another layer of court. I have some questions about the authority you have to set up such a court and who would be qualified to run it? Are there procedures for this type of court hearings?

It's hard for me to read these rules. It says that the hearing officers will be picked by the DLNR. I think there should be more non-interested parties to adjudicate because you want someone who is not prejudicial.

If county prosecutors already handle these cases, why are we setting up another judicial system within the department? Every court has a set of rules so you can defend yourself in it. I don't see that here.

It says that one of the goals of CRVS is to get restitution. Do you need to set up a whole new system to get that? Wouldn't it be better to use the judicial system to get those restitutions within the system? It's all too ambiguous. It sounds like you're talking out of two sides of your mouth. On one side you say you don't have the authority to do this but on the other side you say that you do. This is not a proposal for rules, it's an adoption of rules. I bring this kind of stuff up several times but, of course, no one addresses stuff I bring up, but I want to bring it up again. Have we added an extra layer of judicial remedy when it may not be necessary?

Some people think this is an easy thing to do. I've been in one contested case that's taken two years. Think of others who may be in the same situation and needing to take two years, the amount of people you would need. I don't think you have the resources to do so and if you did, you would take those resources from other places it needs to be, protecting the environment. Mitigation is an after the fact word. It's what you do after something has happened. I think we should not have to get to the point where you have to mitigate.

I question the authority to select a hearing officer because they will be picked from your own ranks and appear prejudicial.

I'm concerned about being subject to a higher fine if I contest the citation. I was involved in a traffic violation, contested the citation, and spent a year in jail for an "unjailable" violation. I didn't go along with the system, decided to fight it, and ended up with a higher penalty. I think this is wrong.

Ms. Cory Harden:

I share the concerns of people that are concerned that the rules might be used against native Hawaiians exercising their gathering rights. I think the bottom line for DLNR is to protect the resources and not make it easier for the violator. I wonder if there's enough staff to carry out the proposed revisions and, if not, how will they be obtained?

Section 13-1-11.1, time for issues should not be limited, time for persons may be limited. Also should have all testimonies at the start of meetings. I've gone to some meetings where you have to sit for four hours before you can even speak. At the County Council meetings, they take all the testifiers right at the beginning.

Section 13-1-31.2, 15-day notice for hearings seems short.

Section 13-1-34, only 48-hours for serving papers, that seems short.

Consider using videoconferencing for some procedures to ease the burden on the Land Board to make better decisions. Thank you.

Mr. Kale Gumapac:

I'm Kale Gumapac and I'm with Aha Kanaka Moku Keawe. Aha Kanaka reserves the rights under Article XII, Section VII. This needs to be addressed. These rights need to be protected. We also reserve the rights under the Kumulipo all the way to 2008. This includes the rights under Kingdom Law and the rights given to us under American Indians and the Federal Protection Act. These rules do not address these rights. The kanaka maoli should not be subjected to undue restraint, arrest, or harassment.

Section 13-1-30 has a fee of \$100 for contested case hearings plus another \$500 for subsequent hearings. This fee should be eliminated. Some of our people might be subject to undue tickets if they couldn't afford to contest the case because of the fee.

Listening to previous testifiers, it's obvious that this chapter has not been discussed with DOCARE officers. They should be consulted so you can have their input because they are the front line guys who have to deal with all this stuff. I think they had some good questions. Not to listen to them would be disrespectful.

The hiring of hearing officers, what experiences do they have with the traditional, customary practices of the kanaka maoli? This has to be addressed because from all of the hearing officers we've seen, they have none. And yet, they are being asked to render a decision based on traditional, cultural, customary practices. There needs to be a Cultural Advisory Commission to the hearing officer. They are the experts and practitioners in the Hawaiian traditions because too many times, we have left it up to the hearing officer who has no expertise. We're not talking about entertainers, kumu hulas.

The intent of the rules is a good thing. We have to protect our resources from mauka to makai. This is what the Kanaka Council is all about. But at the same time, we are concerned about protecting the rights of the kanaka maoli. It should never be an issue about whether we can afford to file a contested case.

Mr. Alan Akau:

I'm from this island and I am a DOCARE officer. Notice of proposed rules should be posted at least three times. The public feels they weren't given enough notice and they were upset.

Mr. Woody Vaspra:

There were some references made to federal laws that need to be clarified and considered in this process. The Native Hawaiian Religious Freedom Act of 1978 states very clearly that native Hawaiians are part of that law, which allows us to practice our spirituality, they use the word

“religion.” And then in 1993, Congress enacted a stronger law, the Native American Free Exercise of Religion Act of 1993. Again, Native Hawaiian is a part of that legislation.

We should not put a violation of our culture on the same level as someone violating a jet ski regulation. That needs to be separated. Our cultural practices have to be put in a whole different category because this is very important.

Mr. Hanalei Fergerstrom:

Are the hearing recordings transcribed? I would like a copy of the transcribed minutes.

Mr. Kale Gumapac:

I would support Cory Harden’s request that all meetings held on the neighbor islands be transmitted on videoconference to the other islands. Similar to the county councils, if the county can do it, the state should also do it.

10/28/2008, Honolulu, Oahu (At Stevenson Intermediate School, attendance – 34):

Mr. Imai Winchester:

I’m not here to provide testimony on the proposed CRVS rules. I’m here to give visual and vocal support to the families being evicted from Kahana Valley, most notably Laura Thielen. I’m one person here on behalf of many. I do represent my family, that has been in these islands for over 2,000 years and the families in Kahana Valley that have also been here for over 2,000 yrs. I am a Hawaiian History high school teacher. I find this situation in the newspapers very interesting. Particularly in the way the Hawaiian people are being treated. We have come here tonight to show our support for those families so they can stay in their homes.

I’m aware of the clouded title the State claims to have over the valley. I don’t understand why the DLNR is choosing to create more homelessness. We have not been given a reason other than the expansion of a park. It doesn’t seem that the DLNR has the best interest of these families in mind. They should be allowed to stay there.

Ms. Karen Murray:

I’m 5th generation Japanese, born and raised in Hawaii. I don’t understand why the Hawaiian families need to be evicted. I object to their eviction. People still need to stand up for what is right, and what is right is these people need to stay there.

The proposed rule changes all look good on paper. But it looks like fund raising. Are DOCARE officers carrying Tasers? I would like to know that these people will not be bullied. What is the oversight? We need to prevent bad situations from occurring.

Ms. Donna Burns:

I just saw a film that mentioned ethnic cleansing. I'm one quarter Hawaiian. My uncle takes care of the bones at Kawaihae Church. He is in the Royal Order of Kamehameha. There's a concerted effort to single out Hawaiians and treat them in a racist manner. The desecration of iwi, bulldozing of sacred sites, continues to occur. It's not right to evict the families in Kahana Valley.

The rules are being solidified in order to increase the penalties on the criminal side. My uncle was one of those people that (?) the rules at Iolani Palace. The rules "suck."

Ms. Noelani Goodyear-Kaopua:

Aloha. Like many of the people who have already spoken, I am in support of the Ohana at Kahana. The rules dealing with enforcement of regulations of natural resources is intimately tied to the eviction of Hawaiian families at Kahana. When you evict people who have been on the land for generations, enforcement of the resources was a part of the cultural system practiced by the people. Evicting the people directly impacts the protection of these natural resources. It runs counter to the purpose of the rules, which are to improve enforcement of these resources. The rules do not engage the people who care for those resources. When you don't have kanaka living on the land, there's no one to care for the aina and the resources.

(The group of protestors gave a chant before leaving.)

Ms. Susan O'Donnell:

I am a small business owner (wedding company). I think the general idea of creating this system is good but I worry if DLNR will take advantage in the way they create policy - Rules without public knowledge, access, or input. What I've seen so far doesn't reassure me the public will have their ample opportunity to help create a fine level that will be fair and just. Thank you.

Mr. Joe Arceneaux:

One of the things I hope we can get is greater presence from the DOCARE officers in the hunting areas. There's a pronounced absence of their presence. I hope this speed up the process of getting them out into the field. Having them just walking around makes a difference.

Mr. Jonathan K Osorio:

I'm a professor at the Center for Hawaiian Studies. I'm here to try and see if there can be some accommodation with the six families threatened with eviction. We understand the legal challenges before the Board and the Attorney General's opinion. I would like to urge you to consider how important Kahana Valley has been to institutions like the Center for Hawaiian Studies. We've sent may be thousands of students to Kahana to study fishpond and taro cultivation and have worked with the families in the past. Having an intact ahupuaa to see people living their culture is really important. Kahana Valley is a really bright idea. We urge the Board to look carefully into this to see what can be done.

10/30/2008, Kaunakakai, Molokai (Attendance – 7):

Mr. Bill Feeter:

There are six people here. Attendance and notification should be improved. We don't represent the whole community. Either the time is wrong, the subject matter is boring, or people don't know. Mostly people are picking up their children.

I'd like to see an ombudsman in this community. We need someone like the Justice of the Peace, who can deal with local community matters and appointed legislatively.

Education is needed. People need to know the regulations and abide by them. Respect for one another.

Improved electronic communication is needed. *Akaku* (Maui Community Television) needs to be here. We're in the dark ages. A lot of people don't know about this. Planning needs to be collaborative.

Sustainability is important. Soil erosion is appalling. The feral animals are chewing the bark off the trees. Our environment is getting devastated. USGS is monitoring the run-off. DLNR should collaborate with other agencies like USGS to monitor erosion impacts on reefs.

Would like to see more private enterprise to help improve economy and the environment. I hope that we can solve these problems and make people more conscience of their environment. I'd like to see something done for a change. I'd like to see a lowland forest.

I'm glad to see you here. People need to be fined. I hope this system will help.

Ms. Linda Place:

I'm not prepared to make a statement on the rules. I wanted to stress education and collaboration. I'm not educated enough to say if the rules are going to be good or not good at this time. Something is lacking since there's so few people here today. I would like to see stronger enforcement and stronger fines to keep the resources going.

Ms. Judy L Caparida:

I'm a Molokai kupuna. We are so involved in our community. I attended the public informational meetings both today and in the previous meeting. Everything on paper looks really good but it doesn't really fit our island. Some of the people need education but this rule doesn't help. The people don't care about the DLNR. We need them to care and take care of the resources. They don't have any respect. DLNR has to come out and give them education. People need to get involved. The young people have to listen, be educated and informed, and be aware of how important life is. Nobody is really caring for life, they only care for having fun. I would push for another meeting to educate the public on this issue because only six of us are here

today. We know how to explain to our own. This is not going to work unless we get all these hardheads together.

Ms. Ruth U. Manu:

Aloha, I'm Ruth Manu. I see a lot of rules and regulations but it doesn't work for the island of Molokai. Just like how my sister says, they need education. On Molokai, we're truly fighting for sustainability. We need the resources because we hardly have jobs on the island. Thank you for coming but all these rules not going to work. You have to bring it down to something the people can understand. If you can explain where they can understand, then you might have something, but like this, they not going to understand. Thank you for coming.

Mr. Bill Feeter:

Substance abuse is devastating. Earlier this year, US Attorney General Ed Kubo came to Molokai to highlight the problem. It takes strength of family to overcome this problem. It's a disease that's blocking all of the things we're working for. There's fear. It's a tragic thing when there's fear in the neighborhood.



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June 25, 2008

Chair Thielen and Members of the Board of Land and Natural Resources:

The Native Hawaiian Legal Corporation has two concerns with the proposed amendments to Hawaii Administrative Rules Chapter 13-1: the new filing fee for contested cases, and the exclusion of members of the public from enforcement actions.

Contested Case Filing Fee

The proposed fee of essentially \$600 to request a contested case hearing found at HAR § 13-1-30, will burden many of the clients that the Native Hawaiian Legal Corporation serves. Native Hawaiian cultural practitioners, many of whom are low-income, will find it difficult to come up with the \$600 needed to protect their rights. The BLNR should not require a fee for practitioners to protect their constitutionally-protected rights.

The last sentence in the proposal suggests that chairperson could waive the filing fee. There are two problems with this proposal. First, there are no criteria by which the chair could waive the filing fee, making waiver a purely arbitrary decision. Second, given short deadlines to file for a contested case hearing, it would be difficult to file and obtain the filing fee waiver within ten days of a BLNR hearing.

Citizen Participation in Enforcement Cases

The proposal barring anyone from intervening in enforcement cases, HAR § 13-1-31.1, is inconsistent with what the Department of Health and the EPA do. For example, in the Clean Water Act, there is a provision that specifically gives citizens the right to participate in enforcement proceedings:

(4) Rights of interested persons.

(A) Public notice. Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence. Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing. If no hearing is held under paragraph (2)

Services made possible with major funding from the Office of Hawaiian Affairs.



June 25, 2008

Page 2

before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

33 USCS § 1319. *See also*, 42 USCS § 7413; HRS § 342B-55

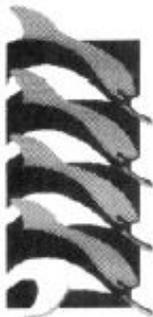
The proposal is also inconsistent with the need for members of the public to ensure that public trust resources are fully protected. The Hawai'i State Constitution provides that "any person may enforce" their right to a clean and healthy environment. Haw. Const. Art. XI § 9. It is unreasonable to completely exclude members of the public from administrative enforcement proceedings. In enacting HRS § 607-25, the Hawai'i State Legislature "intended that individuals and organizations would help the state's enforcement of laws and ordinances controlling development." *Kahana Sunset Owners v. Maui Cty Council*, 86 Hawai'i 132, 134 (1997). The Legislature sought to "encourage individuals and organizations to enforce the law." *Id.* at 135. The proposal before the BLNR is inconsistent with the Hawai'i State Constitution, the expressed intent of the State Legislature, and the action of other environmental agencies.

Sincerely,



David Kimo Frankel
Staff Attorney

Copy: ~~Sam Lemmo~~



Hanalei-Ha'ena Community Association
Post Office Box 789
Hanalei, HI 96714

July 29, 2008

Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, Hawaii 96813

Attention: Bin C. Li

Re: Civil Penalty System for Natural Resource Violations, HAR Chapter 13-1

The Hanalei-to-Ha'ena Community Association strongly commends the DLNR and Chairperson Thielen for their efforts to increase the effectiveness of the state's natural resource protection laws.

There is a long, sad history of inadequate enforcement of natural resource protection laws on the north shore of Kauai. That history extends back to the illegal commercial tour boating operations of the 1970s, 1980s and 1990s through today, as illegal commercial tour boat operations have resumed and illegal commercial uses of beaches and parks have mushroomed over the past few years.

As president of the Hanalei-to-Ha'ena Community Association, I receive many complaints from local residents, who also ask me why non-permitted commercial activities continue day-in and day-out. My answers generally fall into two categories: lack of regulations, and lack of enforcement of those regulations that do exist. I recognize that today's hearing deals with the latter issue; but as to the former, I would like to state that the community strongly desires to work with the DLNR on developing comprehensive new regulations for the commercial uses of the state lands and waters, and that we encourage DLNR to consider a rulemaking that would focus specifically on the Hanalei-Wainiha-Ha'ena area rather than a vanilla, state-wide rulemaking.

As to the latter issue (lack of enforcement of existing regulations): if the DLNR believes that implementing the proposed civil penalty system will result in a more effective system for prosecuting offenses, then the HHCA supports that effort. We are concerned that the proposed system may not go as far as it needs to go.

In discussing the particulars of that concern, I must admit that I have not thoroughly read all of the detailed changes proposed for Chapter 13 or considered the inter-relationships of the various sections of Chapter 13; so if a concern stated below is somewhat off-the-mark, I apologize for taking your time.

To put our Community Association's comments into context: I note that the introductory language to HB 3178 refers to "intentional violation of and blatant disregard for state natural resource laws." It states that "[e]xisting civil penalties for violations are nominal and do not appear to deter such behavior effectively." These are certainly understatements.

There are three important realities to which an effective Civil Resource Violations System must be tailored:

1. The violations system must work under the premise that many violators are willfully violating the natural resource laws and will persistently continue to violate the natural resource laws as long as it is economically advantageous to do so. Some 30 years of experience on the north shore indicates that we are not dealing with misinformed individuals who are acting in good faith; we are dealing with operators of very profitable businesses to which legality means little. We should acknowledge going into this that many violators have a history of not acting in good faith.
2. As much as we would like to see a round-the-clock DLNR presence on the north shore, it is unlikely that there will ever be enough DLNR enforcement agents to consistently and effectively enforce against the abuses that take place from Hanalei all the way through the Na Pali coast.
3. There is no guarantee that in the future, DLNR management will be as citizen-focused and resource-focused as the current DLNR management under Chairperson Thielen seems to be. With that in mind, the public would not be well-served by any system that does not afford the public the ability to ensure that effective enforcement takes place. The public must not be shut out of the process: it must be able to instigate enforcement; and it must be able to ensure that enforcement actions are not biased in favor of those who profit from exploiting our natural resources.

With that background:

1. We are concerned that the definition of "conservation and resource enforcement officer" in Section 13-1-52 may be far too limited. Other state and county personnel - Kauai Police Department, County Parks Rangers, possibly lifeguards - and even appropriately trained and deputized citizens or groups, should all be empowered to issue citations for violations.

As noted above, given the nature of the violators, consistent and diligent enforcement is the key to effective resource management. Even penalties of \$5,000/day may be just a minor cost of doing business for illegal commercial boat tour operators if an over-worked state enforcement team only issues fines once a month. Therefore, a critical element of the Civil Resource Violations System must be to have enough enforcement officers available to ensure its persistent use.

2. Along those same lines, the rules should contemplate a mechanism that enables and encourages citizens to protect our natural resources by initiating complaints. The enforcement system might be made even more effective by paying monetary awards - i.e., a share of the penalties - to citizens who provide information or services leading to convictions or civil penalties for violations, as do the EPA and IRS. Here again, our primary concern is the lack of sufficient DLNR staff to maintain a round-the-clock presence in geographically large and remote areas. But an additional concern is that a future DLNR management might be complacent or give low priority to enforcement.
3. We are concerned that giving the violator the option of simply waiving contest to a citation and paying the fine (as proposed in Section 13-1-64)¹ will result in inadequate incentives for compliance. This concern is amplified by Section 13-1-71, in which no "repeat violator" status is recorded against a person who waives contest. This opt-out loophole seems analogous to allowing a driver who pays a speeding ticket by mail to keep the speeding violation off his driving record: it will not be effective in reducing future speeding by that violator.

We suggest that the option of waiving contest should be one that the DLNR grants at its discretion, based on its assessment of the history and nature of the violator's previous violations, rather than an administrative right of the violator. The waiver option should not be offered to repeat offenders as a matter of right. Further, waiving contest should be considered an admission of guilt (just as for speeding) and at a minimum should result in recording of the violation and repeat offender status.

4. Criterion 11 of Section 13-1-62 (Notice of civil resource violation) states that such a notice shall include: "A statement that a written request for mitigation without contesting the citation shall be examined by a hearing officer without

¹ Section 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."

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."

The lack of judicial review is of concern. What is to prevent a corrupt, biased or hostile hearing officer from undermining the effectiveness of the system through overly-lenient mitigation requirements? At a minimum, there should be a process through which public could appeal such decisions as being inconsistent with the primary goal of protecting the natural resource.

