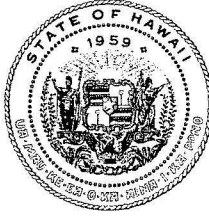
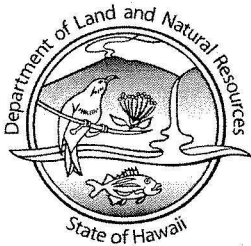


LINDA LINGLE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

**TESTIMONY OF THE CHAIRPERSON
OF THE BOARD OF LAND AND NATURAL RESOURCES**

**on HOUSE BILL 2686 HOUSE DRAFT 1 -RELATING TO ADMINISTRATIVE
PROCEDURE**

**BEFORE THE HOUSE COMMITTEE ON
FINANCE**

February 21, 2008

House Bill 2868 House Draft 1 would amend the procedure for the adoption, amendment, or repeal of administrative rules. The Department of Land and Natural Resources (Department) opposes this bill for the following reasons:

- (1) As proposed, the changes to Chapter 91, Section 3, Hawaii Revised Statutes (HRS), would require any State or County agency in its rule making, to announce the date when it intends to make its decision (proposed change to 91-3 (a)(4). As a practice, the Department allows for up to 15 days following a public hearing for the public to submit written testimony, to afford those who could not attend an opportunity to provide input. This practice, in addition to the magnitude and complexity of the proposed changes, and analyses that it involves, makes it unlikely that the Department will be able to announce a certain date for a decision. Rather, the Department attempts to conclude the process in as timely a manner as is possible and equitable;
- (2) The Department would not be able to comply with the terms as proposed in subsection (a)8 because determinations are not rendered at a public hearing. Testimony received before, during, and after (as explained above) are taken, given full consideration, and recommendations based on all input are provided the Board of Land and Natural Resources for its consideration and subject to their approval;
- (3) The proposed provision in subsection (a)8(B), requiring proof and substantial evidence in support of a proposed rule (in order for its adoption) is unnecessarily burdensome to the agency because the effects of rule changes are not always assured. The Department relies on the best available information, and its authority to create the best management scenario given its mission;

- (4) Many of the proposed provisions in subsection (a)7 are already implemented through the Governor's executive directive for rule-making, and has been done for decades;
- (5) The Department points out that new proposed subsections (a)7 and (a)8 are not underlined and inconsistent with Ramseyer formatting requirements. Further, subsection (a)(7)(E) is duplicative of the existing provision in the last sentence of subsection (a)(2). In addition, many of the proposed provisions in subsection (a)7 are already implemented through the Governor's executive directive for rule-making, as has been done for decades; and
- (6) Section 93-1, HRS, currently requires the adopting agency to provide at least thirty days advance notice for a public hearing, as well as providing all interested parties with the opportunity to submit data, views, or arguments, orally or in writing. Requiring the adopting agency to solicit comments from any person or organization that may be interested in or affected by the adoption, amendment, or repeal of a rule and to obtain comments from any agency that has jurisdiction by law or special expertise with respect to the area to be affected is excessively burdensome to the adopting agency, and would result in substantial delays in regard to implementing, amending, and repealing administrative rules. In particular, it is not clear how an adopting agency would determine the full range of parties who would be interested in or affected by actions involving administrative rules, and the Department notes that as written, this section could technically require consultation with parties outside the State of Hawaii who might also claim to be interested or affected. As such, this clause is so broad as to be unworkable.

In summary, the Department feels that the current statute in regard to administrative rules is fair and equitable, and that the proposed amendments will be more detrimental than helpful in regard to the rule making process overall.

Thank you for the opportunity to testify.



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:

H.B. NO. 2686, H.D. 1, RELATING TO ADMINISTRATIVE PROCEDURE.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Thursday, February 21, 2008 **TIME:** 4:00 PM

LOCATION: State Capitol, Room 308
Deliver to: Committee Clerk, Room 306, 2 copies

TESTIFIER(S): Written testimony only
(For further information, please contact Diane Erickson,
Deputy Attorney General, at 586-1262)

Chair Oshiro and Members of the Committee:

The Attorney General has concerns about this bill.

House Bill No. 2686, H.D. 1, amends section 91-3, Hawaii Revised Statutes, to impose additional requirements on agencies that engage in rulemaking.

