STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
Honolulu, Hawaii 96813

August 12, 2011

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

ADMINISTRATIVE ENFORCEMENT ACTION FOR
CITATION NO. 1 AI-OA-ETV042 ISSUED TO PATRICK MILLER ON JULY 2, 2011
FOR THE EMERGENCY RULE PROHIBITION UNDER
HAR SECTION 13-256-73.13, "AHU O LAKA SAFETY ZONE"

The Division of Boating and Ocean Recreation (DOBOR) submits the following citation for disposition by the Board of Land and Natural Resources (Board) of the violation of HAR section 13-256-73.13(b)(1) at the Kaneohe Bay sandbar, Ahu o Laka safety zone by Patrick A. Miller.

BACKGROUND

Hawaii Administrative Rule (HAR) section 13-256-73.13 is an emergency rule adopted by the Board at its June 23, 2011 meeting, and signed and filed with the Office of the Lieutenant Governor on the same date. A legal notice of the emergency rule was published on June 28, 2011 in the Honolulu Star-Advertiser. Shortly thereafter, copies of the adopted rule were posted at the Heeia Kea Small Boat Harbor, the Kaneohe Yacht Club, and the Kaneohe Marine Air Corps Station. Progress in the adoption and enforcement of the new rule was followed closely in the local media with stories on the emergency rule appearing as early as June 21, 2011, with extensive coverage in both print media and on television. An infraction of the Safety Zone has not been previously addressed by the Board.

The first three-day weekend involving a state holiday after the emergency rule took effect was the 2011 Fourth of July weekend (July 2, 3, and 4), with the final day being a Monday.

ACTIVITIES ALLEGED

On or about 3:45 p.m., Saturday, July 2, 2011, Patrick A. Miller was cited for a single count of consuming, using, or possessing alcohol within Zone H-2 (Ahu o Laka safety zone), thereby committing an administrative infraction in violation of HAR section 13-256-73.13(b)(1). The alleged violator was observed in possession of alcohol by Division of Conservation and Resources Enforcement (DOCARE) officer(s) under the following circumstances:

> DOCARE Officer E. Vuong observed Miller with a beer can in his hand, drink from the can, and as the officer approached, slowly lower the beer can below the port gunwale of the blue and white ski-type boat, anchored on the sandbar. The evidence, one Coors

Light – brand silver 12 oz. beer can, was recovered by Officer Vuong. Subject Miller was present on a vessel with four males and three females. The deck of the vessel had numerous empty beer bottles and cans.

Place: Ahu o Laka (GPS coordinates N 21 deg 27.828 min, W 157 deg 48.595 min)

Date: July 2, 2011

Time: 1545 hrs

Identification: Patrick Miller verbally identified himself by name, address, date of birth, and social security number.

Citation issued: Citation No. 1 AI-OA-ETV042 was given to Patrick A. Miller, who signed the citation. The citation instructed the person cited to appear before the Land Board meeting set for August 12, 2011, at 9:00 a.m.

Officer Vuong noticed a strong odor of an alcoholic beverage emanating from Miller, and that his eyes appeared to be red and watery.

The safety zone is delineated by six (6) white/orange cylindrical-shaped buoys which indicate the H-2 safety zone. The vessel that Miller was aboard was anchored on the sandbar, within the buoys.

According to the citation, one person on board stated that she thought it was just illegal to consume alcohol while in the water or standing on the actual sandbar. The boater stated that she had been out of town and did not see the media reports regarding the prohibited activities within the sandbar. Other people on board, including Miller, also stated that they were unaware of the new regulations.

LEGAL REFERENCES

The emergency rule is effective for no more than 120 days from the June 23, 2011 filing date. Under subsection 13-256-73.13(b), HAR, the following actions are prohibited in the Ahu o Laka Safety Zone between the hours of 12:00 am and 11:59 pm of any day of a three-day weekend involving a state holiday. Infractions shall be subject to penalties as provided in sections 200-14 and 200-14.5, Hawaii Revised Statutes (HRS).

1. Consumption, use, or possession of alcohol.
2. Entering or remaining in area while under the influence of alcohol, narcotics, or drugs.
3. Disorderly conduct, per section 711-1101, HRS.

Under subsection (c), in addition to any other penalty authorized by law, a violation of subsection (b) shall be subject to penalties as provided in sections 200-14 and 200-14.5, Hawaii Revised Statutes.

If pursued in court, section 200-14, HRS (Violation of rules; penalty.), provides that any person, vessel, agent, owner, or crew who violates any rule adopted by the department under part I,

chapter 200, shall be fined not more than $1,000 or less than $50 for each violation, provided that in addition to or as a condition to the suspension of the fines and penalties, the court may deprive the offender of the privilege of operating or mooring any vessel in state waters for a period of not more than thirty days.

Section 200-14.5, HRS (General administrative penalties), authorizes the Board to set, charge, and collect administrative fines and to recover administrative fees and costs, including attorney's fees and costs, or bring legal action to recover administrative fines and fees and costs. Subsection 200-14.5(c), HRS, allows for fines of not more than $5,000 for a first violation and increasing graduated penalties if for a previous violation or violations within five years of this violation.

LEGAL STANDARD

If brought to an HRS chapter 91 contested case, an administrative enforcement action is judged by the *preponderance of evidence* standard, as per section 91-10, HRS.

DISCUSSION

Subsection 13-256-73.13(b), HAR, states that the consumption, use, or possession of alcohol is prohibited in the Ahu o Laka Safety Zone, as well as entering or remaining while under the influence of alcohol. While there is no evidence that Mr. Miller was intoxicated while operating the vessel; he was in possession of alcohol and also had indicia of having consumed alcohol while within the boundaries of Zone H-2 which is an alcohol free zone.

As provided by HRS section 91-9, a contested case hearing may be requested either orally or in writing prior to the end of the Land Board meeting in the event that the person found in violation should choose to contest the outcome of the Board's decision. Under DLNR's rules of practice and procedure, a written request for a contested case hearing must also be mailed or delivered in person to the Office of the Chairperson within ten calendar days from the close of the Board meeting.

RECOMMENDATIONS:

That the Board:

1. Find that an administrative infraction of HAR section 13-256-73.13(b)(1) was committed under Citation No. 1 AI-OA-ETV042, and that Patrick A. Miller committed the infraction.

2. The Board determine the appropriate fine and/or penalty, if any, to issue to Patrick A. Miller per section 200-14.5, HRS.

Respectfully submitted,

Edward R. Underwood
Administrator

APPROVED FOR SUBMITTAL

William J. Aila, Jr.
Chairperson