



Administrative Testimony  
Testimony of Kamana'opono Crabbe, Ph.D  
Ka Pouhana, Chief Executive Officer

Board of Land & Natural Resources  
Submittal Item C-2

REQUEST FOR APPROVAL TO ADOPT A NEW SECTION UNDER HAWAII  
ADMINISTRATIVE RULES AS TITLE 13 CHAPTER 123 SECTION 21.2 TO RESTRICT USE  
OF AND ACCESS TO PORTIONS OF PUBLIC HUNTING AREAS, UNITS A AND K,  
MAUNA KEA, HAWAII ISLAND, THROUGH EMERGENCY RULEMAKING PROCEDURES  
TO PROTECT AGAINST IMMINENT PERIL TO PUBLIC SAFETY AND NATURAL  
RESOURCES.

July 10, 2015

9:00 a.m.

Conference Room 132

The Administration of the Office of Hawaiian Affairs (OHA)<sup>1</sup> **OPPOSES** the staff recommendation in agenda item C-2, which seeks to use emergency rulemaking procedures to enact bans on outdoor gear and nighttime presence in an 18,000 acre<sup>2</sup> corridor leading to the summit of Mauna Kea.

Notably, civil penalties for violations of the proposed rules may include fines of \$2,500 (for a first offense) to \$10,000 (for a third and subsequent offenses)<sup>3</sup> as well as the loss of any hunting license; criminal penalties may include petty misdemeanor liability, minimum fines of \$500 (for a first offense) to \$2,000 (for a third and subsequent offenses within 5 years), and up to thirty days imprisonment.<sup>4</sup> In addition, any vehicles or other property used in violation of the proposed rules may be subject to seizure and forfeiture by the state.<sup>5</sup>

OHA understands that the law enforcement activity and “permanent encampments” described in the submittal are in specific reference to the Mauna Kea “Protectors” who have, to varying degrees, staged a several-month vigil on the roadside

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<sup>1</sup> OHA is the constitutionally-established body responsible for protecting and promoting the rights of Native Hawaiians. HAW. CONST. ART. XII SEC. 5. OHA has substantive obligations to protect the cultural and natural resources of Hawa'i for the agency's beneficiaries. See HRS Chapter 10. Accordingly, OHA is required to serve as the principal public agency in the State of Hawai'i responsible for the performance, development, and coordination of programs and activities relating to Native Hawaiians; assess the policies and practices of other agencies impacting Native Hawaiians; and conduct advocacy efforts for Native Hawaiians. HRS § 10-3.

<sup>2</sup> 18,000 acres is equivalent to approximately 13,500 football fields, or over 60% of the island of Kaho'olawe, or the area on O'ahu Island between Diamond Head and River Street in Chinatown, from the Ko'olau ridge to the shoreline.

<sup>3</sup> HRS §§ 171-6.4, 183D-5; HAR § 13-123-13.

<sup>4</sup> HRS § 171-31.6; HAR § 13-123-13.

<sup>5</sup> HAR § 13-123-22 (7)(C); see also HRS § 171-31.5.

opposite of the Hale Pōhaku Onizuka Center for International Astronomy. These Protectors have and continue to object to the construction of the Thirty-Meter Telescope ("TMT") on Mauna Kea, based on varying concerns including the sacred nature of Mauna Kea's summit, a long history of significant and adverse environmental and cultural impacts from development on the mountain, questions regarding the fiscal accountability of observatory subleases, and long-standing natural and cultural resource management concerns.

Pursuant to a board vote on April 1, 2015, the OHA Board of Trustees has rescinded their support of the siting of the TMT on Mauna Kea. As a result, OHA has no position as to whether or not the TMT should be located on the mountain.<sup>6</sup> Nonetheless, OHA **OPPOSES** the instant proposed rules due to a number of technical, statutory, cultural, environmental, public safety, and constitutional concerns, as well as the potential for unintended natural, cultural, and public safety impacts, all of which may expose the Department of Land and Natural Resources (DLNR) to a range of legal challenges that could drain DLNR of fiscal, staff, and legal counsel resources otherwise necessary to more effectively manage our islands' cultural and natural resources, and the public trust.

