

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

April 13, 2012

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

SUBJECT: Request Approval to Initiate Chapter 91, HRS, Rule-making Proceedings to Amend Title 13, Chapter 256, "Ocean Recreation Management Rules and Areas," Subchapter 5, "Windward Oahu Ocean Recreation Management Area," by Adopting a New Section 13-256-73.13, "Ahu o Laka Safety Zone" to restrict the following while in the safety zone: 1) possession or use of alcohol, 2) entrance while under the influence of alcohol or drugs, and 3) disorderly behavior.

PURPOSE: The proposed new section identifies a safety zone around Ahu o Laka (also known as the Kaneohe Sandbar) in Kaneohe Bay to protect the public while visiting Ahu o Laka during three-day weekends involving a State holiday. The new rule prohibits possession, use, or consumption of alcohol in the safety zone; prohibits a person under the influence of alcohol, narcotics, or drugs from remaining in or entering the safety zone; and prohibits disorderly behavior while in the safety zone.

**RELEVANT
STATUTUORY**

AUTHORITY: Sections 200-2, 200-3, 200-4, 200-14, 200-14.5, Hawaii Revised Statutes

REMARKS:

Ahu o Laka, recognized also as the Kaneohe Bay sandbar, is a well-known site of cultural and social significance within the waters of Kaneohe Bay, Oahu. Roughly translated as "Altar of Laka," some believe that this area was a place of worship named after Laka, the goddess of hula, and was once used as a hula heiau. Others claim that Ahu o Laka is the burial site of Chief Laka, the Oahu chief who died on the sandbar, although whether Chief Laka was actually buried there has not been verified. Despite these differing interpretations, many agree that it is a place deserving of respect, and many individuals have enjoyed the unique surroundings and recreational opportunities provided by this area.

In recent years, however, significant concerns have grown regarding the safety and health of visitors to Ahu o Laka, particularly during holidays and weekends when large crowds consistently congregate in the area. During such times, drug and alcohol use, combined with overcrowding in the limited sandbar area, have led to several instances of injury and even death.

Concern over the use of Ahu o Laka began in 2005, when, according to media accounts, a Labor Day concert of over 400 people with approximately 60-70 boats occupied the area, and led to a riot of approximately 40 to 45 people, resulting in the near-drowning of one woman, and the injury of her brother during his attempts to rescue her. During the riot, people were pushing, shoving, throwing bottles, and yelling. Division of Conservation and Resources Enforcement (DOCARE) officers spent an hour and a half breaking up fights and dispersing people.¹ Two free concerts were held at Ahu o Laka that year, drawing hundreds of visitors to the area. Both concerts ended in fights.²

In 2006, Senator Clayton Hee, citing the escalation of alcohol-related violence at Ahu o Laka, introduced Senate Bill No. 2004, which would have designated Ahu o Laka as a state monument, and led to rules to ban alcohol at the sandbar.³ Residents of Kāneohe and Kahuluu supported this measure, and continued to voice concerns to their neighborhood boards over the pollution, violence, and desecration occurring in this culturally significant site; many felt that Ahu o Laka was no longer a safe place for families to enjoy.⁴ Although passed by the legislature, Senate Bill No. 2004 was subsequently vetoed by former Governor Linda Lingle.⁵

On Labor Day 2007, media reported that a confrontation involving dozens of people ended in an alleged stabbing, with two men taken separately to Castle Medical Center and one treated by paramedics at Heeia Kea pier.⁶ Due to this incident, the Department of Land and Natural Resources partnered with the U.S. Coast Guard to provide boater education and conduct equipment checks for the following Memorial Day, temporarily curbing the disorderly behavior observed at Ahu o Laka.⁷

However, on Memorial Day 2011, drinking and drug use at Ahu o Laka was again implicated in the death of a young man. During that day, over 200 boats and 500 people were reported to have congregated at Ahu o Laka, crowding the Heeia Kea Small Boat Harbor as people loaded and unloaded their boats. Although seven DOCARE officers were in place to monitor crowd activities that day, a later altercation at the boat harbor between the young man and another individual resulted in the young man's death, due to blunt force trauma and bleeding in his brain.⁸ This very recent incident, combined with the long history of drug- and crowd-related violence at Ahu o Laka, indicates a strong and urgent necessity to better address the drinking and overcrowding that is otherwise anticipated at Ahu o Laka during state three-day holiday weekends and especially in the upcoming Fourth of July and Labor Day holidays.

