

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

February 14, 2014

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

REQUEST THAT THE BOARD OF LAND AND NATURAL RESOURCES APPROVE THE AMENDMENTS AND COMPILATION OF HAWAII ADMINISTRATIVE RULES (HAR), CHAPTER 13-253, REGISTRATION AND PERMIT FEES, AND AMENDMENTS TO HAWAII ADMINISTRATIVE RULES, SECTION 13-256-3 COMMERCIAL OPERATOR PERMIT REQUIREMENTS AND SECTION 13-256-4 COMMERCIAL VESSEL AND WATER SPORTS EQUIPMENT REGISTRATION REQUIREMENTS; AUTHORIZE THE DIVISION OF BOATING AND OCEAN RECREATION TO CONDUCT A SECOND ROUND OF PUBLIC HEARINGS REGARDING AMENDMENTS THAT WERE MADE TO CHAPTER 13-231, OPERATION OF BOATS, SMALL BOAT HARBORS, AND PERMITS AND CHAPTER 13-251, WAIKIKI AND KAA NAPALI OCEAN WATERS, BASED ON PUBLIC TESTIMONY THAT WAS RECEIVED DURING THE RULE MAKING PROCESS. ATTACHED TO THIS AGENDA AND INCORPORATED HEREIN ARE THE PROPOSED AMENDMENTS TO CHAPTER 13-231 (EXHIBIT 1), CHAPTER 13-251 (EXHIBIT 2), CHAPTER 13-253 (EXHIBIT 3), AND SECTIONS 13-256-3 AND 13-256-4 (EXHIBIT 4).

PURPOSE:

The purpose of these amendments is to bring parity to all Waikiki catamaran registration certificate holders and Kaanapali catamaran commercial use permit holders. Currently, there are separate rules found across four chapters regarding Maui and Waikiki catamaran registration and permitting requirements even though the services provided are the same. Over the years, the fee schedules for Maui and Waikiki catamarans have diverged to the point of unfairness. Kaanapali catamaran operators pay a commercial use fee of 3% of gross receipts. Waikiki catamaran operators do not pay a commercial use fee.

Furthermore, operator permits have been required for surf instruction, canoe operation, etc., for anyone operating in Waikiki or Kaanapali ocean waters. For reasons unknown to the current division administration, this requirement was never implemented in Kaanapali. For Waikiki, staff have been required to ensure that operators possess the ability to provide commercial water sports instructions. However, the division does not possess the expertise to determine whether an individual is competent to engage in water sports instruction nor should the department assume that liability. We propose to issue commercial use permits to the companies that engage in water sports activities and it will be the companies' responsibility to ensure they hire competent staff.

Lastly, the amendments would update and streamline commercial permit requirements, some of which have not changed in decades.

REMARKS:

On May 24, 2013, the Board of Land and Natural Resources authorized the Division of Boating and Ocean Recreation (DOBOR) to proceed with rulemaking procedures regarding the HAR chapters listed above. The following is a breakdown of the oral and written comments received during the public hearing process.

1. Describe how opinions or comments from the public and affected small business were solicited.

A request to engage in rulemaking was brought before the Board of Land and Natural Resources and the meeting followed proper sunshine law requirements. Legal ads were placed in the newspapers in accordance with Hawaii Revised Statutes, §91-3, and the proposed rule amendment package was placed on DOBOR's website. Copies of the proposed amendments were made available at the small boat harbor offices. Press releases were run to notify people of the proposed amendments.

2. Summary of public and small business comments.

DOBOR received numerous comments from the public with the majority of the comments coming from Waikiki catamaran operators, Waikiki water sports businesses, and commercial launch ramp users. The comments received are broken down as follows:

KAUAI 10/2013 PUBLIC HEARING ASSESSMENT:

ATTENDANCE

Eight individuals attended the Maui County public hearing on 10/17/13.

SUMMARY

None provided oral testimony.

OAHU 10/17/13 PUBLIC HEARING ASSESSMENT:

ATTENDANCE

Twenty four individuals signed the attendance sheets and there were approximately thirty in attendance.

ORAL TESTIMONY

Nine people provided oral testimony.