5. The "Administration Sanctions Schedule" (Section 13-1-70) includes two very important factors:

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

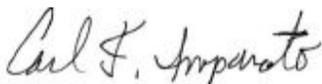
"(11) Repetition and duration of resource violations of the same or similar type in the respondent's history."

It is very appropriate that these factors are explicitly recognized. We suggest that these factors be given very heavy weight, and that any of the explicit monetary limits on fines stated elsewhere in the Civil Resource Violations System be modified to ensure that such limits are no less than the potential pecuniary gains, taking into account repetition and duration of the violations.

6. Lastly, we request that the final language of the proposed administrative rules ensure that the proposed Civil Resource Violations System can not be used in lieu of mechanisms that would otherwise result in the immediate removal of violations for which there is zero tolerance. I.e., the proposed Violations System should not weaken any existing regulations or penalties; and it should not result in any increases in time for abatement of violations.

In concluding, the Hanalei-to-Ha'ena Community Association once again thanks Chairperson Thielen and the DLNR management and staff for proposing the Civil Resource Violations System and for raising the priority of enforcement. We hope that you will consider the concerns that have been raised in this testimony and make such changes as are needed to address those concerns. And we hope that, once those changes are made, the System will be promptly implemented and diligently enforced.

Sincerely,



Carl Imperato
President, Hanalei-to-Ha'ena Community Association

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Attorneys At Law, A Law Corporation

MEMORANDUM

TO: Bin C. Li
Administrative Proceedings Coordinator
Department of Land and Natural Resources
State of Hawai'i
1151 Punchbowl Street, Rm. 130
Honolulu, HI 96813

FROM: Dennis Niles, Esq.

DATE: July 22, 2008

RE: Draft Rules Amending Title 13, Hawaii Administrative Rules

Bin, to follow are my comments up to the contested case subchapter. You will see they fall into three categories: grammatical including misspellings; substantive concerns; finally, matters best characterized as style. Please accept them with the spirit with which they are offered. I am afraid my tone at times may sound critical. This was not my intent but sometimes tone was driven by the seriousness of the concern. By way of background, I know I was able once in my career to successfully petition the Land Board to change an administrative rule. The process was expensive for my client and time consuming for the board. We really need to study the possibility of urging the legislature to update the HAPA to provide for the expedited rulemaking now possible under federal law. Now that I am retiring I have more time to assist with this initiative should you and your colleagues see merit in possible reforms.

Please let me know if the following is helpful. I will continue working through the materials with the goal of concluding early next week. I regret it has taken me this long to get to the heart of the reforms. DN

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	Substantive
AFFECTED RULE	SUGGESTED CHANGES AND COMMENTS
13-1-9	I disagree with the proposed changes. Instead of substituting “prohibited,” the change should use the words of section 92F-3; i.e., “is restricted or closed by law.” The second change is also objectionable. Section 92F-3 prescribes parameters for protecting government records. The law does not allow delegation to the Attorney General of the authority to determine whether a government record should be withheld from disclosure. The board itself must make that decision (presumably with the advice of counsel) and be prepared to defend its decision on challenge.
13-1-2	<p>Definition of applicant and application. Better to use the indefinite article “an” instead of “the” in defining the terms. I also have some difficulty with the remaining wording of the first two definitions. I suggest as an alternative that after “board” the definition read: for (1) authority to act or (2) relief from the consequences of an act taken or proposed to be taken by the board or a person acting under authority of the board.</p> <p>Definition of Proceeding. Should read in relevant part “initiated by petition, application or board board . . .</p> <p>(3) The revised subsection (3) should read in relevant part: “. . . any provision of law, any rule or requirement made pursuant to authority granted by law, <i>or a term or condition of a permit issued by a division of the department pursuant to authority granted by law.</i></p> <p>Reason: The holder of a department permit, such as mooring and commercial permits issued by the division of boating and ocean recreation, is entitled to procedural due process before the permit can be terminated or its renewal withheld.</p> <p>(4) I question the need to continue deeming board investigations and “reviews” to be “proceedings.” It seems a proceeding could be the product of such investigation or review but should not define the process by which it is conducted.</p>

June 23, 2008

	(5) Would it not be better to state simply “Rulemaking in accordance with the Hawaii Administrative Procedure Act.” In that regard, there is no need to separately define “proposed rulemaking.” Rulemaking is a process by which rules may change. The process is initiated by agency notice and is tentative until a rule is adopted.
13-1-10(e)	“Present” is not the correct term. Delete the proposed change.
13-1-2.1	I find this section confusing. The enabling statute may not define common terms. What then? Also, the board cannot adopt a definition that exceeds the authority conferred by the statute or, indeed, assign a meaning to words used in a given statute. The Supreme Court has set the rules for construing administrative rules. There is no need to adopt its own rules of construction.
13-1-11	The suggested clause does not add anything because the board’s powers are already constrained by law. It simply states the obvious without providing much guidance. A better improvement might read: “Absent objection or prejudice to an interested person,” . . . The existing rule goes too far in giving a hearings officer power to suspend or waive to prevent “undue hardship.” I don’t believe HAPA creates such exception. My change would temper this troublesome provision.
13-1-11.1	The <u>officer presiding at board meetings</u> shall confine oral testimony to <u>agenda items</u> . Oral testimony at public hearings shall be confined to the matters for which the hearing has been called. <u>To ensure that those wishing to testify may have time to do so</u> , the presiding officer may limit the amount of time <u>an individual may testify on an item or matter</u> .
13-1-11.2	The presiding officer may <u>order removal of any person who willfully disrupts a proceeding. For purposes of this rule, conduct shall be considered disruptive if it continues despite request of the presiding officer that it cease.</u>
13-1-13.1(a)	(a) Service of documents may be by mail, personal delivery, <u>electronic mail</u> , or facsimile transmission. Service by <u>electronic mail or facsimile transmission</u> is complete upon

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13-1-13.1(b)	"receiver" should be "recipient"
13-1-13.1(c)	<p><u>Service by electronic mail or facsimile transmission shall be confirmed by a signed certification declaring the date and time the document was transmitted electronically to a stated email address or by facsimile to a stated telephone number. An acceptable form certificate of service is attached as an appendix to these rules.</u></p> <p>Comment: Lawyers understand the phrase "certificate of service" but members of the public may not. The form attached to the appendix would eliminate uncertainty as to what information should be provided.</p>
13-1-15	<p><u>Nonconforming documents. The board may reject for filing any document whose form or content does not conform to requirements the board may adopt.</u></p> <p>Comment: Does the board have rules of practice and procedure setting standards? I question whether the board can reject a document based on contents without a rule limiting that power. Nor may the board order amendment of content without raising a First Amendment issue. I think it better to leave the rule to matters of form (page length, font, and the like).</p>
13-1-22(1)	<p><u>Notice of the proposed [issuance] adoption, amendment, or repeal of a rule shall state:</u></p> <p>(1) <u>The subject of the proposed change;</u></p>
13-1-22(2)	<p>(2) <u>The URL or other address of the department website containing the text of the proposed rule and conditions on which a printed copy of the proposed rule will be available.</u></p>

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	<p>Comment: There is no need to weigh the notice down with this level of detail. The public should be encouraged to download proposed rules. You will also see that I simply refer to the "proposed rule" Whether the subject is a new, amended or repealed rule, it is still a "proposed rule."</p>
13-1-22(3)	<p>(3) <u>When, where, and the hours during which</u>, the proposed rule <u>may be reviewed in person;</u></p> <p>Comment: Won't proposed rules always be available for public inspection? This section seems unnecessary. Note typo.</p>
13-1-22(4)	<p>(4) The date, time, and place <u>of the public hearing on the proposed rule;</u> and</p>
13-1-22(5)	<p>(5) <u>In the case of a proposal to establish, change or review forest reserve or watershed boundaries, when and where maps showing the proposed boundaries, may be inspected prior to the public hearing.</u></p> <p>Comment: In that this section follows the conjunction "and" saying "in addition to" is redundant. Other changes are self-explanatory.</p>
13-1-24(c)	<p>(c) . . . <u>At the discretion of the presiding officer, every [witness] person testifying may, be sworn and required, to identify himself or herself, and disclose on whose behalf the testimony may be given and give any other information as may be necessary to understand the interest of the witness in the subject of the hearing.</u> . <u>The presiding officer shall confine the [evidence] testimony to the [questions before the hearing but shall not apply the</u></p>

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	<p>technical rules of evidence] <u>proposed rulemaking</u>. Every [witness] <u>person testifying</u> shall be subject to questioning by the presiding officer or by any other representative of the board[, <u>but cross-examination by private persons shall not be permitted except if the presiding officer expressly permits it</u>].</p> <p>Comment: What is the rationale for limiting witnesses to "testimony?" Should not the public be able to present other forms of evidence; e.g., scientific articles, reports and the like. Certainly the legislature receives such material. The department should do likewise.</p>
13-1-24(d)	<p>(d) All <u>persons</u> 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, <u>persons</u></p> <p><u>Comment</u>: I recognize that the existing rule speaks of "interested persons." However, I question use of the phrase because it suggests the right to be heard is limited to a certain class of the public. While it may be appropriate to limit standing to challenge a rule through suit, I do not believe such limit is appropriate at the public hearing stage. In other words, why it is only "interested" persons who may be heard at the public hearing. I urge you to delete the qualification because it abridges the public's right to be heard and because it would prove challenging to implement.</p>
13-1-26(c)	<p>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</p>

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	<p>petitioner shall be [so] notified [together with] <u>of the grounds for the denial and given an opportunity to amend the petition.</u></p> <p><u>Comment:</u> A petitioner should have the same opportunity to amend as a civil litigant, particularly given the technical pleading requirements you propose in the amendments to section 13-1-27.</p>
13-1-27(b)	<p>(2) <u>A statement of the nature of the petitioner's interest, including the reason for the petition;</u></p> <p><u>Comment:</u></p> <p>Grammatical correction</p> <p>(5)</p> <p><u>Comment:</u></p> <p>A supporting brief is an onerous and unnecessary requirement at this stage. As framed the proposed rule would virtually require participation by a licensed attorney. Instead, it makes more sense to limit the petition to five pages. If the board determines the position or contention of the petitioner warrants consideration, it may require briefing. But to require briefing upfront creates an unreasonable barrier to access to the board.</p>
13-1-27(f)	<p><u>The board may, for good cause, refuse to issue a declaratory order.</u></p> <p><u>Comment:</u></p> <p>Does the federal APA have an analogous provision? I question whether it is necessary to state that the board needs a good reason to deny a petition. Would it</p>

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	not be better to introduce your four enumerated points with "Grounds for denial include without limitation: (1), (2) etc.
13-1-27(g)	<p><u>" . . . or issue an order granting the petition in whole or part.</u></p> <p><u>Comment:</u> I do not understand the phrase "order of the matters contained in the petition."</p>
13-1-27(h)	<p><u>" . . . The board may order initiation of a proceeding for hearing a petition for declaratory ruling.</u></p> <p><u>Comment:</u> Proceeding is a term of art defined in 13-1-2. "May" denotes discretion, thus it is unnecessary to say more. I eliminated reference to "formal hearing" because it creates unnecessary ambiguity. I think the section should be further clarified to make sure the reader understands that the "hearing" contemplated is the proceeding defined earlier. In that regard, it would make sense to conclude this section with the text of subsection (i). Doing so would eliminate the ambiguity and allow no doubt as to the contours of the "formal hearing."</p>
13-1-27(h)(2)	It seems to me a hearing should be required whenever the board determines the petition presents prima facie grounds for declaratory relief. The burden should be on the party opposing such hearing to make the showing required by proposed subsection (2).
13-1-27(i)	Notice should not be discretionary. A declaratory order could affect the public in a variety of ways, including ways the board might not appreciate. Certainly due process requires notice to those who might

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	be aggrieved by a declaratory order. This section should be eliminated and the final sentence moved as suggested earlier.
13-1-27(j)	I do not understand the need to reiterate the principle of "stare decisis." A declaratory order should speak for itself and have prospective effect only to the extent permitted by law (a declaratory order could result in an enforceable "rule" so long as it was rendered in accordance with HAPA). I urge deletion of this section.
13-1-27(k)	I have difficulty envisioning circumstances under which the board could render a lawful declaratory order without notice or hearing. "Declaratory order" is a term of art. The power to "terminate" controversy or "remove uncertainty" is power to affect legal rights and interests. This section suggests a serious constitutional issue and would seem to fall beyond the agency's authority.

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June 23, 2008

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MEMORANDUM

TO: Bin C. Li
 Administrative Proceedings Coordinator
 Department of Land and Natural Resources
 State of Hawai'i
 1151 Punchbowl Street, Rm. 130
 Honolulu, HI 96813

FROM: Dennis Niles, Esq.

DATE: August 6, 2008

RE: Comments re proposed changes to Subchapter 5, Contested Case Proceedings, through section 13-1-31

RULE	COMMENTS
13-1-28(b)	<p>(b) <u>The contested case hearing shall follow, any public hearing which may be held on the same subject matter.</u></p> <p>Comment:</p> <p>I question the need for this provision. I am unable to conceive of a situation where the c/c hearing would not always follow a public hearing. I also think the rule should be specific in terms of the body of law to which the board should look in deciding whether a public hearing is required.</p>
13-1-28(c)	<p>(c) <u>Any procedure in a contested case not affecting the public's right to know may be modified or waived by stipulation of the parties.</u></p> <p>Comment:</p> <p>As a general rule c/c proceedings should be open to the public</p>

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	including the media. The parties themselves should not be able to deny public access, although the board may retain the power to do so under the same circumstances that would allow a court to close a judicial proceeding. Transparency is of paramount importance.
13-1-29 (a)	<p><u>The board may order a contested case hearing on its own motion or on written request of a governmental agency or interested person. An agency or person, desiring, a contested case hearing shall submit a written petition no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. The board may enlarge the time for submitting a written petition for good cause. The petition may be delivered physically or through the postal service, or transmitted electronically by email. The date of posting or electronic transmission shall be deemed the date the of submission.</u></p> <p>Comment:</p> <p>A two step process is too burdensome, particularly for residents of neighboring islands. The latter should be able to request a c/c hearing without attending a public hearing scheduled for Oahu. The proposed rules must allow for electronic submission of papers! The notice of the public hearing should include a statement of the date by when a request for c/c hearing must be submitted.</p>
13-1-29 (b)	<p>(b) <u>A request for contested case hearing shall state:</u></p> <p>(1) <u>[The legal authority under which the proceeding, hearing or actions is to be held or made;] The interest that may be affected by the action proposed by the board;</u></p> <p>(3) <u>[The disagreement, denial, or grievance which is being contested by the petitioner;] The relief or remedy sought;</u></p> <p>(4) <u>Any other information that would assist the board in determining whether to order a contested case hearing, including facts showing how petitioner's</u></p>

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	<p>participation would serve the public interest.</p>
13-1-29.1	<p>(a) <u>Summary Disposition.</u> The board shall deny any petition for contested case hearing that (1) concerns a matter that is not within its jurisdiction or (2) fails to allege that the matter before the board involves a legal right, duty, or privilege affecting petitioner. Any order denying a contested case hearing shall be without prejudice to the right of petitioner to submit an amended petition within such time as the board may prescribe.</p> <p>Comment:</p> <p>The rule should have two parts. The first allows for “summary” disposition. The second will provide for disposition after the parties have been heard under subheading “Disposition following hearing,” as discussed under 13-1-31.</p> <p>I am unaware of a circumstance that would allow the board to vote to deny a petition without meeting. Can the board perform any lawful act without meeting? Certainly a party lacking standing may petition for a c/c hearing or may seek redress beyond the power of the board - - a petition by an incarcerated illegal immigrant who wishes to challenge restrictions on access to Kaho’olawe. But the board must act at a public meeting and must allow the petitioner a chance to cure the deficiencies. Finally, the petition will either show standing and jurisdiction or it will not. I do not see a need to require that such defects be “clear.” What is the standard you envision?</p>
13-1-30	<p>Comment:</p> <p>The board lacks legal authority to levy a fee on a petitioner who opposes issuance of a CDU permit. The costs of a c/c hearing may be imposed on the applicant, however. The proposed rule must be deleted or re-drafted to limit to the applicant liability for costs.</p>
13-1-31(a)	<p>Comment:</p> <p>The proposed changes should be separated. Subsection (a) should stand alone under title Disposition of Petition for Contested Case</p>

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Hearing, and revised to read

[The following persons or agencies shall be admitted as a party] Except as otherwise provided in section 13-1-31.1, The board or presiding officer shall dispose of any petition for contested case hearing as soon as practicable but not later than thirty (30) days following its submission. Notice of the hearing or meeting at which the decision will be made or announced shall be given to all affected persons and agencies. The notice shall set the time for filing objection to a petition .

13-1-31(b)

Comment:

As noted, subsection 13-1-31(b) should be part of section 13-1-29.1 and read as follows. In addition, the proposed changes conflate the separate issues of intervention and contested case hearing (as part of the consideration of the changes a critical path outline should be prepared showing the steps leading to a hearing and beyond).

(b) Disposition following hearing.

(1) An existing party may object to a petition for contested case hearing within the time set forth by the board or presiding officer.

(2) Hearing of the petition may be conducted by the board, the presiding officer, or by hearing officer appointed by the board.

(3) A presiding officer or hearings officer hearing the petition shall, within ten days of the conclusion of the hearing, file with the board a reasoned recommendation that the petition be denied, granted or granted with limitations on the scope of the contested case. . . Petitioner and any interested party may file objection within ten days of receipt of a recommended disposition. The board shall dispose of the petition at the earliest practicable meeting.

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13-1-31

Comment:

It necessary also to treat as a separate rule intervention or other participation in a contested case hearing once one has been ordered.

The separate rule would read:

Intervention in Contested Case Proceedings.

A. On written petition the board may admit as parties other persons with a substantial interest in the matter. A request for participation shall include the information required by _____. The board shall allow intervention if it finds that petitioner's participation will substantially assist the board in its decision making or that the matter before the board involves a legal right, duty, or privilege affecting petitioner .

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] petitioner 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.

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

(C) If intervention is opposed by an existing party, that party may file objections within the time set forth by the presiding officer.

(D) The hearing to determine intervention of additional parties to the contested case may be conducted by the

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	<p>board or the presiding officer, or by a hearing officer appointed by the board. At such hearing, evidence and argument shall be limited to petitioner and any objecting party and to matters necessary to determine whether intervention should be allowed.</p> <p>(E) A presiding officer or hearings officer hearing the petition shall, within ten days of the conclusion of the hearing, file with the board a reasoned recommendation that the petition be denied, granted or granted with limitations on the scope of the contested case. Petitioner and any interested party may file objection within ten days of receipt of a recommended disposition. The board shall dispose of the petition at the earliest practicable meeting.</p>

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Deleted: 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.

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.

If any party opposes another person's request to be a party, the party may file objections

hearing to determine parties to the contested case

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.

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.

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MEMORANDUM

TO: Bin C. Li
 Administrative Proceedings Coordinator
 Department of Land and Natural Resources
 State of Hawai'i
 1151 Punchbowl Street, Rm. 130
 Honolulu, HI 96813

FROM: Dennis Niles, Esq.