Section 1 of the bill states: "Questions have arisen regarding whether certain agencies have usurped the legislature's legislative power by adopting rules that exceed the scope of the agencies' statutory authority. In addition, while agencies are required under chapter 91, Hawaii Revised Statutes, to afford interested persons an opportunity to submit data, views, or arguments when the agency proposes to adopt, amend, or repeal a rule, agency proposals are regularly adopted without any apparent consideration of submitted information." These broad statements of a problem are not accompanied by any specific examples. The bill indicates a problem with some, not all, agencies, but solves the problem by burdening all agencies that have rulemaking authority, rather than addressing the particular agencies. Moreover, there have been very few reported cases decided by the Hawaii Supreme Court in the last several years where an agency has been found to have exceeded its statutory authority in adopting rules.

Furthermore, the bill states that it intends to conform Hawaii's administrative procedure law to federal law. The section regarding rulemaking in the federal administrative procedure act, 5 U.S.C. § 553, is very simple. Indeed, Hawaii's existing rulemaking statute has more requirements. What this bill does is attempt to impose federal administrative rules relating to the preparation of an environmental impact statement on rulemaking generally. The wording of 40 CFR §§ 1503.1 and 1503.4 of the federal administrative rules that implement the National Environmental Policy Act is quite close to the language proposed in this bill, which is supposed to apply to all agencies, not just to agencies that deal with environmental issues.

The first substantial amendment to section 91-3 is the addition to subsection (a) (2), redesignated as paragraph (4), on page 5, lines 1-4 of the bill. This amended paragraph requires the agency to affirmatively solicit comments from any person or organization that "may" be "interested" in or "affected by" the adoption, amendment, or repeal of a rule. This paragraph imposes an impossible burden on any agency to determine what person or organization "may" be interested in or affected by proposed rulemaking. As a general proposition, individuals or organizations that are interested in or affected by proposed rulemaking have made or will make written request for advance notice of rulemaking, as already provided by section 91-3.

In addition, House Bill No. 2686, H.D. 1, requires the agency proposing rulemaking to obtain the comments of any agency "that has jurisdiction by law or special expertise with respect to the areas to be affected" and to request comments of agencies "that are authorized to develop and enforce standards applicable to the area to be affected" by the rulemaking. Generally, it is the agency engaging in the rulemaking that has legal jurisdiction and the expertise in the area affected. If the agency did not have legal jurisdiction in the area affected, it may not be able to adopt valid rules.

Agencies that engage in rulemaking do the things described in proposed paragraph (7) (A)-(D), on page 6, lines 6-16, so this amendment

is not necessary. Paragraph (7)(E), on page 6, lines 17-22, is not necessary because the agency already is required, upon request, to provide a concise statement of the principal reasons for adopting, amending, or repealing a rule. Finally, the bill requires that the agency must adopt the proposed rule at a public hearing at which the "proponent" of the adoption, amendment, or repeal has the burden of proof; and a rule may not be adopted unless it is supported by "reliable, probative, and substantial evidence." Rulemaking is a quasi-legislative function (*Shoreline Transp. Inc. v. Robert's Tours and Transp., Inc.*, 70 Haw. 585, 779 P.2d 868 (19989); *Application of Hawaiian Elec. Co., Inc.*, 81 Haw. 459, 918 P.2d 561 (1996)). We believe that this quasi-legislative function should be based on policy considerations, not on standards appropriately applicable to judicial and quasi-judicial functions.

If agencies have improperly adopted rules, they can be, and have been, challenged.

Section 91-3 as presently written already provides individuals and organizations the opportunity to know what agencies are proposing in terms of rulemaking, the opportunity to participate at public hearings and give input, and the opportunity to receive information on why rules were or were not adopted, repealed, or amended.

This bill adds a tremendous burden to an agency for its rule-making. The Attorney General respectfully urges you to hold this bill because it is unnecessary and, as drafted, imposes unjustified and unduly heavy burdens on agencies engaged in rulemaking.

Thank you for the opportunity to testify on this bill.

DEPARTMENT OF HUMAN RESOURCES
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET 10TH FLOOR • HONOLULU, HAWAII 96813
TELEPHONE: (808) 768-8500 • FAX: (808) 527-5563 • INTERNET: www.honolulu.gov/hr

MUFI HANNEMANN
MAYOR



KENNETH Y. NAKAMATSU
DIRECTOR

February 21, 2008

The Honorable Marcus R. Oshiro, Chair
and Members
Committee on Finance
House of Representatives
State Capitol
Honolulu, Hawaii

Dear Chair Oshiro and Members of the Committee:

I am Ken Y. Nakamatsu, Director of Human Resources, City and County of Honolulu. House Bill 2686, House Draft 1 proposes amendments to the rulemaking procedures. We are opposed to this measure.

