

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

September 6, 2005

No. 1 Capitol Building 250 South Hotel Street Room 410

I. **CALL TO ORDER:** Chair Woods called the meeting to order at 10:30 a.m., with a quorum present.

MEMBERS PRESENT:

- Lynne Woods
- George Handgis
- Michael Yee
- Jeanette C. Otsuka
- Dorvin Leis
- Noelani Whittington
- Donald Dymond
- Sharon Pang

ABSENT MEMBERS:

- Ed MacDowell

STAFF: DBEDT Office of the Attorney General
 Thomas Smyth Margaret Ahn
 Iris Mishima
 Carol Poepoe

GUESTS: Peter T. Young, Director, Department of Land and Natural Resources (DLNR)
 Athline M. Clark, Aquatic Resources Manager, Aquatic Resource Division, DLNR
 Sean Corson, Sanctuary Designation Coordinator, Northwestern Hawaiian Islands Ecosystem Reserve
 Rod Ehler, Economist, National Marine Sanctuary Program, NOAA - Washington DC
 Dr. Takiora Ingram, Policy Specialist, Division of Aquatic Resources, DLNR
 Michael Constantinides, Forestry Programs Manager, Division of Forestry and Wildlife, DLNR
 Holly McEldowney, Archeologist, Historic Preservation Division, DLNR
 Laureen Tanaka, Planner, State Parks Department, DLNR
 Christine Kurashige, Specialist, Division of Financial Institutions, Department of Commerce and
 Consumer Affairs (DCCA)
 Laureen Wong, Staff Attorney, Cable Television Division, DCCA
 Verna Oda, Executive Officer, Professional and Vocational Licensing Division, DCCA
 Genevieve Salmonson, Director, Office of Environmental Quality Control, Department of Health (DOH)
 Lane Otsu, Planner, DOH
 Patrick Felling, Environmental Ombudsman, Compliance Assistance Office, DOH
 Davis Bernstein, Program Manager, Hazard Evaluation and Emergency Response Office, DOH
 Kevin Sunada, Planner, Hazard Evaluation and Emergency Response Office, DOH
 Denis Lau, Program Manager, DOH
 Kookie Moon-Ng, Medical Assistance Program Officer, Med-QUEST Division, Department of Human
 Services (DHS)
 Alan Matsunami, Program Specialist, Med-QUEST Division, DHS

WORKING LUNCH AS THE MEETING PROGRESSED

II. **APPROVAL OF MINUTES:** Minutes of the July 12, 2005 meeting were amended and approved as presented.

III. OLD BUSINESS

- A. Review and discussion of post public hearing statement of Chapter 13-60.5, "Northwestern Hawaiian Islands Marine Refuge" (DLNR) – Director Peter Young indicated that this refuge is the single largest marine preservation in the State of Hawaii. He state that there is an attempt to combine both federal and state initiatives to create designated sanctuary areas similar to the humpback whale sanctuary; there has been very strong support for this measure. There is evidence of Hawaiian occupation including shrines; as such, the traditional and local practices would return to some of the islands. Chair Woods asked how the rules would be enforced. Director Young replied that because of the

restrictiveness of the rules requiring permits, the enforcement is somewhat easier because if a person does not have a permit, they are not allowed to be there; however, because of its remoteness factor, there is still an enforcement challenge.

Ms. Athline Clark, Aquatic Resources Manager, distributed maps and a copy of a report outlining the socioeconomic assessment of commercial bottom fishing in the Northwestern Hawaiian islands. She pointed out the hatched area, which is State waters, the fish and wildlife refuge waters outside of the State's jurisdictions, as well as other waters outside the State's jurisdictions. There are field stations that monitor wildlife on the islands, and divers that clean the water of nets in surrounding the areas. In March 2004, there were nine fishermen within a five-mile zone with preferred fishing locations in relation to State waters. Mr. Rod Ehler, Economist, National Marine Sanctuary Program, indicated that the fishing industry averages about \$1.3 million annually, and although the profit margins are low, the fishermen love to fish there. There are two zones that cover the chain of islands, the Mau Zone, which has four islands with State waters on Nihoa and Necker islands, and the Ho'omalulu Zone, which covers 18 islands.