#### **A. Technical errors and concerns**

As a preliminary matter, OHA notes that the instant submittal and proposed rules, as well as their manner of posting, are replete with technical errors that may bring into question the validity of any BLNR approval granted today.

First, as of Wednesday this week, it appears that the notice posting the availability of the proposed emergency rules do not actually lead to the rules themselves. Both the submittal and BLNR agenda point to the Lieutenant Governor's website to view the proposed draft rules, per the requirements of HRS §91-2.6. However, the proposed draft rules are not evident on the Lieutenant Governor's website nor on the pages it directs users to. The "Proposed Changes to Administrative Rules" link on the Lieutenant Governor's website leads to a table of proposed changes by department; following the DLNR link for Title 13 on the table leads to another table of "Draft Rules/Public Notices" for each division within the DLNR. However, while there are proposed draft rules in the Draft Rules/Public Notices Column of this table for the Division of Aquatic Resources, Division of Boating & Ocean Recreation, and Division of State Parks, *there is no link to proposed draft rules for the Division of Forestry and Wildlife (DOFAW), the division these rules are being promulgated under.*

Second, the submittal notes that copies of the rules can be picked up at 1151 Punchbowl Street, Room 325, Honolulu Hawai'i 96809. If this is referring to the Kalanimoku Building, the zip code should read 96813.

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<sup>6</sup> On January 3, 2013, the OHA Board of Trustees did pass a Resolution urging the Board of Land and Natural Resources ("BLNR") to "afford the strongest consideration to the affected rights and practices identified in the contested case regarding the TMT."

Third, the submittal, in a footnote, suggests that the draft rules can be found at <http://dlnr.hawaii.gov/dar/rules-and-public-notice/>. However, this link leads to the Division of Aquatic Resources' Rules and Public Notices page, which, as of Wednesday, July 8, does not include the instant DOFAW rule proposal.

Fourth, the proposed rules (which can be only be found by following the link to "Final" rules for DOFAW on the DLNR Draft Rules/Public Notices page), cite to a nonexistent statute in a nonexistent chapter, HRS 187D.

Finally, the submittal itself appears incomplete, as the purpose section ends in a comma, and does not discuss the purpose of prohibiting blankets and backpacks as described in the rule proposal.

Given these technical errors, OHA urges the BLNR to consult with legal counsel as to whether any approval of these rules may lead to legal liability that could drain essential DLNR resources, should legal challenges be filed.

#### **B. Substantive concerns with the proper use of emergency rulemaking in this instance**

There are also a number of concerns regarding the propriety of using the BLNR's emergency rulemaking authority in this instance. Again, these concerns would seem to invite a host of legal challenges that may inhibit the department from more effectively carrying out its management and stewardship responsibilities.

##### 1. Lack of express and written justification as to why rulemaking is required in less than thirty days' notice of hearing

First, neither the proposed rules nor submittal indicate why emergency rulemaking must occur in less than thirty days' notice of public hearing, as required by statute. The submittal states that these emergency rules are being promulgated pursuant to the abbreviated notice and public hearing exception to general rulemaking under HRS § 91-3. However, as cited in the submittal, such emergency rulemaking requires written and express reasons for any finding that an imminent peril "to public health, safety . . . or natural resources *requires adoption . . . of a rule upon less than thirty days' notice of hearing.*"<sup>7</sup> The submittal provides no written reasoning as to why any such alleged peril requires rulemaking in less than thirty days, when the referenced "permanent encampments" have been peaceably assembling for nearly 100 days, with no injuries or illnesses, and no documented impacts to natural resources. OHA notes that information from the Office of Mauna Kea Management (OMKM) indicates that since 2002, over 100,000 people have visited the rules' "Restricted Area" in over 32,000 vehicles every year (a daily average of over 270 visitors);<sup>8</sup> the long-standing and regular occupation of Mauna Kea by such significant numbers of non-Protector individuals – much greater than

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<sup>7</sup> HRS § 91-3 (b) (emphasis added).

