

STATE OF HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
Honolulu, Hawai'i

May 25, 2018

Chairperson and Members
Board of Land and Natural Resources
State of Hawai'i
Honolulu, HI

Land Board Members:

SUBJECT: DENIAL OF PETITION FILED BY HENRY K. POMROY FOR AMENDMENT OF HAWAI'I ADMINISTRATIVE RULES SECTIONS 13-231-67(a) AND (d)(20).

SUMMARY:

This submittal requests that the Board of Land and Natural Resources (Board) deny Mr. Henry K. Pomroy's petition to amend Hawai'i Administrative Rules (HAR) §§ 13-231-67(a) & (d)(20), regarding the launch ramp permit limit for the Pohoiki Boat Ramp.

HAR §§ 13-231-67(a) & (d)(20) were last amended in April 2014, where the limit on boat ramp permits for the Pohoiki Boat Ramp was set at four (4). Mr. Pomroy submitted a petition for HAR amendment to the Department of Land and Natural Resources (Department), received on April 27, 2018 (*see Exhibit 1* for a scan of the petition). Mr. Pomroy's petition asks the Board to remove the limits on commercial ramp permits for the Pohoiki Boat Ramp in HAR § 13-231-67(a) and (d)(20).

RECOMMENDATION:


DOBOR requests that the Board adopt the proposed decision, attached hereto as **Exhibit 2**, denying Mr. Henry K. Pomroy's petition for amendment of Hawai'i Administrative Rules Sections 13-231-67(a) & (d)(20).

Respectfully submitted,



EDWARD R. UNDERWOOD, Administrator
Division of Boating and Ocean Recreation

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

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Attorney for Petitioner
Henry K. Pomroy

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

In the matter of Amendment of) Case No.
H.A.R. Sec. 13-231-67(a) and (d)(20))
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PETITIONER HENRY K. POMROY'S PETITION FOR AMENDMENT OF
H.A.R. SEC. 13-231-67(a) and (d)(20)

Pursuant to H.A.R. Sec. 13-1-26, Petitioner Henry K. Pomroy hereby submits his Petition for amendment of H.A.R. Sec. 13-231-67(a) and (d)(20).

Petitioner is an interested person pursuant to H.A.R. Sec. 13-1-26(a) because he has operated vessels from the Pohoiki boat ramp for many years, is desirous of obtaining in a commercial permit for the use of the Pohoiki boat ramp for carrying of paying passengers, and has been denied such a commercial permit based solely on the limitation of available permits set forth in H.A.R. Sec. 13-231-67(a) and (d)(20).

According to the testimony of DLNR Division of Boating and Ocean Recreation employee Ed Underwood in Case No. BLNR-CC-17-004, until its amendment in April 2014, H.A.R. Sec. 13-231-67(a) and (d)(20) did not limit the number of available commercial permits for the use of the Pohoiki boat ramp, and more than 4 permits had been issued by the Division.

Exhibit 1

In April, 2014, the Board of Land & Natural Resources adopted an amended Sec. 13-231-67 and (d)(20) that limited the number of available permits to 4. Petitioner is informed and believes and thereon alleges that the Board's adoption of the amended Rule was part of adoption of a "package" of numerous Rule amendments and additions, and that the Board gave no specific consideration on the record for any reason to amend the Rule to limit the number of available permits.

Petitioner further alleges that DLNR offered no public meetings in the Pohoiki area to interested persons or stakeholders and sought no input from such persons and entities before presenting the proposed Rule amendment to the Board in violation of *State v. Rowley*, 70 Haw. 135, 764 P.2d 1233 (1988) and related cases, and that no interested persons or stakeholders presented comment on the proposed Rule amendment.

Petitioner further alleges that no adverse impact on the relevant resource nor any other good reason supports limitation of commercial permits to 4 as provided by the amended Rule, which is therefore arbitrary and capricious and exceeds the statutory authority of the Board.