Ms. Chang brought up the issue of potential violation concerns. Ms. Clark indicated that when there is any type of poaching within the islands, there are certain directives that are taken. Compliant fishermen report these activities and potential non-compliant parties are ordered to "anchor up" by the Coast Guard and other federal agencies that are there throughout the year. Mr. Dymond asked if there are a limited number of issued permits. It was indicated that these are federally managed fisheries, so one would have to qualify under federal criteria in order to receive a permit. If the criteria are met, they can receive the permit; however, they would not qualify for fishing in State waters once the federal permit is obtained, and it would be considered a "no fishing area" under State rules. Second Vice Chair Handgis recommended that a memo be sent to the Governor recommending approval to adopt these rules; the Board unanimously agreed.

- B. Review and discussion of post public hearing statement regarding Rules of the Liquor Commission of the City and County of Honolulu, "Relating to License, Trade Name Change, Permit, and Filing Fees, and Providing for an effective date of July 1, 2005, or as soon thereafter as practicable" – The rules have been withdrawn for discussion per the request of the Honolulu Liquor Commission until further notice.
- C. Review and discussion of post public hearing statement of HAR Chapter 16-25, "Application Procedures Relating to Hawaii Financial Institutions and HAR Chapter 16-28, "Escrow Depositories" (DCCA) – Ms. Christine Kurashige, Specialist, indicated that at the public hearing there were no attendees nor written testimony; thus, no objections. When questioned whether any of the Hawaii-based financial institutions have fewer than 100 employees, Ms. Kurashige indicated that there are in fact some smaller banks such as the ones currently being established that would constitute as a "small business," as defined by Chapter 201M. Second Vice Chair recommended that the rules proceed to the Governor for adoption; the Board unanimously agreed.
- D. Review and discussion of post public hearing statement of HAR Chapter 11-282, "Deposit Beverage Container Recycling" (DOH) – Mr. Lane Otsu, Planner, explained that the rules cover the redemption activity which is a product of when the State statute was established; the rules are very specific, but also very limited in scope. Ms. Genevieve Salmonson reviewed the testifiers' comments submitted at the public hearings, but DOH found the comments not to be substantial in nature and so did not include their commentary in the rules. The definition of "reasonable time" noted in revision 2 was questioned, and it was indicated that this refers to requests for daily reports, reducing spot checks. The issue of whether a retailer is required to obtain a permit if they chose to redeem bottles was also questioned, and it was indicated that if there is a recycling machine, they would obtain a permit by rule, but they would need to become a certified redemption center and would need to obtain a certification from the State. Mr. Yee recommended that the Board accept the post public hearing statements; the Board unanimously agreed.
- E. Review and discussion of post public hearing statements of HAR Chapter 13-37, "Old Kona Airport Marine Life Conversation District, Hawaii," Chapter 13-58, "Kona Coast, Hawaii," and Chapter 13-60.3, "West Hawaii Regional Fisheries Management Area, Hawaii" (DLNR) – Director Young indicated that these rules were the subject of extensive community input by the West Hawaii Fisheries Management Group. At the public hearings, there was strong support from both businesses and the public

community. Second Vice Chair Handgis confirmed this, mentioning that he had attended one of the public hearings; he recommended that the rules proceed to the Governor for adoption; the Board unanimously agreed.

