

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Aquatic Resources
Honolulu, Hawaii 96813

October 14, 2016

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

RECOMMENDATION TO DENY THE PETITION FOR AMENDMENT OF A RULE FROM
KATHRYN XIAN, KAREN CHUN, CORY (MARTHA) HARDEN, LARRY GELLER, AND
MICHAEL GAGNE, FILED ON SEPTEMBER 21, 2016, REQUESTING THAT
HAWAII ADMINISTRATIVE RULE (HAR) SECTION 13-74-20 BE AMENDED
(SEE ATTACHED PETITION)

Background

On September 21, 2016 the Division of Aquatic Resources received a petition from Kathryn Xian, Karen Chun, Cory (Martha) Harden, Larry Geller, and Michael Gagne requesting the amendment of Hawaii Administrative Rules (HAR) Chapter 13-74. The requested rule amendment relates to the issuance of the commercial marine license (Section 13-74-20, HAR).

Specifically, the petition included proposed amendments to Section 13-74-20, HAR, to: 1) require that commercial marine licenses require “whether the applicant is eligible for landing privileges in Hawai’i”, 2) require that the applicant provide certain information and certify that he or she has read and understood all terms provided on the application form and further provides that if the applicant cannot read the terms unassisted that the person who assists the applicant shall certify that he or she has read the application and translated the terms to the applicant, 3) require the applicant (if he or she is ineligible to land in Hawaii and/or is declared “detained on board by the United States government) to furnish the department with copies of documents issued by the United States Government relating to the applicant’s eligibility for landing privileges in Hawaii, and 4) to provide the department a list of all licensees in their hire or command who are ineligible for landing privileges in Hawaii (if the licensee is a vessel owner who hires other licensees or is an officer of a vessel who commands other licensees) .

Hawaii Revised Statutes (HRS), Section 91-6, provides that any interested person may petition an agency to adopt, amend, or repeal any rule and state the reasons for their request. HRS Section 91-6 further provides that upon submission of the petition, the agency shall within thirty days either deny the petition in writing, stating its reasons for denial or initiate proceedings in accordance with section 91-3, HRS.

HAR Section 13-1-26(b) provides that petitions for proposed rulemaking shall set forth the text of any amendment desired, state the nature of the petitioner’s interest in the subject matter and the reasons for seeking amendment of the rule, and include any facts, views, arguments, and data

deemed relevant by the petitioner. HAR Section 13-1-26 also states that the board may require the petitioner to notify persons or government agencies known to be interested in the proposed rulemaking of the existence of the filed petition. HAR Section 13-1-26(c) requires that the board shall, within thirty days of the filing of the petition, either deny the petition in writing or initiate public rulemaking procedures. When the board determines that the petition does not disclose sufficient reasons to justify the institution of public rulemaking procedures, or where the petition for rulemaking fails in any material respect to comply with the requirements of these rules, the petitioner shall be notified and given the grounds for the denial. HAR Section 13-1-26(c).

Analysis and Reasons Supporting Denial of the Petition

The department's authority to require a commercial marine license is found in Section 189-2, HRS and implemented in Section 13-74-20, HAR.

The petition does not state sufficient reasons to justify its request that the Board initiate rule amendment procedures. The existing rule already requires sufficient information for a commercial marine license and contains requirements that are necessary and sufficient under HRS Chapter 189. Petitioners' proposed rule amendment and the justification set forth in their petition appears to be focused on labor issues that are outside of the department's jurisdiction. Additionally, we believe that a requirement that the applicant certify that he or she understands the application, or alternatively, certification from a person assisting the applicant that he or she has read the application and translated its terms to the applicant, is unnecessary because the applicant would be required to comply with all terms and conditions of a commercial marine license (if he or she is granted a license).

The Board, at its meeting of May 27, 2016, approved the holding of statewide public hearings to amend Chapter 13-74, Hawaii Administrative Rules, to 1) require marine dealers in local marine life to obtain a license from the department, 2) require primary dealers to report regularly to the department their purchases from commercial fishers, and 3) raise the commercial marine license fees from its current \$50 to \$150 per year. The proposed rule amendment has been approved by the Small Business Regulatory Review Board to proceed to public hearing and is awaiting Attorney General review before requesting the Governor's approval to hold the hearings.

