



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015**

ON THE FOLLOWING MEASURE:
S.B. NO. 379, S.D. 1, RELATING TO FOOD.

BEFORE THE:
SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

DATE: Tuesday, February 24, 2015 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): WRITTEN TESTIMONY ONLY.
(For more information, contact Wade Hargrove,
Deputy Attorney General, at 587-3050)

Chair Baker and Member of the Committee:

The Department of the Attorney General has the following concerns.

This bill would create new Class A and Class B permits under chapter 328, Hawaii Revised Statutes (HRS), for “cottage food operations,” legislatively creating an exemption to the Department of Health’s (DOH) current permitting structure for food establishments under existing chapter 11-50, Hawaii Administrative Rules (HAR); create a list of special operating requirements for each permit class; and establish a system of “self-certification” for both classes to be used by the DOH to verify the operations' compliance with the special operating requirements. This measure also creates a list of “non-potentially hazardous foods” that is to be modified as necessary by the DOH and imposes special restrictions on the DOH's ability to access, via inspection, cottage food “home” and “farm” kitchens to confirm compliance with the law.

This measure raises several questions about how the new permitting of cottage food operations can be effectively reconciled with the DOH's existing rules regulating food establishments more broadly, and how the DOH will be able to implement these statutory changes in a way that is both consistent with, and equally protective of, public health. Generally speaking, a “cottage food operation” is by definition a “food establishment” for purposes of chapter 11-50, HAR (promulgated pursuant to the authority of chapter 321, HRS), and a “cottage food operator” is a person responsible as a seller of food as envisioned by chapter 328, HRS, which, in part, codifies the DOH's responsibility to address food adulteration. In either case,

whether in view of the existing rules, or the DOH's existing approach to cases of food adulteration, it is uncertain what impact the exceptions created by this measure will have.

A summary of particular areas of concern follows.

1. Terminology. This measure makes several references to “registered” [page 3, line 20; page 6, line 19; page 7, line 11] and requires a cottage food operation to be “registered” with the DOH, because such operations need to be permitted it is unclear what registered means or what it would entail apart from the permit requirements. Similarly confusing is this measure’s use of the term “open for business” in the description of the requirements for the two permit classes [page 7, lines 9-10; page 8, lines 12-13]. This term makes no sense in view of the type of home or farm kitchen at issue in this measure. It may be better to instead focus on the activity, or the “sale of food,” because any particular home or farm may never be “open for business” in the traditional sense.

2. Permits. The operational distinction between Class A and Class B permits, in particular, is unclear, but so too is the permitting process as a whole. The distinction this measure makes between the Class A and B operations appears to be based solely upon the nature of the relationship between the operator and the consumer (direct vs. indirect sale), but there is no corresponding difference in the actual operational requirements themselves, aside from what the DOH develops as part of the required “self-certification checklists” [see page 6, lines 10-14, for example]. No criteria are provided, however, for the “self-certification checklist” and there is no clear basis for any operational distinctions between the classes. After a checklist is approved and a permit issues, it is unclear when and upon what general conditions this permit expires or may be revoked, and what process of review any revocation would trigger. New section 328-H, HRS, created by this measure [beginning at page 14, line 11] provides that if an inspection by the DOH is denied, the cottage food operator’s permit “may be automatically revoked” and provides that the DOH may make rules to allow re-application. Automatic revocation is usually, just that, automatic, so it is unclear what discretion this bill imagines the DOH applying under these circumstances. It is also unclear when it would ever be appropriate for the DOH to re-issue a permit to an operator who refused entry for inspection, particularly where these inspection rights are already so heavily restricted.

3. Self-certification. This measure's reliance upon "self-certification" as a means of compliance verification [see page 7, lines 9-16 and page 8, lines 12-20], is questionable in light of the home-based operations this measure seeks to promote. It is unclear how the DOH will validate the self-reporting, particularly in light of the limitations on its inspection authority. Given this, the DOH's ability to evaluate the operation's suitability for a permit, and thus the basis for denying one, is questionable. If the cottage food operation is essentially self-certified, then it is unclear what purpose the DOH's issuance of a permit serves. Specifically, the measure calls for the DOH to "determine" if a "cottage food operation and its method of operation conform to this part" [page 8, lines 1-3; page 9, lines 1-4], but this is a task not normally accomplished without an application review, consultation with the permit applicant, and initial and follow-up inspections. Thus, it is not clear how the DOH will make this determination.

4. Inspection. This measure significantly limits the DOH's ability to inspect cottage food operations, and different inspection rights are created for each class of cottage food operation. Specifically, Class A operations are not subject to initial or routine inspections [page 7, lines 17-19], Class B operations can be subjected to only one inspection per year [page 9, lines 5-7], and new section 328-H of this measure limits inspections to all cottage food operations to only those initiated by "consumer complaint" [page 14, lines 11-13]. The limitation on the DOH's right to inspect is particularly inconsistent with the DOH's responsibility in new section 328-I to review foods not already on the non-potentially hazardous food list, a process that might otherwise call for an on-site, site-specific inspection of manufacturing process and procedure [page 12, lines 13 to 17]. In the event of an outbreak of foodborne illness or a case of food adulteration, these limitations on inspection are inconsistent with the DOH's existing responsibility to investigate these real threats to public health. As a final consideration regarding the DOH access, it is particularly difficult to understand how the DOH's inspectors, in practice, can accommodate the mandate that inspections be limited to only the "registered or permitted area" of a home or farm kitchen [see page 15, lines 11-13].

5. Descriptions of types of food. This measure's concept and use of the terms "potentially hazardous foods," "acidified," "low-acid," and "fermented" foods are difficult to reconcile with the way those terms are used in chapter 11-50, HAR, and these conflicts may present difficulties for the DOH in applying those terms to individual food operations. For

example, new section 328-E requires the DOH to create a list of non-potentially hazardous foods [page 9, lines 8-11] and prescribes a specific notice and comment period as a means to amend that list, but no such list currently exists for food establishments under chapter 11-50, HAR. Currently the DOH evaluates specific operations on a case-by-case basis and the creation of a list for cottage foods alone will effectively create two classes of “potentially hazardous foods.”

We respectfully ask that the Committee consider our concerns.

From: mailinglist@capitol.hawaii.gov
To: [CPN Testimony](#)
Cc: snfire2001@hotmail.com
Subject: *Submitted testimony for SB379 on Feb 24, 2015 09:30AM*
Date: Monday, February 23, 2015 5:07:33 PM

SB379

Submitted on: 2/23/2015

Testimony for CPN on Feb 24, 2015 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Autumn Miller	Individual	Support	No

Comments:

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From: mailinglist@capitol.hawaii.gov
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Subject: Submitted testimony for SB379 on Feb 24, 2015 09:30AM
Date: Tuesday, February 24, 2015 12:22:57 AM

SB379

Submitted on: 2/24/2015

Testimony for CPN on Feb 24, 2015 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Don Heacock	Individual	Comments Only	No

Comments: Dear Senators, As a commerical taro farmer on Kauai I strongly support SB 379, Cottage Food Bill, that will allow farmers to make poi from their farm's home (farm dwelling) to either give to or sell to the community I support. This will help keep food (poi) prices lower for the consumers, it will help the net economic return of farmers, and it will help our communities be more food secure... a win-win for everyone. Please support and pass SB 379. Sincerely, Donald E. Heacock Kauai Sustainable Agroecological Systems Box 1323 Lihue, Kauai, Hawaii 96766

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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