

---

---

## A BILL FOR AN ACT

RELATING TO ADMINISTRATIVE PROCEDURE.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The policy making function of government is  
2 vested in the legislative branch. However, the legislature is  
3 permitted to, and routinely does, delegate authority to various  
4 government agencies to adopt rules as necessary to implement the  
5 laws enacted by the legislature.

6           An agency's rulemaking authority is governed by the  
7 administrative procedure law under chapter 91, Hawaii Revised  
8 Statutes. The administrative procedure law reflects the  
9 limitations that the legislature imposes on the agencies with  
10 regard to rulemaking. The relevant law can vary in specificity,  
11 but serves as a judicially enforceable restriction on an  
12 agency's discretion. When an agency exceeds its statutory  
13 rulemaking discretion, the legislature's policy making authority  
14 is usurped. This is counter to the concept of separation of  
15 power.

16           Questions have arisen regarding whether certain agencies  
17 have usurped the legislature's legislative power by adopting  
18 rules that exceed the scope of the agencies' statutory



1 authority. In addition, while agencies are required under  
2 chapter 91, Hawaii Revised Statutes, to afford interested  
3 persons an opportunity to submit data, views, or arguments when  
4 the agency proposes to adopt, amend, or repeal a rule, agency  
5 proposals are regularly adopted without any apparent  
6 consideration of submitted information. Clear administrative  
7 procedure limits agency discretion and helps ensure that agency  
8 rules more closely reflect legislative intent.

9       The federal Administrative Procedure Act of 1946 served as  
10 the model for Hawaii's administrative procedure law. While  
11 Hawaii's administrative procedure law conforms in large measure  
12 with the federal Administrative Procedure Act, state agencies  
13 have greater discretionary authority under Hawaii law than  
14 federal agencies do under federal law. Federal law also places  
15 additional requirements on federal agencies to ensure careful  
16 deliberation of public input. For instance, federal regulations  
17 promulgated pursuant to the National Environmental Policy Act of  
18 1969, require federal agencies to request comments from  
19 appropriate state and federal agencies, affirmatively solicit  
20 comments from persons or organizations that may be interested or  
21 affected, and respond to the comments prior to preparing an  
22 environmental impact statement. Under these regulations,



1 federal agencies must study, develop, and describe appropriate  
2 alternatives to recommended courses of action in any proposal  
3 that involves unresolved conflicts regarding alternative uses of  
4 available resources.

5 The purpose of this Act is to clarify existing  
6 administrative procedure law to ensure that agency rulemaking in  
7 the State does not exceed statutory authority by conforming  
8 Hawaii administrative procedure law to federal law regarding  
9 rulemaking and public participation in government.

10 SECTION 2. Section 91-3, Hawaii Revised Statutes, is  
11 amended by amending subsection (a) to read as follows:

12 "(a) Except as provided in subsection (f), prior to the  
13 adoption of any rule authorized by law, or the amendment or  
14 repeal thereof, the adopting agency shall:

15 (1) Give at least thirty days' notice for a public  
16 hearing. The notice shall include:

- 17 (A) A statement of the topic of the proposed rule  
18 adoption, amendment, or repeal or a general  
19 description of the subjects involved; and
- 20 (B) A statement that a copy of the proposed rule to  
21 be adopted, the proposed rule amendment, or the  
22 rule proposed to be repealed will be mailed to



1 any interested person who requests a copy, pays  
2 the required fees for the copy and the postage,  
3 if any, [~~together with~~] and a description of  
4 where and how [~~the requests~~] a request may be  
5 made;

6 (C) A statement of when, where, and during what times  
7 the proposed rule to be adopted, the proposed  
8 rule amendment, or the rule proposed to be  
9 repealed may be reviewed in person; and

10 (D) The date, time, and place where the public  
11 hearing will be held and where interested persons  
12 may be heard on the proposed rule adoption,  
13 amendment, or repeal[~~—~~

14 ~~The notice shall be mailed];~~

15 (2) Mail the notice to [all persons] each person who [~~have~~  
16 ~~made~~] makes a timely written request of the agency for  
17 advance notice of [~~its~~] the agency's rulemaking  
18 proceedings, given at least once statewide for state  
19 agencies and in the county for county agencies[~~—~~  
20 ~~Proposed state agency rules shall also be posted];~~

21 (3) Post proposed state agency rules on the Internet as  
22 provided in section 91-2.6; [~~and~~



1       ~~(2)~~ Afford] (4) Request comments from the public,  
2           affirmatively soliciting comments from any person or  
3           organization that may be interested or affected by the  
4           adoption, amendment, or repeal of a rule, and afford  
5           all interested persons opportunity to submit data,  
6           views, or arguments, orally or in writing. The agency  
7           shall fully consider all written and oral submissions  
8           respecting the proposed adoption, amendment, or repeal  
9           of a rule. The agency [~~may make its decision at the~~  
10          ~~public hearing or~~] shall announce [~~then~~] the date when  
11          it intends to make its decision[~~. Upon adoption,~~  
12          ~~amendment, or repeal of a rule, the agency, if~~  
13          ~~requested to do so by an interested person, shall~~  
14          ~~issue a concise statement of the principal reasons for~~  
15          ~~and against its determination.];~~

16       (5) Obtain the comments of any agency that has  
17           jurisdiction by law or special expertise with respect  
18           to the area to be affected by the adoption, amendment,  
19           or repeal of a rule;

20       (6) Request the comments of:

21           (A) Agencies that are authorized to develop and  
22           enforce standards applicable to the area to be



1 affected by the adoption, amendment, or repeal of  
2 a rule; and

3 (B) Any agency that requests to receive a copy of the  
4 proposed adoption, amendment, or repeal of a rule  
5 pursuant to paragraph (1)(B);

6 (7) Assess and consider comments, individually and  
7 collectively, and respond by one or more of the  
8 following methods prior to the adoption, amendment, or  
9 repeal of the rule:

10 (A) Modifying the proposal to adopt, amend, or repeal  
11 the rule;

12 (B) Developing and evaluating alternatives that were  
13 not given serious consideration;

14 (C) Supplementing, improving, or modifying the  
15 agency's analysis;

16 (D) Making factual corrections; or

17 (E) Explaining why the comments do not warrant  
18 further agency response; provided that the agency  
19 shall cite the source, authority, or reason that  
20 supports the agency's position and, if  
21 appropriate, indicate the circumstances that  
22 would trigger a reappraisal or further response;



1       (8) Issue a determination on the proposal to adopt, amend,  
2       or repeal a rule at a public hearing convened in  
3       accordance with this subsection; provided that:

4       (A) The proponent of a proposal to adopt, amend, or  
5       repeal a rule shall have the burden of proof; and

6       (B) The proposal shall not be adopted except after  
7       consideration of the whole record or those parts  
8       of the record cited by a party and supported by,  
9       and in accordance with, reliable, probative, and  
10       substantial evidence; and

11       (9) Upon request by an interested person, issue a concise  
12       statement of the principal reasons for and against the  
13       determination to adopt, amend, or repeal a rule."

14       SECTION 3. This Act does not affect rights and duties that  
15       matured, penalties that were incurred, and proceedings that were  
16       begun, before its effective date.

17       SECTION 4. Statutory material to be repealed is bracketed  
18       and stricken. New statutory material is underscored.

19       SECTION 5. This Act shall take effect upon its approval.

20

INTRODUCED BY: 

JAN 18 2008



**Report Title:**

Administrative Procedure; Rulemaking

**Description:**

Amends the procedure for the adoption, amendment, or repeal of rules to conform to federal law.