<sup>8</sup> MAUNA KEA COMPREHENSIVE MANAGEMENT PLAN: UH MANAGED AREAS 6-3 (2009) available at <http://dlnr.hawaii.gov/occl/files/2013/08/Mauna-Kea-CMP.pdf>.

the estimated daily average of less than twenty Protectors on non-construction days -- raises serious doubts as to any allegedly imminent peril to natural resources from the alleged encampments. OHA notes that the Protectors, in the stated interest of resource and public health protection, have even provided their own temporary, commercial-grade portable sanitation facilities assumedly subject to well-established hygiene standards for such commercial units, of the same type that are regularly used by both state, county, and federal governments, event planners, and corporate entities to handle on-site wastewater needs.<sup>9</sup>

2. Lack of specific and credible evidence demonstrating imminent peril to the cited interests

In addition to the lack of justification as to why rulemaking must occur in less than thirty days' notice, the proposed rules and submittal further do not describe in any detail how the Protectors being targeted have created any actual threat of "imminent peril" to public health, safety, or natural resources, as required for emergency rulemaking:

a. *Public health*

While the submittal quotes "public health" as a relevant concern for emergency rulemaking under HRS § 91-3, it provides no subsequent discussion of any imminent peril to public health, as opposed to public safety. However, the submittal does mention the Protectors' provision of portable toilets, which OHA understands are commercial-grade temporary restrooms subject to industry standards for human hygiene, and available for the use of both visitors and Mauna Kea Protectors.

b. *Public safety*

The "Purpose" section of the submittal alleges that there is a public safety risk associated with "the presence of numerous individuals that remain in those [Public Hunting Areas] after dark, where they may place themselves and others at risk due to the remote nature of the areas and the possible impacts from hazardous conditions and inclement weather." However, OHA understands that a large number of individuals have regularly remained throughout the remote "Restricted Area" for years, if not decades, to engage in recreational stargazing and other activities. The submittal contains no more specific justification as to why the handful of Protectors assembling directly across the street from solid infrastructure and a regular stargazing area, would result in more dangerous conditions, much less "imminent peril," from inclement weather after decades of such activity with no apparent need for regulation. Furthermore, it is OHA's understanding that the targeted individuals have immediate access to an ample number of vehicles, which can provide both shelter and ready transport in the event of inclement weather.

The submittal's "Background" section also notes that numerous "law enforcement actions have taken place in recent days, placing staff, officers, and the public at risk."

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<sup>9</sup> OHA understands that these toilet facilities have since been removed at the behest of DOFAW.

However, it does not give any indication of any physical harm or altercation relating to these "actions," much less what laws were being enforced, and against whom. The submittal also raises questions as to how the creation of new laws and prohibitions will reduce the need for law enforcement actions that supposedly put public safety in imminent peril.

Finally, OHA notes that the proposed rules themselves may in fact create conditions that put human health and public safety in imminent peril. The prohibition of backpacks, emergency blankets, and other basic hiking and survival gear listed as types of "obvious camping paraphernalia" would require Mauna Kea visitors to forego essential safety supplies highly recommended for traversing "remote" areas. Moreover, the prohibition of any individuals within one mile of the Summit Access Road – equal to an area of 18,000 acres, or an area more than 37 times the size of Lē'ahi (Diamond Head State Monument) -- during nighttime hours would require stargazers and visitors wishing to legally access the Summit area on foot, to remain more than one mile from the only paved road, in potentially treacherous and extremely remote areas highly inaccessible to emergency personnel and others should their assistance be needed.

*c. Natural resources*

The submittal suggests concerns regarding the threat of "direct impacts" to natural resources that are specific to the Protectors, "through trampling and other direct impacts, as well as by the accumulation of waste, litter, and other disposables."

However, similar to the discussion above, there is no indication of what natural resources in the Protector's relatively small roadside area are being impacted, or how and to what extent the unspecified and undocumented amount of "accumulated litter" imperils such resources. OHA reiterates that per the annual visitor estimates by OMKM, there have been over 100,000 visitors per year, or over 270 individuals per day, who have accessed the summit and traversed the "Restricted Area" since 2002. The relative magnitude of the number of daily visitors who have visited the mountain on a daily basis for over a decade, compared to the small number of protectors currently present, and the submittals' stated intention to not limit daytime visitors to the mountain, again raises serious doubts as to the merits of any concerns regarding allegedly imperiled natural resources from the Protectors specifically.