Currently, there are no apparent Department regulations relating to the consumption, use, or possession of alcohol or other intoxicating substances, or disorderly behavior, in relation to

¹ <http://archives.starbulletin.com/2005/11/04/news/story04.html>

² <http://the.honoluluadvertiser.com/article/2005/Nov/03/ln/FP511030316.html/>

³ <http://the.honoluluadvertiser.com/article/2007/Sep/10/ln/hawaii709100329.html/>

⁴ <http://www1.honolulu.gov/refs/nco/nb30/07/30sepmin.htm>

⁵ <http://the.honoluluadvertiser.com/article/2007/Sep/10/ln/hawaii709100329.html/>

⁶ <http://archives.starbulletin.com/2007/09/05/news/story07.html>

⁷ <http://archives.starbulletin.com/2008/05/24/news/story07.html>

⁸ http://www.staradvertiser.com/news/breaking/No_charges_will_be_filed_in_Memorial_Day_fight_death.html A Honolulu Star-Advertiser article stated that the medical examiner eventually found alcohol and cocaine in the decedent's system.

Ahu o Laka. While set aside as a bird reservation by General Executive Order No. 532 (GEO 532) in 1932, Ahu o Laka is not designated as a wildlife sanctuary under DLNR's Division of Forestry and Wildlife regulations, which would have prohibited such activities.⁹ In addition, the set-aside in GEO 532 also precludes Ahu o Laka from consideration as unencumbered public lands, which otherwise would prohibit possession of drugs and alcohol.¹⁰ Ahu o Laka is included in Division of Boating and Ocean Recreation (DOBOR) regulations establishing subzones within Kaneohe Bay; however, these existing regulations also do not cover the full range of activities of concern in this area.¹¹ Given the apparently increasing levels of recreational use of Ahu o Laka, this submittal seeks to address these activities in the interest of public health and safety on a permanent basis.

At its June 23, 2011 meeting, the Board adopted section 13-256-73.13, HAR, as an emergency rule which was then signed and filed with the Office of the Lieutenant Governor on the same date due to an imminent peril to the public health, safety, or morals as described above. The emergency rule ended after one hundred twenty days and was not capable of renewal. HRS §91-3(b); HAR §13-1-25.

On December 9, 2011, as Item J-3, the department requested that the Board allow DOBOR to conduct rulemaking to adopt the previous emergency rule as a regular boating rule. While approval for rulemaking was obtained, the Attorney General's office reviewed the proposed rule and suggested that substantial changes be made which required that the proposed rule be again presented for approval. See Exhibit "A."

AUTHORITY

The Board of Land and Natural Resources is tasked with the "primary responsibility for administering the ocean recreation and coastal areas programs and performing the functions [formerly] performed by the department of transportation and the department of public safety in the areas of boating safety, conservation, search and rescue, and security of small boat harbor environs." HRS §200-2. The Chairperson is authorized to promulgate rules "to continue the ocean recreational and coastal areas programs and govern the ocean waters and navigable streams of the state . . . to protect and foster public peace and tranquility and to promote public safety, health, and welfare." Rules may involve "[s]afety measures . . . in or on the ocean waters and navigable streams of the State," and "[a]ny other matter relating to the safety, health, and welfare of the general public." HRS §200-4(a). All such rules must "be adopted in accordance with chapter 91 and shall have the force and effect of law." HRS §200-4(b). "[P]rior to the adoption of any rule authorized by law," an agency must "give at least thirty days' notice for a public hearing," and "afford all interested persons opportunity to submit data, views, or arguments," all of which must be "fully considered" prior to the agency's decision on adopting the rule. HRS §91-3(a).

⁹ See Governor's Executive Order No. 532 (1932); cf. HAR ch. 13-126.

¹⁰ See HAR § 13-221-2 (defining "unencumbered public lands" as public lands "which have not been set aside for any purpose, by statute, executive order or otherwise, to a governmental agency" (emphasis added)).

¹¹ See HAR § 13-256-73; cf. HAR §§ 13-244-10 (persons under the influence of intoxicating liquor), 13-244-11 (persons under the influence of drugs), 13-251-59 (intoxication) (generally prohibiting only the operation of vessels while under the influence of intoxicating liquors or other substances).

PURPOSE

Under the Board’s §200-4, HRS, rulemaking authority, DOBOR recommends the following measures, reflected in the Ramseyer format attachment, be implemented for all three-day weekends involving a State of Hawaii-recognized holiday under §8-1, HRS (see Exhibit “B”):

1. A prohibition on the possession or consumption of alcohol and other intoxicating substances within the most frequently crowded sections of Ahu o Laka and the immediate surrounding area;
2. A prohibition on entering or remaining in such area while intoxicated or under the influence of alcohol, narcotics, or drugs; and
3. A prohibition on disorderly conduct, within such area.