WRITTEN TESTIMONY

Two written testimonies were received, one from the law office of George K. Lindsey, Jr., and the other from the law office of Frame & Nakano. Both were primarily focused on commercial catamaran operations occurring on Waikiki beach and ocean waters as well as the provision to repeal the operator permit requirements for Waikiki and Kaanapali.

SUMMARY

Testimony was received regarding the proposed amendments as they relate to operator permits and catamaran operations on Waikiki beach and near shore waters. People felt that the operator permit requirements should be left in the rules and catamaran operators felt that the amendment to allow for larger catamarans to operate on Waikiki beach should be deleted. Comments were made that there wasn't enough notice given for the public hearings. A request was made to place all rules relating to Waikiki catamaran operations into a separate section. Waikiki catamaran operators were opposed to paying the same commercial fee as all other commercial vessel operators.

MAUI 10/2013 PUBLIC HEARING ASSESSMENT:

ATTENDANCE

Thirty four individuals attended the Maui County public hearing on 10/17/13.

ORAL TESTIMONY

Five people provided oral testimony.

WRITTEN TESTIMONY

One piece of written testimony was received at the hearing, which contained many suggestions on changes for clarification and to avoid significant and unnecessary hardship to commercial permit holders.

SUMMARY

Oral testimony about the rule amendment package in its entirety was mostly positive. However, it was stated that certain facets of the rule amendment package would cause hardships for commercial operators including the Vessel Moored Elsewhere (VME) and Ocean Recreation Management Area (ORMA) permit holders if this rule package were implemented as is. Other testimony was received about issuance of permits and how the shall/may change in terminology is unfair for those who have been on a waitlist for an extended period of time; differences between Waikiki and Kaanapali in regards to revocation of permits, that the same rules should apply to all parties; and that modification of the cap on vessel sizes is a safety issue. Support was expressed for the amendment that increased the cumulative number of days a vessel may be on a temporary mooring and the increase in the number of special charter permits from 8 to (the proposed) 24, although a suggestion was made that the seven day advance notice approval for these special charter permits be modified to allow "reasonable notice."

HAWAII ISLAND PUBLIC HEARING ASSESSMENT (KONA):

ATTENDANCE

25 individuals attended the Hawaii Island public hearing on 10/16/13 in Kona.

ORAL TESTIMONY

Testimony received from 9 individuals was, in general, opposed to the proposed rule amendments.

WRITTEN TESTIMONY

Five individuals submitted oral testimony or written testimony identical to documents DOBOR received by email.

SUMMARY

The majority of the people in attendance were opposed to the rule amendments. Testimony received stated that the rules are difficult to read and understand. A professional rules writer should be employed. The hearing is in violation of the Hawaii Administrative Procedures Act. The proposed limit of two commercial use permits per launch ramp per person would be detrimental to existing businesses. The rule does not allow existing businesses with more than two commercial use permits to continue business after the expiration of the current permit period.

HAWAII ISLAND PUBLIC HEARING ASSESSMENT (HILO):

ATTENDANCE

No individuals attended the Hawaii Island public hearing on 10/17/13 in Hilo.

SUMMARY

DOBOR did not document any oral testimony and did not receive any written testimony at the Hilo public hearing.

PUBLIC HEARING ASSESSMENT OF EMAILED TESTIMONY (RECEIVED BY 10/24/13 11:59 P.M.):

E-MAIL TESTIMONY RECEIVED

Thirty-one (31) separate emails messages were received containing testimony on the proposed rule amendments package. Five individuals who attended the public hearing in West Hawaii also submitted email testimony. Two emails were nearly verbatim documentation of oral testimony provided on Maui during that District's public hearing. Two individuals representing the Kauai Westside Watershed Council submitted testimony that was very similar in nature opposing any commercial activity that is detrimental to the environment. One piece of testimony was received from the C&C Honolulu suggesting that an ocean hazard analysis be undertaken as a baseline prior to passage of the proposed rule amendments.

The majority of the testimony received pertained to the Waikiki and Kaanapali commercial catamaran operations, Waikiki Operator Permits issued by the department, and the proposed limit of two commercial use permits per person for the use of state launch ramps. Another issue (which has been discussed at several Board meetings) is to allow the grace period that was recently established for regular mooring permits to apply to all use permits issued by the department.