OHA notes that the Protectors have actively worked to minimize their impacts to natural resources, including through the provision of portable toilets to the general public, who currently have no other option to relieve themselves other than in their own portable containers, or on the surrounding environment.

Finally, the proposed rules may only increase threats to sensitive natural resources, by requiring all daytime hikers, stargazers, and nighttime visitors to remain one mile from the paved Summit Road, in remote areas with a significantly higher likelihood of sensitive natural and cultural features and resources, which may be threatened by trampling, litter, fire hazards, and other potential direct and indirect impacts.

Thus, in the interests of DLNR's mission, its failure to properly justify and substantiate the purported concerns of "imminent peril" again counsel denying the current staff recommendation: such deficiencies in justification and reasoning, and the complete lack of specific and credible evidence in this submittal, are highly likely to invite legal challenges that would severely impact DLNR's capacity to carry out its constitutional mandate to conserve and protect all of the state's public trust and natural and cultural resources.

3. Lack of connection between the prohibited conduct and the claimed threats of imminent peril

The proposed rules and submittal further do not establish any connection between the vaguely-described threats to public safety or natural resources, and the actual conduct being prohibited. For example, there is no justification linking the possession of blankets, protective tarps, or backpacks – regularly and necessarily used by workers, visitors, hikers, cultural practitioners, and others not engaged in camping activities – in the 18,000 acre "Restricted Area," and any of the submittal's described threats to public safety or natural resources. Despite extensive research, OHA staff have also not been able to identify any plausible situation wherein blankets would lead to increased "law enforcement activity," increase the dangers of inclement weather in remote areas, or otherwise threaten public safety or natural resources.

Similarly, it is unclear how the exclusion of all persons from the "Restricted Area," leading to and including the summit, during nighttime hours has or will lead to any mitigation of the aforementioned threats, particularly when such a prohibition would likely lead to greater enforcement activity, would not address any threat of inclement weather that may occur during the day, and would continue to permit a substantial number of visitors with no cultural connection to the mountain, to access the summit and directly trample and/or relieve themselves upon natural and cultural resources.

In summary, the rule proposal fails to meet the statutory emergency rulemaking requirements of chapter 91, by failing to provide any substantive and specific description of any credible threat of imminent peril to public health, safety, or natural resources; any justification or required reasons as to why any such threats would require rulemaking within thirty days' public notice, particularly given the years if not decades of unmanaged activity posing much more significant, yet still unregulated, threats; any connection between the conduct to be prohibited and the alleged threats; or any consideration as to the potential for the adverse public health, public safety, and natural resource impacts of these rules. These deficiencies strongly counsel the denial of the proposal today.

4. Comparison to Ahu o Laka Emergency Rules

As a final note in this regard, it may be helpful to contrast the current proposal with the most recent and much-lauded public safety-related emergency rules promulgated by the BLNR, in 2011. This 2011 proposal was intended to address bona fide threats to public safety on Ahu o Laka in Kāne'ōhe Bay, arising from a combination of overcrowding

and excessive alcohol use on three-day weekends, and was successfully enforced through administrative actions by the BLNR.

There, the submittal included clear evidence of a long history of consistent physical altercations and threats to public safety, including at least one death, on three-day weekends; these altercations were directly linked with alcohol consumption and/or drug use, and the extremely overcrowded conditions on Ahu o Laka and the He'eia Kea Boat Harbor during such long weekends. The submittal noted an upcoming series of three-day weekends during the summer season, including one within a month's time; thus, rulemaking action was required well within the thirty-day public hearing notice window. The proposed rules were also tailored to a specifically defined and narrow geographic area within Ahu o Laka, where crowds were known to occur, and furthermore targeted only drinking and drug consumption, as well as disorderly conduct – specific activities that were directly linked with past physical altercations and threats to public safety. Actual occupation of the Ahu o Laka "Safety Zone" was never prohibited.