DATE: August 6, 2008

RE: Comments re proposed changes to Subchapter 5, Contested Case Proceedings, beginning with section 13-1-31.1 to end

RULE	COMMENTS
13-1-31 (g)	<p>Comment:</p> <p>“Therefore” should be “therefor.” I am not sure the need for correction is obviated by my other changes. Please check</p>
13-1-31.1	<p>Comment:</p> <p>The first sentence is awkward and imposes an unreasonable burden on a party facing an administrative sanction. The party charged is entitled of right to a c/c hearing which the department must provide unless it is expressly waived. I also believe there is no need for the second sentence. There may be a case where a party would have standing to intervene but that issue should be left for another day. There is no need to a preemptory bar.</p> <p><u>A party charged with a violation, for which the department seeks an administrative remedy, shall be accorded a contested case hearing on</u></p>

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	<p><u>request. Notice of the alleged violation shall provide the particulars of the violation and inform the alleged violator may request a hearing by signing and returning the citation. Failure by the alleged violator to return the citation or otherwise submit a written request for a hearing by the date specified in the notice shall constitute waiver of a contested case hearing.</u></p>
13-1-32 (d)	<p>Comment:</p> <p>The proposed rules do not address the possibility that a party charged with an administrative violation might be indigent and unable to afford such things as a transcript. I believe the rules must provide for proceeding <i>in forma pauperis</i> to the same extent as a similarly situated criminal defendant. Perpetuation of testimony</p>
13-1-32 (e)	<p>In hearings on applications, petitions, complaints, and violations, the <u>applicant, petitioner, [or] complainant,</u> or in the case of violations, the <u>department shall shall have the burden of proof and may</u> make the first opening statement and the last closing argument. <u>Other parties shall be heard in such order as the presiding officer directs.</u></p> <p>Comment:</p> <p>The order of proof and argument should be tied expressly to the burden of proof as assigned by section 13-1-35(k). There is no need to give the board power to direct the order of proceeding; such detail should be left the hearing officer.</p>
13-1-32 .1	<p>Comment:</p> <p><u>A contested case is by definition an adversary proceeding. Decisions must be based on a record. The proposed rule suggests the board would be free to consider matters outside of the record and beyond judicial scrutiny in the event of an appeal. The proposed rule appears to violate my recollection of the holding in <u>Town v. Land Use Commission.</u> Similarly, the author of a staff report should be made available for cross-examination to avoid an obvious hearsay issue. At the very least, the rule obligate the board to consider the absence of</u></p>

Deleted: , 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.

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	<p>opportunity for cross-examination on the weight that should be accorded such hearsay. In sum, the proposed rule exceeds the board's authority under chapter 91.</p>
13-1-32.2	<p><u>Enforcement action initiated by the department.</u> <u>In contested cases involving alleged violation of law, the department shall be deemed a party and assigned the burden of proof and persuasion.</u> Comment:</p> <p>I question the need to expressly allow department employees to testify. At best, the rule should state <u>Department employees who may be called to testify shall be subject to cross-examination.</u> No more is required. I also do not understand the need for the second sentence. This is an internal matter and should not be subject to rulemaking, or am I missing something?</p>
13-1-32.3	<p>There may be a need to take the testimony of a terminally ill witness but a party may object. The hearings officer should be empowered to allow perpetuation under where a material witness might be available at the time of the hearing.</p>
13-1-32.4	<p><u>Public records, on file with the board, including, but not limited to, the record of any public hearing, may be made part of the record of the contested case as provided in these rules. The proponent of the admission of such record serve all parties with a designation that identifies the document, describes its relevance, and indicates where it may be found. On request of any party, and as a condition of its receipt into evidence, the proponent of such record shall provide all parties with a legible copy. A request for a copy shall not be deemed waiver of objection to the admissibility or evidentiary weight of the record.</u></p>
13-1-34	<p>Comment:</p>

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	<p>The rule must provide for electronic filing of papers. We should not lose this opportunity to reduce the cost to all of contested case proceedings.</p>
13-1-35	<p>Comment:</p> <p>The heading for this section should read “Evidence; Burden of Proof and Persuasion”</p> <p>Also, concerning subsection (h), please explain your purpose in substituting “government” for “public.”</p>
13-1-35(i)	<p>Comment:</p> <p>Here’s the problem with the proposed change. By limiting the use of notice to facts known to the board it may impossible to contest the state of their knowledge. I also question whether this limitation exceeds the board’s authority.</p>

June 23, 2008

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TO: Bin C. Li
 Administrative Proceedings Coordinator
 Department of Land and Natural Resources
 State of Hawai'i
 1151 Punchbowl Street, Rm. 130
 Honolulu, HI 96813

FROM: Dennis Niles, Esq.

DATE: August 6, 2008

RE: Comments re proposed changes to Subchapter 7, Civil Resource Violations System

RULE	COMMENTS
13-1-52	<p>"Administrative hearing officer" or "hearing officer" means an individual authorized by the board to conduct a contested case hearing, or examine a request for mitigation pursuant to this subchapter.</p> <p>Comment: Non-substantive, textual improvement.</p>
13-1-52	<p>"Civil resource violations system" or "CRVS" refers to proceedings initiated pursuant to chapter §199D, HRS, to adjudicate an alleged civil resource violation.</p> <p>Comment: "Process" is too colloquial. Other changes not substantive but textual</p>

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	improvement.
13-1-54	<p><u>The department may adjudicate through the civil resource violations system any alleged violation of state law or the terms or conditions of any permit or license condition administered by the department.</u></p> <p>Comment:</p> <p>Deletion of much of the qualifying language seems appropriate. There is no reason to state that the rule might be trumped by other law. Also, my wording would allow a CRVS hearing where the department proposes to cancel a permit based on a resource violation. Due process requires a hearing in such instances. Is DOCARE or DOBOR an “attached agency.” These are divisions of the department itself so separate reference is unnecessary. Do you have anything else in mind?</p> <p>Also, at what point would an alleged violator be entitled to jury trial. I have not researched the question. Also, what if a particular violation is subject to criminal penalty? Must the CRVS hearing be held in abeyance pending disposition of criminal charges? Please let me have your thoughts on these questions.</p>
13-1-57	<p><u>CRVS hearing officers shall be nominated by the chairperson from a list of candidates submitted by the administrative judge of the Circuit Court of the First Circuit. CRVS hearing officers shall for a term of up to two years on such terms and conditions as the board may prescribe. A hearing officer may be removed or disqualified for cause.</u></p> <p>Comment:</p> <p>This provision gives me pause. Years ago in representing members of the armed forces in various proceedings I became familiar with the concept of “command influence.” The rule you propose would undermine the independence of hearings officer and seems to invite undue influence. Are hearings officers political appointees? May a hearings officer be removed while a matter is pending?</p>
13-1-58	(a) The board may delegate to the chairperson or an administrative hearing officer the power to render the final

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	<p>decision in a CRVS <u>proceeding including a request for mitigation.</u></p> <p>Comment:</p> <p>Do you have authority for such delegation?</p> <p>(b) Whenever <u>authority to render a final decision</u> is delegated to the chairperson, <u>the decision shall follow a CRVS contested case hearing and accord due weight to</u> the hearing officer's recommendation. Comment:</p> <p>The chairperson represents the "convening authority," using my military analogy. As such, he or she should not sit in an adjudicatory capacity in any contested proceeding. I have less difficulty with the chair deciding a request for mitigation. What happens if a request is rejected? I assume the matter goes to hearing.</p>	<p>Deleted: contested case</p> <p>Deleted: the</p> <p>Deleted: final</p> <p>Deleted: making power</p> <p>Deleted: the chairperson shall only render the</p> <p>Deleted: final</p> <p>Deleted: after receiving</p> <p>Deleted: after a CRVS contested case hearing, and may</p> <p>Deleted: /</p> <p>Deleted: The administrator or a conservation and resource enforcement officer shall have the power to issue</p> <p>Deleted: 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</p>
13-1-61	<p>(a) <u>Any person who is alleged to have committed a civil resource violation may be cited to respond to the alleged violation within the time prescribed therein. The citation shall be substantially in the form of Appendix "A" to these rules, and shall include the information required by section 13-1-62.</u></p> <p>(c) Service of the <u>citation</u> may be <u>effected</u> by an employee of the department, or anyone authorized by the administrator, <u>through</u> one of the following methods:</p> <ol style="list-style-type: none"> (1) Personal service; or (2) <u>Certified mail, return receipt requested.</u> <p>(d) Where a resource violation involves an unattended vehicle or vessel, service may be <u>effected</u> by a conservation and resource enforcement officer who shall conspicuously affix the <u>citation</u> to the vehicle or vessel.</p>	<p>Deleted: answer to the violation notice and any</p> <p>Deleted: citation contained therein, and to submit to administrative proceedings conducted pursuant to t[... [1]</p> <p>Deleted: violation notice</p> <p>Deleted: conducted</p> <p>Deleted: y</p> <p>Deleted: , and may be [... [2]</p> <p>Deleted: on the responder [... [3]</p> <p>Deleted: Mailing by c</p> <p>Deleted: to the responder [... [4]</p> <p>Deleted: conducted</p> <p>Deleted: violation notice</p> <p>Deleted: for the regist[... [5]</p> <p>Deleted: (e) In any pend[... [6]</p>
13-1-62	<p><u>Contents of citation for civil resource violation.</u> A <u>citation for</u> civil resource violation shall include, at a minimum, the following:</p> <ol style="list-style-type: none"> (1) The name and <u>address of the individual cited</u>; (2) A statement that the <u>citation</u> is issued pursuant to chapter 199D, 	<p>Deleted: Notice of</p> <p>Deleted: ; contents</p> <p>Deleted: notice of</p> <p>Deleted: respondent's</p> <p>Deleted: current</p> <p>Deleted: if available</p> <p>Deleted: notice</p> <p>Deleted: being</p>

	<p>HRS.</p> <p>(3) A <u>brief statement of the facts constituting the violation</u> ;</p> <p>(4) A <u>statement of the proposed administrative sanction</u> ;</p> <p>(5) A statement <u>that a CRVS contested case hearing must be requested within the time specified by the citation</u> ;</p> <p>(6) A summons to <u>respond to</u> the <u>citation</u> , within twenty one days of the service ;</p> <p>(7) Name and signature of the officer or official <u>issuing</u> issues the citation ;</p> <p>(8) Date of the citation ;</p> <p>(9) A statement that <u>the proposed sanction</u> sanctions <u>will be</u> final unless contested in writing by , within twenty one days of service of the violation notice ;</p> <p>(10) ,</p> <p>(11) A statement that <u>mitigation may be requested in lieu of</u> , <u>and</u> ,</p> <p>(12) A statement that <u>service of the citation</u> , <u>will not bar</u> , <u>a</u> <u>judicial proceeding in the event the citation involves criminal wrongdoing</u> .</p> <p>Comment:</p> <p>The form of the citation must be shortened. The form should be attached as an appendix and incorporated by reference. The boating rules does this in prescribing the form of the standard harbor use (mooring) permit. The citation should give enough notice to satisfy due process and alert the recipient of the opportunity to respond. If the recipient indicates a desire to contest the charges, then the department should provide a more particular statement of the charge, along the lines of what you would have in the original notice. I will address later the cited party's burden in responding to the citation.</p>

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- Deleted: 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;
- Deleted: a written request for
- Deleted: without
- Deleted: shall be examined by a hearing officer without the need to hold any hearing or have the attendance (... [7])
- Deleted: any administrative action against the (... [8])
- Deleted: shall not preclude
- Deleted: the state from pursuing
- Deleted: separate
- Deleted: criminal prosecution in a court of law for a (... [9])
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- Deleted: (13) A space for the respondent's statement (... [10])
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citation contained therein, and to submit to administrative proceedings conducted pursuant to this subchapter	
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, and may be effectuated by	
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on the respondent, with or without the respondent's signature acknowledging the service;	
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to the respondent's last known address, provided that a return receipt or its electronic mail format is received by the administrator	
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for the registered owner to receive and answer	
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(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.	
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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	
Page 4: [8] Deleted	8/12/2008 2:25:00 PM
any administrative action against the respondent for any civil resource violation	
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criminal prosecution in a court of law for an offense committed in the same course of conduct	
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(13) A space for the respondent's statement and signature.

HONOLULU OFFICE
Suite 1300, American Savings Bank Tower
1001 Bishop Street, Honolulu, HI 96813
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PAUL JOHNSON PARK & NILES

Attorneys At Law, A Law Corporation

MEMORANDUM

TO: Bin C. Li
Administrative Proceedings Coordinator
Department of Land and Natural Resources
State of Hawai'i
1151 Punchbowl Street, Rm. 130
Honolulu, HI 96813

FROM: Dennis Niles, Esq.

DATE: August 6, 2008

RE: Comments re proposed changes to Subchapter 7, Civil Resource Violations System, section 13-1-63 et seq.

My final set of comments follows. The challenge for both of us is daunting. I intend to search for suitable federal approaches that might provide guidance in finalizing the rules. I would be very surprised to learn that the federal government has not implemented a CRVS of its own. Do you have an understanding in such respect? As the next step, I think you and I should meet and confer, possibly with the folks from DOCARE and the AG's office. It may be advisable also to seek input from the Bar's Natural Resources committee. The other afternoon I heard on public radio an interesting interview of an author who later became an editor. His description of the traits of a good editor convinces me that I may not be up to the task. Again, please accept the comments with the collegial spirit with which they are offered.

RULE	COMMENTS
13-1-62	Further Comment: In reflecting on CRVS, I am of the view that the department should elect to prosecute violations administratively or through the criminal justice system. A violator should not be subject to both. The department can decide, in consultation with its attorneys, whether a violation should be treated as a crime or an infraction that lends itself to administrative disposition. For one, forcing DOCARE to participate in

two proceedings is wasteful. In addition, the courts appear unenthusiastic when dealing with such matters. I also question whether the Fifth Amendment precludes the State from requiring a party to file the answer contemplated by section 13-1-63 if a criminal prosecution is a possibility. The issue might be obviated if the criminal case were prosecuted before the department begins CRVS proceedings. A conviction or guilty plea (as opposed to a plea of no contest) would provide the predicate for a subsequent civil sanction. In sum, I recommend against a dual track. This will render unnecessary subsection (12) which should be deleted.

In addition, the rule should allow the department opportunity to amend.

13-1-63

Response options; consequences of default.

(a) Every person served with notice of an alleged conservation resource violation shall have twenty-one days within which to complete, sign and deliver the response form accompanying the notice. The form shall allow the responding person to select one of the following responses:

- (1) Admit the violation and accept the proposed sanction;
- (2) Admit the violation and request an opportunity to contest the proposed sanction; or
- (3) Deny the violation and request a contest case hearing.

(b) Any person who fails to respond within twenty-one days of service of a notice of conservation resource violation shall be deemed to have admitted the violation specified in the notice and accepted the proposed sanction.

(c) The department may excuse a party's failure to respond in accordance with this rule if it is the result of excusable neglect.

Comment:
The citation form should include a standardized response incorporating the options you outline in section 13-01-64. I recommend that the notice and response form be made part of the rules. Note also that I provide for amendment of the notice to seek a different sanction. I see no justification for enhancing

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	<p>the penalty based on failure to respond unless the department is prepared to amend and cite the default as grounds for enhancement. This strikes me as circuitous. The violation, not the violator's response should determine the sanction. Lastly, is there a need to say the sanction is within the law? I do not believe so. Accordingly, proposed subsection (b) should be deleted in its entirety.</p>
13-1-64	<p>Comment:</p> <p>Made part of 13-1-63 as noted.</p>
13-1-65	<p>Any counterclaim <u>by responding person</u> against the state, the department, or the citation issuing officer or official <u>is beyond the jurisdiction of the board or and a hearing officer on civil resource violations. However, facts giving rise to a claim in the nature of offset against a proposed monetary sanction may be considered as a mitigating circumstance.</u></p> <p>Comment:</p> <p>There may be an instance where the department is allegedly indebted to a person charged with a resource violation. I am now litigating a case against the department seeking a refund of use fees overpaid in error. That is one instance where a violator would be entitled to offset his claim against the proposed penalty.</p>
13-1-66	<p>Preliminary Comment:</p> <p>I have addressed failure to respond. The board or hearings officer should have the ability to enter judgment by default if the responding person later fails to defend. However, the proposed rule goes too far in empowering the board to "impose any sanctions allowed by law for the violation." The rule should read in this respect: <u>Impose the sanctions proposed in the notice of conservation resource violation;</u></p>
13-1-67(a)	<p>Comment:</p> <p>Subsection 13-1-67 needs to be divided into three separate rules. The purpose of subsection (a) is unclear, particularly the differentiation between a person complying after "losing" a</p>

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contested case and a person who pays after admitting culpability. Why should there be a difference? Is it because you want to reward admissions of fault? Also, "record" is a term of art typically referring to the bureau of conveyances. Should not the rule simply require the administrator to note satisfaction in the department's file or, alternatively, endorse the judgment being satisfied much as a promissory note would be marked "paid." The substance of this paragraph should be a rule that stands alone, if it is really needed.

13-1-67(b)

Proceedings on request for mitigation.
A request for mitigation shall be determined in accordance with the following steps:

- (1) The administrator shall confirm the department is in receipt of the request within ten days of the date it is due.
- (2) On confirmation of receipt of a timely request for mitigation, the administrator shall notify the parties of a schedule for submitting and responding to any fact or circumstance the responding person believes justifies mitigation.
- (3) As soon as reasonably practicable following receipt of a statement justifying mitigation and the department's response, the administrator shall assign a hearing officer to examine the mitigating circumstances and recommend disposition of the requested mitigation.
- (4) Decision of a request for mitigation shall be based on the request and the department's response.
- (5) The hearing officer may sustain, moderate or reduce, or disapprove any sanctions proposed, in the violation notice. The disposition shall be accompanied by findings of fact

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Deleted: decide on the mitigation request.

Deleted: 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.

