



P. O. Box 1554  
Kailua-Kona, HI 96745

April 15, 2011

Sharon L. Pang, Chair  
Small Business Regulatory Review Board  
Department of Business, Economic Development and Tourism  
c/o [mkwock@dbedt.hawaii.gov](mailto:mkwock@dbedt.hawaii.gov)

Re: STRONG OPPOSITION to Proposed Amendment  
to HAR § 13-231.5 *as written*

Dear Chairperson Pang:

#### Position

This written testimony is submitted on behalf of the 1,325 members of the Hawaii Fishing and Boating Association. Our testimony is in opposition to adoption of the amendments to HAR § 13-231.5, Mooring Permit Renewal, in its current form. We applaud the concept of a grace period for lapsed permit renewals, but cannot support the phrasing of the proposed amendment.

Although alternative language has been previously offered to DLNR, the recommendations have been ignored. We ask that SBRRB continue to support the small business sector's reasonable request for well-written, unambiguous rules.

#### History

We have previously submitted written testimony in opposition to this and other proposed amendments that were on SBRRB's October 13, 2010 agenda. In our opposition, we expressed our concern that the rules were poorly written, were ambiguous, were susceptible to arbitrary enforcement, and would therefore have an adverse affect on small businesses and individuals at our small boat harbor and throughout the State.

We were gratified to read in the minutes of that meeting that:

“Mr. Schnitzler offered a motion to oppose sending the proposed amendments to public hearing because there were many elements within the amendments that had a negative small business impact and did not encourage small business growth. Mr. Bucky seconded the motion and the Board voted unanimously in favor of the motion. “

Your Board's support of our shared goal of clear, unambiguous rules with predictable enforcement outcomes is noted with appreciation.

Since your October 13th meeting, there has been an attempt by DOBOR to rewrite some of the proposed amendments. Unfortunately, notwithstanding the clear recommendations arising from both your October 13th and January 18th meetings, the amendments were simply "rubber stamped" and passed along to the Governor with little, if any, further scrutiny. We believe your minutes of January 18th noted the following weaknesses (still unaddressed) in the proposed amendments:

- Issues with words like "shall" and "may"
- Lacking in Clarity – gap in statutes to develop better rules - Mr. De Luz
- Small business impact statement lacked substance - Ms. Pang
- The department complied with the letter of the law by providing a marginal impact statement. The spirit of the law was not followed. - Mr. De Luz
- There seems to be a fundamental communication problem between the stakeholders and staff.

Further hearings were held on the amendments now before you. The public was offered the opportunity for further comment at Honokohau Harbor and in Hilo on February 24th and 25th, 2011. However, at the Honokohau hearing where the meeting was chaired by District Manager Nancy Murphy, the public was directed by Ms. Murphy to restrict its testimony to comments pertaining to Section 13-231-5, *only*. **That testimony was unanimously in support of a grace period provision and unanimously in opposition to the proposed amendment as written.**

#### Content Problems with Current Draft of Section 13-231-5

While we are pleased to see the inclusion of a 30-day grace period for permit holders who inadvertently miss their permit renewal date, and while we have no objection to a commercially reasonable reinstatement fee, we remain opposed to the language and construction of the proposed amendment. Like many of the HAR's affecting boating, it can be read as inconsistent, ambiguous, and incomplete leaving the door open for misinterpretation and arbitrary enforcement.

For example, the proposed amendment begins by referencing a "permittee," then switches to "person."

The language is written in the permissive "may," when it should be written in the mandatory "shall" if it is to give meaningful guidance to staff and to permit holders.

The language references a 30-day grace period, but does not explain how the 30-day period will be measured. What is the trigger? Notification of the permittee? Lapse of the permit? How will the permittee know that the permit has lapsed?

The language describes the penalty fee of \$250.00 as a "one-time" fee. Query: Does that mean one can only have one grace period throughout the history of permit-holding? Or, does it mean that staff can only impose the fee one time no matter how many times the grace period arises? Just what does it mean?

We contend that because of the uncorrected drafting problems cited above, adoption of this amendment will violate the Small Business Bill of Rights, II, IV, VIII, and that the SBRRB should, once again, decline approval of this amendment. Specifically:

- Provision II is violated because the language of the proposed rule is neither clear nor concise.
- Provision IV is violated because the unclear nature of the language will permit the Administrator to adjudicate different cases unequally.
- Provision VIII is violated because the rule is silent on how a supplicant may obtain a contested case hearing.

## Context Problems with Proposed Amendment

We continue to maintain that the Hawaii Administrative Rules pertaining to boating are hopelessly convoluted, impossible to interpret, suffer from illogical clustering of topics, and must be professionally rewritten in their entirety to overcome this longstanding defect.