RECOMMENDATIONS:

That the Board deny the Petition for Amendment of a Rule filed on September 21, 2016 for the reasons stated above.

Respectfully submitted,

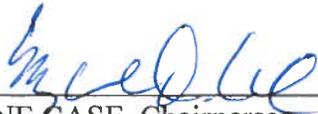


BRUCE S. ANDERSON, Administrator
Division of Aquatic Resources

Item F-1

October 14, 2016

APPROVED FOR SUBMITTAL

A handwritten signature in blue ink, appearing to read 'Suzanne Case', is written over a horizontal line.

SUZANNE CASE, Chairperson
Board of Land and Natural Resources

Attachments:

Exhibit 1 – Petition

Item F-1

BEFORE THE
BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Petition)
of)
KATHRYN XIAN, MICHAEL GAGNE,)
KAREN CHUN, LARRY GELLER and)
CORY (MARTHA) HARDEN)
For the Amendment of a Rule)

RECEIVED
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DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

PETITION FOR THE AMENDMENT OF A RULE

KATHRYN XIAN
Honolulu, O'ahu

MICHAEL GAGNE
Ha'iku, Maui

KAREN CHUN
Paia, Maui

LARRY GELLER
Honolulu, O'ahu

CORY (MARTHA) HARDEN
Hilo, Hawai'i

Petitioners

BEFORE THE
BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Petition)
)
of)
)
KATHRYN XIAN, MICHAEL GAGNE,)
)
KAREN CHUN, LARRY GELLER and)
)
CORY (MARTHA) HARDEN)
)
For the Amendment of a Rule)

PETITION FOR THE AMENDMENT OF A RULE

1. Petitioners Kathryn Xian, Michael Gagne, Karen Chun, Larry Geller and Cory (Martha) Harden (hereafter "Petitioners"), hereby petition the Board of Land and Natural Resources (hereafter "Board") for the amendment of a rule pursuant to Section 91-6, HRS and HAR 13-1-26(a)-(b).

Draft Proposed Rule

2. Petitioners hereby submit the proposed amendment to HAR §13-74-20 as follows in Ramseyer format:

§13-74-20 Commercial marine license. (a) No person shall take marine life for commercial purposes whether the marine life is caught or taken within or outside of the State, without first obtaining a commercial marine license. Additionally, any person providing vessel charter services in the State for the taking of marine life in or outside of the State shall obtain a commercial marine license.

(b) Licenses to persons with proof of identity to engage in the activities described in subsection (a) shall require the person's name, address, age, place of birth, length of residence in the State, height, weight, color of hair and eyes, citizenship, whether the

applicant is eligible for landing privileges in Hawai'i, and such other information as the department may require.

(c) The fee for the commercial marine license shall be:

- (1) Residents, \$50;
- (2) All other persons, \$200;
- (3) Duplicate license, \$10.

(d) The department may require persons issued the commercial marine license to submit reports of their fishing activity. Such reports shall be submitted to the department monthly; provided that persons taking bottomfish as defined in chapter 13-94, in the main Hawaiian islands, shall, in addition to their monthly report for species other than bottomfish, submit trip reports of their bottomfish fishing activity if requested. The monthly and trip reports shall be subject to section 13-74-2, sections 189-3 and 189-3.5, HRS, and as may be otherwise provided by law.

(e) The applicant must certify that he or she has read and understood all terms provided on the form. If the applicant is unable to read the terms unassisted, the person who assists the applicant in reading and/or translating the terms shall also provide their full legal name, address and telephone number and certify that they have fully and truthfully read and/or translated all the terms to the applicant.

(f) Any applicant or licensee who is ineligible to land in Hawai'i and/or is declared "detained on board" by the United States government shall furnish a copy of all documents, issued by the United States government, to the department with the application or within thirty days of having such documents issued if such documents are issued after the application has been submitted and/or the license has been issued. Applicants and licensees shall be under a continuing duty to provide the department with the most recent information regarding the eligibility for landing privileges in Hawai'i.