- F. Review and discussion of post public hearing statement of HAR Chapter 13-104.22, "Commercial Harvest Permits" (DLNR) – Director Young indicated that the commercial harvest permit is a small business support permit. The rules permit the threshold to be changed from \$1,000 in value to \$10,000 in value, which allows an opportunity for taking of more material. He further mentioned that sometimes it becomes ineffective to harvest for \$1,000. Mr. Michael Constantinides, Forestry Programs Manager, expressed that the rules will provide the opportunity to capture the value of resources that might otherwise be destroyed and allow the department to recapture that value. Second Vice Chair Handgis recommended that the rules proceed to the Governor for approval; the Board unanimously agreed.
- G. Review and discussion of post public hearing statement of HAR Chapter 16-94, "Pest Control Operators" (DCCA) – Ms. Chang asked several questions regarding the rules. In response, Ms. Verna Oda, Executive Officer, explained that storing chemicals (residential or otherwise) should be done in a zone approved by the County for chemical storage. It was explained that material safety data sheets supplied to the fire departments are submitted to show which stored chemicals are in business buildings. Ms. Chang recommended that the rules proceed to the Governor for adoption; the Board unanimously agreed.
- H. Review and discussion of post public hearing statement of HAR Chapter 11-55, "Water Pollution Control" (DOH) – Mr. Denis Lau, Program Manager, explained these rules were adopted on July 14, 2005 after public hearings. The rules address new changes in the federal regulations that the department must comply with to maintain the delegated responsibilities of the Environmental Protection Agency. Three people testified at the public hearing with the Farm Bureau opposing the revisions of the rules. One of the Farm Bureau's concerns was that EPA required that all concentrated animal feed operations, regardless as to whether they had potential to discharge, to take out a permit.

It was expressed that the State is going ahead with these rules despite there being a "flawed law," and that the Governor has already signed off on these rules. The Board will acknowledge this fact and it was also suggested that a memo be sent to the Governor with the Board's concerns. (Separate notes regarding these concerns will be transcribed into a memorandum to the Governor.) Ms. Pang stated that it appears the Governor signed off because of the funding and the compliance with the federal requirements but did not take into account the impact on small business. Even though Hawaii's business industry, in general, is very minimal, and the way Hawaii does things is different than what the rest of the United States does things, Hawaii is regulated the same way and must comply with the "world at large."

Chair Woods recommended that this topic be discussed at the strategic planning session as the Board needs to send their communication to the Office of the Advocacy at the U. S. Small Business Administration with a business impact statement and a copy sent to the Governor. Chair Woods further stated that the Board has an obligation to let the Governor know that there could be other ways that this process could have been avoided, and that if the rules came to the Board before they were signed, the Board would have recommended against it. Mr. Yee recommended that, despite being signed off for adoption, the Board submit a memo to the Governor to accept the post public hearing statement with specific comments; the Board unanimously agreed.

- I. Review and discussion of post public hearing statement of HAR Chapter 13-223, "Historic Preservation and Restoration on Public Lands" (DLNR) – Director Young indicated that the purpose of the rule amendments is to align the rules with State statute. It allows for direct negotiations where DLNR can impose conditions on individuals to assure that the historic property is maintained in its historic character. Rather than going through a bidding process with the highest bidder prevailing, DLNR can directly negotiate on a one-on-one basis. Many early 18th century structures are part of these historic properties. When asked if this bidding structure may violate the State's sunshine law, it was indicated that if the landlord makes the decision to negotiate one-on-one, there should not be any violation. Second Vice Chair Handgis recommended that the rules proceed to the Governor for approval; the Board unanimously agreed.

- J. Review and discussion of post public hearing statement of HAR Chapter 16-132, "Fees to be Paid by Cable Operators" (DCCA) – Ms. Laureen Wong, Staff Attorney, discussed the rule changes and the purpose of the reduction of fees. Ms. Chang recommended that the rules proceed to the Governor for approval; the Board unanimously agreed.
- K. Update on Strategic Planning Session on October 4, 2005 – Chair Woods would like the October 4th strategic planning session to include discussions regarding review of federal rules, commentary to the Governor, and the Regulatory Flexibility Act and the Small Business Bill of Rights bills. She would also like to identify any board shortcomings, responsibility of agenda line items, the organization of the Board, its effectiveness and how to improve upon it, the structure of the meetings, and the requirements of the departments when testifying on rules and the rule's impact statement.