In contrast, the submittal and emergency rule proposal here provide no specific documented evidence, studies, or other credible sources describing the nature and magnitude of the claimed threats; provide no clear justification as to why rulemaking must occur within a thirty-day window; prohibit activities and conduct that are either unconnected to the vaguely-asserted threats, and/or that may actually increase the potential for adverse impacts to natural resources and public safety; and target a huge geographic area well beyond the scope of the "encampments" of concern, from which all members of the public will be excluded during nighttime hours.

### **C. Concerns regarding lack of statutory authority to promulgate these rules**

There are additional concerns regarding whether or not the DLNR has the statutory authority to promulgate these rules, as cited in the proposed rules' Ramseyer draft.

First, the proposed rules cite HRS § 187D-5 as one of the statutes that are being implemented by these rules; however, this section does not exist in the Hawai'i Revised Statutes.

Second, the proposed rules cite HRS § 183D-4 as the other statute being implemented by these rules. However, this section pertains to the department's ability to "establish, maintain, manage, and operate . . . public hunting areas," solely for the purposes of "preserving, protecting, conserving, and propagating wildlife." Nothing in this section pertains to rulemaking for public safety or the protection of natural resources generally, as is the purported purpose of these rules.

Finally, this rule proposal cites to HRS § 183D-3 as its rulemaking authority. While the lack of any applicable statute being implemented by these rules already draws into serious question their statutory and constitutional validity, it is worth noting that even HRS § 183D-3 does not appear to authorize the types of rules being proposed.

HRS § 183D-3 authorizes the DLNR to promulgate rules relating to “fees for activities”; “size limits, bag limits, open and closed seasons, and specifications for hunting gear which may be used or possessed”; “protecting, conserving, monitoring, propagating, and harvesting wildlife”; and “concerning the preservation, protection, regulation, extension, and utilization of, and conditions for entry into wildlife sanctuaries, game management areas, and public hunting areas designated by the department.” None of these statutory authorities appears to contemplate rules for public safety or natural resource protection unrelated to hunting activities or wildlife management. The proposed prohibitions on possessing blankets, backpacks, etc. for purposes unrelated to any hunting or game management activity might appear to constitute “conditions for entry into . . . public hunting areas”; however, the specificity of all other provisions within this section, and in adjoining statutes relating to the department’s powers and duties, strongly counsel against such a broad reading of this general provision. Given the statutory construction principles of ejusdem generis (general terms must be read as limited by more specific terms) and the axiom that statutes be read in harmony with each other, the expansive use of this general provision well outside of the consistent statutory context of hunting- and wildlife-related powers and authorities, would appear legally tenuous if not a blatant regulatory overreach of the department.<sup>10</sup>

By way of comparison, the Ahu o Laka emergency rules described above relied upon Division of Boating and Ocean Recreation statutory authorities clearly relevant to public safety in ocean areas and boat harbors. Such authorities included HRS § 200-4, which authorizes the board to adopt rules “For the safety of small boat harbors, launching ramps, and other boating facilities,” and “to promote public safety, health, and welfare in or on the ocean waters . . . of the state, including . . . any other matter relating to the safety, health, and welfare of the general public.” Thus, statutory authority clearly existed for the BLNR to promulgate rules specifically for public health and safety during its passage of the Ahu o Laka emergency rules. The instant rule proposal, on the other hand, relies upon an overly expansive reading of a single provision within a statutory context exclusively concerned with hunting-related activities (including, arguably, non-hunting activities which may be directly impacted by or related to hunting) and wildlife management; again, the purported purpose of the proposed emergency rules have nothing to do with such activities.

Accordingly, OHA strongly believes the aforementioned concerns counsel denying the staff recommendation and emergency rule proposal at issue today.