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	<p><u>and conclusions of law.</u></p> <p>(6) The administrator shall, within ten days of the hearing officer's decision, serve upon respondent a certified copy of the decision.</p> <p>(7) A hearing officer's decision on a mitigation request shall be final.</p> <p>(8) <u>The administrator shall note the case file when all sanctions imposed by the hearing officer have been satisfied.</u></p>	<p>Deleted: 7</p> <p>Deleted: 8</p> <p>Deleted: No further administrative or judicial review shall be allowed.</p> <p>Deleted: 9</p> <p>Deleted: When all sanctions imposed by the hearing officer have been complied with, t</p>
13-1-67(c)	<p><u>Proceedings on request for contested case.</u></p> <p><u>On receipt of a timely request for contested case hearing to challenge an alleged conservation resource violaion,</u> the administrator shall assign a hearing officer to conduct a CRVS contested case hearing as provided in subchapter 5 of this chapter.</p> <p>Comment:</p> <p>Completes the separation of 13-1-67 into three separate rules. Remaining changes are non-substantive, textual improvement. The rules may be used by the lay public, thus my reluctance to conclude with "except as provided herein." If qualification is required, it should be specific.</p>	<p>Deleted: record a satisfaction</p> <p>Deleted: of decision and conclude the case</p> <p>Deleted: (c)</p> <p>Deleted: When a respondent's answer contests any citation in the violation notice and requests a contested case hearing,</p> <p>Deleted: the case to</p> <p>Deleted: who shall proceed</p> <p>Deleted: the</p> <p>Deleted: of</p> <p>Deleted: , except as provided herein</p>
13-1-68	<p>(a) <u>An audio record of all proceedings in a CRVS contested case shall be retained for five years following final conclusion of proceedings.</u></p> <p>Comment:</p> <p>Changes are non-substantive, textual improvement.</p>	<p>Deleted: For every contested case processed under this subchapter, the administrator shall, by means of an electronic recording device, maintain</p> <p>Deleted: a</p> <p>Deleted: a period</p> <p>Deleted: not less than</p> <p>Deleted: two</p> <p>Deleted: after</p>
13-1-69	<p><u>Procedure on delegation of final decision</u></p> <p>(a) <u>The procedure provided in this section applies when the chairperson or a hearing officer is delegated power to make the final decision in a CRVS contested case.</u></p> <p>(b) After all evidence has been taken, the parties may submit, within the time set by the chairperson or hearing</p>	<p>Deleted: the case</p> <p>Deleted: is concluded</p> <p>Deleted: when</p> <p>Deleted: power delegated</p> <p>Deleted: W</p> <p>Deleted: with the</p> <p>Deleted: , subchapter 6 shall not apply. Instead, the procedure provided in this section shall apply</p>

	<p>officer, a proposed decision and order which shall include proposed findings of fact and conclusions of law.</p> <p>(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.</p> <p>(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 <u>proposed findings of fact, a separate ruling on each shall be incorporated in the findings of fact of the</u> chairperson or hearing officer.</p> <p>(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.</p>
13-1-70(a)	<p><u>To ensure fair and consistent</u> assessment of administrative sanctions, <u>the</u> Board <u>shall adopt through rulemaking</u> an administrative sanctions schedule. The department shall use <u>the schedule in</u> assessing a <u>proposed</u> sanction.</p>
13-1-70(b)	<p>(b) <u>In proposing</u> a sanction, <u>the department may</u> consider the following factors:</p> <p>(1) Value of <u>any natural or cultural resource affected by the violation. For purposes of this section, "value" is not limited to economic value and may include consideration of the role of the</u></p>

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	<p><u>resource in the natural environment</u> and the cost of restoration or replacement;</p> <p>Comment:</p> <p>We need to look to the academic community and possibly the historic preservation office for help with the wording of this section. I lack the expertise to provide what may be desirable. My revision shows ways in which wording can be improved but the suggestion itself requires improvement.</p>	<p>Deleted: 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</p> <p>Deleted: Damages</p> <p>Deleted: the</p> <p>Deleted: in its</p> <p>Deleted: and</p> <p>Deleted: , including the present value of any accrued past damages and defined future damages</p> <p>Deleted: s for</p>
<p>13-1-70(b)(cont'd)</p>	<p>(2) <u>Injury to state facilities or impairment of the delivery of state services</u> ;</p> <p>(3) <u>Cost to the state of remedial measures</u> ;</p> <p>(4) <u>Cost incurred to investigate, prosecute and monitor compliance with any sanction resulting from a conservation resource violation</u> ;</p> <p>(5) ;</p> <p>(7) <u>The appropriateness of restitution, or disgorgement of gains realized through a conservation resource violation</u> ;</p> <p>(8) <u>Pendency of one or more other alleged conservation resource violations related in time, place or manner</u> [***"perpetuating" should be perpetrating***];</p> <p>(9) <u>Pendency of one or more alleged violations of state or federal environmental or conservation laws related in time, place or manner</u> ;</p> <p>(10) <u>Conviction or imposition of sanction as a result of one or more prior conservation resource violations related in time, place or manner</u> ;</p> <p>(12) <u>Extent of the responsible person's cooperation in the investigation or remediation of an alleged conservation resource violation</u> ;</p> <p>(13) Voluntary actions taken by the respondent <u>to mitigate injury or damage resulting from or</u></p>	<p>Deleted: to remedy any damages, restore any resources, repair any facilities, replace any assets, or recover any losses</p> <p>Deleted: s for the state to enforce against,</p> <p>Deleted: and monitor the violation and its damages</p> <p>Deleted: Fees and costs for the state to prosecute or process the violation in any legal or administrative proceedings, including ... [1]</p> <p>Deleted: Level of damage ... [2]</p> <p>Deleted: Pecuniary</p> <p>Deleted: that have been</p> <p>Deleted: or may be ... [3]</p> <p>Deleted: Concurrent</p> <p>Deleted: civil</p> <p>Deleted: when perpetuating ... [4]</p> <p>Deleted: Concurrent</p> <p>Deleted: any federal law ... [5]</p> <p>Deleted: other than those ... [6]</p> <p>Deleted: Level of the ... [7]</p> <p>Deleted: Repetition and ... [8]</p> <p>Deleted: Level</p> <p>Deleted: respondent's</p> <p>Deleted: with authorities ... [9]</p> <p>Deleted: in</p> <p>Deleted: ing</p> <p>Deleted: any</p> <p>Deleted: s</p>

	<p><u>threatened by a conservation resource violatin ;</u></p> <p>(14) The respondent's <u>financial condition ; and,</u></p> <p>(15) The respondent's <u>compliance , with ,</u> sanctions assessed <u>to redress one or more</u> civil resource violations<u>.</u></p>	<p>Deleted: already inflicted or averting any imminent damages</p> <p>Deleted: capability and resources in providing any redress and restitution</p> <p>Deleted: willingness to voluntarily comply</p> <p>Deleted: all the</p> <p>Deleted: in the notice of</p> <p>Deleted: for any specific violation; and</p>
13-1-71	<p>Comment:</p> <p>Recidivism may be considered in determining the sanction to be assessed but I think it unwise to limit the decision maker to adverse adjudications. Nor do I understand the purpose of subsection (b). The department should be free to judge a repeat bad actor on the basis of prior cases, whether or not the underlying allegation was challenged. The department should not, however, seek enhancement where it failed to prove the underlying charge.</p>	
13-1-72	<p>Comment:</p> <p>(a) <u>An administrative fine or other monetary assessment, shall be due and payable within thirty days of service of a final decision imposing the sanction unless a later date for payment is ordered by the board. Performance of any non-monetary sanction shall completed within thirty days of service of a final decision imposing the sanction unless a later date for performance is ordered by the board.</u></p> <p>(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. <u></u></p> <p>Comment. The first set of changes should be self-explanatory. The board does not have the power to abrogate the power of the judiciary to stay payment or performance; a bankruptcy court certainly would have such power. A stay might be ordered to protect the violator from irreparable harm that could follow imposition of a sanction.</p>	<p>Deleted: Unless otherwise stated in a final decision, a</p> <p>Deleted: 11</p> <p>Deleted:</p> <p>Deleted: s</p> <p>Deleted: ,</p> <p>Deleted: s</p> <p>Deleted: and non-monetary sanctions</p> <p>Deleted: the</p> <p>Deleted: the</p> <p>Deleted: such fines and sanctions</p> <p>Deleted: The chairperson's decision as to the request for stay is final.</p> <p>Deleted: ¶</p>

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<p>Fees and costs for the state to prosecute or process the violation in any legal or administrative proceedings, including attorneys' fees and costs;</p> <p>(6)</p>	
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<p>Level of damages to the public for whom the state holds a public trust of the resource involved;</p>	
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<p>or may be potentially realized by the respondent from an unauthorized commercial activity</p>	
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<p>when perpetuating the underlying violation</p>	
Page 7: [5] Deleted	8/17/2008 6:47:00 PM
<p>any federal laws or state</p>	
Page 7: [6] Deleted	8/17/2008 6:48:00 PM
<p>other than those administered by the department</p>	
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<p>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;</p> <p>(11)</p>	
Page 7: [8] Deleted	8/17/2008 6:50:00 PM
<p>Repetition and duration of resource violations of the same or similar type in the respondent's history</p>	
Page 7: [9] Deleted	8/17/2008 6:55:00 PM
<p>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</p>	



"Gretchen Grove"
<groveg001@hawaii.rr.com>
08/28/2008 10:09 AM

To <dlnr.co.apo@hawaii.gov>
cc
Subject Bills HB 3178, HB, 3177 & HB 3176

I had hoped to attend tonight's meeting in Hilo but will not be able to. However, I want to express my support for the enforcement and stiffening of penalties for people who destroy cultural and natural resources. It's the only way we can keep Hawaii the special place that it is.

Drawing on personal experience, we own property in Pepekeo that is bounded on two sides by State land. I have a neighbor who crosses the stream between us and cuts trees on state land to open up his view. This sort of thing needs to be stopped. I know his attitude is that he's beautifying the land. But, in fact, he's thinking only of his own needs and not those of future generations.

I feel adamantly about this issue. State lands are for all generations, not just ours.

Thank you for allowing us to comment.

Gretchen Grove
28-233 Kulaimano Hmstd Rd
Pepeekeo, HI 96783
808-964-3535



Rene Siracusa
<malamaopuna@yahoo.com>

To DLNR.CO.APO@hawaii.gov

cc

bcc

08/29/2008 11:49 AM

Please respond to
malamaopuna@yahoo.com

Subject Testimony on Proposed Administrative Rules on Civil
Enforcement

History

This message has been replied to

Aloha kakou -

Malama O Puna is an environmental 501(c)(3) operating out of the Puna District on the Big Island. Having witnessed (and reported) many violations over the years, we are pleased to see that DOCARE will finally have some additional enforcement tools and are in general agreement with what is being proposed.

Regarding the penalty/fine/mitigation we have the following concern: The type of individual or entity that is guilty of violation in the first place should not be trusted to perform any mitigation themselves. Mitigation measures such as site/habitat restoration should be performed by professionals, and the fine or penalty should cover the entire cost, so that the State (i.e. the taxpayers) do not have to pay for this. We believe that the past level of fines, which were standardized and bore no relation to the amount of damage done, but were mere pittance, did not create disincentives for violators. In addition, we would like an additional non-monetary penalty imposed, such as (where applicable), no CDUA permit would be granted to any applicant that has a history of violations. For some violators, this more than anything else would dissuade them from their illegal practices.

For some years we have been concerned that new property owners who, for example, grub and grade in the SMA without permits, are considered the ONLY violators - and the heavy equipment operators who do not demand to see a permit are not held accountable. We would like to see that situation changed, so that these grubbers and graders can also be subjected to civil enforcement proceedings.

Since our natural environment is coming under ever increasing stress, we must take a very hard line in enforcement. Concurrent with this, DLNR should step up its educational outreach to the general public - especially targetting newcomers in partnership with the Hawaii Board of Realtors.

Thank you for the opportunity to comment.

Rene Siracusa
President
Malama O Puna



Dan Wong
<shunzowong@hotmail.com>

09/25/2008 11:18 AM

To <dlnr.co.apo@hawaii.gov>

cc

bcc

Subject DLNR Noncriminal Violations

History:

 This message has been replied to.

I agree that we need more enforcement of our laws, when it comes to governing our natural resources, especially fishing.

A system similar to a traffic ticket would be welcome if it could provide a wider blanket of enforcement. People who know they are guilty will pay the fine and hopefully not make the same mistake twice. People who don't think they are guilty will have a venue for due process. Just as HPD officers have to use their judgement, we should expect respect and the highest levels of professionalism from our DLNR Officers.

A portion of generated monies from fines should also go back into DLNR to expand current enforcement resources (more enforcement personnel & equipment) and education.

Spot checks at popular fishing spots and protected areas to ensure everyone is following the rules and more education of current laws could also be improved.

I know DLNR covers more than just fishing rules, but as a fisherman, I have witnessed nets in the water for days at a time, hunting in preservation areas, and out of season taking of certain fish. Yes, I have called the DLNR and reported several of these incidents, and was basically told to go on my way (except for the the net, which they asked if I could haul out to the beach & they picked up the next day).

Daniel S. Wong

See how Windows connects the people, information, and fun that are part of your life. [See Now](#)

October 2, 2008

Aloha Chairperson Thielen and Members;

Thank you for the opportunity to submit testimony regarding draft rules to be authorized as subchapter 7, under Chapter 13-1, to establish a Civil Resource Violation System. My name is Toni Marie Davis. I'm the executive director of the statewide Activities & Attractions Association of Hawaii, (A3H). We've 186 members statewide. A3H is a not for profit, trade association owned by the members. One of my roles in this position is to ensure members' interests and concerns are expressed to all levels of government.

Underneath this profession, I'm a Makawao mom with three children, two dogs, a mortgage and a member of the endangered Maui middle-class. I would never compromise my integrity, or the quality of life for my children or future generations to speak up on something I didn't in my heart and mind believe was true.

I debated coming here this evening the paper made this sound like a no brainer: Less involved violations being reduced to "civil" from "criminal". Less cost to the DLNR, easier to correct bad behavior and ticket people. After reading it, I wonder about the intent. Is this to create a more efficient process for citations or is it meant to provide a more capable process, in order to accommodate increased citations.

Using a plumbing analogy, relate the number of citations to the amount of water and the structure as the pipe. Efficiency is the water flow rate through the pipes. Is this change to enlarge the pipe because the flow is too slow and inefficient OR is there a plan to turn up the water and larger pipes are necessary?

I went to the DLNR web site seeking clarity, here I found, "this is to **strengthen** DLNR's enforcement of violations" and also "support more rigorous enforcement." This would suggest there is a plan to turn up the water.

Tourism states rich in natural resources, like Hawaii, face challenges related to overuse, user conflicts and degradation. In Hawaii these challenges are magnified by the high percentage of rare endemic species and increased susceptibility to invasive species. It's a tough job, one that must balance environmental protection with users.

Balance is the key to managing our public resources responsibly. I will be the first to agree that scofflaw – those disrespectful of the law are root cause of problems. Rigorous enforcement is the answer. Scofflaws come in various packages.

It would be wrong to perceive all government employees as “on the take” and “corrupt”. As with government employees, not all tourism related activities are disrespectful to natural resources.

In my experience they are just the opposite. These guided tours are supervised; rules are recited to guests and followed. There is an opportunity to teach and educate respect for the environment and culture. These operators also watch over and protect our natural resources while assisting customers and non customers. Obviously a demand exists for these activities. Tourism is our number one economic engine. Visitors in an unorganized, unsupervised capacity cause an increased conflict, detriment and safety hazard. Too often these legal small businesses are perceived as the dark side.

These are the people providing the experience, the adventure, the excursions – They create the stories, picture and videos that the visitors take back home. They are a huge reason our visitor industry is so successful. Tourism is an incredible economic, sustainable gift to any community. It's a look but don't take lucrative industry. According to HTA, reports reflect most residents embrace and understand this. There exist a loud minority that just doesn't get this. It concerns me because I've seen this loud minority within our government at various levels. This perception is why I am here. Please address this perception, ensure that your enforcement staff “get it” prior to turning up the water. Thank you again.

RECEIVED



OCT -8 P2:11

 DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

 STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
711 KAPI'OLANI BOULEVARD, SUITE 500
HONOLULU, HAWAII 96813

October 6, 2008

HR08-3730

OHA'S COMMENTS ON DLNR/BLNR'S REQUEST 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, SUBCHAPTER 13-1

Chair Thielen and Members of the Board of Land and Natural Resources:

The Office of Hawaiian Affairs (OHA) has reviewed the proposal to amend Hawaii Administrative Rules (HAR), Chapter 13-1, Subchapters 1 to 6, to adopt HAR, Chapter 13-1, Subchapter 7, and to compile HAR, Chapter 13-1. In short, the measure amends and realigns existing subchapters while establishing a Civil Resource Violations System. OHA offers **CONDITIONAL SUPPORT WITH AMENDMENTS** as follows:

SUBCHAPTER 1—GENERAL PROVISIONS

Definitions

Under § 13-1-2, retain the original language of subpart (3) for "Proceeding," as it reinforces the requirements of due process for administrative rulemaking, as applied to specifically enumerated resources comprising the public trust *res*. The language is also indicative of the value placed on such enumerated resources as a matter of public policy. If, on the other hand, there are imminent plans for restructuring or reorganizing the Department of Land and Natural Resources (DLNR), OHA requests information affirming or denying any such measures as soon as practicable. Note typographical error: "... historical sit[e]s ..."

Adjudicatory functions

Contrary to the language of § 13-1-5.1, the adjudicatory functions of the Board of Land and Natural Resources (board) are indeed meetings within the meaning of Hawaii Revised Statutes (HRS). OHA is not inclined to second guess the legislature: "Notwithstanding provisions in this section to the contrary, this part shall apply to **require open deliberation of the adjudicatory functions of the land use commission.**" Section 92-6(b), HRS (emphasis supplied). [L1975, c166, pt of § 1; am L 1976, c 92, § 8; am L 1985, c 25s1, § 11]. Public policy favors full accountability in governmental decision making—to wit, transparency—particularly when it is reasonably foreseeable that the exercise of traditional and customary

native Hawaiian practices will be subject to attack. Public policy also favors insuring equality and fairness in the application of law enforcement. Accordingly, § 13-1-5.1 should be modified to conform to law or omitted altogether.

Government records

The “protection of the character or reputation of any person” clause in § 13-1-9, as originally intended and worded, should be preserved. No compelling governmental interest is benefitted by having government, and ultimately John and Jane Doe taxpayers, risk liability in defamation lawsuits. In the alternative, records having no relation to violations, and/or pertaining to character or reputation, can be treated appropriately and discretely, or sealed as the case may require. Neither more nor less resources would be expended, as when culling through documents to determine attorney-client and attorney work product privileges. Similar effort is employed with redacting confidential information and such.

SUBCHAPTER 2—PROCEEDINGS BEFORE THE BOARD

Limiting testimony at public hearings and meetings

Modify § 13-1-11.1 to take into account educationally- and physically-challenged individuals. For instance, persons who may not possess the acumen to read, let alone draft, written communications are unfairly prejudiced by this draft language. Consider further individuals who are blind, deaf, without speech, or otherwise disabled. Many of these circumstances cannot be helped. Due process requires that we treat individuals facing such challenges equitably and with a sense of justice.

Furthermore, OHA requests that the board explicitly adopt rules permitting and providing for usage of the official state language of Hawaiian whenever and wherever opportunities for written and oral data, testimony, views, or arguments arise. Same applies for all agenda and official notices. Therefore, a portion—if not all—of the hearing/presiding officers should be required to be fluent and knowledgeable in the Hawaiian language, culture and history.

Continuances or extensions of time

Typographical error in § 13-1-14: “Whenever a person or agency has a right or [is] required to take action. . . .”

SUBCHAPTER 3— RULEMAKING PROCEEDINGS

Time and place

Retain the bracketed clause in § 13-1-23, as originally intended and worded: “Where the proposed rulemaking affects only one county, the public hearing shall be held in that county.” As an example, in passing Act 212 (relating to ‘Aha Kiole/Moku councils), the legislature

embraced a policy reinforcing community input with government decision making pursuant to traditional and customary native Hawaiian geo-political divisions. Access to government is the most fundamental of rights, such that the will and voice of a community directly affected should be heard in their proper context and place. Often, for instance, nothing can sufficiently substitute the efficacy of conducting on-site visits. The counter result then, mobilizing entire communities to an epicenter—*e.g.*, O‘ahu—is fiscally, logistically and socio-politically untenable.