The proposed amendment to section 13-231-5 providing for late permit renewal is a perfect example of why a comprehensive re-write of this title is required. Why? Because arguably late renewal is already provided for elsewhere in Title 13 at section 13-234-16 in a chapter whose title does not even mention the word permits. Chapter 231 is titled “Operations of Boats, Small Boat Harbors, and *Permits*.” Chapter 234 is titled “Fees and Charges.” Yet in Chapter 234 at 13-234-16, “*Permit processing fees*,” it states in pertinent part:

If a permittee utilizing any property or facility **fails to renew a use permit on or before the date on which it expires**, the applicable renewal fee plus a **penalty fee of \$1 per month** shall be collected from the permittee for each month or fraction of a month the permittee is late in applying for renewal of a permit or any other penalty fees provided by these rules. [Emphasis added.]

DOBOR has proposed amendment to 13-231-5, while existing section 13-234-16 is still in full force and effect (albeit this is a rule the Division has consistently refused to apply when requested by tardy permittees). An earlier proposed amendment to section 13-234-16 striking the entire paragraph cited above has apparently been withdrawn. While a case can be made to include the proposed rule change allowing for tardy permit renewal in either chapter, both provisions cannot exist at the same time. It must be one or the other. Therefore, if the Division wishes to increase fees, change the existing rules about reinstatement of expired permits, and include those changes in Chapter 231, it must first repeal the applicable portion of section 13-234-16 to avoid conflicting rules.

This is but one example of the defects raised by this Title. As business people, we should be able to look to the applicable administrative rules and with reasonable ease, determine what is applicable to any pending business activity decision. It is our belief that this is not the case with Title 13, and that until a comprehensive reconstruction is undertaken, amending individual sections is simply an exercise in “rearranging the deck chairs on the *Titanic*.”

## Suggested Changes to 13-231-5

As noted above, we believe a method to cure the default of an untimely permit renewal is important and commend the Department for offering its proposal. And, a provision for a thirty day grace period and payment of a penalty fee for reinstatement represent reasonable business practices – typical of many business contracts. However, *the current language is fatally flawed*.

Below is a suggested revision of the currently proposed amendment that we believe cures the defects found in the present proposed version. It is presented in “redline” format so you can see the specific changes recommended.

Section 13-231-5(b): If a permittee fails to renew a regular mooring permit on or before the date on which it expires, the Department shall send a notice by regular and certified mail to the permittee at the permittee’s current address of record, notifying the permittee that the permit has expired, and that person~~the permittee may shall~~ be granted a thirty (30) calendar day period measured from the date of delivery of the certified letter within which to apply for reinstatement of~~to reinstate~~ the regular mooring permit. Reinstatement shall be granted as long as all of the conditions or covenants of the original issuance, including the requirement of prompt monthly payment of charges in advance, have been met and the permittee has fully complied with the rules governing small boat harbors of the ~~department~~ Department of ~~land~~ Land and ~~natural~~ Natural resources~~Resources~~have been complied with. Reinstatement under this rule requires that the permittee shall pay a~~The person shall pay a one-time~~ penalty fee of \$250.00 as well

as all other applicable fees. Impoundment of the vessel shall be stayed ~~only~~ until the grace period has expired.

### Urgent Need for an Appropriate Rule

It is a mystery to us as to why our proposed changes to the amendment have not been embraced.

Perhaps the problem is that the same person(s) who has been charged with the responsibility for authoring the amendments is simply not up to the task. Or perhaps it is that there really is no genuine interest in developing rules that are clear, precise, and easy to understand and apply.

Whatever the root cause, it is urgent that an appropriate amendment be enacted. Our harbor community is feeling unreasonably at risk. Currently, too much is left to the discretion and interpretation of staff. The uncertainty has created unnecessary anxiety and business uncertainty within the harbor community. The lack of an appropriate reinstatement policy has had an adverse economic impact on the harbor community this past year as devastating financial burdens have fallen on too many permit holders who have had their permits abruptly terminated without recourse. When they have requested Contested Case Hearings, those hearings have been denied by Administrator Underwood on the theory that the applicants no longer have standing because they are no longer permit holders. This is a classic "Catch-22" – you can't complain about the manner in which your permit was denied renewal because you no longer hold a permit and without a permit you cannot request a hearing, but of course if you had your permit, you wouldn't need a hearing. Clearly, this is unjust. In practice, every contested case requested in 2010 and 2011 concerning terminated mooring permits (about which we are privileged to know) has been denied by DOBOR Administrator Underwood using just this rationale. In effect, he has acted as judge, jury and executioner. This kind of arbitrary denial of access to due process must be stopped.

This recent history of abuse makes the adoption of a meaningful, well-crafted grace period rule even more important. We respectfully ask your continued support for rules that are understandable, that can be predictable and fair in their application, and do not impose the burdens of uncertainty to the small business community.

Respectfully submitted,  
Hawaii Fishing & Boating Association

By

*Ray Kalman*

Myrick Gaffney, President  
Ray Kalman, Vice President  
Howard Conant, Secretary  
Victoria L. Kalman, Esq., Treasurer

cc: Hon. Neil Abercrombie  
Governor of the State of Hawaii

William Aila, Executive Director  
Department of Land & Natural Resources

William Tam, Deputy Director  
Department of Land & Natural Resources

Rob Pacheco, Member  
Board of Land & Natural Resources

Hon. Denny Coffman  
Hawaii State Legislature

Hon. Cindy Evans  
Hawaii State Legislature