IV. NEW BUSINESS

- A. Review and discussion of proposed of draft HB 1706, "Relating to the Uniform Environment Covenants Act" (DOH) – Mr. Davis Bernstein, Program Manager, gave the members a background on this bill and indicated that the purpose of the law has to do with risk-based environmental clean-up. Several members brought their individual opinions to the table; one issue arose as to whether the covenant can be removed if the property was conveyed with a restriction and if the new landowner could mitigate the problem or have it removed from the title. Chair Woods recommended this issue be deferred and discussed at the Strategic Planning Session; the Board unanimously agreed. In addition, Mr. Davis will be invited to attend the November 8th meeting for further discussion.
 - B. Review and discussion of proposed amendments to HAR Chapter 17-1705, "Medical Assistance Recovery," HAR Chapter 17-1721, "Medical Assistance to Aged, Blind, or Disabled Individuals," HAR Chapter 17-171722, "Special Medical Assistance Coverages and Programs," HAR Chapter 17-1737, "Scope and Contents of the Fee for Service Medical Assistance Program," and HAR Chapter 17-1744, "Coverage of Medicare Premiums" (DHS) – Ms. Kookie Moon-Ng, Medical Assistance Program Officer, indicated that the purpose of the rule amendments is to accommodate the Federal Medicare new benefit that will be effective January 1, 2006. This was mandated by Congress as part of the Medicare Modernization Act of 2003, and mandates that Medicare will now provide a prescription drug benefit to its beneficiaries. Thus, effective January 1, 2007, Medicaid will no longer provide a prescription drug benefit to Medicare beneficiaries. Overall, the transition plan for prescription coverage to beneficiaries ensures continued coverage. Second Vice Chair Handgis recommended that the rules proceed to public hearing and that Ms. Moon-Ng return with the post public hearing statement; the Board unanimously agreed.
 - C. Discussion of August 12, 2005 Memorandum regarding "Periodic Review of Administrative Rules" – Ms. Ahn, Deputy District Attorney stated that under section 201M-7, the rules may be reviewed every other year in a report in short form. Mr. Smyth added discussion of Act 168 in addition to section 201M-7. Chair Woods recommended that the members familiarize themselves with this process for discussion at the strategic planning session.
 - D. Discussion of legislative timetable and existing bills, "Relating to the Small Business Regulatory Flexibility Act," and "Relating to the Small Business Bill of Rights" – Chair Woods requested that Mr. Smyth be present during next month's strategic planning session to discuss these two bills currently at the legislature.
 - E. Review and discussion of prospective new Board member – Mr. John Meyers' resume was reviewed, showing that he is in the technology industry. After review and discussion, it was suggested that Mr. Meyers' references be checked. Chair Woods indicated that two Board seats are currently available, including one member in the accounting/tax industry.
 - F. Discussion of scheduling 2006 board meetings – Discussion on proposed dates for the 2006 board meeting will be deferred until the strategic planning session meeting.
- V. **REPORT FROM THE CHAIR** – Chair Woods noted that if any members know of anyone they can nominate for Export of the Year, they should do so because it is a good reward.

- VI. **REPORT FROM COMMITTEES** – Nothing was reported.
- VII. **REPORT AND UPDATE FROM BOARD MEMBERS** – Mr. Dymond attended the recent board meeting of the Honolulu Liquor Commission and was the only individual that testified against the proposed fee increases. He discussed the issue of arming investigators with weapons, as well as the police department's responsibility of enforcing laws. Mr. Smyth will provide a copy of the County's set of law.
- VIII. **ANNOUNCEMENTS** – Nothing was reported.
- IX. **NEXT MEETING** - Tuesday, October 4, 2005 from 9:00 a.m. to 5:00 p.m., held at Aloha Beach Resort Kauai – Pi'ikoi Room
- X. **ADJOURNMENT** – Chair Woods adjourned the meeting at 1:50 p.m.