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<sup>10</sup> “Conditions for entry” may refer to the types of “conditions” described in HAR § 13-123-22, entitled “Conditions and Restrictions,” which directly relate to the conduct of hunters (i.e. requiring possession of a valid hunting license, unloading all weapons after filling a bag limit, prohibiting the possession of exploding arrow heads, prohibiting hunting in “safety zones” near roads, etc.), or of non-hunters accompanying hunters (i.e., requiring non-hunters to wear blaze-orange outer garments, prohibiting them from carrying firearms, etc.), or of conduct relating to hunting safety (no possession of alcoholic beverages, etc.). None of these “conditions for entry” appear to pertain to public safety or natural resource protection that is not related in some way to hunting activities or game management, or the preservation of game management areas for such purposes.

#### **D. Lack of consideration of cultural impacts**

OHA notes that there is extensive documentation of potential Native Hawaiian traditional and customary practices that occur in the "Restricted Area," including practices that must necessarily occur at night, or that may require the use of backpacks, emergency blankets, and other prohibited gear for safety or survival reasons. These activities may be completely foreclosed by the proposed rules for the entire summer season, should the proposed rules be passed today.

As the BLNR members may know, the state has a constitutional duty to protect and enforce the rights of Native Hawaiians to engage in traditional and customary practices.<sup>11</sup> Courts have accordingly found that state agencies are required to make specific findings in their decisionmaking actions, relating to the identification of traditional and customary practices potentially impacted by their decisions, the magnitude of such impacts, and how such impacts may be mitigated.<sup>12</sup> Here, the proposed rules may clearly impact potential traditional and customary practices; however, there is no such analysis provided whatsoever.

While OHA can appreciate that bona fide exigent circumstances underlying emergency rule proposals might require, in some instances, quick decisionmaking and abbreviated cultural analyses, the serious questions raised above as to the propriety and necessity of using the emergency rulemaking process for the current situation; the nearly unmatched level of cultural significance of Maunakea to the Native Hawaiian community; and the complete regulatory foreclosure of protected cultural practices without any analysis whatsoever; further counsels extreme caution and critical inquiry in the board's consideration of the instant proposal. Accordingly, OHA again urges the BLNR to deny the staff recommendation and rule proposal embodied in the current agenda item.

#### **E. First Amendment concerns**

Finally, OHA notes that the undeniable political context underlying this rule proposal – targeted at "encampments" and reducing "law enforcement actions" that are clearly in reference to the Mauna Kea Protectors – may raise substantial First Amendment and freedom of speech and assembly concerns, and associated legal liabilities. Well-established freedom of speech jurisprudence in state and federal courts, regarding the First Amendment of the U.S. Constitution and Article 1 Section 4 of the Hawai'i Constitution, consistently hold that public streets and roads are "traditional public fora" which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."<sup>13</sup> Accordingly, government regulations targeting disfavored speech, and political speech in particular, are closely scrutinized by the courts, with the highest level of judicial scrutiny for those regulations prohibiting particular content by

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<sup>11</sup> HAW. CONST. ART. XII § 7.

<sup>12</sup> See Ka Pa'akai o ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31 (2000).

<sup>13</sup> See, e.g., In re Hawai'i Gov't Employees Ass'n, AFSCME, Local 152, AFL-CIO, 116 Haw. 73, 84-86 (2007) (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

express provision or via implementation; even “content-neutral” regulations on speech-related conduct must be narrowly tailored to achieve a significant government interest, with ample alternative channels of communication.<sup>14</sup> While an extensive constitutional analysis is beyond the purview of these comments, OHA strongly believes that the state and federal constitutional concerns raised by these rules and submittal strongly counsel denying their adoption, to avoid the likely inevitable legal challenges that will only further drain department resources otherwise necessary for the management of our islands’ natural, cultural, and public trust resources.

#### **F. Conclusion**

Accordingly, for the above-listed reasons, OHA urges the BLNR to **DENY** the staff recommendation for the adoption of the proposed emergency rules, pending resolution of the numerous aforementioned issues and concerns that may otherwise require significant and substantial department resources to resolve after-the-fact, at the expense of our natural and cultural resources and the better fulfillment of the DLNR’s mission.

Mahalo nui for the opportunity to comment on this matter. For any questions or concerns, please contact Sterling Wong, Public Policy Manager, at 594-1908 or via email at [sterlingw@oha.org](mailto:sterlingw@oha.org).

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<sup>14</sup> See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).