We are concerned that the bill would add several new requirements to the rulemaking process that may hamper our ability to respond quickly when rule changes are needed. In particular, we are concerned about the requirements surrounding the response to comments. It appears that if a modification is not made in response to a comment, a considerable amount of analysis will be required. While we understand the value of giving due consideration to comments (as is already required under current law), we are unsure of the need for the level of detail that seems to be required under the proposed bill. The time needed to perform the analysis may lead to a delay in effectuating desirable and necessary rule changes. We also note that the burden of evaluating, assessing and responding appropriately to the comments will sometimes be borne by volunteer commissions, such as our Civil Service Commission—an already rigorous appointment.

Our experience has been that the current law already provides sufficient opportunities for input from interested parties. For our civil service rules, we not only send out copies of proposed rule changes to the Unions, but offer to meet with them on the changes before a public hearing is held.

Based on the foregoing, we respectfully request that this bill be held.

Thank you for the opportunity to testify on H.B. 2686.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ken Nakamatsu".

KEN Y. NAKAMATSU
Director of Human Resources

HAWAII BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO
Gentry Pacific Design Center, Suite 215A
560 N. Nimitz Highway, #50
Honolulu, Hawaii 96817
(808) 524-2249 - FAX (808) 524-6893

February 21, 2008

Honorable Representative Marcus R. Oshiro, Chair
Honorable Representative Marilyn B. Lee, Vice Chair
Members of the House Committee on Finance
Hawaii State Capital
415 South Beretania Street
Honolulu, HI 96813

RE: IN SUPPORT OF HB 2758
RELATING TO HEALTH
Hearing: Friday, February 22, 2008, 3:30 p.m.

Dear Chair Oshiro, Vice Chair Lee and the House Committee on Finance:

For the Record my name is Buzz Hong the Executive Director for the Hawaii Building & Construction Trades Council, AFL-CIO. Our Council is comprised of 16-construction unions and a membership of 26,000 statewide.

The Council SUPPORTS the passage of HB 2758, which requires the Department of Taxation (DOTAX) to defer general excise tax collection for a for-profit hospital group that provides services to an annual patient population consisting of sixty percent or more uninsured, Medicaid and Medicare patients for hospital operations between July 1, 2008, and an unspecified date. HB 2758 also requires DOTAX to collect the deferred taxes plus interest after the unspecified date and provides for immediate payment of deferred taxes, interest, and penalty upon occurrence of certain events.

Thank you for the opportunity to submit this testimony in support of HB2758.

Sincerely,

William "Buzz" Hong

WBH/dg

To: **Representative Marcus Oshiro, Chair**
Representative Marilyn Lee, Vice-Chair & Members of the
Committee on Finance

From: **Darrell Tanaka,**
Haiku, Maui, Hi, 96708

Re. **Hearing on HB 2686 Relating to Administrative Procedure**

Bill scheduled to be heard by FIN on Thursday, 02-21-08 at 4:00 pm in House conference room 308.

Testimony in Support, with recommendation for amendment.

Dear Chair Oshiro, Vice-Chair Lee and members:

Thank you for hearing my testimony in support of HB 2686 relating to administrative procedure. This testimony actually was meant for HB 2687, but applies here as well.

It is my hopes you will consider a suggestion for **amendment to HRS section 91-3 in regards to public meetings. To require the Dept. of Land and Natural Resources to hold public informational meetings atleast 30 days prior to Land Board approval for a public hearing, to require legal notification in local newspapers as well as posting said notice on the DLNR website home page under "News Releases"**.

Natural resource rule changes are known to be emotionally hot topics, therefore, proper engagement of the public is crucial, and if not done, can lead to additional, unnecessary animosity, I offer the following as an example.

Recently the Div. of Boating and Ocean Recreation of the Dept. of Land and Natural Resources pretty much crapped on harbor users with their new rule regarding parking in harbors...in particular Ala Wai and Lahaina Harbors. They are proposing to hike slip fees and decrease the time harbors users can park at harbors statewide. But that's not the real problem.

The real problem was the lack of **informational meetings** on neighbor islands, there were none, thus, when the public hearing came about for this administrative rule change, boaters and fishers on Maui did not know what to say as evidenced by a Maui News Article at the end of this letter. Public Hearings are required by Law, however, informational meetings, where the public gets to ask questions and get answers is not required by law. I am proposing we change this.