SUBCHAPTER 4—DECLARATORY RULINGS

Petition for declaratory ruling

Note typographical error in proposed § 13-1-27(b)(2): “. . . including reason[s] for submission . . .” Substantively, OHA opposes measures authorizing board action which shifts the burden and costs of conducting any proceeding, as proposed in §§ 13-1-27(d) and (i), to native Hawaiians and Hawaiians engaged in constitutionally protected and statutorily recognized traditional and customary practices. Haw. Const. Art XII, § 7; *Kalipi v. Hawaiian Trust Company, Ltd.*, 66 Haw. 1, 656 P.2d 745 (1982); *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992); *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission*, 79 Haw. 425, 903 P.2d 1246 (1995) (*PASH*); *State of Hawai‘i v. Hanapi*, 89 Haw. 177, 970 P.2d 485 (1998); *Ka Pa‘a Kai O Ka‘aina v. Land Use Commission*, 94 Haw. 31, 7 P.3d 1068 (2000).

As agent of the state of Hawai‘i, the board owes a special fiduciary duty to native Hawaiians and Hawaiians. See *The Admission Act* (Pub.L. 86-3: 1959); *The Apology Resolution* (Pub.L. 103-150: 1993); *Office of Hawaiian Affairs v. Housing and Community Dev. Corp. of Hawai‘i*, 117 Haw. 174, 177 P.3d 884 (2008)(*cert. granted* Oct. 1, 2008)(*OHA v. HCDCH*); see also, Haw. Const. Art. XII, § 7; *cf. Rice v. Cayetano*, 528 U.S. 495 (2000). Notwithstanding the high Court’s *certiorari* ruling on *OHA v. HCDCH*, OHA expects to prevail on the issue requiring, *inter alia*, the state’s maintenance of the public trust *res pending* resolution to the unrelinquished claims of native Hawaiians.

The Hawai‘i Supreme Court’s decision in *OHA v. HCDCH* was no mere moral victory; more significant, the full court’s opinion is compelling, rational and based on invulnerably sound legal authority. All counter arguments rest largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the state of Hawai‘i. OHA relies equally on the state’s assumption of duty and inherent moral obligation to serve this compelling interest. Therefore, modify §§ 13-1-27(d) and (i) to reflect the foregoing or omit entirely.

SUBCHAPTER 5—CONTESTED CASE PROCEEDINGS

Contested case hearings

Note typographical error in § 13-1-28: “. . . the board shall hold a contested case hearing upon it[s] own motion . . .” Note also the open-ended bracket within the same subpart: “. . .

[who is properly admitted as a party pursuant to” There is no indication what text is meant for deletion.

Request for hearing & Determination of entitlement to a contested case hearing

Sections 13-1-29 and 13-1-29.1, as proposed, are repugnant to due process in perpetuating paternalistic attitudes and minimizing the public interest and right-of-entry to governmental processes. Noteworthy is the attempt to eliminate “any interested person” from participating in contested cases. However, even more glaring is language explicitly allowing the board to enter conclusions (or “matter[s]”) of law concerning subject-matter jurisdiction, and the “legal right, duty, or privilege” of petitioners to a contested case, without conducting hearings. This proposed scenario is unfairly prejudicial, ripe for abuses of discretion without recourse, and contrary to public policy.

Unsurprisingly, it is rather unfortunate how history has on many occasions shown government as a poor judge in executing its duties and obligations. Not only does democracy require each of government’s coordinate branches to hold its own while keeping an eye on the others, it must also rely fundamentally on its citizenry to participate whenever the need arises. We must be reminded that a government of the people, by the people, and for the people is not merely a lesson taught in civics class. Accordingly, consistent with our comments concerning the board’s adjudicatory functions, OHA opposes §§ 13-1-29 and 13-1-29.1, as proposed, and recommends keeping the original language of § 13-1-29 intact.

Fees

OHA opposes § 13-1-30, as proposed, as well as measures requiring a nonrefundable filing fee and contested case fee. This section is tantamount to predisposition fines and penalties, which lacks foundation constitutionally and is abhorrent public policy. Further, the proposed waiver clause is so arbitrary, capricious and discretionary that it raises the specter of abuse and impropriety. There are no estimable or explicit standards for which to scale fairness.

The public’s interest in defending against prosecutions outweighs the government’s interest in rulemaking that may or may not promote efficiency. Similarly, the public’s interest in safeguarding constitutionally protected rights surpasses government’s desire to reform public access to civil services. Equally important, prohibitions and restrictions to due process diminish public confidence in government. Studies continue to indicate native Hawaiians and Hawaiians on the lower rungs of socio-economic strata and health indices. Since many of OHA’s constituents are very likely to be unfairly prejudiced by § 13-1-30, as proposed, its original language should be preserved.

Parties

As a point of clarification, and unless explicitly advised to the contrary, OHA interprets § 13-1-31(b) as always admitting the Office of Hawaiian Affairs as a party governmental agency, and without prejudice to native Hawaiian or Hawaiian entities, organizations or persons applying

for party status or otherwise intervening. As representative of one of the enumerated beneficiary classes to the public lands trust, OHA asserts that it satisfies *de facto* and *de jure* the first-prong of § 13-1-31(b)(1) (“[G]overnment agenc[y] whose jurisdiction includes the land in question”) in perpetuity. OHA—by, through and for native Hawaiians and Hawaiians—is endowed with a special authority unlike all other state governmental agencies. See The Admission Act (Pub.L. 86-3: 1959); The Apology Resolution (Pub.L. 103-150: 1993); Haw. Const. Art. XII, §§ 4-7; *OHA v. HCDCH*, 117 Haw. 174, 177 P.3d 884 (2008) (*cert. granted* Oct. 1, 2008); *cf. Rice v. Cayetano*, 528 U.S. 495 (2000).

Hearing of violations

For reasons stated herein, OHA is firm in its opposition to § 13-1-31.1. OHA and its beneficiaries possess a special relationship to the land and resources of Hawai‘i—including, but not limited to, the ceded lands trust and public trust resources. The state holds a special fiduciary duty to OHA and its beneficiaries. These are indisputable truths. See The Admission Act (Pub.L. 86-3: 1959); The Apology Resolution (Pub.L. 103-150: 1993); Haw. Const. Art. XII, §§ 4-7; *OHA v. HCDCH*, 117 Haw. 174, 177 P.3d 884 (2008) (*cert. granted* Oct. 1, 2008); *Kalipi*, 66 Haw. 1, 656 P.2d 745 (1982); *Pele Defense Fund*, 73 Haw. 578, 837 P.2d 1247 (1992); *PASH*, 79 Haw. 425, 903 P.2d 1246 (1995); *Hanapi*, 89 Haw. 177, 970 P.2d 485 (1998); *Ka Pa‘a Kai O Ka‘aina*, 94 Haw. 31, 7 P.3d 1068 (2000); *cf. Rice v. Cayetano*, 528 U.S. 495 (2000). No administrative act or rule shall serve as a bar on OHA and its beneficiaries’ participation in contested cases where ceded lands and public trust resources are at issue.

Conduct of hearing

Consistent with views presented herein, OHA recommends implementing appropriate procedures for determining the qualifications and delegation of hearing officers in contested cases pursuant to § 13-1-32(b), as proposed. The absence of any selection process specifying even a minimum of qualifications is neither helpful nor desirable policy-making. OHA reiterates the recommendation that:

[T]he board explicitly adopt rules permitting and providing for usage of the official state language of Hawaiian whenever and wherever opportunities for written and oral data, testimony, views, or arguments arise. Same applies for all agenda and official notices. Therefore, a portion—if not all—of the hearing/presiding officers should be required to be fluent and knowledgeable in the Hawaiian language, culture and history.

OHA Comments at p.2 (under “Limiting testimony at public hearings and meetings”).

Evidence

Note typographical error in § 13-1-35(i): “Official notice may be taken of such mat[t]ers as may be”

Reconsideration

Note typographical error as to form in § 13-1-39(b), as proposed, as follows: Either add an earlier sub-numerical “(i)” or delete the “(ii)” from the added language “. . . no less than fourteen days prior to . . .”

SUBCHAPTER 6—POST HEARING PROCEDURES FOR HEARING CONDUCTED BY HEARING OFFICER

Support of hearing officer’s report and recommendation

Note typographical error in § 13-1-43(b): “The brief shall[:]”

SUBCHAPTER 7—CIVIL RESOURCE VIOLATIONS SYSTEM

Under § 13-1-52, the definition for “Civil resource violation” begs the question as to what constitutes a violation under the Hawai‘i State Constitution and case law. *But see* Haw. Const. Art. XII, § 7; *see, e.g., Kalipi*, 66 Haw. 1, 656 P.2d 745 (1982); *Pele Defense Fund*, 73 Haw. 578, 837 P.2d 1247 (1992); *PASH*, 79 Haw. 425, 903 P.2d 1246 (1995); *Hanapi*, 89 Haw. 177, 970 P.2d 485 (1998); *Ka Pa‘a Kai O Ka‘aina*, 94 Haw. 31, 7 P.3d 1068 (2000); *see also*, HRS § 6E; HAR § 13-300 (recognition of native Hawaiian and Hawaiian culture and rights).

OHA is mindful of the historical connections our beneficiaries have with the lands and natural resources of our state. Native Hawaiian traditional and customary practices are in fact linked symbiotically to those very lands and resources, and thereby constitute cultural resources requiring equal protection under the proposed Civil Resource Violations System (CRVS).

OHA is empowered to work towards the betterment of native Hawaiians and Hawaiians, and to serve the needs and interests of a wide and diverse beneficiary group. OHA must also ensure that all other governmental agencies uphold their constitutionally, statutorily and judicially mandated obligations to the native Hawaiian and Hawaiian beneficiaries.

Section 10-3(4), HRS, states that a core purpose of OHA shall be:

Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians.

Section 10-1(b) states that:

It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which

affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.[L 1979, c 196, pt of Section 2] (emphasis supplied).

Accordingly, OHA supports the adoption of additional language and measures, not prohibited by *Rice v. Cayetano*, which will immunize the traditional and customary practices of our beneficiaries from the CRVS. Similarly, we urge for the adoption of definitions for “Affirmative defenses” excusing practitioners of traditional and customary practices from civil liability or sanctions in the event of CRVS citations or enforcement.

Safeguarding cultural practices is tenable through the adoption of a “Schedule of Immunities and/or Defenses to the CRVS” or other feasible mechanisms. Preserving and protecting the native Hawaiian and Hawaiian culture—as a uniquely established state resource—is a compelling governmental interest covered by, *inter alia*, Sovereign Immunity. See National Environmental Policy Act (NEPA); National Historic Preservation Act (NHPA); American Indian Religious Freedom Act (AIRFA); Native American Graves Protection and Repatriation Act (NAGPRA); Haw. Const. Art. XII, § 7; *OHA v. HCDCH*, 117 Haw. 174, 177 P.3d 884 (2008)(*cert. granted* Oct. 1, 2008); *Kalipi*, 66 Haw. 1, 656 P.2d 745 (1982); *Pele Defense Fund*, 73 Haw. 578, 837 P.2d 1247 (1992); *PASH*, 79 Haw. 425, 903 P.2d 1246 (1995); *Hanapi*, 89 Haw. 177, 970 P.2d 485 (1998); *Ka Pa’a Kai O Ka’aina*, 94 Haw. 31, 7 P.3d 1068 (2000); HRS § 6E; HAR § 13-300.

Again, returning to the question of what constitutes a violation, OHA further supports the adoption of additional definitions, enabling language and measures for CRVS enforcement to penalize acts or omissions which negatively impact or infringe upon our beneficiaries’ culture, traditional and customary practices, and way of life—i.e., a “Schedule/Policy of Prohibited Acts; Sanctions for Violations Impacting Native Hawaiian Cultural Resources, Practices and Rights” or other feasible measures. To illustrate the importance and necessity of such measures, consider the matter of iwi kūpuna, burials, and cultural and religious practices at Naue, island of Kaua’i. See *Brescia v. Edens-Huff*, Civil No. 08-1-0107 (Haw. Cir. Ct.—Fifth Cir.).

As a matter of practicality, however, establishing such measures may not be as simple as suggested primarily because many traditional and customary practices are not as recognized as others. As a result, CRVS enforcement activities will obviously face challenges and some frustration, or ironically such enforcement may very well constitute “violations” that negatively impact “cultural resources” as discussed above.

To address the highly probable abuse in enforcement, and until government as a whole gains a greater understanding of its role and appreciation for the cultural resources, OHA respectfully asks that the board adopt and articulate a policy of enforcement that is more accepting and responsive to the needs of native Hawaiians and Hawaiians in preserving and protecting our natural and cultural resources and public land trust. Ultimately, OHA welcomes a day when it can place full faith and confidence in the ability of the state to execute its duties in accordance with the expectations of our beneficiaries.

Chair Thielen and Members of the BLNR
October 6, 2008
Page 8

Until then, however, OHA would be remiss to accept the proposed amendments and adoption of rulemaking without recommending the changes offered herein. Therefore, OHA offers conditional support with the expectation that our recommendations be adopted for full implementation.

Finally, if and when a CRVS-type process is made functional, OHA hereby officially requests that a portion not less than twenty-percent of all income, revenues and monies deriving from the board's enforcement of all fines and sanctions be paid forthwith to OHA. We issue this request without prejudice to the state's duty to resolve the unrelinquished claims of the native Hawaiians and Hawaiians.

In establishing this office, the legislature specified six purposes of the office. One of the purposes empowered the office to:

[] Serv[e] as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians;" [Section 10-3(3), HRS.]

The legislature also directed in § 10-13.5, HRS, that: "Twenty per cent of all funds derived from the public land trust, . . . shall be expended by the office . . ." for the betterment of the conditions of native Hawaiians. OHA interprets these as no bar on co-agencies sharing prospective revenues from enforcement activities.

Mahalo for this opportunity to provide comments. OHA reserves the right to amend, modify or supplement comments at any time. If you have any questions, please contact Jerome Yasuhara, Policy Advocate in Native Rights, Land & Culture, at (808) 594-0239 or via e-mail at jeromey@oha.org.

'O wau iho nō me ka 'oia 'i'o,



Clyde W. Nāmu'o
Administrator

C: OHA Neighbor Island CRC's

October 7, 2008

Ms. Laura Thielen, Chairperson
Department of Land & Natural Resources
P.O. Box 621
Honolulu, HI 96809



Re: Public Hearing for Civil Penalty System, HAR, Chapter 13-1, Subchapters 1 to 6

Dear Ms. Thielen:

My testimony is in SUPPORT of the proposed amendments to the Hawaii Administrative Rules, Chapter 13-1, Subchapters 1 to 6 for the purpose of implementating a Civil Penalty System. My name is Lynn McCrory and I am the President of PAHIO Development, Inc. We are a locally owned and operated time share development company on the island of Kauai. I was also the Kauai Land Board member from 1996 to 2004.

There are minor violations that go unreported because of the process by which a DOCARE officer must determine if they have a criminal prosecution to bring to a County prosecutor's office or an administrative law violation that must be brought before the Board of Land & Natural Resources. Minor violations do not meet the level of scrutiny and time that are required to do either of these two processes. Nothing is done, and the public does not understand why.

Having the ability to issue a civil resource violation, with a penalty that can be either complied with, shown there are mitigating issues and there should be a change, or contest the violation, would work very quickly and reasonably to address the minor issues. This is not different from receiving a parking ticket versus causing a vehicular death.

These amendments will provide for a greater degree of caring for our natural resources, and for those that choose to violate our laws, a process to focus their attention on what should not be done. Mahalo!

Me ke aloha pumehana
With warm aloha,

PAHIO DEVELOPMENT, INC.

A handwritten signature in black ink, appearing to read "Lynn P. McCrory", is written over the typed name.

Lynn P. McCrory
President

EXHIBIT 7I



"Jacob K. Barros Jr."
<kapuahi@hawaii.rr.com>
10/14/2008 09:15 PM

To <DLNR.CO.APO@hawaii.gov>
cc
bcc

Subject Civil Resource Violation Rules

History:  This message has been replied to.

I attended the Maui Public Informational Meeting and stayed for the Hearing also. What bothers me is that not one thing was said about where the monies would go that would be collected, presumably paid to DLNR and not to the State of Hawaii General Fund. Can someone elaborate on this? Presenters brought up "lack of consistency" when applying fines/punishment/etc. How would this be addressed with CRVS? It was also brought up about DLNR/DOCARE not prosecuting some violators because "it was/may have resulted in a minor penalty or having been a minor violation". It seems to me that with that attitude as justification for the lack of enforcing laws, only creates others to violate more laws that are/may seem "minor" as well. If a violator is prosecuted for a minor violation that his neighbor also violated but was not prosecuted, then where is the "consistency"? Finally, if this should pass and become law, I sure hope that (1) the fees/monies/funds paid in is publicly accounted for and (2) that the Board chairing the enforcement of the citation/sanction is VERY partial to the protection of the Resource.

Jacob K. Barros Jr.



chucklipps@aol.com
10/21/2008 10:23 AM

To dlncr.co.apo@hawaii.gov
cc
bcc
Subject DLNR - Support For Proposed Changes

History:  This message has been replied to.

Aloha,

I just read an article in West Hawaii Today and want to express my support for the proposed changes in how the DLNR handles fines, citations, etc.

This new proposed system appears much more practical, will save several levels of government money and in general, streamline that segment of your responsibilities.

Excellent idea!

Charles Lipps Jr.
75-938 Hiona Street
Holualoa, HI. 96725

McCain or Obama? Stay updated on coverage of the Presidential race while you browse - [Download Now!](#)

Glenn S. Shiroma
460 Naniakea St.
Hilo, HI 96720

October 23, 2008

Mr. Bin Li
Administrative Proceeding Coordinator
Department of Land and Natural Resources

Subject: Testimony in Opposition
Public Informational Meeting and Public Hearing
October 23, 2008, County of Hawaii, Aipuni Center Conference Room

“To Amend Hawaii Administrative Rules, Chapter 13-1, Subchapters 1 to 6, relating to Rules of Practice and Procedure, Adopt Hawaii Administrative Rules, Chapter 13-1, Subchapter 7, relating to Civil Resource Violations System, and Compile of Hawaii Administrative Rules, Chapter 13-1.”

Dear Mr. Bin Li,

I fully support the INTENT of the Department of Land and Natural Resources to amend the Hawaii Administrative Rules regarding Civil Resource Violations.

However, I strongly OPPOSE the exclusion of a public informational meeting as part of the rule change process, thereby preventing the stakeholders’ an opportunity to better understand and ask questions on the proposed rule changes.

Please note the following examples:

- Division of Boating and Ocean Recreation news release dated December 13, 2007 to hold only a “public hearing” on proposed changes to parking rules at state boat harbors.

Division of Boating and Ocean Recreation did not hold any public informational meeting on the island of Hawaii and the public hearing was held in Waimea. The above submittal demonstrates the lack of concerns for the stakeholders’ to participate in the rule making process.

- Intermediate Court of Appeals ruling in the case of Tanaka vs. Department of Land and Natural Resources dated December 31, 2007.

The ruling just demonstrates the total disregard of the Department of Land and Natural Resources in making rules changes without due process, by not holding a public hearing.