(g) A licensee who is a vessel owner who hires other licensees or is an officer of a vessel who commands other licensees shall provide the department with a list of all licensees in their hire or in their command who are ineligible for landing privileges in Hawai'i. The duty to update such a list shall be continuing and any changes shall be made within thirty days of said change.

Petitioners Are Interested Parties

3. Petitioners are interested parties within the meaning of Section 91-6, HRS.

Petitioners are recreational users of the coastal, territorial waters of Hawai'i and consume fish and other marine resources and have an interest in knowing whether the producers of the fish they consume originate from fishing vessels licensed by the department that hire crew that are ineligible for landing privileges when in Hawai'i and are subject to "detained on board" deportation orders. They also seek to be able to identify which licensees are ineligible for landing privileges in Hawai'i and which licensees hire other licensees which are ineligible for landing privileges in Hawai'i.

Support for the Proposed Rule Amendment

4. A number of commercial marine licensees are not U.S. citizens and are ineligible for landing privileges in Hawai'i. Nevertheless, they are crew members of fishing vessels which operate and dock in Hawai'i waters – which is why they must obtain commercial marine licenses. In order to remedy the situation where these commercial marine licensees are present at the state harbors but have ineligible to land, the owners and officers of these vessels obtain deportation orders from the United States government, Form I-259, which designate said crew members as “detained on board.”

5. Recent press reports indicate that crew members subject to “detained on board” deportation status are subject to low wages and unsafe working conditions including lack of proper medical care and because they are subject to a “detained on board” deportation order are unable to leave the ship. This substantially limits their ability to seek medical attention, redress for unfair labor practices or report illegal activity.

6. Presently, commercial marine license holders are required to provide information such as eye and hair color but are not required to disclose whether they are subject to the “detained on board” deportation orders. It is therefore nearly impossible for the consumer of their products, wholesalers who deal in their products or state and federal agencies to ascertain which vessels are utilizing this process.

7. Recently, several food establishments have indicated that they will suspend purchases from the United Fishing Agency auctions until the source of the fish can be identified and assurances can be established that only boats engaged in fair labor practices can be purchased from.

8. Mike Goto of the United Fishing Agency Ltd, the agency which auctions fish from commercial marine license holders, indicated that his company is working to establish a system to be able to identify the source of fish in their auctions – which it presently is unable to do.

9. It is commendable that industry has taken the first step in greater transparency regarding the sourcing of fish entering into the Hawaii market. However, the proposed rule will ensure that whatever system might be established by private industry in the future regarding informational transparency can be readily and easily verified by the public, consumers, wholesalers and state and federal regulatory agencies.

10. Commercial license holders are obligated by the United States government to maintain copies of “detained on board” deportation orders of crew members ineligible to land in

Hawai'i and therefore the burden to produce copies for the Department are minimal.

11. Finally, it has been reported that a number of commercial marine licensees are not fluent in written English. While the license applications require applicants and licensees to certify that they understand and agree to abide by all general terms and conditions of the license, yet an applicant cannot knowingly and intelligently agree to abide by these terms if they do not understand the language in which it is written. Applicants and licensees who do not read English fluently are assisted in the preparation and signing of the application and the person assisting the applicant or licensee should be required to disclose their participation.

Requested Action

12. Petitioners request that the Board initiate rule-making within thirty days after the filing of this petition pursuant to Section 91-3, HRS and HAR 4-1-23(c), HAR 4-1-25 or to deny the petition and give the reasons for the denial, at a public meeting. HAR 4-1-24 and Section 91-6, HRS. Petitioners also request to be provided notice of said public meeting, as required by HRS 92-7, where the Board will determine whether to initiative rule-making or deny the petition and give its reasons for the denial.



Digitally signed by Kathryn Xian
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Alliance to Stop Slavery,
ou=Executive Director,
email=kathy@passhawaii.org, c=US
Date: 2016.09.19 10:45:11 -10'00'

KATHRYN XIAN



LARRY GELLER

KAREN CHUN

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CORY (MARTHA) HARDEN

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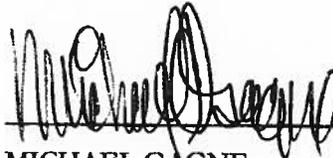
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