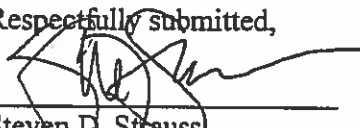
The present Rule also violates Petitioner's right to equal protection against arbitrary discrimination provided by the Fourteenth Amendment, U.S. Constitution. See *Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000)

Accordingly, Petitioner requests that the Board adopt the following amendment to H.A.R Sec. 13-231-67(d)(20):

(20) Pohoiki – no limit

Dated: Hilo, Hawai'i, April 27, 2018.

Respectfully submitted,



Steven D. Strauss
Attorney for Petitioner

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of the Amendment of Hawaii) DLNR File No.
Administrative Rules Sec. 13-231-67(a) and)
(d)(20)) BOARD OF LAND AND NATURAL
) RESOURCES' DENIAL OF THE PETITION
) FOR AMENDMENT OF HAR SEC. 13-231-
) 67(a) AND (d)(20) FILED BY HENRY K.
) POMROY; CERTIFICATE OF SERVICE
)
_____)

BOARD OF LAND AND NATURAL RESOURCES' DENIAL OF THE PETITION FOR
AMENDMENT OF HAR SEC. 13-231-67(a) AND (d)(20) FILED BY HENRY K. POMROY

The Board of Land and Natural Resources ("Board"), having considered Henry K. Pomroy's Petition for Amendment of HAR sec. 13-231-67(a) and (d) ("Petition"), filed on April 27, 2018, hereby denies that petition in accordance with Hawaii Administrative Rules ("HAR") § 13-1-26(c). The Petition does not disclose sufficient reasons to justify the institution of public rulemaking procedures, as detailed hereafter.¹

The Petition raises the following bases for requesting the amendment of HAR §§ 13-231-67(a) and (d):

1. When the rule was adopted in April, 2014, no specific reason was given to amend HAR § 13-231-67(d)(20) to limit the number of available permits at Pohoiki;
2. DLNR offered no public meetings in the Pohoiki area before presenting the proposed rule in violation of *State v. Rowley*, 70 Haw. 135, 764 P.2d 1233 (1988) ("*Rowley*") and related cases;
3. No adverse impact on the relevant resource nor any other good reason supports limitation of commercial permits to 4, which makes the rule arbitrary and capricious and exceeds the statutory authority of the Board; and

¹ The Petition does not fully comply with the requirements of HAR § 13-1-26(b) which requires that a petition set forth the text of any proposed rule or amendment desired. Although the Petition cites to the amendment of HAR § 13-231-67(a), the Petition fails to set forth what amendment to this section is desired. The Board will not consider an amendment to subsection (a) based on the failure of the Petition to conform to the requirements of HAR § 13-1-26(b).

4. The present rule violates Petitioner's right to equal protection against arbitrary discrimination provided in the 14th Amendment.

The Board notes that the Petition has provided little beyond the contentions themselves to support the claims asserted. The Board does not find that the Petition sets forth sufficient reasons to justify the institution of public rulemaking procedures.

Any Challenge to the Rulemaking Procedure is Barred

The Petition raises essentially two ways that the rulemaking procedure for HAR § 13-231-67(d) was defective. The first error alleged was that the Board gave no specific consideration on the record for any reason to amend the rule to limit the number of available permits. The second error alleged was that the DLNR did not offer any public meetings in the Pohoiki area prior to presenting the rule amendment to the Board in violation of *Rowley*. This argument is not persuasive for two reasons. First, subsequent to *Rowley*, the Legislature amended the statute to specifically address the issues raised in *Rowley*. Claims based on *Rowley* are no longer valid. Second, any challenge based on a violation of rulemaking procedure brought more than three years after the effective date of the rules is forever barred. Hawaii Revised Statutes ("HRS") § 91-3(e).