The following is the Maui News Article aforementioned.

Proposed parking fee rules change flounder at hearing
By CLAUDINE SAN NICOLAS, Staff Writer

LAHAINA – Local fishermen and small-boat harbor users expressed anger and frustration Friday night during a hearing on proposed harbor parking fee increases and rule changes.

A group of about 30 people criticized the proposed changes and testified against them during a hearing held in Lahaina by the Department of Land and Natural Resources' Division of Boating and Ocean Recreation. Many of the people testifying also complained about the timing of the hearing held from 5 to 7 p.m. three days after Christmas. They said many boaters were still out working on the ocean and/or spending time with family during the holidays.

"They're going to try to say there was limited opposition," said Greg Howeth, president of Lahaina Divers. Howeth said people might not be so opposed to the rule changes and fee increases if they knew the reason behind the changes and what the money was going to be used for. "All we see is fees being raised and no explanation why," said Brendan Au, a nine-year boat operator whose testimony mirrored Howeth's.

The hearing looked as if it might shut down after the first 20 minutes when fishermen and small-boat operators hesitated to testify because they were unsure about the proposed rule and fee changes.

Acting Small-Boat Harbors Maui District Manager Nicholas Giaconi said there was no specific boating program activity targeted for money generated by the fee increases, but all boating fees went into a special fund to cover costs at small-boat harbors throughout the state. As an example, Giaconi pointed out that a new bathroom installed at Lahaina Harbor cost at least \$500,000. He later told The Maui News that small-boat harbor projects often need to be subsidized by the state because the boating fund doesn't receive enough funding for all needed improvements.

State law also requires that boating fees and parking regulations be changed every 10 years to comply with new statutes.

Division of Boating and Ocean Recreation officials also expressed hope that rule amendments would help them more effectively manage parking within the small-boat harbors and facilities, plus provide additional security required from a new parking management permit. Fishermen were frustrated by Giaconi's inability to say specifically what the increase in fees would pay for or when the proposal would be presented to the Board of Natural Land and Resources for final approval.

"Nobody knows. Nobody can answer," said 62-year-old boat operator Matt Kahapea of Honolulu. Kahapea was visiting Maui for the holidays and pointed out that many boaters would have attended Friday's hearing if it had not been scheduled at an inconvenient time. Audience members also pointed out they would have preferred that state officials first hold an informational meeting to explain all the proposed parking rule changes and fee increases. Atlantis Submarines General Manager Jim Walsh, who also is a recreational boat owner, said he believes each harbor should have its own set of rules. He argued that

Lahaina Harbor has a different set of issues than those at Ala Wai Harbor on Oahu. "The one-size-fits-all theory really doesn't work in reality," Walsh said. Both Howeth and Jim Coon, president of the Ocean Tourism Coalition, were actively involved in meetings in 1999 and 2000 with state officials to hash out small-boat harbor rule changes and permit fees. Both men objected to the proposed rule changes and recommended that state officials search their records for a comprehensive rule-and-fee package discussed nearly 10 years ago.

Highlights of the current proposed fee and rule changes are:

Repealing the parking permit rules specific to Lahaina Harbor. Officers there currently set priorities and issue the permits.

Increasing parking permit fees at small-boat harbors. Those who own or co-own a vessel moored at the small-boat harbor will see an increase from the current \$5 a quarter to \$25 a month. Others working on a permitted boat will see their permit fees rise from \$15 per quarter to as much as \$25 a month. Workers with businesses operating at a small-boat harbor will have fees increase from \$10 a month to \$90 a month. Cutting the time a vehicle without a permit can be parked at a small-boat harbor or ramp from 72 hours to 24 hours. "Why are they coming after the lowest people on the totem pole?" asked Kim Miyaki, the owner of a charter sport fishing boat. "The people who could least afford it are being targeted for increase in fees." Deytyn Asami, an owner of a commercial fishing operation, said small businessmen and fishermen cannot afford to pay such high increases in fees. "That's definitely unreasonable," Asami said. "We're fishermen. We're not millionaires."