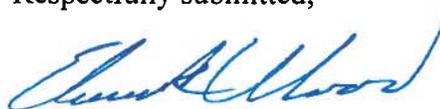
According to a 2009 dog bite case that occurred in shallow water, *State v. Bereday*, the City and County of Honolulu continues to have joint jurisdiction including enforcement of any city ordinances or other criminal offenses committed in O‘ahu’s nearshore waters such as Kāne‘ohe Bay and Ahu o Laka. Criminal offenses such as the possession or use of narcotics (ranging from petty misdemeanors to felonies), offenses against the person – such as misdemeanor and felony assault, and offenses against the public order – such as disorderly conduct (a petty misdemeanor or criminal violation) may be prosecuted if committed on Ahu o Laka.

If adopted, this rule section would create the possibility of prosecutions as both a criminal violation in the court system (HAR §200-14) and a separate administrative enforcement proceeding before DLNR by contested case (HAR §200-14.5). An administrative enforcement action would allow such sanctions as administrative fines up to \$5000 for a first offense. Any fines, fees, and costs would be paid into the special boating fund.

RECOMMENDATIONS:

1. Grant the Division of Boating and Ocean Recreation approval to initiate rule-making proceedings pursuant to chapter 91, HRS, regarding amendments to Title 13, by adopting a new section 13-256-73.13, HAR, entitled “Ahu o Laka safety zone”.

Respectfully submitted,



Edward R. Underwood
Administrator

Approved for Submittal



William J. Ailā, Jr., Chairperson

DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF BOATING AND OCEAN RECREATION

Amendments to Chapter 13-256, Subchapter 5
Hawaii Administrative Rules

(date)

1. Chapter 13-256, Hawaii Administrative Rules, is amended by adding a new section to read as follows:

"§13-256-73.13 Ahu o Laka safety zone. (a) The Ahu o Laka safety zone is the area encompassed within the boundaries designated as Zone H-2 shown on Exhibit "X-2," "Zone H-2 Ahu o Laka safety zone, Kaneohe Bay, Hawaii" dated June 8, 2011, and located at the end of this subchapter. The boundaries of Zone H-2 are as follows:

Beginning at a point in the water at 21° 28.462'N 157° 49.203'W, then by straight lines drawn to a point at 21° 27.9647'N 157° 49.140'W, then to 21° 27.514'N 157° 48.115'W, then to 21° 28.030' N 157° 47.940'W, then back to the starting point.

(b) Zone H-2 is subject to the following restrictions from 12:00 a.m. to 11:59 p.m. on any three-day weekend involving an observed state holiday designated in section 8-1, Hawaii Revised Statutes:

- (1) No person shall possess, use, or consume alcohol within Zone H-2;
- (2) No person shall enter or remain in Zone H-2 while under the influence of alcohol, narcotics, or drugs; provided that a person may use or possess drugs legally prescribed by that person's physician; and
- (3) No person within Zone H-2 shall:
 - (A) engage in fighting or threatening, or violent or tumultuous behavior;
 - (B) make unreasonable noise;
 - (C) subject another person to offensively