In 1989, the Legislature, in reaction to the decision in *Rowley*, and the earlier decision in *Costa v. Sunn*, 64 Haw. 389, (1982), determined that the impact of these cases would be that "[a] considerable expense of staff time and effort will be required to review all public hearing notices published pursuant to the Hawaii Administrative Procedure Act since its original enactment took effect on January 2, 1962, or to republish detailed notices of public hearings and re-adopt all existing administrative rules." Act 64, 1989 Haw. Sess. Laws 115 ("Act 64"). The Legislature passed Act 64 for the following three purposes:

1. To expressly ratify and validate all administrative rules and rule amendments and repeals that were filed before the close of business on December 31, 1986;
2. To provide clarifying statutory wording that would expressly enable agencies to publish notices that generally describe the subjects involved and the purposes to be achieved by a proposed rule; and
3. Impose a three year limitations period on challenges to the validity of any adopted administrative rule adoption, amendment, or repeal on the basis of noncompliance with the procedural requirements for rule adoption, amendment, or repeal.

The last purpose was codified in HRS § 91-3(e) that provides that:

Any challenge to the validity of the adoption, amendment, or repeal of an administrative rule on the ground of noncompliance with statutory procedural requirements shall be forever barred unless the challenge is made in a proceeding or action, including an action pursuant to section 91-7, that is begun within three years after the effective date of the adoption, amendment, or repeal of the rule.

The Board finds that the first two points raised in the Petition are a challenge to the validity of HAR § 13-231-67(d)(20) because of noncompliance with procedural requirements. As stated in the Petition, the Board adopted HAR § 13-231-67(d)(20) in April, 2014. Based on HRS § 91-3(e), any challenge to the validity of the rule is forever barred because it is being brought more than three years after the effective date of the adoption of the rule. This is not a sufficient reason to justify the institution of public rulemaking procedures.

Impact to Natural Resources is Not Necessary to Support the Rule

The Petition claims that the current rule is arbitrary and capricious and exceeds the statutory authority of the Board because no adverse impact on the relevant resource nor any other good reason supports limitation of commercial use permits to four, as provided in HAR § 13-231-67(d)(20). This claim does not take into account all of the Board's statutory rulemaking authority.

HAR § 13-231-67 was adopted by the Board to implement, amongst others, HRS § 200-

4. Under HRS § 200-4, the Chairperson may adopt rules with regards to small boat harbors, launching ramps and other state boating facilities (collectively the “facilities”): to regulate the manner in which vessels moor, anchor, or dock; for the safety of the facilities and the vessels anchored or moored therein; for the conduct of the public using the facilities; and to regulate and control recreational and commercial use of the facilities. HRS §§ 200-4(a)(1)-(4). There is no requirement under the statute that the rules also protect against adverse impact to natural resources.

Based on the above, it is clear that the Board had sufficient statutory authority to adopt the amendment to HAR § 13-231-67 that limited the amount of commercial use permits that could be issued at the Pohoiki launch ramp. The adoption of the rule amendment was not arbitrary and capricious. The alleged lack of statutory authority or reason to adopt the rule amendment is not a sufficient reason to justify the institution of public rulemaking procedures.

Not Clear How the Rule Violates Petitioner’s Right to Equal Protection

The last point raised by the Petition is that the present rule violates Petitioner’s right to equal protection against arbitrary discrimination provided by the Fourteenth Amendment. The Petition does not specify how the current rule violates his right to equal protection. The Petition cites to *Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000)² in support of this claim. The claim of an equal protection violation and citation to *Willowbrook* does not provide a sufficient reason to justify the institution of public rulemaking procedures.

The essence of a claim of an equal protection violation is that the person “has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Willowbrook*, 528 U.S. at 564. The Petition does not state how

² The correct citation to this case should have been *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

Petitioner has been treated differently from others similarly situated. Also, the claim that Petitioner was treated differently is essentially a claim that the rule was not applied the same to the Petitioner as it was to other people. That argument does not support the conclusion that the rule needs to be amended.

Based on the above stated reasons, the Petitioner Henry K. Pomroy's Petition for Amendment of HAR sec. 13-231-67(a) and (d)(20) is hereby denied.

DATED: Honolulu, Hawaii, _____.

Suzanne D. Case

James A. Gomes

Stanley H. Roehrig

Christopher Yuen

Thomas Oi

Keith "Keone" Downing

Samuel "Ohu" Gon, III