Asami also took issue with permit parking times, saying it's difficult for boat operators to estimate the time they need in the ocean to fish and conduct business. Sometimes it might take 24 hours, but other times it might take longer and they should not have to worry about parking tickets on shore. "The problem comes in we don't know how long we're going to be out there in the ocean," Asami said. Friday's hearing in Lahaina was the last scheduled in a series of meetings held statewide earlier this month. Written testimony will be accepted through Friday by the Division of Boating and Ocean Recreation; or call the division's Maui office at 243-5824. Written testimony can be sent to: Department of Land and Natural Resources Chairwoman Laura Thielen, Kalanimoku Building, 1151 Punchbowl St., Honolulu 96813; send it via fax to (808) 587-0390; or by e-mail to dlnr@hawaii.gov.

Claudine San Nicolas can be reached at claudine@mauinews.com.

Sincerely, Darrell Tanaka

FINtestimony

From: Noa Napoleon [freeoceanaxs@yahoo.com]
Sent: Thursday, February 21, 2008 9:23 AM
To: FINtestimony
Cc: Rep. Marilyn Lee
Subject: HB 2686 / Relating to Administrative procedure

Noa Napoleon
1750 Kalakaua Ave #103
Hon, Hi 96826

Date: 2/ 21/ 08

House Committee on Finance
Chair Marcus Oshiro

Subject: HB 2686 Relating to Administrative Procedure

Aloha and thank you the opportunity to testify on this bill. The problem of administrative abuse is responsible for much of the outcry over unregulated commercialism across the state. Waikiki is the best example I could give to show state lawmakers how an Admin. opinion can circumvent the law and cause massive confusion in the community. The Supper Ferry exemption situation is being repeated on many fronts but most of the problems associated with Administrative over reach or abuse has roots in the Waikiki grand father clause (See Peter Young's letter). Also please take a look at the Hilton story (third paragraph) for some history on what I call a government "conspiracy to subvert the public interest." Mahalo.

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TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:

H.B. NO. 2686, H.D. 1, RELATING TO ADMINISTRATIVE PROCEDURE.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Thursday, February 21, 2008 **TIME:** 4:00 PM

LOCATION: State Capitol, Room 308

Deliver to: Committee Clerk, Room 306, 2 copies

LATE

TESTIFIER(S): Written testimony only

(For further information, please contact Diane Erickson,
Deputy Attorney General, at 586-1271)

Chair Oshiro and Members of the Committee:

The Attorney General has concerns about this bill.

House Bill No. 2686, H.D. 1, amends section 91-3, Hawaii Revised Statutes, to impose additional requirements on agencies that engage in rulemaking.

Section 1 of the bill states: "Questions have arisen regarding whether certain agencies have usurped the legislature's legislative power by adopting rules that exceed the scope of the agencies' statutory authority. In addition, while agencies are required under chapter 91, Hawaii Revised Statutes, to afford interested persons an opportunity to submit data, views, or arguments when the agency proposes to adopt, amend, or repeal a rule, agency proposals are regularly adopted without any apparent consideration of submitted information." These broad statements of a problem are not accompanied by any specific examples. The bill indicates a problem with some, not all, agencies, but solves the problem by burdening all agencies that have rulemaking authority, rather than addressing the particular agencies. Moreover, there have been very few reported cases decided by the Hawaii Supreme Court in the last several years where an agency has been found to have exceeded its statutory authority in adopting rules.

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Agencies that engage in rulemaking do the things described in proposed paragraph (7)(A)-(D), on page 6, lines 6-16, so this amendment

is not necessary. Paragraph (7)(E), on page 6, lines 17-22, is not necessary because the agency already is required, upon request, to provide a concise statement of the principal reasons for adopting, amending, or repealing a rule. Finally, the bill requires that the agency must adopt the proposed rule at a public hearing at which the "proponent" of the adoption, amendment, or repeal has the burden of proof; and a rule may not be adopted unless it is supported by "reliable, probative, and substantial evidence." Rulemaking is a quasi-legislative function (*Shoreline Transp. Inc. v. Robert's Tours and Transp., Inc.*, 70 Haw. 585, 779 P.2d 868 (1989); *Application of Hawaiian Elec. Co., Inc.*, 81 Haw. 459, 918 P.2d 561 (1996)). We believe that this quasi-legislative function should be based on policy considerations, not on standards appropriately applicable to judicial and quasi-judicial functions.

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This bill adds a tremendous burden to an agency for its rule-making. The Attorney General respectfully urges you to hold this bill because it is unnecessary and, as drafted, imposes unjustified and unduly heavy burdens on agencies engaged in rulemaking.

Thank you for the opportunity to testify on this bill.