- Department of Land and Natural Resources submittal to the Land Board of Natural Resources dated June 13, 2008, recommendation for “Approve holding of statewide public hearing on the proposed rule amendment, adoption and compilation; Authorize the Department to schedule such public hearings as expeditiously as possible following the Governor’s approval to conduct public hearings;”

The above submittal demonstrates the lack of concerns for the stakeholders’ to participate in the rule making process.

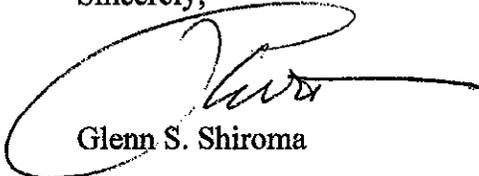
- Division of Forestry and Wildlife news release dated October 17, 2008 states “Due to a December 31, 2007 appellate court ruling, game bird stamps and fees are waived, and only a hunting license is required for all game bird hunting on public and private lands.”

This above news release is a disgrace admission of the Department of Land and Natural Resources failure to involve stakeholders’ in the rule making process.

As the above examples have demonstrated, “public informational meetings” needs to be included as part of the amendments to the Hawaii Administrative Rules for Civil Resource Violations.

Thank you for the opportunity to testify on this subject matter.

Sincerely,



Glenn S. Shiroma

Attachments:

DLNR, Division of Boating and Ocean Recreation news release to hold Public Hearing dated December 13, 2007.

Intermediate Court of Appeals of the State of Hawaii dated December 31, 2007, regarding Tanaka vs. Department of Land and Natural Resources.

Department of Land and Natural Resources submittal to Board of Land and Natural Resources dated June 13, 2008.

DLNR, Division of Forestry and Wildlife news release announcing the opening of Game Bird Hunting Season dated October 17, 2008.



DEPARTMENT OF LAND AND NATURAL RESOURCES

News Release**LINDA LINGLE**
GOVERNORLAURA H. THIELEN, CHAIRPERSON
Phone: (808) 587-0401
Fax: (808) 587-0390

For Immediate Release: December 13, 2007

**DLNR Holds Public Hearings On Proposed Changes
To Parking Rules At State Small Boat Harbors**

HONOLULU -- The Department of Land and Natural Resources (DLNR) invites the public to hearings statewide starting next week to provide input on proposed amendments to administrative rules relating to parking at small boat harbors.

The proposed rule amendments are needed to allow the Division of Boating and Ocean Recreation (DOBOR) to:

- more effectively manage motor vehicle parking within the state small boat harbors and related facilities;
- provide additional security that will be a requirement of a parking management permit;
- increase fees to provide additional funds to improve state boating facilities;
- fund other boating program activities; and
- comply with HRS 91-5(a) requiring revision and compilation of rules every 10 years.

"The input we receive from the public will be valuable as we work to standardize parking rules statewide as part of our ongoing effort to improve management of all of our boating facilities, including providing enhanced parking services," said Laura H. Thielen, DLNR chairperson, who noted that the current parking rules are specific only to the Ala Wai and Lahaina small boat harbors.

"We believe that the proposed changes are reasonable and equitable, and would help the state better manage boating facilities, improve services and generate additional funds that can be used to make much needed improvements at small boat harbors around the state," she said.

The hearings schedule is:

O'ahu – 6-8 p.m., Wednesday, December 19, Jefferson Elementary School cafeteria, 324 Kapahulu Avenue

Hawai'i – 5:30 – 7 p.m., Wednesday, December 19, Waimea Senior Center, 67-1199 Mamalahoa Highway, Kamuela

Kaua'i – 1-3 p.m., Saturday, December 22, Wilcox Elementary School Cafeteria, 4319 Hardy Street, Lihu'e

Lana'i – 5-8 p.m., Thursday, December 27, Lana'i Public and School Library, Fraser Avenue, Lana'i City;

Maui – 5-7 p.m., Friday, December 28, Lahaina Intermediate School Cafeteria, 871 Lahainaluna Road, Lahaina.

All interested parties are invited to attend and to present their views on the proposed amendments, either orally or in writing.

Written statements may be submitted at the public hearing or to the Chairperson up to one week following the last public hearing date.

DLNR held three public meetings earlier this year with users of the Ala Wai harbor area to begin a dialogue on a range of possible options for addressing parking problems that include: activities taking place at the harbor after hours, and the amount of parking being taken up by non harbor users such as construction workers and employees in the surrounding area, which reduces the parking available for recreational users.

Based on public feedback at the meetings, and in order to incorporate and balance as many concerns as possible raised by the various user groups, an amended plan for parking rule changes at the Ala Wai small boat harbor currently proposes to:

- 1) dedicate the helipad area, approximately 130 parking stalls, as free parking for recreational and harbor users;
- 2) continue to provide permit parking with rate increase from approximately \$1.67 a month to \$25 a month, which is equivalent to the City and County employee rates; and
- 3) open the remaining stalls in the harbor to the public at County rates managed by a parking management company.

A copy of the proposed rule changes will be mailed at no charge upon receipt of verbal or written request to the Division of Boating and Ocean Recreation at 333 Queen St., Suite 300, Honolulu, Hawaii 96813. Copies can also be downloaded from the DLNR Web site at: www.hawaii.gov/dlnr/dbor/bordraftrules.htm.

The meeting locations are disability accessible. If special needs are required, i.e., large print,

taped materials, sign language interpreter, etc., call Clifford Inn on O'ahu at (808) 587-1972 at least three business days prior to the public hearings.

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For more information news media may contact:

Deborah Ward

DLNR Public information specialist

Phone: (808) 587-0320

FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

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Civ. No. 04-1-0357

MELVIN T. TANAKA, JAMES WATT, MASAICHI TAKAKI, and DEXTER
EGDAMIN, Plaintiffs-Appellants, v. STATE OF HAWAI'I,
DEPARTMENT OF LAND AND NATURAL RESOURCES
("DLNR");
ROES GOVERNMENTAL UNITS OR ENTITIES 1-10,
Defendants-Appellees

AND

Civ. No. 04-1-0358

KATSUYA YAMADA, Plaintiff-Appellant, v. DEPARTMENT OF LAND
AND NATURAL RESOURCES ("DLNR"), STATE OF HAWAI'I;
STATE
OF HAWAI'I, Defendants-Appellees

NO. 27487

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT

DECEMBER 31, 2007

WATANABE, PRESIDING J., FOLEY, AND NAKAMURA, JJ.

OPINION OF THE COURT BY WATANABE, PRESIDING J.

This appeal stems from two consolidated cases for declaratory and injunctive relief, challenging the following actions by Defendants-Appellees State of Hawai'i (the State) and Department of Land and Natural Resources, State of Hawai'i (DLNR or the department) (collectively, State Defendants) as being in violation of Hawaii Revised Statutes (HRS) chapter 91 (1993 & Supp. 2006), the Hawaii Administrative Procedure Act (HAPA): (1) allowing game-bird hunting in the County of Hawai'i on Wednesdays and Thursdays, (2) requiring hunters to purchase a wildlife-conservation stamp and a bird-hunting stamp before they can obtain a license to hunt for birds, and (3) allowing black-powder hunting in areas restricted to archery hunting by DLNR rules. Plaintiffs-Appellants Melvin T. Tanaka, James Watt, Masaichi Takaki, and Dexter Egdamin (collectively, Tanaka Plaintiffs) filed Civil No. 04-1-357, alleging claims 1 and 2, and Plaintiff-Appellant Katsuya Yamada (Yamada) filed Civil No. 04-1-358, alleging all three claims. In this opinion, Tanaka Plaintiffs and Yamada will be collectively referred to as Appellants.

The Circuit Court of the Third Circuit (the circuit court)⁽¹⁾ entered judgment in favor of State Defendants and against Appellants as to claims 1 and 2, and in favor of Yamada and against State Defendants as to claim 3. Appellants timely appealed from the adverse judgment as to claims 1 and 2. State Defendants did not appeal from the judgment as to claim 3.

We conclude that DLNR exceeded its authority when it allowed game-bird hunting on Wednesdays and Thursdays and exacted fees for the wildlife-conservation and bird-hunting stamps (the stamp fees) without going through the rulemaking procedures set forth in HRS chapter 91. Accordingly, we reverse the circuit court's judgment as to claims 1 and 2.

BACKGROUND

Appellants are avid game-bird hunters and reside on the island of Hawai'i. DLNR is the state agency responsible for managing and administering "wildlife, . . . game management areas, [and] public hunting areas," HRS § 171-3 (Supp. 2006); regulating hunting activities on state lands, HRS chapter 183D (1993 & Supp. 2006); and enforcing state hunting laws. *Id.* DLNR is "headed by an executive board . . . known as the board of land and natural resources" (the Board), HRS § 171-3, which is "composed of seven members, one from each land district⁽²⁾ and three at large, to be nominated and, by and with the advice and consent of the senate, appointed by the governor[.]" HRS § 171-4(a) (Supp. 2006) (footnote added).

Pursuant to HRS § 183D-2(12) (1993 & Supp. 2006), DLNR is charged with the duty to "[p]reserve, protect, and promote public hunting." HRS § 183D-4(a) (Supp. 2006) provides that "[f]or the purposes of preserving, protecting, conserving, and propagating wildlife, [DLNR] shall establish, maintain, manage, and operate game management areas, wildlife sanctuaries, and public hunting areas on land under its control[.]" In addition, HRS § 183D-3 (1993) provides:

Rules. Subject to chapter 91, the department shall adopt, amend, and repeal rules:

- (1) Concerning the preservation, protection, regulation, extension, and utilization of, and conditions for entry into wildlife sanctuaries, game management areas, and public hunting areas designated by the department;
- (2) Protecting, conserving, monitoring, propagating, and harvesting wildlife;
- (3) Concerning size limits, bag limits, open and closed seasons, and specifications of hunting gear which may be used or possessed;
and
- (4) Setting fees for activities permitted under this chapter, unless otherwise provided for by law.

The rules may vary from county to county or in any part of the county and may specify certain days of the week or certain hours of the day in designating open seasons, except that any fees established by rule shall be the same for each county. All rules shall have the force and effect of law.

(Emphasis added.)

As authorized by HRS § 183D-3, DLNR promulgated administrative rules that regulate game-bird hunting. See Hawaii Administrative Rules (HAR) title 13, chapter 122 (1999). Pursuant to HAR § 13-122-4 (1999),⁽³⁾ which references and incorporates an Exhibit 1,⁽⁴⁾ DLNR: (a) established "Saturdays, Sundays, and State Holidays" as "Open Hunting Days" for game birds on the island of Hawai'i; and (b) provided that "[t]he [B]oard or its authorized representative may . . . lengthen hunting seasons; and open special hunting . . . seasons; whenever, after study by the division, the action is deemed to be in the public interest."

On October 17, 2004, without revising any of its rules, DLNR published a notice in the Hawaii Tribune Herald announcing "the opening of the 2004-2005 Game Bird Hunting Season on Saturday, November 6, 2004." The notice stated, in part:

Due to significant rainfall received throughout the game bird breeding season this year, department biologists are predicting good results around the state. The fall season will run through Monday, January 17, 2005, (Martin Luther King Day) with legal hunting days on Saturday, Sunday, and state holidays with exceptions as noted below. Mauna Kea Game Management Area and privately owned lands on the Island of Hawaii will be open to hunters on two weekdays, Wednesdays and Thursdays, this season due to good game bird resources. . . .

ISLAND OF HAWAII

....

PORTIONS OF THE POHAKULOLOA TRAINING AREA (PTA) will be made available to hunting when not in conflict with military training activities. . . . When allowed, hunting days will be on Wednesdays, Thursdays, weekends, and state holidays. . . .

KAOHE & MAUNA KEA GAME MANAGEMENT AREA will be open for game bird hunting on Wednesdays, Thursdays, weekends and state holidays throughout the game bird hunting season. Wild turkeys can only be hunted

during the month of November.

...
....

PRIVATELY OWNED LANDS on the island of Hawaii may be open to game bird hunting on Wednesdays, Thursdays, weekends, and state holidays, at the landowner's discretion.

Pursuant to HRS § 183D-21 (Supp. 2006),⁽⁵⁾ all hunters in Hawai'i are required to obtain a hunting license, which, pursuant to HRS § 183D-23 (1993), "shall expire on June 30 next following the date of issuance." Hunters must also pay a hunting-license fee "or any other hunting related fee the [B]oard may require as provided in [HRS chapter 183D]." HRS § 183D-22 (1993 & Supp. 2006).⁽⁶⁾

HRS § 183D-10.5(a) (1993) establishes a wildlife revolving fund administered by DLNR. HRS § 183D-10.5(b) (1993) states, in relevant part, as follows:

Wildlife revolving fund; establishment. . . .

(b) The following proceeds shall be retained by or transmitted to [DLNR] for deposit into the wildlife revolving fund:

(1) Moneys collected as fees for hunting licenses[;]

....

(4) Moneys collected from the sale of:

(A) Any article, in addition to a hunting license, which a person is required to purchase from the department in order to hunt, when the requirement is established by law or rule[.]

DLNR also adopted HAR § 13-122-5.1 (1999), which provides, in relevant part:

Applications, tags, and stamps. (a) [DLNR] shall have the authority to require application forms for the selection of hunters and may require the use of tags or stamps or both, for purposes of hunting game birds. [DLNR] may establish fees for wildlife stamps, application fees, and tags for special or lottery hunts; . . . Fees set for each of the following: application fees, tags, and stamps shall not exceed the cost of a hunting license, with the exception that the [B]oard reserves the right to establish higher application fees for specific hunts that require special accommodations, including, but not limited to, helicopter transportation costs.

(Emphases added.)

DLNR has relied on HAR § 13-122-5.1 to require hunters to purchase a wildlife-conservation stamp to "validate" a hunting license. For fiscal year 2002 (July 1, 2001 to June 30, 2002), the Board set the fee for this stamp at \$5 per hunting season and, in 2002, increased the fee to \$10. In 2004, the Board began requiring game-bird hunters to purchase a second stamp, to be affixed to their hunting license. The Board set the fee for this bird-hunting stamp at \$10 per hunting season. DLNR did not amend its rules pursuant to HRS chapter 91 before requiring purchase of and establishing fees for these stamps.

On November 3, 2004, Tanaka Plaintiffs filed their lawsuit, seeking: injunctive and declarative relief to prohibit the hunting of game birds on any weekday except a holiday; and special damages in amounts to be proven at trial. Tanaka Plaintiffs alleged that: (1) "DLNR's decision to allow Game Bird Hunting on Wednesdays and Thursdays is contrary to [HAR] Chapter 122 without following the requirements of

[HRS] Chapter 91[;]" and (2) DLNR's requirement that hunters annually purchase a stamp in order to obtain a hunting license "is a violation of HRS chapter 183D, as amended[;]" "amount[s] to a tax without proper authorization by statute[;]" is "in violation of . . . [HRS §] 91-3, . . . as amended," and "violates the United States Constitution 14th Amendment requirement of due process of law."

In his complaint, Yamada alleged that DLNR was systematically violating various laws and its own rules by: (1) allowing game-bird hunting on Wednesdays and Thursdays,⁽⁷⁾ (2) requiring hunters to purchase the wildlife-conservation and bird-hunting stamps in addition to a hunting license in order to engage in bird hunting, and (3) administratively permitting black-powder hunting in areas designated by rule as archery-hunting areas (black-powder count).

On April 1, 2005, Yamada filed a motion for summary judgment. That same day, the State filed its Motion for Summary Judgment as to All Claims in Both Cases. On April 4, 2005, Tanaka Plaintiffs filed their Motions for Summary and Declaratory Judgments. After hearing these motions on April 29, 2005, the circuit court entered an order on August 9, 2005, granting in part and denying in part the State's motion for summary judgment (the summary-judgment order). The circuit court held, in pertinent part:

As to the hunting season and weekday hunting . . . , the court finds and concludes that [the Board] is authorized to control hunting days by [HRS] § 183D-2 (1993 and Cum. Supp. 2004), [HRS] § 183D-3 (1993), and [HRS] § 183D-31 et. [sic] seq.; that HAR § 13-122-4, a validly adopted rule, implements the authority; and that pursuant to statute and rule the chairperson, as the authorized representative of the [B]oard, added the disputed weekdays to the hunting season.

As to wildlife stamps . . . , the court finds and concludes that the [B]oard is authorized to require payment for wildlife stamps as a condition of obtaining a hunting license by [HRS] § 183D-22(a) (Cum. Supp. 2004) and [HRS] § 183D-10.5 (1993); that HAR § 13-122-5.1, a validly adopted rule, implements the authority; and that pursuant to statute and rule [DLNR], through the [B]oard, properly approved the disputed charge.

As to black powder hunting in areas allegedly designated as archery hunting areas . . . , the State has failed to show that the [B]oard or its authorized representative approved such hunting.

[Yamada] has failed to show that [DLNR] has been systematically violating laws of the State of Hawaii and [DLNR's] own rules and regulations.

On May 17, 2005, State Defendants filed a motion for reconsideration of that part of the circuit court's August 9, 2005 summary-judgment order that resolved the black-powder count of Yamada's complaint in Yamada's favor. On August 30, 2005, the circuit court entered its "Findings of Fact, Conclusions of Law and Order Denying [State Defendants'] Motion for Partial Reconsideration of Ruling on Motions for Summary Judgment Filed April 1, 2005[.]" On the same day, the circuit court entered final judgment in favor of State Defendants as to all claims asserted by Tanaka Plaintiffs and all claims asserted by Yamada, except the black-powder count. On September 6, 2005, Appellants timely filed their notice of appeal. The State did not cross-appeal.

DISCUSSION

A. The HAPA Rulemaking Requirements

HRS chapter 91 includes various provisions that relate to the adoption, amendment, or repeal of rules. Relevant to this appeal, HRS § 91-3 (Supp. 2006) currently provides as it did during the proceedings below, in pertinent part, as follows:

Procedure for adoption, amendment, or repeal of rules. (a) Except as provided in subsection (f), prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:

(1) Give at least thirty days' notice for a public hearing. The notice shall include:

- (A) A statement of the topic of the proposed rule adoption, amendment, or repeal or a general description of the subjects involved; and
- (B) A statement that a copy of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed will be mailed to any interested person who requests a copy, pays the required fees for the copy and the postage, if any, together with a description of where and how the requests may be made;
- (C) 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 may be reviewed in person; and
- (D) 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.

The notice shall be mailed to all persons who have made a timely written request of the agency for advance notice of its rulemaking proceedings, given at least once statewide for state agencies and in the county for county agencies. Proposed state agency rules shall also be posted on the Internet as provided in section 91-2.6; and

- (2) Afford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule. The agency may make its decision at the public hearing or announce then the date when it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency, if requested to do so by an interested person, shall issue a concise statement of the principal reasons for and against its determination.

(Emphases added.)

HRS § 91-1 (1993) defines "[r]ule" as

each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

DLNR complied with the HAPA rulemaking requirements when it initially designated Saturdays, Sundays, and state holidays as days for game-bird hunting on the island of Hawai'i. The issue in this appeal is whether DLNR was required to comply with the rulemaking requirements when it added two hunting days to each week of the 2004-2005 hunting season and required hunters to pay two stamp fees in order to hunt.