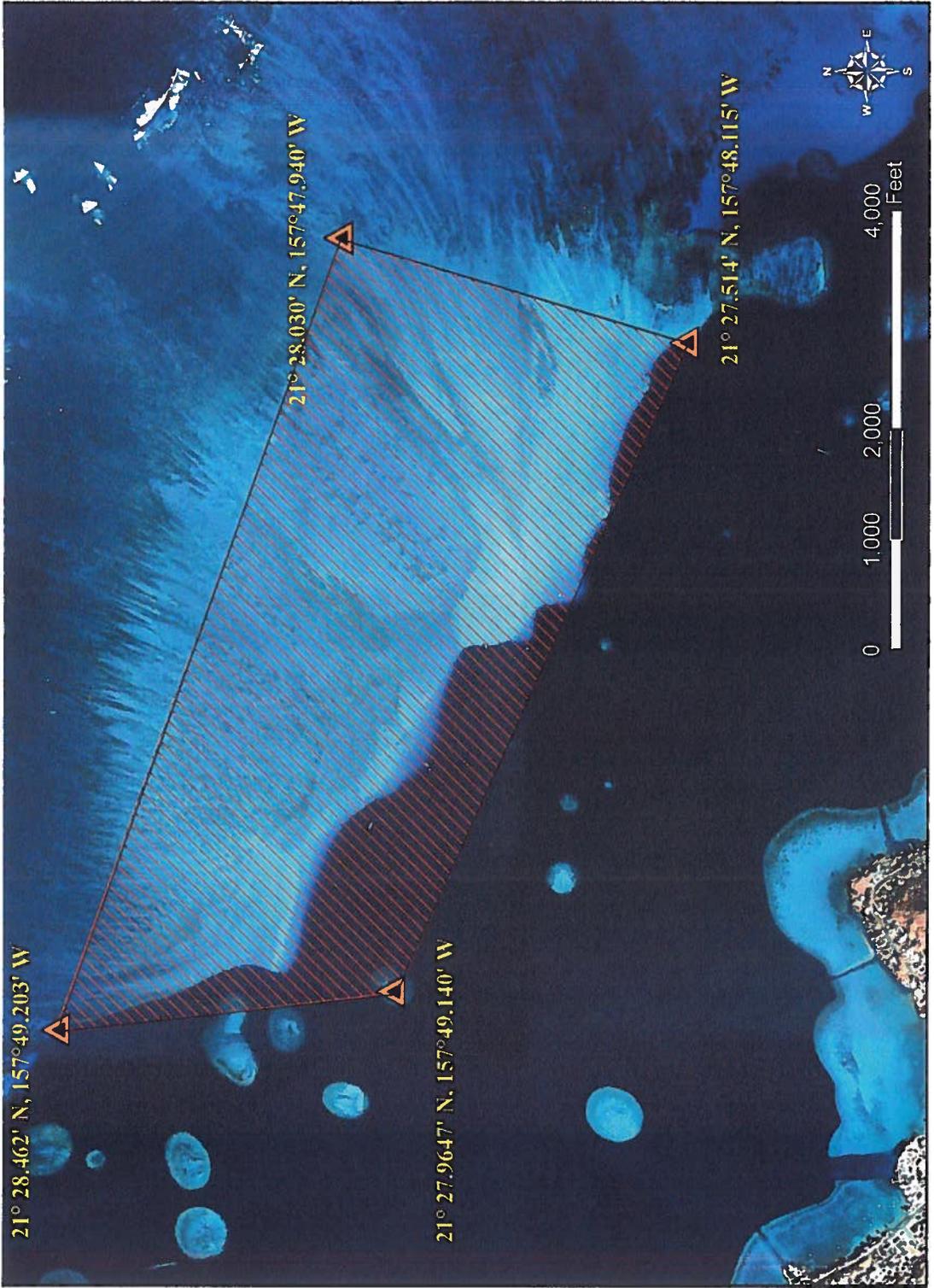
coarse behavior or abusive language which is likely to provoke a violent response; or

(D) create a hazardous or physically offensive condition by any act which is not performed under any authorized license or permit.

Noise is unreasonable, within the meaning of subparagraph (3)(B), if considering the nature and purpose of the person's conduct and the circumstances known to the person, including the time of day or night, the person's conduct involves a gross deviation from the standard of conduct that a law-abiding citizen would follow in the same situation; or the failure to heed the admonition of a law enforcement officer that the noise is unreasonable and should be stopped or reduced.

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

(d) If any term or provision of this section, or the application thereof to any person or circumstance is found unenforceable or invalid to any extent, the remainder of this section or the application of such term or provision to persons or circumstances other than those to which it is held unenforceable or invalid, shall not be affected thereby, and each remaining term and provision of this section shall be valid and enforceable to the fullest extent permitted by law." [Eff] (Auth: HRS §200-4)
(Imp: HRS §§200-2, 200-3, 200-4, 200-14, 200-14.5)



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

WILLIAM J. AILA, JR.
Chairperson
Board of Land and Natural
Resources

APPROVED FOR PUBLIC HEARING:



Deputy Attorney General

A List of State-Recognized Holidays Under §8-1, HRS

§8-1 Holidays designated. The following days of each year are set apart and established as state holidays:

- The first day in January, New Year's Day;
- The third Monday in January, Dr. Martin Luther King, Jr., Day;
- The third Monday in February, Presidents' Day;
- The twenty-sixth day in March, Prince Jonah Kuhio Kalaniana'ole Day;
- The Friday preceding Easter Sunday, Good Friday;
- The last Monday in May, Memorial Day;
- The eleventh day in June, King Kamehameha I Day;
- The fourth day in July, Independence Day;
- The third Friday in August, Statehood Day;
- The first Monday in September, Labor Day;
- The eleventh day in November, Veterans' Day;
- The fourth Thursday in November, Thanksgiving Day;
- The twenty-fifth day in December, Christmas Day;

All election days, except primary and special election days, in the county wherein the election is held;

Any day designated by proclamation by the President of the United States or by the governor as a holiday.