Based on the oral testimony received at the public hearings as well as written (including email) testimony received during this process, the division is recommending further revisions to the proposed rule amendments. We propose that the Board authorize the division to conduct a second round of public hearings on the rules found in Chapter 13-231 and Chapter 13-251. DOBOR recommends the following additional revisions:

Chapter 13-231:

- 13-231-4: Add new subsection to read as follows “(c) Notwithstanding the provisions of subsection (a), the department may issue additional offshore mooring permits to owners of vessels holding a valid commercial use permit issued pursuant to section 13-231-59”. Remove the words “or other authorization”.
- 13-231-5(b): Amend “fails to renew a regular mooring permit” to “fails to renew a use permit”.
- 13-231-11: Add the language “requirements of the United States Coast Guard” but not in the provision where they would exceed fifteen months.
- 13-231-45: Add the language “(a) and” in subsection (c). Add the language to subsection (g) and (l) regarding the inspection of United States Coast Guard certified vessels.
- 13-231-61: Amend passenger capacity as it pertains to minimum gross receipts.
- 13-231-62: Add the language “in accordance with Chapter 91, Hawaii Revised Statutes”.
- 13-231-67(e): Add the following language, “Notwithstanding this section, all owners of commercial use permits on the effective date of these rules may continue operations and be permitted to apply for and renew their commercial use permits subject to compliance with all other conditions set forth in this chapter until their total number is reduced by attrition or other means to the numbers in subsection (d).” Allow for three commercial launch ramp permits at Ala Wai and Keehi small boat harbors.

Chapter 13-251:

- 13-251-3: Amend carrying capacity for minimum gross receipts from 25 to 26 and 25 to 27. Add language “held in accordance with chapter 91, Hawaii Revised Statutes.
- 13-251-37: Clarify that a propeller guard can be mechanical or a person used as a “look-out”. Amend the length of a Waikiki catamaran to 50’ and remove the repeal of (8)(b) & (c).
- 13-251-38: Add the proposed language, “with accuracy, validity”.
- 13-251-39: Remove the language, “or other vessel”.
- 13-251-40: Add the language, “an authorized”.
- 13-251-45: Add the language, “in accordance with Chapter 91, Hawaii Revised Statutes.”
- 13-251-49: Adding language to allow a catamaran to be absent for longer than thirty days as long as they are making repairs required by the USCG and add the language “in accordance with Chapter 91, Hawaii Revised Statutes.”
- 13-251-51: Remove strike through regarding attrition clause for Waikiki and limits on the number of catamarans for Kaanapali. Keep subsections (a) and (b).
- 13-251-52: Change the Section from 13-251-38 to 13-251-51. Change language from “genuineness and regularity” to “accuracy, validity, and regularity”.
- 13-251-53: Adding language to allow permanent anchors to be installed on Waikiki beach. Adding that the Land Board must approve any installation of moorings on Waikiki beach and the fee for the use of the beach for mooring and embarking and disembarking passengers will be included as part of the commercial use fee paid by the catamaran operators (instead of them obtaining a Revocable Permit from the Board at fair market value for the use of Waikiki beach). Catamaran operators must indemnify and defend the State and carry insurance for mooring and embarking and disembarking passengers on the beach.
- 13-251-76: Add the language “or registration certificate” to clarify that commercial use permits and registration certificates are treated similarly.

RECOMMENDATION:

1. Approve amendments and compilation made to Chapter 13-253, HAR; and approve amendments to subsections 13-256-3 and 13-256-4, HAR, as shown in Exhibits 3 and 4; and

2. Authorize DOBOR to conduct a second round of public hearings regarding amendments and compilation made to Chapter 13-231 and Chapter 12-251 based on comments received during the administrative rulemaking process, as shown in Exhibits 1 and 2.

Respectfully submitted,



Edward R. Underwood
Administrator

APPROVED FOR SUBMITTAL



William J. Aila, Jr.
Chairperson and Member

Attachments

- Chapter 13-231 (Exhibit 1)
- Chapter 13-251 (Exhibit 2)
- Chapter 13-253 (Exhibit 3)
- Sections 13-256-3 and 13-256-4 (Exhibit 4)