B. The Validity of DLNR's Addition of Two Extra Days Per Week for Game-Bird Hunting

1.

The Hawai'i Supreme Court has stated that

[t]he interpretation of a statute is a question of law reviewable de novo.

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

Ka Paakai O Ka Aina v. Land Use Comm'n, 94 Hawai'i 31, 41, 7 P.3d 1068, 1078 (2000) (citations and internal quotation marks omitted) (quoting Amantiad v. Odum, 90 Hawai'i 152, 160, 977 P.2d 160, 168-69 (1999)). In addition,

[t]he general principles of construction which apply to statutes also apply to administrative rules. As in statutory construction, courts look first at an administrative rule's language. If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning.

Allstate Ins. Co. v. Ponce, 105 Hawai'i 445, 454, 99 P.3d 96, 105 (2004) (quoting In re Doe Children, 105 Hawai'i 38, 53, 93 P.3d 1145, 1160 (2004)).

DLNR's current rule, HAR § 13-122-4(a) (1999), states, in pertinent part, that "[b]ag limits, open seasons, hunting days, and game birds that may be hunted are listed in Exhibits 1, 3, 5, 7, 9, and 11, located at the end of this chapter and by reference made a part hereof." (Emphases added.) Exhibit 1 lists the permissible days for game-bird hunting as "Saturdays, Sundays, and State Holidays." Since HAR § 13-122-4(a) specifically incorporates Exhibit 1 by reference, the hunting days listed in Exhibit 1 are a part of the rule.

HRS § 183D-3 explicitly and unambiguously requires DLNR to amend its rules affecting public-hunting areas in accordance with HRS chapter 91. HRS § 183D-3 states, in pertinent part:

Rules. Subject to chapter 91, [DLNR] shall adopt, amend, and repeal rules:

(1) Concerning the preservation, protection, regulation, extension, and utilization of, and conditions for entry into wildlife sanctuaries, game management areas, and public hunting areas designated by the department;

....

(3) Concerning size limits, bag limits, open and closed seasons, and specifications of hunting gear which may be used or possessed;

...

....

The rules may . . . specify certain days of the week or certain hours of the day in designating open seasons[.]

HRS § 183D-3 (1993) (emphases added). Since the addition of two extra hunting days to each week of the hunting season concerns "conditions for entry into . . . game management areas, and public hunting areas designated by [DLNR]" and "open . . . seasons" for hunting, the express language of HRS § 183D-3 mandates that to add the two weekdays for bird hunting, DLNR must amend HAR § 13-122-4 pursuant to HRS chapter 91.

We reject State Defendants' argument that HAR § 13-122-4(b) authorized the Board's chairperson to add Wednesdays and Thursdays as permissible days for game-bird hunting. HAR § 13-122-4(b) allows the

Board or its authorized representative to "lengthen hunting seasons . . . whenever, after study [by] the division [of forestry and wildlife], the action is deemed to be in the public interest." HAR § 13-122-4(b) (emphases added). First, there is no indication in the record that the division of forestry and wildlife conducted a study that determined that adding two hunting days a week was in the public interest. Second, the ordinary meaning of the word "lengthen" is "to make longer." Merriam-Webster's Collegiate Dictionary 665 (10th ed. 2000). In the context of HAR § 13-122-4(b), "lengthen" logically refers to adding days to the beginning or end of a hunting season to make the season longer. Adding Wednesdays and Thursdays as hunting days during a season will not have the effect of lengthening the hunting season as set forth in Exhibit 1 and incorporated as part of HAR § 13-122-4. Thus, HAR § 13-122-4(b) did not authorize DLNR's actions.

2.

Hawaii case law supports the conclusion that DLNR's failure to follow the procedures outlined in HRS § 91-3 voids the addition of Wednesdays and Thursdays as permissible days for game-bird hunting.

In Vega v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., Inc., 67 Haw. 148, 682 P.2d 73 (1984), the Hawai'i Supreme Court considered a rule promulgated by the Insurance Commissioner of the State of Hawai'i (the Commissioner) pursuant to the Hawaii Motor Vehicle Accident Reparations Law (the no-fault-insurance law). The rule mandated that any no-fault-insurance policy "issued or renewed on or after September 1, 1974 shall provide the coverage required of a no-fault policy in accordance with the endorsement prescribed by the Commissioner or such modification thereof approved in writing by the Commissioner prior to its issuance." Id. at 149, 682 P.2d at 74-75. The basic no-fault endorsement prescribed by the Commissioner for inclusion in all motor-vehicle-insurance policies contained a specific clause that compelled "an injured person eligible for no-fault benefits to 'submit to medical examination by physicians selected by, or acceptable to, the insurer when, and as often as, the insurer may reasonably require.'" Id., 682 P.2d at 75 (brackets and ellipses omitted). An insured whose no-fault benefits were retroactively terminated for refusal to appear for a scheduled independent medical examination challenged this endorsement, which was included in her no-fault insurance policy.

In invalidating the endorsement, the Hawai'i Supreme Court initially noted that under the no-fault-insurance law,

[the Commissioner] was charged with the function of implementing a new system of motor vehicle accident reparations and vested with ample authority to develop the detailed regulations necessary for its enforcement.

....

Hence, there is little doubt about [the Commissioner's] power to require all no-fault policies to provide a basic coverage which in his considered opinion would be consistent with the No-Fault Insurance Law and its purpose.

Id. at 154, 682 P.2d at 77. The supreme court determined, however, that the endorsement was "a nullity" because

when the Commissioner prescribed the Basic No-Fault Endorsement for all insurers issuing motor vehicle insurance policies, he did not follow the procedure set forth in the [HAPA]. In our view[,] HRS Chapter 91 also governed the issuance of the endorsement itself, and the Commissioner's neglect rendered the prescript fatally defective, except for those portions reflecting what the legislature had already prescribed in HRS Chapter 294.

Id., 682 P.2d at 77. See also Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 490 & 493, 522 P.2d 1255, 1263 & 1265 (1974) (holding that amendments to the Master Management Resolution adopted by the Hawaii Housing Authority (HHA) that fundamentally altered the rate structure for public-housing

rents, and thus changed the rent amount paid by nearly every public-housing tenant, constituted "rules" that were required to be adopted pursuant to HAPA).

In accordance with Vega and Aguiar, we conclude that DLNR was required to amend its rules pursuant to HRS chapter 91 before it could add two extra days per week for hunting game birds on the island of Hawaii during the 2004-2005 hunting season. Since it did not, its addition of hunting days cannot be given effect.

C. Whether the Stamp Fees were Validly Adopted

Appellants contend that the circuit court erred in concluding that DLNR was authorized to require payment of the stamp fees as a condition of obtaining a hunting license. Appellants raise two issues regarding the sale of stamps: (1) whether DLNR is authorized to sell the stamps, and (2) whether DLNR must establish the fees for the stamps through the rulemaking procedures of HRS chapter 91.

Appellants argue that DLNR lacks authority to charge fees for the stamps because there is no enabling statute authorizing the sale of stamps in HRS chapter 183D. This argument is without merit. HRS § 183D-22 (Supp. 2006), as last amended in 1999, expressly provides that "[a] hunting license shall be issued to a person by an agent of the department upon . . . [p]ayment of a hunting license fee or any other hunting related fee the [B]oard may require as provided in this chapter[.]" (Emphasis added). HRS § 183D-10.5, which establishes a wildlife revolving fund, authorizes DLNR to collect, for deposit into the fund, "[m]oneys collected from the sale of . . . [a]ny article, in addition to a hunting license, which a person is required to purchase from [DLNR] in order to hunt, when the requirement is established by law or rule[.]" (Emphasis added.) These two statutes provide the authority for DLNR to require payment of a fee for a hunting-related article such as a stamp.

Nevertheless, Appellants are correct that the stamp fees must be established through the rulemaking procedures set forth in HRS chapter 91. HRS § 183D-3 states that "[s]ubject to chapter 91, [DLNR] shall adopt, amend, and repeal rules . . . [s]etting fees for activities permitted under this chapter, unless otherwise provided for by law." (Emphases added.) Since hunting, specifically game-bird hunting, is an activity permitted under HRS chapter 183D, DLNR is required to adopt a rule pursuant to HRS § 91-3 when setting the stamp fees for hunting. Moreover, State Defendants acknowledge that all stamp fee revenues are being deposited into the wildlife revolving fund. Pursuant to HRS § 183D-10.5, moneys collected from the sale of articles (such as stamps) that a person is required to purchase from DLNR in order to hunt may be deposited into the revolving fund only "when the requirement is established by law or rule[.]"

State Defendants argue that the Board validly promulgated HAR § 13-122-5.1(a) (1999), "which implements the statutory authority to require and charge a [stamp] fee[.]" This rule states, in pertinent part:

Application, tags, and stamps. (a) The department shall have the authority to require application forms for the selection of hunters and may require the use of tags or stamps or both, for purposes of hunting game birds. The department may establish fees for wildlife stamps, application fees, and tags for special or lottery hunts; and determine the manner in which such tags or stamps may be affixed, displayed, or utilized. Fees set for each of the following: application fees, tags, and stamps shall not exceed the cost of a hunting license, with the exception that the [B]oard reserves the right to establish higher application fees for specific hunts that require special accommodations including, but not limited to, helicopter transportation costs.

HAR § 13-122-5.1(a) (emphases added).

In Vega, the defendants and the Insurance Commissioner similarly argued that

the mandatory inclusion of a provision for compulsory medical examinations in every no-fault policy is valid because statutory requisites were met when the Rules and Regulations Relating to the Hawaii Motor Vehicle Reparations Act were adopted. Since one of the rules sanctioned the issuance of the basic endorsement, . . . nothing more was necessary to lend validity to the endorsement or any of its provisions.

Vega, 67 Haw. at 154-55, 682 P.2d at 78. Disagreeing with this argument, the Hawai'i Supreme Court held that

the [HAPA] demands more of a public administrator when he [or she] acts in a quasi-legislative capacity.

Although [HAR] § 16-23-60 of the promulgated rules enabled the Commissioner to prescribe endorsements, it by no means gave him "*carte blanche* to sidestep the independent requirements" of HRS Chapter 91. *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 493, 522 P.2d 1255, 1265 (1974). See also *Koolauloa Welfare Rights Group v. Chang*, 65 Haw. 341, 344, 652 P.2d 185, 187 (1982). A "rule" for purposes of the chapter includes "each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy." Reading the pertinent part of the Basic No-Fault Endorsement with the foregoing definition in mind, we can only conclude it is a "rule" as defined by HRS § 91-1(4) and it should have been adopted as such in accord with the procedure set forth in HRS § 91-3.

The Commissioner's prescription of the Basic No-Fault Endorsement caused a specific clause compelling a benefit claimant to submit to medical examinations as directed by the insurer to be included in every no-fault policy written in Hawaii. The provision in the endorsement that brought this about could only be a "statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy." HRS § 91-1(4). It undoubtedly "touches the affairs of the entire 'public,'" and "delineates the future rights of an entire class of unnamed individuals." *Aguiar v. Hawaii Housing Authority*, 55 Haw. at 485-86, 522 P.2d at 1261.

"Where an administrative agency seeks to promulgate a 'rule,'" it "must consider the views of interested persons," *id.* at 487-88, 522 P.2d at 1262; for the "powers of government should not be used in a manner giving an appearance of being arbitrary." *In re Western Motor Tariff Bureau, Inc.*, 53 Haw. 14, 19, 486 P.2d 413, 416 (1971). And since the Commissioner neither afforded interested persons an opportunity to be heard nor considered their views with respect to a proposed rule as required by [HAPA], the purported promulgation of the "rule" relating to compulsory medical examinations was a nullity. See HRS § 91-3(a)(1) and (2).

Vega, 67 Haw. at 155-56, 682 P.2d at 78 (brackets, ellipses, and footnote omitted). See also Aguiar, 55 Haw. at 493, 522 P.2d 1265 (holding that a clause in a standard lease allowing rent increases based on HHA's "established rent schedule" "does not accord HHA a *carte blanche* by which it may sidestep the independent requirements of the HAPA" before raising rents and the rent structure for public housing).

Here, HRS § 183D-3 expressly requires any amendments to DLNR rules to be made pursuant to HRS chapter 91. Therefore, DLNR was not allowed to sidestep the rulemaking procedures set forth in HRS chapter 91 by administratively requiring that stamps be purchased as a condition for obtaining a hunting license and setting the fees for the stamps. "Rules are necessary to ensure fairness and to minimize unbridled use of discretion of an agency." Aluli v. Lewin, 73 Haw. 56, 62, 828 P.2d 802, 805 (1992). The rulemaking procedures set forth in HRS chapter 91 require public notice of a proposed rule, an opportunity for the public to provide input on a proposed rule, and consideration by the agency of any public comments before implementing, interpreting, or prescribing law or policy regarding game-bird hunting.

While HAR § 13-122-5.1(a) authorizes DLNR to establish "fees for wildlife stamps" and sets a cap for such fees, such authorization does not, and could not, exempt DLNR from complying with the rulemaking procedures set forth in HRS chapter 91 when DLNR: (1) requires members of the public to purchase wildlife-conservation and bird-hunting stamps in order to obtain a hunting license; or (2) sets the fees for these stamps at \$10, the maximum cap imposed by HAR § 13-122-5.1(a).

CONCLUSION

Based on the foregoing discussion, we agree with Appellants that DLNR exceeded its authority when it allowed game-bird hunting on Wednesdays and Thursdays during the 2004-2005 hunting season and exacted stamp fees from Appellants without going through the rulemaking procedures set forth in HRS chapter 91. Accordingly, we reverse the circuit court's judgment as to these claims. We affirm that part of the judgment that resolved the black-powder count in Yamada's favor.

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1. The Honorable Glenn S. Hara presided.
2. Hawaii Revised Statutes (HRS) § 171-9 (1993) divides the State of Hawaii into four land districts and defines the boundaries of these land districts.
3. Hawaii Administrative Rules (HAR) § 13-122-4 (1999) states:

Bag limits, open seasons and hunting days. (a) Bag limits, open seasons, hunting days, and game birds that may be hunted are listed in Exhibits 1, 3, 5, 7, 9, and 11, located at the end of this chapter and by reference made a part hereof.

(b) The [B]oard or its authorized representative may add conditions and restrictions for hunts; set bag limits; limit, suspend, or postpone the hunting of any game bird, or hunting in any area open to hunting, including cooperative hunting areas and natural area reserves; lengthen hunting seasons; and open special hunting areas or seasons; whenever, after study by the division, the action is deemed to be in the public interest. Where special conditions are needed for a particular hunt, they shall be prescribed on specially prepared instruction sheets for that specific hunt, which by reference shall be made a part hereof these rules.

HAR § 13-122-2 (1996) defines "[d]ivision" as "the division of forestry and wildlife."

4. Exhibit 1 is a table that sets forth for the island of Hawai'i the game birds to be taken, the daily bag limits, the open periods, the open hunting days, and special conditions and restrictions for hunting.
5. HRS § 183D-21 (Supp. 2006), as last amended in 1998, states, in pertinent part:

Hunting licenses required. No person shall hunt, pursue, kill, or take any game bird or mammal without first procuring a hunting license[.]

6. HRS § 183D-22 (1993 & Supp. 2006), as last amended in 1999, states, in pertinent part:

Application and issuance of licenses; fees. (a) A hunting license shall be issued to a person by an agent of the department upon:

....

(2) Payment of a hunting license fee or any other hunting related fee the [B]oard may require as provided in this chapter; . . .

....

(b) The hunting license fee shall be:

(1) \$10 for any person who has resided in the State for one year or longer, or who is a member of the armed forces of the United States on active duty and the spouse and children thereof, or who elects to forgo [sic] the exemption provided in paragraph (3);

(2) \$95 for all other persons; and

(3) Free to all Hawaii residents sixty-five years of age or older and to all persons with Hansen's disease who are residents of Kalaupapa, Molokai.

7. In his complaint, Plaintiff-Appellant Katsuya Yamada (Yamada) acknowledged that Hawaii Administrative Rules (HAR) § 13-122-4 authorized Defendant-Appellee Department of Land and Natural Resources, State of Hawai'i (DLNR) to "lengthen the hunting seasons" whenever, after a study by the division of wildlife and forestry, such action was "deemed to be in the public interest[.]" However, Yamada contended that HAR § 13-122-4 did not authorize DLNR to alter the hunting days. Additionally, Yamada maintained, based on information and belief, that the division had not conducted any study to determine if the addition of Wednesdays and Thursdays as hunting days was in the best interest of the public. Yamada also alleged:

15. The inclusion of Wednesdays and Thursdays as bird hunting days was done only at the request of a few hunters wanting to train their dogs when the game management areas are not saturated with other hunters.

16. The inclusion of additional days in hunting areas follows a year when the hunting seas [sic] was very poor because of the prolonged drought in the game management areas and is predicted to be "fair" for the coming year because of the loss of the brood stock in the previous years.

17. That the inclusion of the additional days will further reduce the brood stocks and cause irreparable damage to the game bird population which will take years to recover.

During oral arguments before this court, Yamada also indicated that Appellants are opposed to the addition of weekday-hunting days because when hunting occurs in game management areas, game birds tend to run uphill or fly to adjoining lands and not return to the game-management areas for at least a week.

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. THIBLEN
Chairperson
Board of Land and Natural Resources

EXHIBIT LIST:

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



DEPARTMENT OF LAND AND NATURAL RESOURCES

News Release

LINDA LINGLE
GOVERNOR

LAURA H. THIELEN, CHAIRPERSON
Phone: (808) 587-0320
Fax: (808) 587-0390

For Immediate Release: October 17, 2008

DLNR ANNOUNCES OPENING OF THE 2008-2009 GAME BIRD HUNTING SEASON

HONOLULU – The Department of Land and Natural Resources (DLNR) announces the opening of the 2008-2009 game bird hunting season on Saturday, November 1, 2008.

Department biologists are predicting an average to below average season of bird hunting with ongoing dry conditions in many parts of the state.

The fall game bird hunting season will run through Monday, January 19, 2009, with legal hunting days on Saturday, Sunday, and state holidays.

Due to a December 31, 2007 appellate court ruling, game bird stamps and fees are waived, and only a hunting license is required for all game bird hunting on public and private lands.

Specific details on open areas, bag limits, and conditions are provided in HAR 13-122, "Rules Regulating Game Bird Hunting." Additional information is available on the Division of Forestry and Wildlife website, www.dofaw.net under "Announcements" and through the district offices listed below.

Island of Kaua'i:

Units A, B, E, H, and I are open for game bird hunting, with Unit F open for game bird hunting with archery equipment only. Pu'u 'Opae Sugar Cane Lands and the Waimea Heights Special Game Bird Hunting Area are also being opened to the public for the season by the private landowners. The Waimea Heights area will be opened to hunting on weekends only (and not state holidays) throughout the season. Other private lands on the island of Kaua'i are open to game bird hunting on Saturdays, Sundays, and state holidays, with landowner permission.

Island of O'ahu

Units 1, 2, 3 and 4 will be open for the duration of the season on Saturdays, Sundays, and state holidays. If accessing Units 1 or 2 from Farrington Highway, hunters must check in and out of the Ka'ena Point Satellite Tracking Station Access Road. Private lands are open to game bird hunting on Saturdays, Sundays, and state holidays, with landowner permission.

Islands of Maui, Moloka'i and Lana'i

Maui: Units C, F, and N will be open for the duration of the season, on Saturdays, Sundays, and state holidays. Units C and F will be closed to game mammal hunting on open game bird hunting days.

Moloka'i: the Moloka'i Forest Reserve (Units C, D, and E) will be open for the season on Saturdays, Sundays, and state holidays, and closed for mammal hunting on open game bird hunting days.

Lana'i: the Cooperative Game Management Areas (Units 1, 2, and 3) will be open for the season on Saturdays, Sundays, and state holidays. For instructions on access and parking, see the DOFAW website under "Announcements," or contact a district office.

Island of Hawai'i

All public hunting areas for game birds will be open for the entire season on Saturdays, Sundays, and state holidays, with the following exceptions: All portions of Pu'u Wa'awa'a have been closed to public access due to fire danger. The Kahua/Ponoholo Special Permit has been closed by the landowner due to concerns over fire danger. Pohakuloa Training Area is open by clearance only when not in conflict with military training activities. Private lands on Hawai'i island will be open to game bird hunting only Saturdays, Sundays, and state holidays, with landowner permission.

Further information may be obtained at the DLNR Division of Forestry and Wildlife website www.dofaw.net under "Announcements," or by contacting Division of Forestry and Wildlife offices at the following phone numbers: Kaua'i: 274-3433; O'ahu: 587-0166; Maui: 984-8100; Moloka'i: 553-1745; Lana'i: 565-7916; Hilo: 974-4221; Kamuela: 887-6063.

SIDEBAR:

All areas statewide: Game bird hunters should be familiar with Title 13, Chapter 122 "Rules Regulating Game Bird Hunting."

Where check stations are established, hunters are required to check in and out. When seeking to hunt on private land, first obtain permission from landowners.

Please help prevent fires. **DO NOT PARK OR DRIVE IN TALL GRASS OR BRUSH!** Smoking in the field can be extremely hazardous. Report smoke or suspected fires immediately, even if you think somebody may have already reported them.

Support wildlife conservation: Report game law violators to the Division of Conservation and Resources Enforcement by calling the new DOCARE number: (643-DLNR 3567).

###

For more information news media may contact:

Deborah Ward
DLNR Public information specialist
Phone: (808) 587-0320

Edwin Johnson
Division of Forestry and Wildlife, Hunting Program Coordinator
Phone: (808) 587-4155

Testimony of The Nature Conservancy of Hawai'i
Supporting Adoption of Hawaii Administrative Rules, Chapter 13-1, Subchapter 7
Relating to the Civil Resource Violations System
Thursday, October 30, 2008

The Nature Conservancy of Hawai'i is a private non-profit conservation organization dedicated to the preservation of Hawaii's native plants, animals, and ecosystems. The Conservancy has helped to protect nearly 200,000 acres of natural lands for native species in Hawai'i. Today, we actively manage more than 32,000 acres in 11 nature preserves on O'ahu, Maui, Hawai'i, Moloka'i, Lāna'i, and Kaua'i. We also work closely with government agencies, private parties and communities on cooperative land and marine management projects.

The Nature Conservancy of Hawai'i supports the creation of the Civil Resource Violations System. All of us depend on the unique natural capital that makes Hawai'i such an attractive place to live, work and recreate. Indeed, our forests, streams, oceans, beaches, and open space contribute directly and significantly to the ongoing health of our economy and our lifestyle, not to mention providing some of the most basic human necessities like clean fresh water.

There is widespread agreement amongst a variety of stakeholders that Hawaii's fragile environment is in need of improved enforcement and prosecution of violations of our State natural resource laws. Specifically identified is the need for:

- Natural resource laws that are complete, clear and enforceable;
- Enhanced personnel and resources for enforcement;
- Community awareness and engagement to enhance compliance;
- Adequate investigation, prosecution and penalties for violations;
- Consistent and fair enforcement;
- Appropriate opportunity for civil and administrative enforcement; and
- Improved understanding and management of cases in the court system.

Historically, the Department of Land & Natural Resources has had difficulty gaining the appropriate attention, expertise, and prosecution of conservation violations in the State court system. Such violations like illegal harvesting of native tree species such as koa on State conservation lands or violations of marine conservation laws have garnered limited attention in the State judicial system as compared to cases involving personal property or safety. Also, while the DLNR has improved its ability to successfully bring significant civil cases before the Board of Land & Natural Resources for administrative adjudication, this process is often inappropriate or unnecessary for addressing relatively minor infractions.

The DLNR's proposed CRVS will fill an important gap in conservation enforcement between criminal cases before the State courts and civil violations presented to the Board of Land and Natural Resources. The CRVS system of citations will allow the DLNR and its law enforcement division the ability to more effectively educate the public about natural resource laws, cite offenders for infractions, and effectively deter repeated and greater violations of our natural resource laws.

EXHIBIT 7M

BOARD OF TRUSTEES

S. Haunani Apoliona Peter D. Baldwin Christopher J. Benjamin Zadoc W. Brown, Jr. Carl A. Carlson, Jr. David C. Cole
Samuel A. Cooke Peter H. Ehrman Kenton T. Eldridge Guy Fujimura J. Stephen Goodfellow Thomas Gottlieb
James J.C. Haynes Ron Higgins Peter Ho Stanley Hong J. Douglas Ing Mark L. Johnson Dr. Kenneth Kaneshiro
Bert A. Kobayashi, Jr. Faye Watanabe Kurren Duncan MacNaughton Bill D. Mills Wayne Minami Michael T. Pfeiffer
H. Monty Richards Jean E. Rolles Scott Rolles James Romig Eric Yeaman

Aloha Wedding Planners
1400 Kapiolani Blvd, A23 Honolulu, HI 96814
Ph: (808) 943-2711 / Fax: (808) 949-1128
Email: aloha.ido@att.net

November 13, 2008

Laura H. Thielen, Chairperson
Dept. Of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, HI 96813

Re: Creation of Civil Resource Violation System (CRVS) and proposed HAR 13-1-1 to 13-1-72 changes

Aloha,

As business owner and member of the Oahu Wedding Association I support the creation of a system that will allow the Dept. of Land and Natural Resources a way in which to process non-criminal violations in 'a just, expeditious and cost effective manner', to quote the Chairperson. We think this system will help Department's main goal of protection of our natural and cultural resources.

1) I do however have concerns in which the system will operate.

- The proposed system would enable violations to be processed through a ticketing system that would allow for monetary or non-monetary fines to be assessed. Who will determine the level of fines assigned to the schedule fees?
- What and who will determine the level(s) of the violation, minor vs major? I understand that DLNR has many divisions within the Department and want to ensure that any fines or penalties are fair & just based on the severity of the violation.
- Will there be public hearings to discuss the setting of the fine schedule once the system is in place as this is not included in the proposed HAR changes? I would want this to be an open process.
- With the CRVS in place, how will repeat violations and violators be handled?
- Once the CRVS is in place, how does the Department plan to notify the public as to educate them on what the rules are and the scheduled fines thereafter?
- Will there be warnings for first-time violators?

2) With regards to Subchapter 3, Rulemaking Proceedings;

- Under subsection 13-1-22 Notice of the proposed rule making shall be published at least once. We propose a change to allow for a minimum of (2) notices to be published in a newspaper of general circulation in the State and in each county affected by the proposed rule. In addition notification is to be made to the trade association(s) whose members may be specifically affected by the proposed rule making. This gives the public more opportunity to attend.

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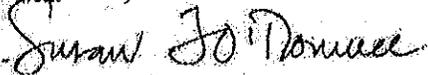
Page 2 of 2
DLNR CRVS comments

Recently it was brought to my attention that in the Department held statewide public hearings regarding proposed changes to HAR 13-221-2 and 13-221-5. A public notice was placed on September 14, 2002 for public hearings on October 15, 2002. It is recorded that a total of (15) persons attended these meetings on Oahu, Maui, Kauai & Hawaii islands. Additional notice would have enabled more concerned citizens to appear and testify.

The wedding industry will follow this issue closely as we are concerned about the Department's recent implementation of Right of Entry permits and continued changes to the permit requirements and feel the CRVS may effect our members. I look forward to open communication with the Department with regards to our industry's concerns.

You may contact me with any additional questions.

Mahalo,



Susan T. O'Donnell
Aloha Wedding Planners
Owner



November 14, 2008

Laura H. Thielen, Chairperson
Dept. Of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, HI 96813

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The wedding industry will follow this issue closely as we are very concerned about the Department's recent implementation of Right of Entry permits and continued changes to the permit requirements and feel the CRVS may effect not only affect the Oahu Wedding Association but the National Association of Catering Executives (NACE) membership of which I am currently Chapter President. I look forward to open communication with the Department with regards to our industry's concerns especially as it directly relates to the state's economy.

You may contact me with any additional questions.

Mahalo,

Dianna K. Shitanishi, CPCE, CMP
Owner
Hawaii Weddings and Events
(808) 782-4514

Sarah Chang LLC dba Wanna Hula?
2405 10th Avenue
Honolulu, HI 96816

808-677-7341

November 13, 2008

Laura H. Thielen, Chairperson
Dept. Of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, HI 96813

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Sarah Chang LLC dba Wanna Hula?
2405 10th Avenue
Honolulu, HI 96816

808-677-7341

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DLNR CRVS comments

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You may contact me with any additional questions.
Mahalo,

Sarah Chang
Sarah Chang LLC dba Wanna Hula?

Posted on: Friday, July 25, 2008

Civil penalties offer sensible resource protection

Rules are there to protect the general good from the misdeeds of the few, but without reasonable tools for enforcement, the rules don't have much effect.

"Adding tools to the toolkit" was the idea behind the Department of Land and Natural Resources' push to establish civil penalties for some of the lesser violations of resource protection rules. So says department director Laura Thielen, who makes a convincing case that such a change will vastly improve current enforcement.

In that current system, citations require violators to appear before the state Land Board — taking time off work or, in some cases, traveling between islands to do so.

That presents such a burden that the officer might just wave off the offense with a warning, leaving the impression that there is no enforcement at all.

So much for nipping bad habits in the bud.

But under a plan now undergoing public review statewide, DLNR wants to create a system more like parking or traffic tickets: You can contest them if you wish, but you can also simply pay the fine, and resolve to be more careful next time.

The details need to be worked out: which offenses should be handled with this particular method, and which still should compel stiffer penalties and referral to the Land Board or the courts. Also, the department must propose, and the Land Board approve, a schedule of fines appropriate to each offense.

People who use the beaches, forests and streams of the Islands have a good sense of where the problems lie and should participate by offering their views (see box).

The department intends to roll out the new system gradually to assess its staffing needs, and that's wise.

But it's important to get the process started. The continued depletion of reef fish through illegal use of lay nets is just one unfortunate reason for the need to act.

Deterring repeat offenses through sensible civil penalties should better protect precious land and sea resources, an aim that must remain a top priority for our island state.

GET INVOLVED:

Information meetings on the proposed civil penalties for DLNR violations continue next week, 11 a.m.-1 p.m.:

- Monday at the Lihu'e State Office Building, Conference Room C.
- Friday at the Mitchell Pauole Center, 90 Ainoa Street, Kaunakakai, Moloka'i.

View the proposal online at

<http://hawaii.gov/dlnr> (click on "Announcements").

Written comments may be sent to: DLNR Administrative Proceedings Office, 1151 Punchbowl Street, Room 130, Honolulu, HI 96813; or by e-mail:

DLNR.CO.APO@hawaii.gov.

**RELATED QUESTIONS COLLECTED FROM
PUBLIC MEETINGS AND HEARINGS**

Compiled by the DLNR Administrative Proceedings Office

I. Questions on the CRVS Program:

1. Does the Land Board or the department have the legal authority to set up these rules and the CRVS?
2. How will CRVS sustain itself – through fines, general funds, other sources?
3. What is a major or minor violation?
4. Who decides if a violation is civil or criminal? Is there a standard?
5. Will the public, especially the neighbor islands, have an opportunity to provide comments on the fine schedule as it is being developed?
6. Will the citations be public record? Will they be on the website to track?
7. Will the respondents have to pay for the costs of prosecuting themselves?
8. Will there be higher fines for repeat offenders? How do you deal with repeat offenders?
9. How would these rules affect the Native Hawaiian rights, their religious practices and traditional access to resources?
10. Should the rules explicitly provide an exemption, immunity or affirmative defense for people exercising their Native Hawaiian gathering rights and engaging in other traditional and customary practices
11. Doesn't the CRVS give the violators a break by making it simple and easy?
12. What percentage of cases will CRVS address?
13. Can DLNR be the lawmaker, the prosecutor and the judge in the same time?
14. Where will the money (fines) go? Would they go back to the resources and local community?
15. Who's going to oversee the system so that abuses don't occur?
16. Will there be a public awareness campaign to inform the public of the fines and process?

17. Should the penalty schedule be incorporated into the rules?
18. Is the CRVS intended to target certain areas, industries or activities, such as the Superferry, beach weddings, rock takings, coral damages, jetskiers, hunters or fishermen?
19. Will the CRVS be applicable in certain cases, such as ancient burial site violations?

II. Questions on the CRVS Process:

20. Who will issue the citations, a division or a DOCARE officer?
21. Will the hearings be held on the neighbor islands?
22. What happens if a party won't participate in the proceeding or fines can't be collected?
23. Will the process hinder the constitutional and customary gathering rights? Does DLNR intend to do what it should to protect the native rights?
24. Is there a rule on seizures in an administrative proceeding?
25. Will the citations be public record? Will they be on the website to track?
26. How do you deal with the repeat offenders? Would there be higher fines?
27. Doesn't the CRVS give the violators a break by making it simple and easy?
28. What happens if fines cannot be collected?
29. Can you hold meetings in the evenings?
30. If I disagree with the hearing officer's decision, can I request for a review by the Board? Can I appeal the case to court?
31. Can CRVS revoke a violator's driver's license if that person fails to comply?
32. Can someone request to intervene in a CRVS hearing?
33. Will the violator be subject to the costs of holding the hearing? What is included in the administrative costs mentioned in the presentation?
34. At what point does a citation become a public record and accessible to the public?

35. Can the CRVS impose other penalties beside a fine, e.g., revoking or suspending a permit or license?
36. In case of tourist violations, how will violations by persons that will not return to the islands handled?
37. When issuing a citation, can the department or a DOCARE officer impose a non-monetary sanction or penalty in addition to a fine? How would you do that?
38. Can the Board issue immediate injunctive orders to stop damages from occurring before the damage gets bigger? Can the Board authorize people in the field to do so?
39. Will these rules be applicable to both individuals and companies?
40. Can you appoint hearing officers who come from the same island where violations occur?
41. Can you make sure that your hearing officers are properly trained and qualified, with understanding and knowledge of the Hawaiian language, history, rights and cultures?
42. Who will have the job to value a resource, and how to do that?
43. In a case where a respondent's answer requests for mitigation, should the hearing officer make the final decision without allowing the respondent the opportunity to ask for a review by the Board, or even a judicial review?
44. Can we ask DLNR to make sure that the CRVS will not be used in a way to allow willful violators to get away with a minimal fine?
45. Is there a "warning system" for first time violators? Not everybody knows all the DLNR regulations.

III. Questions on Specific Rule Provisions:

46. §13-1-2: OHA suggested that the definition of "proceedings" should retain the original language "[p]roceedings 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".
47. §13-1-5.1: Why is adjudicatory function not a meeting? Does this follow the Sunshine Law? Is it against the requirement under §92-6(b), HRS?
48. §13-1-9: Would it work to prevent the public from accessing government records and information?

49. §13-1-9: Should you retain the part that allows the withholding of government records when they “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”?
50. §13-1-9: It took out “public” and replaced with “government”, why this change? What is the difference between public and government records?
51. §13-1-9: Should this rule authorize the Chairperson to determine whether a record may be withheld from public inspection? The contention is that the attorney-client privilege belongs to the client, not the attorney. The current proposal designates the Attorney General to make the decision.
52. §13-1-11.1: There are different suggestions on the better method to limit the amount of time each individual should be allocated for giving testimony at a public hearing. The difference is whether a limitation should be set per agenda item, per person or per issue. Another question is whether a testifier can offer testimony on another subject not on the agenda.
53. §13-1-11.1: OHA’s proposition to modify this section to take into account educationally- and physically challenged persons and permitting and providing the usage of the Hawaiian language.
54. §13-1-11.2: Should the rules provide some definition as to what would constitute a disruption of a meeting when a disruptive person can be removed from a DLNR proceeding?
55. §13-1-15: Is there a constitutionality problem if the Department’s rule provides that the Board may refuse to accept a document or require its amendment if its contents do not meet certain standards?
56. §13-1-22: Should notice of public hearing be published only one time? Should the rules provide two times, with at least one statewide, and another in each county where the proposed rules will have any effect? Should additional notice be provided to any trade associations whose members may be affected by the new rules?
57. §13-1-22(b)(4): Should public notice include the department’s website address for further information?
58. §13-1-23: OHA’s proposition to retain the language that “[w]here the proposed rulemaking affects only one county, the public hearing shall be held in that county”.

59. §13-1-27: Why do you need these provisions for declaratory rulings? Don't they give a lot of power to the board? What recourse does someone have if they disagree?
60. §13-1-27(d) and (i): Does these two provisions unfairly shift the burden to the petitioner?
61. §13-1-29: What would you do if a person has trouble with English and/or written materials?
62. §13-1-29, 29.1 and 31.1: OHA's contention that these three sections violate the due process requirement, and unduly obstruct the advocacy of public interest, the public access to governmental processes, and the protection of resources in public trust.
63. §13-1-30: Why are the contested case fees (\$100 + \$500) so high if related to the conservation district?
64. §13-1-31: Without a hearing, an applicant or an alleged violator shall be a party. Is this a typo?
65. §13-1-31.1: Can DLNR legally exclude the public or interested parties from participating in its enforcement actions and contested case hearings?
66. §13-1-31.2: Isn't the 15-day notice too short?
67. §13-1-32.2: Why would this proposed rule require a first deputy of the Department to perform or supervise its enforcement activities?
68. §13-1-32.3: Why discovery is prohibited under your rules? Does the hearing officer have the power to grant discovery requests?
69. §13-1-67(b): In a CRVS case where a respondent's answer requests for mitigation, should the hearing officer make the final decision without allowing the respondent the opportunity to ask for a review by the Board, or even a judicial review?
70. §13-1-70: Should the administrative sanctions schedule be incorporated into the administrative rules?
71. §13-1-71: Will this rule give more lenience to repeat offenders than necessary and appropriate? Should violators be allowed to cleanse their records by just paying the fines?

IV. Questions on DLNR Enforcement Activities as Related to the CRVS:

72. How does the community get involved in resource enforcement? Could there be community watch programs or community deputized officers?
73. Will the DLNR employees in the field (non-DOCARE) be expected to enforce against violations and issue citations?
74. What do DLNR employees do when witnessing a violation in the field?
75. Will the county police be able to issue civil citations if a DOCARE officer is not available?
76. What is the procedure for the community to report violations they observe in the field?
77. Should there be a finder's fee option for persons who report violations?
78. The big violations are ignored now but you going after the small violations?